



# Sexual Politics in Muslim Societies

STUDIES FROM PALESTINE, TURKEY, MALAYSIA AND INDONESIA

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## **Sexual Politics in Muslim Societies**

Studies from Palestine, Turkey, Malaysia and  
Indonesia

Edited by:

Pinar Ilkkaracan

Rima Athar

With the introduction

**Sexuality as Difference?**

by Dina M. Siddiqi

Yayasan GAYa NUSANTARA



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**Edited by:** Pinar Ilkcaracan & Rima Athar

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## **About CSBR:**



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The Coalition for Sexual and Bodily Rights in Muslim Societies (CSBR) is an award-winning international solidarity network that works to integrate a holistic and affirmative approach to sexual and bodily rights as human rights across Muslim societies. Founded in 2001, CSBR now connects over 30 member organizations across 16 countries in the Middle East, North Africa, Central Asia, South Asia, and South East Asia. CSBR's work is facilitated by our Coordinating Office, which from 2015–2017 has been with Yayasan GAYa NUSANTARA in Indonesia.

CSBR publications aim to provide accessible content and scholarship to a wide array of audiences & stakeholders invested in gender justice and human rights. The information contained in this publication does not necessarily represent the views and positions of the publishers, or of CSBR, unless explicitly stated.



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## Acronyms

<b>ASEAN:</b>	Association of South East Asian Nations
<b>ADVAW:</b>	Against Domestic Violence Against Women [Palestinian NGO]
<b>CSBR:</b>	Coalition for Sexual and Bodily Rights in Muslim Societies
<b>CSW:</b>	UN Commission on the Status of Women
<b>DSM IV:</b>	Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association, version IV.
<b>DPR:</b>	<i>Dewan Perwakilan Rakyat</i>   Indonesian National Parliament
<b>EHRC:</b>	European Human Rights Convention
<b>ECHR:</b>	European Court on Human Rights
<b>ICCPR:</b>	International Covenant on Civil and Political Rights
<b>JAG:</b>	Joint Action Group for Gender Equality [Malaysia]
<b>JAWI:</b>	<i>Jabatan Agama Islam Wilayah Persekutuan</i>   Federal Territories of Kuala Lumpur Religious Department [Malaysia]
<b>JAKIM:</b>	Jabatan Kemajuan Islam Malaysia   Department of Islamic Development Malaysia
<b>JDP:</b>	Justice and Development Party [Turkey— <i>Adalet ve Kalkınma Partisi</i> ]
<b>KAOS-GL:</b>	KAOS Gay and Lesbian Cultural Research and Solidarity Association [Turkish NGO]
<b>Komnas Perempuan:</b>	<i>Komisi Nasional Anti Kekerasan terhadap Perempuan</i>   National Commission on Violence Against Women [Indonesia]
<b>KOWANI:</b>	<i>Kongres Wanita Indonesia</i>   Indonesian Women’s Congress
<b>LGBTI:</b>	Lesbian, gay, bisexual, transgender, intersex
<b>MAMP:</b>	Malaysians Against Moral Policing
<b>MPR:</b>	<i>Majelis Permusyawaratan Rakyat</i>   People’s Consultative Assembly [Indonesia]
<b>MUI:</b>	<i>Majelis Ulama Indonesia</i>   Indonesian Clerics Council
<b>NU:</b>	<i>Nahdlatul Ulama</i> [Indonesian Islamic NGO]
<b>NGO:</b>	Non-governmental organization
<b>OIC:</b>	Organisation of Islamic Cooperation

<b>PAN:</b>	National Mandate Party [Indonesia]
<b>PAS:</b>	<i>Parti Islam Se Malaysia</i>   Islamic Party of Malaysia
<b>PDI:</b>	Indonesian Democratic Party
<b>PKS:</b>	Prosperous Justice Party [Indonesia]
<b>PNA:</b>	Palestinian National Authority
<b>PPP:</b>	People's Development Party [Indonesia]
<b>SCOA:</b>	Syariah Criminal Offences Act [Malaysia]
<b>SIS:</b>	Sisters in Islam [Malaysian NGO]
<b>SOGI:</b>	Sexual orientation and gender identity
<b>UMNO:</b>	United Malays National Organisation [Malaysia]
<b>UN:</b>	United Nations
<b>VAW:</b>	Violence against women
<b>WAVO:</b>	Women Against Violence [Palestinian NGO]

## Introduction: Sexuality as Difference?

### Tensions, Contradictions, and Strategies for Moving Ahead

*Dina M. Siddiqi*

#### Sexuality as Difference

Sexuality, rights and Islam—individually each of these words has a rich history, unstable and contested, but profoundly productive. Taken together, however, they signal an extraordinarily charged dynamic in the world today. Whether it is Daesh circulating footage of its executions of gay men in the name of purifying their “caliphate”, Israel promoting itself as a gay haven as part of its pink-washing campaign, European governments considering the equivalent of a homosexuality acceptance test as a condition of citizenship,<sup>1</sup> the Turkish government lifting a long-standing ban on headscarves in official spaces,<sup>2</sup> or reports of forced marriages in Syrian refugee camps—the world seems transfixed by questions of gender, and sexuality in Muslim societies.<sup>3</sup> Arguably, such attention should not surprise—after all, sexuality itself is a dense transfer point of power, as Michel Foucault once put it, and its management remains an integral aspect of governance in modern nation states. Nonetheless, the current moment stands out for the peculiar prominence granted to Muslim sexual subjectivity in discourses of global governance and as well as the striking emotional charge such discourses carry. Most obviously, the war on terror and subsequent securitization discourses drive much of contemporary interest in Muslims. Such attention is bolstered by “common sense” imaginations of sexuality and Islam that are a

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<sup>1</sup> Deanne Corbett, “Testing the Limits of Tolerance.” *Deutsche Welle*, March 3, 2006. See: <http://www.dw.com/en/testing-the-limits-of-tolerance/a-1935900>

<sup>2</sup> AFP, “Turkey Lifts Decades Old Ban on Headscarves.” *Al Jazeera*, October 8, 2013. See: <http://www.aljazeera.com/news/europe/2013/10/turkey-lifts-decades-old-ban-headscarves-201310814177943704.html>

<sup>3</sup> By juxtaposing these actions, my intention is not to equate them in severity or impact. I am interested in uncovering their shared ideological underpinnings.



colonial legacy.<sup>4</sup> As a result, sexuality is increasingly central to the production of an idea of *Islamic difference*—cultural, religious and civilizational. As we will see, the concept of an absolute Islamic difference complicates scholarship, activism and advocacy on sexuality, both in Muslim majority spaces as well as in locations where Muslims are a minority. It produces the contradictions and dilemmas that form a major backdrop for the issues raised in the chapters in this volume.

Since the Iranian revolution of 1979, if not earlier, discussions of sexual politics in Muslim societies have been guaranteed to produce impassioned and often vituperative debates. Invariably, the topic is attached to narratives that are sensationalist, reductive and shorn of context, informed as much by geopolitical cynicisms as other considerations.<sup>5</sup> The contemporary global context—more fraught and uncertain than ever—has only exacerbated this state of affairs, especially with the rise of social media.

The post September 11<sup>th</sup> world saw the revival and reformulation of a host of Orientalist tropes—premised on an incommensurable distance between a

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<sup>4</sup> European fascination/obsession with Muslim sexuality has a much longer history rooted in colonial relations of power. See for instance Malek Allaoula *The Colonial Harem* (University of Minnesota Press, 1986) and Joseph Massad *Desiring Arabs* (University of Chicago, 2008).

<sup>5</sup> In 2015, around the time the US signed a nuclear pact with Iran, reports of the hanging from a tree of a gay teenager in Isfahan circulated widely. On investigation activists found that the incident had been wholly manufactured. I would venture to add that the imagery of a boy being hanged from a tree was calculated to recall the lynching of African American boys and men in a different era. The effect was to stage Iranian “barbarity” that was backward/ out of time with an evolutionary stage the US had presumably left behind. A decade earlier, Euro-American media circulated sensationalized accounts of the public execution of two Iranian teenagers; taken as evidence of the Iranian regime’s barbarity and homophobia, it was assumed the boys were hanged for being gay. It turned out the two young men had been convicted of the rape, at knife point, of a fellow teen. Much handwringing followed over how best to “save” Muslim gays. At the time, an Iranian gay friend observed that the truly horrific act was the execution of children (gay or not) and the Iranian state’s wholehearted embrace of the death penalty. She noted too that the US still allowed children to be awarded the death penalty. Notably, the horror of being raped at knifepoint barely merited recognition in the discussions that followed. This was also when Ahmadinejad famously declared that there were no gay people in Iran. For details, see: <https://paper-bird.net/2015/07/20/gay-hanging-in-iran/>.

monolithic “Islam” and equally homogenous “West”. It is no accident but still a profound irony that extremist Islamist organizations that claim to speak/act for all Muslims share key ideological assumptions with Euro-American and other individuals, organizations, and states that in turn—inadvertently or not—(re)produce xenophobic and reductive tropes and narratives about Islam and Muslims. These ostensibly opposing discourses share a historically inflected civilizational paradigm through which (a) the meanings of Islam and Muslims are fixed, and (b) the lines between barbarity and civilization are delineated. Both sides take for granted that Islam has an essence, one that is located in the textual; individual Muslim identity is thereby delimited by this relationship to religion. From this perspective what Muslims do can be explained by the fact that they are Muslims. This absurd tautology arises when “Islam” is emptied of history, location and politics.

Both sides share the idea that Islam (and by extension, Muslims), in its *essence* is different and incompatible with the “West”. This Muslim difference or Islamic exceptionalism is profoundly cultural; sexuality is crafted as a fundamental fault line in the production of this ‘absolute’ difference. For many radical Islamists, Euro-America and its ostensibly lax stance on homosexuality and sex in general represents a degenerate, promiscuous civilization in decline, in opposition to the pure Islamic space that is their quest. In the dominant Euro-American imaginary, Muslims are always already backward and sexually regressive—a consequence of being Muslim—and redemption lies in remaking their subjectivities in a Euro-American mold.

The “return” of the civilization framework has real life material consequences. It sheds light, for instance, on the logic behind a number of controversial steps taken by European governments recently. In the context of mass migrations of refugees from Syria, Iraq, Afghanistan and neighboring countries to Europe, in March 2016, the German government set up a website instructing male migrants on how to have sex with German women.<sup>6</sup>

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<sup>6</sup> See: <https://www.zanzu.de/en/themes/sex>

Along with explicit advice on the mechanics of sex, the website carries information on *appropriate* behavior in male-female relationships. Earlier in the year, Norway announced it would offer non-European asylum seekers classes in European sexual norms, apparently in a bid to prevent violence against women. Belgium followed suit, making courses on ‘respect for women’ obligatory for non-European migrants.

Such policy formulations are premised on and also actively produce the Muslim male (refugee) as a violent sexual predator—savage, homophobic, and misogynist. Male Muslim bodies are also constructed as an absolute sexual Other (in need of instruction on how to have sexual relations with “civilized” European females); they must be educated/habituated into the kind of sexual civility that Europeans are assumed to possess by virtue of being European. Put differently, these policies assert that Islam *tout court*—not politics, place or historical contingency—is at the root of Muslim male actions and thoughts. The long histories of interconnectedness of Europe and Asia/Africa, primarily through colonial extraction and imperial aggression, are erased, as is the well-documented existence of gender diversity and same sex practices in Muslim places. Instead, here gay and feminist rights are invoked as a cover for racist and xenophobic policies designed to police Muslim migrants in Europe. Once the political and historical context is excised, the discourse of civilization can be deployed to discipline and police all potentially dissenting bodies.

### **CSBR in the World**

CSBR was formally convened in September 2001, at almost the same time as the World Trade Center attacks. This unanticipated but profoundly symbolic conjuncture served to foreground the critical significance of one of the network’s central missions. From the outset, CSBR sought to produce a nuanced and critical discourse on sexuality and rights—a new sharper analysis that would address the ideological burden of (geo)politics and history, and

offer fresh perspectives. This Southern discourse would be produced by and for scholars/advocates living and working within Muslim societies. The founders of CSBR could not have known but the political environment after September 11<sup>th</sup> rendered this task ever more urgent.

In this respect, lobbying and advocacy at the international level constitutes an important aspect of the organization's work. The annual meeting of the United Nation's Commission on the Status of Women (CSW), for instance, provides an important venue. The active participation of CSBR members, typically as NGO delegates and occasionally as part of the official delegation, is an important avenue through which voices and insights from Muslim countries in the global South can inform policy decisions otherwise dominated by Northern powers and interests.

By the turn of the 21<sup>st</sup> century, debates at the CSW and elsewhere at the UN had become increasingly acrimonious, especially with respect to issues of culture, religion, and tradition. Not incidentally, in this post cold war climate and the so-called triumph of the free market, political and economic tensions between Northern countries and the global South (re)emerged wherein "culture/religion" became an alibi for other battles. In a replay of older colonial politics, at selective moments sexual and other rights come to be associated with generic "Western values", as opposed to for instance "Asian Values". Ensuing debates also echo moments in anti-colonial struggles when practices such as sati, veiling and female genital cutting became emblematic of "tradition" or religious authenticity, or alternately signified native barbarity in need of reform. This is a well-worn rhetorical strategy. What is new is that already existing fault lines are now visibly 'Islamized'. If in the past it was women's rights in general, today it is sexual and bodily rights that constitute the main ground for other battles. Today, the West/Euro-America presents itself as providing rational and sexually liberating spaces, while many Muslim majority countries position themselves as resisting geopolitical and western cultural hegemony. The boomerang effect explains the escalating hostility towards rights discourse that many CSBR members observe in their home

countries, also apparent in UN debates—which provided a key motivation for the research presented in this volume. On several occasions, CSBR members have found themselves acting as a foil to both the Organization of Islamic Cooperation (OIC) and the Holy See at the CSW meetings.

Thus, during the historic 19<sup>th</sup> session of the Human Rights Council in March 2012—the first time that a document on sexual orientation and gender identity (SOGI) was under discussion at the UN—OIC representatives staged a walkout. This was a public performance, a way of dramatizing ‘absolute cultural difference’ between OIC members and others. In its objection, the OIC insisted that culture and religion must be respected in the making of rights. Issues of SOGI did not fit, since by the OIC’s implication non-heteronormative practices were culturally alien to Muslim societies. Historically and empirically this is simply untrue. However, the gesture and rhetoric resonated because it drew on existing tropes of Muslim exceptionalism—defined in this instance as sexually “pure”, against the “licentious” behavior permitted under the cover of respecting sexual and gender diversity.

Similarly, the drafters of the 2012 Human Rights Declaration of the Association of South East Asian Nations (ASEAN) refused to include language on SOGI—despite intense lobbying on the part of activists. At the same time, and against calls from women’s and sexual rights advocates, they retained a clause on “public morality” as a limitation on the exercise of human rights.

The declaration further asserted that “the social, cultural, historical and religious backgrounds” of member states should be taken into account in the realization of human rights. According to reports, Muslim majority Malaysia was foremost among those objecting to the inclusion of language on SOGI.<sup>7</sup>

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<sup>7</sup> Until recently, members states—Malaysia included—did not object to Myanmar’s entry into and chairing of ASEAN, despite the documented ongoing ethnic cleansing of the Muslim Rohingya community. Not surprisingly, Muslim solidarity proves to be a selective enterprise in South and South East Asia.

A reported exchange between then Malaysian opposition leader Anwar Ibrahim and deputy Prime Minister Muhyiddin reveals the extent to which the Islam versus western binary has been normalized. Ibrahim is said to have called Malaysia's existing sodomy laws "archaic". In response, Muhyiddin asked, "If these laws are backward, then is the opposition leader saying Allah's laws are also backward?"<sup>8</sup> It is revealing that the law in question was introduced by the British colonial state. This profoundly ironic statement from a representative of the Malaysia state reproduced key ideas about "Islam" (traditional) and the "West" (modernity). Here we see a convenient slide between tradition and modernity—a reverse narrative of progress.

The seemingly intractable culture versus rights (or tradition versus modernity) dichotomy cannot be dismantled without acknowledging the enduring *discursive* and material legacies of colonial histories of exploitation and extraction. This is precisely the appeal of much right wing rhetoric—the ability to draw on everyday resentment in a language and idiom that is easily cognized.

Further, key events in the last decade—the invasions of Iraq and Libya, the global recession, the collapse of the Arab uprisings, the Syrian civil war, and the refugee crisis—have been accompanied by a sharp rightward shift in politics. From Turkey to India, the United States to Bangladesh, neoliberal, authoritarian and/or xenophobic regimes are on the ascendant. Drawing on sexuality or religion as a central fault line, otherwise unpopular authoritarian governments can bolster their image as protectors of 'authentic' culture/Islam/morality. In a globally interconnected world, reductionist discourses about Muslims and Islam provide incitement for hyper-nationalist and/or religious forces and offer cover for the ravages of failed neoliberal policies. This is a perfect field for moral panic and scapegoating. By extension, sexual and bodily rights advocates can be cast as agents of alien/western agendas. It should be evident by now that there is nothing

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<sup>8</sup> See: <http://actup.org/news/malaysia-country-reveals-it-objected-to-lgbt-rights-in-asean-rights-charter/>

particularly Muslim about state regulation of sexuality. By extension, ‘secular’ states are as likely as ‘theocratic’ ones to police morality and frequently do so, especially when faced with political dissent. The virginity tests forced on female protesters at Tahrir Square by Egyptian General Sisi should be understood in this light. Muslim majority or not, all states regulate sexuality as part of managing their populations. They might do so in the name of maintaining public order and morality; or on the grounds of protecting and promoting national culture; or some variation thereof. This is as true of European countries that position themselves at the vanguard of human rights as of ‘Third World, underdeveloped’ nations. So for instance, several Western European countries including Finland, Belgium and Switzerland force transgender people to undergo sterilization if they want to change their sex on legal documents.<sup>9</sup> The situation has begun to shift only in last three or four years; Norway, Denmark, Sweden and France have finally changed their laws, after years of campaigning by LGBT advocacy groups.<sup>10</sup> Poland, which has among the most restrictive abortion laws in Europe, unsuccessfully attempted to impose a near total ban on abortion last year.<sup>11</sup> In South and Southeast Asia, with the rise of right wing governments, intermarriage has become a target of state and social policing. In 2015, Myanmar introduced legislation that effectively allows the government to stop marriages between Buddhist women and non-Buddhist (primarily Muslim) men.<sup>12</sup> This and other aspects of the country’s Protection of Race and Religion Laws are clearly designed to regulate religious and “racial” boundaries. A similar impulse drives much of the discourse in India on “Love Jihad” (an alleged Muslim plot

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<sup>9</sup> Rick Noak, “Many European Countries Won’t Recognize Transgender People Unless They Are Sterilized.” *Washington Post*, February 25, 2017.

<https://www.washingtonpost.com/news/worldviews/wp/2017/02/25/many-european-countries-wont-recognize-transgender-people-unless-theyre-sterilized/>

<sup>10</sup> Sara Morrison, “Sweden Will Compensate Transgender Forced Sterilization Victims.” *Vocativ*, March 28, 2017. <http://www.vocativ.com/415514/sweden-transgender-sterilization-compensation/>

<sup>11</sup> “Poland Abortion: Parliament Rejects Near Total Ban.” BBC, October 6, 2016. <http://www.bbc.com/news/world-europe-37573938>

<sup>12</sup> Anna K. Poole, “New Myanmar Law Regulates Interfaith Marriage.” *World*, July 15, 2015. <https://world.wng.org/2015/07/new-myanmar-law-regulates-interfaith-marriage>

to seduce and convert Hindu girls to Islam). In this case, the government has not introduced legislation preventing intermarriage, nor does it seem likely to do so in the immediate future. Instead, prominent members of the ruling Hindu nationalist Bharatiya Janata Party (BJP) and its close ally, the extremist Rashtriya Swayamsevak Sangh (RSS), consistently invoke the Love Jihad trope, thereby lending authority and official sanction to the narrative. The current Chief Minister of Uttar Pradesh, the ruling party's Yogi Adityanath, is especially notorious for his inflammatory rhetoric on the subject.<sup>13</sup>

### **Reframing Sexual Politics: Beyond the Civilizational Framework**

Why have Muslim majority states become increasingly conservative over time, acting to reverse many hard won advances on women's rights and those concerning gender diverse populations? How has this happened despite vigorous efforts by activists, civil society organizations and social movements in general? What are the factors that have contributed to state-sanctioned surveillance and policing of sexual morality? Is this rightward shift the result of a backlash to the success of gender and sexual rights activism? In what ways have these moves been resisted or accommodated? These were some of the issues that CSBR members sought to understand and find ways to better address through the commission of this study. The methodology was designed to take into account the specific historical, political and sociological complexities of each national context. The comparative aspect of the project was critical in this respect.

The four essays that follow illuminate the unstable terrain and shifting constraints that CSBR members navigate everyday. We hear from scholar/activists in "Muslim" spaces whose lives and work must take into

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<sup>13</sup> The Wire Staff, "Hindutva's 'Love Jihad' Obsession Leads to Murder of Muslim Man in UP." *The Wire*, May 3, 2017. <https://thewire.in/131678/hindutvas-love-jihad-obsession-leads-to-murder-of-muslim-man-in-up/>



account not only localized complexities but the often obscure entanglements of the local with transnational discourses. The analysis refuses easy oppositions and fixed definitions of Islam, culture or rights. It calls for us to be open to improbable alliances and strategies. These researchers are critically aware that there are no ‘pure’ spaces of indigeneity or of rights, that meaning is derived from the political and discursive framing of problems. Traversing as they do geographically diverse and historically distinct contexts (Palestine, Turkey, Malaysia and Indonesia) they remind us of the necessity to be vigilant of the analytical and conceptual lens we bring to bear on our scholarship and activism. Studies of sexual and bodily rights vis-à-vis Muslim societies cannot assume the existence of a generic ‘Muslim state’ or narrative of progress in which religious tradition gives way to secular modernity. Rather, terms such as tradition and modernity are deployed and inflected through the politics of postcolonial or neocolonial nationalism. Each of the chapters that follow addresses the politics of sexual and bodily rights in Muslim societies from a historically and contextually nuanced but localized vantage point. Taken together these studies demonstrate that (1) there is no such thing as a uniform ‘Muslim’ state or community; definitions of Islam and Muslim identities are contested, dynamic and in flux; (2) ensuing struggles over sexual and bodily rights are as much over politics as they are over textual interpretation or prescription, and are invariably imbricated in contests over (post colonial) national identity and/or the fall out from neoliberal policies; (3) in a transnational age, the “local” is always also global, sometimes pronounced and other times muted, from the effect of NGOization to overt geopolitical pressures; (4) colonial pasts are also our discursive and imperial presents.

Arguably, these issues are most clearly articulated in the case study from Palestine. In their chapter, Nadera Shalhoub-Kevorkian and Suhad Daher-Nashif situate their fine-grained analysis of the “local” firmly within the broader context of Israeli settler colonialism, and the effects of the “War on Terror” and “Islamophobia”. The authors seek to analyze the intersection of formal and informal legal systems in the understanding of femicide or the

murder of Palestinian women by family members. Conventionally such murders are framed as a purely “cultural” issue, the outcome of local patriarchal attitudes toward women and morality. The authors eschew this narrow framing, arguing instead that localized manifestations of patriarchal and masculine logics are empowered by processes of exclusion at both local and global levels. These exclusions include mechanisms through which the occupying state and members of the international committee deny Palestinian people’s basic rights. Denial of Palestinian suffering, in conjunction with global Islamophobic discourses, heightens a sense of fear of the racialized Palestinian Other and contributes to legal and political chaos within Palestinian society. The resulting state of affairs has “opened up new spaces in which hegemonic and/or patriarchal power-holders within Palestinian communities can exercise greater control over women’s lives, bodies and sexuality”. This is the context within which violence against colonized women is fueled, strengthened and even justified “by colonized and colonizer alike”.

The chapter on Turkey by Pinar Ilkcaracan offers a fascinating contrast. Turkey, the seat of the former Ottoman Empire, was never colonized. Yet it has an ambivalent relationship to European modernity, as evident in its aspirations to join the European Union and its unsuccessful attempts to do so. Although unstated, the implication is that the country is “too Muslim” to be European. In addition, until recently, the Turkish state has been avowedly secular, with public signs of Islam strictly policed. Ilkcaracan skillfully unpacks the rhetorical strategies used by the incumbent Justice and Development Party (JDP), a party with deep religious roots, to further its social and political agenda. The chapter offers an important insight into the working of the JDP, which carefully side-steps open reference to religion. Ilkcaracan maps the party’s strategic deployment of a secular discourse of ‘conservative democracy’, which stands in for Islam without naming it. As she notes, the international context, the desire for EU member as well as the trajectory of Turkish nationalism, all militate against the JDP’s open embrace of Islamist politics. Crucially, this specifically Turkish conservative democracy is never represented in opposition to “western values” as such.

Rather it has its counterpart in European and American right wing political movements that are equally against “the right to diverse sexualities, gay marriages, abortion and contraception”. Through an analysis of competing public and legal discourses on morality, Ilkcaracan also shows how the highly subjective language of “general morality” (proposed for inclusion in the Constitution at the time of writing) can be used to restrict and police political and social/sexual dissent. This instrumentalization of morality does not require open resort to religious rhetoric. Thus, when an LGBT organization applied for legal registration, it was not only refused but also charged with offences against general morality. Ilkcaracan attributes the conservative backlash to the increasingly visibility and power of feminists, and LGBT groups, including the successful reform of the Turkish Penal Code in 2004.

Questions of morality and its framing are fundamental to the chapter on Malaysia by Julian C. H. Lee and tan beng hui. Malaysia offers an interesting case study because of its noticeable transition from being relatively permissive to markedly conservative, with periodic bouts of public moral panic over the sexual behavior of its citizens. The authors situate their sophisticated historical and sociological account of the rise of state sanctioned moral policing within multiple and intersecting histories. Lee and tan beng hui show how the legal and political legacies of colonialism, which in addition to giving Islam the power of statutory law also conflated Malay ethnicity with “Muslimness”, laid the governmental groundwork for the politicization of Islam in the decades after Independence. Indeed, the much feared *khalwat* laws (on illicit proximity) were not part of a timeless Muslim tradition but enacted only in 1938. Postcolonial electoral politics provided impetus for state directed Islamization; in an effort to secure the support of ethnic Malay voters, political parties began to ‘out-Islamize’ one another, primarily through advocating conservative sensibilities on sexuality. The promotion of an increasing orthodox official Islam laid bare the contradictions of postcolonial nation-building. Lee and tan beng hui note that developments in the international arena—including the fallout from the Iranian revolution and the emergence of the “Asian values” discourse critically

informed debates on morality in Malaysia. The idea of Asian values entrenched the association of non-heterosexual and pre-marital sex with the “West.” Paradoxically, Malay trans women (*mak nyah*) find themselves subject to aggressive prosecution for transgressing Shari’a laws rather than common laws, as was the rule earlier. With this trend in Islamization, the state appears to be trying to mold a specific kind of ideal Muslim citizen.

In the final chapter of the book, Andy Yentriyani & Neng Dara Affiah present a compelling analysis of the rhetorical stakes in debates around a controversial Anti-Pornography bill that, in a modified form, was passed into Indonesian law in 2008. Yentriyani & Affiah contextualizes these debates in relation to Indonesia’s history of militarised authoritarianism, shifting state representations of the ideal Indonesian woman and popular resistance to the perceived imposition of a monolithic Indonesian Muslim identity—smuggled in through a law purportedly for the protection of morality. Notably, a simple religious/secular opposition did not map on to supporters or opponents of the bill. As Yentriyani & Affiah show, the coalition against the pornography bill include both faith-based women’s groups and secular organizations, and couldn’t be easily mapped on to East-West or Tradition-Modernity binaries. Equally significant, proponents of the bill invoked “western” anti-pornography feminists such as Catherine MacKinnon used to make their case. Remarkably enough the Bill, whose origin lay in a fatwa issued by the Indonesian Muslim Cleric’s Council, ultimately made no mention of Islam in its final form. The excision of references to Islam resulted from objections and criticisms from detractors who pointed out that the original version of the bill represented not just Muslims but a particular segment of Islamic orthodoxy. Opponents also invoked the diverse nature of Indonesian nationalism, of its cultures and religions to make their case. The 2008 Law on Pornography eventually accommodated some of the concerns of the Bill’s opponents; however, the language defining what exactly constitutes the real of the illegal or pornographic remains strategically vague. In practice, this leaves women or any one who transgresses “acceptable” public morality exceptionally vulnerable to criminalization. Nevertheless, the authors finish on an optimistic

note. As they state, “the debate on the Pornography Bill has also stimulated the emergence of strong leadership among, and a stronger role for, women’s rights groups and civil society in general in shaping the process and direction of democratization in the country”.

This is an extraordinary volume with lasting value. The individual chapters are intellectually and politically rigorous and will give the reader much food for thought. They illuminate not simply isolated singular problems and their immediate strategic solutions, but force us to confront broader questions around the politicization of sexuality and morality. Together the case studies demonstrate the power of collective resistance, of historicizing and unpacking ostensibly fixed laws and “traditions”, and of the necessity of improbable or unexpected alliances across social movements.

It has been my honor to write this introduction. My only regret is that our dear colleague Zaitun ‘Toni’ Kasim, whose acute political and analytical vision helped to shaped this project in its initial stages, did not live to see its completion. It is to Toni’s memory that this book is dedicated.

Dina M. Siddiqi  
April 13, 2017.<sup>14</sup>

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<sup>14</sup> Acknowledgement: I would like to thank Rima Athar for her detailed and thoughtful comments on the first draft of this introduction.

## **Femicide and Racism:**

### **Between the Politics of Exclusion and the Culture of Control**

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## **Introduction**

This paper seeks to analyse the ways in which the interrelationship between formal and informal legal-social systems constructs women's murders within Palestinian society. The main focus will be on the processes through which the local/global "politics of exclusion" colludes with a localized "culture of control" to generate the context within which violence against colonized women in colonial/occupied zones is fueled, strengthened and even justified, by colonized and colonizer alike. More precisely, we address how raced, classed, and gendered processes of exclusion at both the local and global levels jeopardize the lives and bodies of women in conflict zones, in this particular case those of Palestinian women. The term "politics of exclusion" refers to the mechanisms through which the Israeli occupying state and members of the international community participate in the denial of the Palestinian people's rights to a homeland, safety, housing, freedom of movement, economic development, education, health, etc. The term "culture of control" refers to localized manifestations of patriarchal and masculine logics that are empowered by the politics of exclusion. An examination of the crime of femicide will shed light on how the global denial of Palestinian suffering (underpinned by the global "War on Terror" and current climate of "Islamophobia") has heightened a sense of fear of the Palestinian Other, and contributed to a state of social, legal and political chaos within Palestinian society, in which Palestinians are further marginalized. This chaotic and violent state of affairs has, in turn, opened up new spaces in which hegemonic and/or patriarchal power-holders within Palestinian communities can exercise greater control over women's lives, bodies and sexuality.<sup>1</sup>

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<sup>1</sup> This article was written in 2012, and is based on data collected before 2012.

Discussions of femicide in Arab societies, however, often draw on Orientalist depictions of “Arab culture”, which are often supported by shallow, culturalized analyses that depict Western societies as “cultureless”, and contrast them to societies represented as the “Cultural Other” (Volpp, 2000). As Shahrzad Mojab and Rachel Gorman point out, such a limited analysis, “dividing cultures into violent and violence-free is in and of itself a patriarchal myth” (2003: 2). Our use of the term “femicide” refers to the murder of women and girls by a family member(s); and as can be learned from similar experiences in other cultural settings (see Fregoso and Bejarano, 2010), femicide remains one of the most pervasive human rights violations committed against Palestinian females. The use of the term femicide is proposed to counter the common usage of the term “honour crimes”. It signifies a refusal to accept the conception of the act of killing a female as “honourable” in any context, or as “crimes committed on romantic basis”, as they are sometimes defined in Israel.<sup>2</sup> In the Palestinian context, the concept of “femicide” was used first by Nadera Shalhoub-Kevorkian to denote “all violent acts that instill a perpetual fear in women or girls of being killed under the justification of “honour”” (Shalhoub-Kevorkian, 2004: 10). Femicide is not particular to Palestinians and is not a cultural phenomenon; it exists in every country, cutting across culture, class, education, ethnicity and age. The global dimensions of this violence are alarming, as studies on its prevalence have highlighted (Coomaraswamy, 2005: xii). There are variations in the patterns and trends of femicide within different regions and social groups (i.e. minorities, indigenous women, migrant, refugee women, women living in shadows of armed conflict, disabled women, girls, elderly, etc.).

This paper argues that efforts to de-politicize and de-globalize femicide by locating it in the realm of “culture” are grossly misguided, and contribute to constructing a racialized and racist framework that fails to effectively address the murder of Palestinian women. We then seek to set forth a framework of analysis that moves beyond essentializing cultural logics to show how economic, political, and social processes at the local and global levels create spaces for articulations of “Palestinian culture”—as though it were a static entity—that justify the crime of femicide, when in fact femicide

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<sup>2</sup> The terminology employed when the murdered woman is Jewish. When the murdered woman is Palestinian, the formal Israeli systems and Israeli media refer to the act as “killing on the ground of family honour”.

is fuelled by the interplay between a global politics of exclusion and a localized culture of control. The paper concludes by emphasizing the need to carefully analyze and understand the coordinated and integrated policy responses of the Israeli and Palestinian formal and informal legal systems; to evaluate programmes and policies, and to re-visit and criticize the existing legislation.

## **Methodology**

Philosophically, the research takes as its point of departure one of the foundational premises of feminism: that both the personal and the private are political, and consequently the home/family space is a political domain. The study adopts a qualitative research methodology, which provides the most appropriate tools to address multifaceted and dynamic perceptions (Denzin and Lincoln, 2000), especially given the multiple layers of meanings at play influenced by the interactions of political, social, psychological, economic, bio-political and geo-political contexts.

Guiding the interviews and other research described below was a set of three main research questions (with other subsidiary questions described in Appendix A):

- How does the interrelationship between the formal, informal, tribal legal Palestinian systems and the Israeli civilian-militaristic legal systems, construct the daily lives of Palestinian women, and the practice of femicide?
- How do global mechanisms of the denial of Palestinian suffering, contribute to the processes which construct femicide?
- How do socio-political shifts, both global (e.g. Islamophobia, the West's reactions to the events of September 11<sup>th</sup>, 2001), and local (e.g. the rise of Hamas, the second Intifada, and the Israeli militarization), construct these systems of social control and their functioning with regard to women's bodies, and how is this construction reflected in the politics of Palestinian women's sexuality and the discourse of "morality", principally in cases of femicide?



The process of data collection differed somewhat in each of the three research contexts, and consisted of a combination of interviews (both planned and unplanned, constructed and informal), textual analysis, and observations (participant and non-participant). In the context of the Palestinian minority in Israel was gathered through, data was gathered through interviews with the chief Imam of the Big Mosque in Ramleh;<sup>3</sup> the director of female youth programs in the Childhood Programs Association in Ramleh (who is also the manger of the town's Female Youth Center); the General Director of NGO Women Against Violence (WAVO), and a forensic technician from the Israeli Institute of Forensic Medicine.<sup>4</sup> Textual analyses were conducted on: media coverage of femicide cases; the protocol of a conference entitled "Women and Girls in Ramleh and Lydda: Future visions," which took place on 12 December 2008 in Ramleh; two court protocols; a position paper on the issue of killing women (in Israel) published by the Knesset (the Israeli parliament), and the protocol of Knesset meeting on the subject of promoting the position of women in the "Arab sector".<sup>5</sup> Statistics compiled from data collected by various women's rights organizations were also used, as were published literature on the issue of femicide published on and by members of the Palestinian minority in Israel.

In the context of the West Bank, we<sup>6</sup> conducted interviews with two tribal heads, two forensic physicians, two human and women's rights activists, two lawyers, and the Muftis of the West Bank and Jerusalem. We undertook textual analysis of documents published by women's rights organizations, including statistics, media coverage, forensic protocols and the Palestinian Penal Code, as well as observations made in the Palestinian Forensic Medicine Institute.

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<sup>3</sup> The city of Ramleh is located in the center areas of the Israeli state. We focus on the city of Ramleh, due to both an increase in women being killed there over the past two decades and its spatial significance. With most of its Palestinian residents expelled in 1948, Ramleh exists as a "contested" city with a Jewish majority but also a sizeable Palestinian minority.

<sup>4</sup> It was impossible to interview family members or women threatened by femicide themselves, due to the risks both to ourselves as researchers and to the women.

<sup>5</sup> Israelis, both formally and informally, refer to the Palestinian minority living within their midst as "the Arab sector". We view this designation as an act of political naming aimed at marginalizing the Palestinian identity, and as symptomatic of ignorance towards the Palestinian entity as whole.

<sup>6</sup> We would like to thank Eisa Manasrah for the enormous help he provided in collecting the data in the West Bank.

In the context of the Gaza Strip,<sup>7</sup> interviews were conducted with a tribal head, a family member (a brother) of a victim of femicide (the interview was done in the Palestinian prison in which this man, who killed his sister, was being held), a lawyer, a police officer, and two women's rights activists. Textual analysis was carried out on documents and statistics published by various human and women rights organizations on the subject of the rape and killing of women in the Gaza Strip, cases documented by the Woman Rights Centre in Gaza, and articles and position papers written on the subject.

## **Background**

Palestinian society lived through a long history of Zionist colonization and displacement during the early twentieth century, which culminated in the *Nakba* (catastrophe) of 1948. The *Naksa* (setback) of 1967 (Khalidi, 1991), coupled with the international denial of Palestinian suffering, increased the exclusion of Palestinians while enhancing their oppressor's power. The global silence, the subjugation and denial of the legitimacy of the Palestinian struggle, in turn stoked the fires of the two *Intifadas*, or uprisings, of 1987 and 2000. Following the October 2000 uprising and the second (Al-Aqsa) *Intifada*, Israeli oppression against Palestinians increased once more, as the Jewish state began to use "security necessities" to further crackdown on and target members of Palestinian society. As Israeli oppression increased, levels of both despair and resistance within Palestinian communities rose commensurately (Shalhoub-Kevorkian, 2002a). Shortly after the events of September 11<sup>th</sup>, 2001 in the US, the Palestinian Arab-Muslim community became the target of growing Islamophobia in the West. It is against this backdrop, and more specifically against the last nine years of heightened racial oppression against Palestinians, that we must assess the nature and intensity of violence against women (VAW), including femicide. It is a combination of these factors—the silence of the global community in the face of ever harsher aggression, the growing sense of frustration and

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<sup>7</sup> We would like to thank Hidaya Shamo' for her valuable work in collecting data in Gaza Strip, which would otherwise have remained inaccessible due to current status of the area as a closed military zone.

despair amongst members of Palestinian communities, together with the rapidly declining socio-economic conditions in which Palestinians live—that must provide the backdrop for a proper understanding of the social-political contexts in which violence against Palestinian women has become normalized.

With respect to the West Bank and Gaza Strip, Palestinian women, together with Iraqi Kurdish women, were the first in the world to resist “honour crimes”. Moreover, they have historically worked hand-in-hand with Palestinian community (men and women, educators, health and welfare workers, legal and human rights activists and more) to resist oppression. Following the first *Intifada*, Palestinian women and feminist organizations put up clear intervention plans to resist violations of their sexual and bodily rights. Palestinian women proposed a very progressive Penal Code, openly discussed and challenged femicide, conducted studies on the issue, and were the first to reject the label “crime of honour” (Shalhoub-Kevorkian, 2003). Their fight against socio-political-legal practices, including femicide, has been waged within a highly complex context shaped by several overlapping systems: the formal systems of the Palestinian semi-state;<sup>8</sup> informal Palestinian systems (including non-governmental organizations (NGOs); social systems such as the tribal-patriarchal system) and the Israeli military systems.

Within Palestinian society, human resources and support have traditionally been provided by the *hamula*—(the clan or extended family), which also controlled economic resources. The *hamula* was reinforced as a system of social control by various colonial and militaristic governing powers in Palestine, which refrained, for political reasons, from intervening directly in internal Palestinian social affairs, opening the space for patriarchal power holders to re-produce and inscribe their power over women’s living and dead bodies. As settler colonialism, militarism, and the foreign political leadership usurped traditional authority, only internal societal and family disputes were left under the control of the traditional power holders of the *hamula*, which, along with its old legal system, was limited to addressing internal social

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<sup>8</sup> We use the phrase “semi-state” in the Palestinian context as most of the institutions of the modern nation-state have been established, but operate in the absence of sovereignty and against the backdrop of the ongoing Israeli military occupation of the Palestinian territories.

issues, including violence against women. The need to survive political uncertainties, the loss of control over land, the loss of political leadership and economic viability engendered the parallel existence of two legal systems: the new, foreign “modern” system, and the traditional *hamula* based system, known and accessible to the local community. In parallel, systems of social control, leadership and local justice based on powerful members of society called *jaha* (the “faces” of society) were developed and consolidated through resistance to external colonial and militaristic interventions (Shalhoub-Kevorkian, 2006; Shalhoub-Kevorkian and Abdulhadi, 2003).

The informal Palestinian leadership included Muslim religious leaders and “wise men” (*hukama*) who based their judgements and rulings on their life experiences, family backgrounds, and history of participation in informal mechanisms of social justice. They created an unwritten system of tribal law comprised of norms, customs and religious law (Al-Aa’raj, 2002; Al-Abadi, 1986). As a result, part of their decisions based on their personal opinions, which were based on social interpretations of local tradition.

Following the establishment of the state of Israel—following the *Nakba*—in 1948, Palestinians were divided into three geographical groups. One group was turned into a minority inside the declared State of Israel, while the West Bank fell under Jordanian rule, and the Gaza Strip under Egyptian control (Robinson, 1997: 54). In 1967, both these latter areas were occupied by Israel and subjected to Israeli military rule. The Israeli state and its military occupation evoked anger and hostility from Palestinians, and the justice system administered by Israel was perceived as an imposed, enemy system, discriminatory and oppressive in nature (ibid: 54). As a result, Palestinians tended to resort to informal systems of justice, including the tribal justice system, in order to resolve their internal problems and conflicts, as an act of rejection of the occupation (Al-Aa’raj, 2002). Following Oslo Accords (1994), the Palestinian National Authority (PNA) took partial control over part of the Occupied Palestinian Territories, grappling with different and at times conflicting systems of social control in its attempts to establish internal order within the community (Shaine and Sussman, 1998).

After the arrival of the PNA, however, three cases of sexual abuse (two in the West Bank and one in Gaza) were widely reported by the media in the

Occupied Palestinian Territories, provoking vehement reactions within Palestinian society. The PNA responded by transferring the cases to the National Security Court<sup>9</sup>, seeking the speedy trial and punishment of the offenders. Concurrently, the PNA requested the intervention of members of the tribal system and their assistance in reinstating social stability (Shalhoub-Kevorkian, 1997). This example illustrates how the judicial system in the 1967 Occupied Palestinian Territories has become a hybrid patchwork of secular, Islamic and tribal authorities (Al-Rais 2000; Dara'awi and Zhaika, 2000). It has been argued that the fine balance between the formal or public law and the informal or tribal systems of justice may be disturbed when women's victimization is sexualized (Shalhoub-Kevorkian, 1999; Mernissi, 1982) and notions of female virginity, shame and honour direct the judicial cognition of legal practitioners, while at the same time members of the criminal justice system enjoy discretionary power (Abu-Odeh, 2000; Abdo, 1999; Shalhoub-Kevorkian, 2003). Although both systems have operated side by side to avert militaristic intervention in local matters and to promote social stability, their co-operation on issues that relate to gender, such as women's sexual abuse and femicide, has led to further oppression of and discrimination against Palestinian women (Shalhoub-Kevorkian, 2000).

An important element of the context of our discussion is that in 1948 the Jewish State, Israel, was established (formally) on Palestinian land. Palestinians were forced to leave their homes and land. Some fled to neighboring Arab states, while others abandoned their homes for other towns and villages within Historic Palestine, including locations within the borders of the newly-established state. A minority remained in their original homes. Today the Palestinian home-land minority in the Israeli state numbers approximately 1.2 million people, who are Israeli citizens by law. Palestinians inside Israel gradually shifted from accessing their internal, informal legal systems to the formal Israeli legal system (Hassan, 1999; Shalhoub-Kevorkian, 1997; 2004; 2005), resulting in intertwining the informal systems and the official-formal Israeli systems. This relationship helps to construct the daily lives of Palestinians in Israel, especially those of women, who are always located at the lowest rungs of the hierarchy of control within the various systems.

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<sup>9</sup> See more details on National Security Courts in Dara'awi and Zhaika (2000).

## **The Palestinian Social-Political Context**

Today, Palestinians live a hybrid and liminal existence. While Palestinian society has always been in a process of transformation from one condition to another, the last fifteen years in particular (since the Oslo Accords) have been a continuous and dynamic process of socio-political change (Murphy, 1996: 58), comprised of transitional stages between total occupation to “liberation”. The hybrid structure of this period in the history of Palestinian society stems from the existence of several controlling powers, both Israeli and Palestinian, and the process of establishing the institutions of the nation-state in the absence of the state itself (Hilal, 1998: 7). Most of the characteristics of the modern state as a sovereign entity are absent in the Palestinian context: Israel controls the internal and external borders of the Palestinian territory, and controls the movement of people, their political destiny, their economy, etc. (Rouhana, 1997; Zureik, 2001: 226-227).

Subject to the control of Israel’s militaristic systems, Palestinian society is in a state of colonization, a state of exception, and the sovereign is “he who decides on the state of exception”, as defined by Carl Schmitt (Agamben, 2005: 1). In such a state, Palestinians are excluded socially (in part, as Palestinians have their own civil-administrative institutions, which are detached from the parallel Israeli systems), but included politically and militaristically (by Israel’s militaristic-political control over Palestinian lives). It is a state in which life is “bare”, and in which death, too, is “bare”,<sup>10</sup> particularly in the case of women. And because the social is constructed through the political, the Palestinian political condition participates in the construction of Palestinian social structures. Hence the colonial condition plays a role in constructing the status of women and gender relations within Palestinian society. Projects of militarization and colonization aim, in part, at excluding the other, and colonization through occupation scripts domination over the bodies of the people. Women’s bodies, sexuality and spaces are channels through which the Otherized is militarized and colonized.

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<sup>10</sup> The notions of life and death as ‘bare’ is meant to evoke the recognition that our lives from start to finish are in fact subject to and the object of politics.

## **The Occupation and Palestinian Social Reactions**

Foucault (1980) stated that power produces types of behaviors and events; one reaction to control by an external power is that those who are subjugated in turn find ways to exercise their (diminished power) by focusing on an even more subjugated category of persons within their limited sphere of influence, which can manifest in several ways. In the Palestinian context, external (Israeli) and internal (Palestinian) forces are in a state of imbalance. Israelis hold and control the power, while Palestinians wield far less power and are controlled. Therefore “returning control” from the Palestinian is directed towards insiders who have less power, primarily women, as well as children, the handicapped and the elderly. In this context the exercising of control over women’s sexuality, through several mechanisms associated with formal and informal systems, constitutes a patriarchal means of maintaining control of and managing the internal social equilibrium (Shalhoub-Kevorkian, 2002b). Women’s bodies become sites of struggle for internal control, and femicide is a form of self-destruction that results from external control exercised by colonial powers (see Fanon, 1963). Hegemonic powers are practiced daily on the bodies and sexuality of Palestinian women via several institutions.

Haj (1992) holds that two issues must be considered when analysing Palestinian patriarchy: first, the fact that Palestinian men are humiliated, depressed and lack power, and second, the social relationships and interactions that define conceptions of power relations. The Israeli occupation of 1967 led to the creation of a system of external orders and laws that govern the social, economic and political life of Palestinian society. Israel appropriated most of the resources available to the population, most crucially land and water resources (See Fischer, 2006; Benvenisti, 1986). This economic oppression led to a sharp rise in unemployment and dealt a “death blow to the economic viability of the Palestinians as a community” (Benvenisti, 1986). The position of women in the economy was greatly damaged, if not abused. Due to social patriarchy, women’s waged work is concentrated in the agricultural sector, in factories (textiles) and in the tobacco industry, where salaries are very low (Haj, 1992).

## **Femicide: Formal and Informal Legal Systems**

Although the traditional system of tribal justice does not permit the murder of a woman on the basis of “honour”, (even if “her actions were voluntary”<sup>11</sup>), prevailing tradition views such murders as lawful. In Jordan and Palestine a man who commits such a killing is not charged with the crime of murder. If it is apparent that the murder was committed in reaction to a violation of family honour, the murderer is deemed “innocent”, and may even be viewed in a positive light, as someone who restored the honour of his family. In the West Bank, the Jordanian Penal Code applies. Article 340 of Law no. 16 of 1960 grants exemption from prosecution or a reduced penalty to a husband or male blood relative who kills or assaults his wife or female relative on the grounds of “family honour”. This provision provides women with no legal protection.

The militarized, colonial violence perpetrated by Israel has over the decades permeated the formal legal system, via the socio-cultural system, as evidenced by what Bisharat (1989: 36) terms the “infinite negotiability” of all social transactions. Thus, in the case of abuses inflicted upon women, from analyses of offences that have come before the court system—as administered by both the Israeli occupation authorities and by the tribal/indigenous system.

“The formal court system conceives of offences primarily in their material dimension, and its procedures assume a rational plaintiff who will take initiative to maximize a material or economic interest. In the ethos of honour, damage to the body or property, whether intentional or accidental, is an offence against the person, the proprietor, so to speak, of either the body or the property, in other words, against his or her honour... the very sense of honour is, that it is of a different order of value than the material” (Bisharat, 1989: 37).

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<sup>11</sup> As stated by several tribal leaders who were interviewed.



## Global Developments and Local Changes

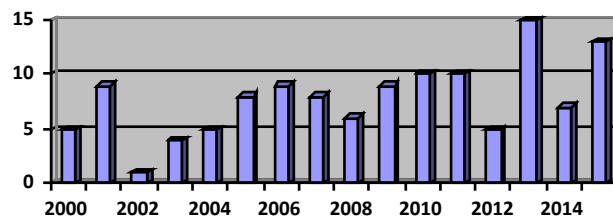
A historical analysis of the rising power of Palestinian informal legal systems in the absence of contextual analysis (of global and local political and economic factors) stands to endanger women victims/survivors of abuse, and jeopardize the work and activism of local feminist movements and feminist strategies of resistance. Strategies to confront VAW fail when they reify the ‘modern white’ and the ‘pre-modern non-white’ conception of subjectivity. Strategies that do not acknowledge the structure and context of colonization seldom undermine the structures and practices that both give rise to and perpetuate women’s abuses (Razack, 2004). Close examination of the triangle of the victimized colonized woman, the dangerous colonized man, and the civilized white European, may help us to challenge the “color line” that differentiates the modern from the non-modern, the colonized from the “civilized”. This line is particularly destructive in the Palestinian case, against the backdrop of the Israeli “security theology” and the War on Terror.

The following is divided in three sections, the first of which describes the findings of the research as they pertain to the Palestinian minority in Israel. The second and third sections describe findings that relate to the West Bank and the Gaza Strip, respectively.

## Research findings

### *The Palestinian minority in Israel*

Between the years 2000 and 2015, one hundred and thirty two (124) Palestinian women living in Israel were killed. The numbers are as follows:



The following section focuses on the Palestinian city of Ramleh,<sup>12</sup> where research reveals that a relatively high rate of femicide cases occurred in the neighborhood of Al-Gawareesh. The research also showed that most of the victims were killed by their brothers and other male relatives, often cousins. A complex picture emerged from the research, revealing the interplay of social-religious-political processes underpinning the crime of femicide:

“Not a long time ago they came and told me that my turn was next. They have a list, every woman knows if she’s on this list or not. If you are on the list, it doesn’t matter whether you did something or not, they will find a reason to say you behaved badly. If a woman has a cellular phone, they might kill her. If she talked with someone they might kill her. We have men in the family who hate women... It’s enough for someone to say something about a girl or a woman, that’s it. One guy might provoke and anger the entire family, turning them against the woman. Afterward they will begin the planning, what they will do with her, they fear no one. Sometimes they work on the plan for a whole year, and the whole time she is aware of the fact that they plan to kill her, until they kill her. If the woman knows that there is a plan to kill her, sometimes she goes to the heads and elders of the family to ask them do something to calm the situation. But they can’t help all the time. After completing their plan, they decide who will do it. They said to me as for other women – “Wait, wait, your turn will come soon”. I left the neighborhood because of that. There are many women who are afraid to leave because they fear asking for help from the authorities” (Zinger-Heruti, 2007a).

The foregoing quotation is an excerpt from a testimony provided by Maysa (Zinger-Heruti, 2007b) to the police and published in an Israeli newspaper. Maysa is a young woman from Al-Gawareesh. She spoke following the killing of the eighth woman in Al-Gawareesh in 2007 (named Hamdah). Ten women were murdered in Al-Gawareesh between 2000 and 2009. Maysa is missing and it is suspected that she was also killed after giving her testimony. In the

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<sup>12</sup> Since its occupation in 1948, Ramleh has been a “mixed city”, with Palestinian and Jewish residents.

case of Hamdah, twenty women from her family testified against the killer, who was her brother. However, despite their testimonies, the Tel Aviv District Court delivered a verdict of not guilty of the crime of murder, finding him guilty of the lesser charge of being an accomplice to murder.

When interviewed, the chief *Imam* (clergyman) of the Grand Mosque (*Jami el-Kebir*) of Ramleh said:

“The people there consider the woman as an object. They think and say that a woman must uphold the honour of the family. If not, she is to be killed”.<sup>13</sup>

According to the chief *Imam*,<sup>14</sup> Ramleh constitutes a unique context because of the highly heterogeneous character of the Arab population of the city and its outskirts, which includes refugees (who moved to the city from other locations in and after 1948), Bedouin, natives residents, as well as collaborators and informants from the West Bank and Gaza who worked for Israel and were moved to Ramleh for fear of reprisals. In 2006 the population of Ramleh stood at 64,200, around 14,200 of whom were Arabs.<sup>15</sup> Al-Gawareesh is home to roughly 4,500 – 5,000 residents, the majority of whom are Bedouin. It is one of the most socio-economically disadvantaged neighborhoods in Ramleh.<sup>16</sup>

### *The response of the Israeli legal system to femicides in Ramleh*

Governmental institutions have failed to stop the persistent crimes of femicide, and cultural, religion-based or Orientalist explanatory models are commonly used by the formal systems in addressing these crimes in Ramleh. For example, a policeman who had worked on femicide cases in Ramleh spoke about femicide as a cultural issue, rooted in Eastern, Arab-Muslim customs. He made the following statement at a conference on “Women and

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<sup>13</sup> An interview conducted with the chief *Imam* of the Big Mosque in Ramleh on 27 August 2008.

<sup>14</sup> And according to the Director of the Young Women’s Public Centre in Ramleh, from an interview conducted on 16 April 2008.

<sup>15</sup> *Ibid.*

<sup>16</sup> An interview conducted with the chief *Imam* of the Grand Mosque in Ramleh on 27 August 2008.

Girls in Ramleh and Lydda: Future Visions”, held on 12 February 2008, at the Arab Community Center of Lydda and Ramleh:

“I want to talk to the men about their aggression, about culture and other things... this problem is a major one within the Arab population... I want to change accepted behaviors within this society... These men are taking the law into their own hands...”<sup>17</sup>

Clearly this law enforcement official sees femicide as an expression of cultural norms, and entirely disregards the complicated context in which the Palestinian population of Ramleh lives. The speakers at the aforementioned conference and the interviews we conducted revealed that the Israeli engineered socio-economic hardship of Ramleh, and the neighborhood of Al-Gawareesh in particular, has been debilitating for the local population and has increased its susceptibility to abuse from without and within. For example, unemployment rates among young men are very high, there is no public transportation and a wall has been constructed to separate Al-Gawareesh from the adjacent Jewish neighborhoods. Al-Gawareesh has become a highly isolated community in all respects (Yacobi, 2009: 66). Such isolation impoverishes lives and can turn women’s bodies into *femina sacra*—that is, excluded, isolated and unrecognized.

Our analysis and interviews<sup>18</sup> strongly support the argument that several of the cases of femicide were a result of the reproduction of the patriarchal mentality in a colonized context, as was echoed in the words of a social worker in Ramleh:<sup>19</sup>

“Violence is not something unique to Arab men in Ramleh, they did not discover or produce it...It’s the language of the whole world; we are living in a society and world where there has always been violence... Arab society has a patriarchal structure. It’s a collectivist society in which the individual gains his confidence and his strength from being part of his family... The

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<sup>17</sup> Statement made at the aforementioned conference.

<sup>18</sup> An interview conducted with the chief *Imam* of the Grand Mosque in Ramleh on 27 August 2008.

<sup>19</sup> Statement made at the aforementioned conference.

disadvantage of such a structure is that freedom and the ability to achieve self-fulfillment are low, especially when it comes to women, who are located low down the patriarchal hierarchy. The exclusion of the group, as in the Al-Gawareesh neighborhood, weakens the individual more and more and strengthens the patriarchal structure... As in every society, the occupier will never work to change the bad situation of the occupied... The occupier will never free the occupied because he's comfortable with destroying the occupied”.

A social worker representing the association WAVO stated:<sup>20</sup>

“...we are living in a state of which the military and militarization are a fundamental part... In mixed cities such as Ramleh, we witness the state's constant efforts to weaken the Arab community... The Israeli state doesn't allocate the same budgetary funds, build infrastructure or run awareness-raising programs in Arab schools as it does for the Jewish population... Israelis have tightened the stranglehold around them, which has minimized their ability to develop and learn. All this leads to a maximization of violence....”

The data revealed a very complex situation in which control over women's bodies and sexuality is not always the primary cause of femicide. According to the chief *Imam*, in some cases a woman may be killed for refusing to give money to or relinquish a portion of her inheritance to her brother: “I remember a case of an eighty year-old-woman who had been killed by her brothers and their sons because they wanted the inheritance, but the police and the media called it an ‘honour killing’” (ibid.). In other cases it may be divorce that heightens a woman's vulnerability. For example, in a police interview Nihaya<sup>21</sup> explained that, “I asked for a divorce. My brother said no way. I asked him what he would do if I did get a divorce, and he replied, ‘You would be the next to die’”.<sup>22</sup> The killers and their close relatives use the pretext of preserving the “honour of the family” to justify their acts.

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<sup>20</sup> Ibid.

<sup>21</sup> A pseudonym.

<sup>22</sup> As she testified to the police. See Zinger-Heruti (2007c).

Prior to even investigating cases of suspected femicide the Israeli police routinely resort to the pretext of “honour” when the victims are Palestinian women and girls. Classifying such murders as “honour” crimes allows the police system to frame them as “internal family matters” and “cultural issues,” and hence beyond effective police intervention. The lack of police investment in combating femicide also affects murders of Palestinian women that may not involve their family members, as in the case of the murder of Reem Al-Qasem in Haifa. When she was killed the police immediately declared it a “family honour” killing. In an interview for *Haaretz* her sister disagreed, stating:

“That’s the easiest thing to say. I have never heard about it in my family; our girls go out of Israel to study. Reem was very accepted within the family and has good relationship with all the family members... The police don’t even check if her killing was an attempted burglary or a criminal act...” (Awyadat, 2007).

It was further found that because the police system does not document these cases as murders, the number of women killed is significantly higher than the statistics published by the police suggest (Tamir, 2007), though the killing of a woman by her husband is filed as a murder (*ibid.*), since “honour killings,” are generally conceived of as being committed by brothers or fathers. Moreover, while the Israeli legal system only addresses issues around femicide in relation to some murder cases, it does not investigate at all threats made against women and girls to try and prevent murders. Our interview subjects said that while there are occasions when police act to warn a potential victim that her life may be in danger, they do not approach the men who make such threats. And even when police pursue killings of Palestinian females as murder cases, the murderers are often released through pardons or plea-bargains. Furthermore, when a victim and her murderer share a family name, investigators are less likely to further examine the relationship between the victim and the perpetrator. The response that these crimes elicit from the Israeli legal system in practice does little to deter men from murdering their female relatives.

On at least two recorded occasions the women’s rights organization Al-Badeel provided the Ramleh police department with a list of women who had

received death threats from family members; the women were not provided any police protection (Touma-Suleiman, 2005). According to the chief *Imam*,

“Not only do these killers go unpunished, but sometimes they are even celebrated as heroes in their family or within the community...The girls don't trust the police any more...”<sup>23</sup>

Operating in parallel to the formal legal system, informal social systems exert significant control over women's lives, bodies and sexualities. In the context of Ramleh, we found four primary groups of powerful influence: the first being the family as represented by the family head, often referred to as the “well-respected person”, (*Mukhtar*); secondly the religious establishment and religious leaders; third is the network of “informal police brokers”, and the fourth are NGOs.

In contemporary Palestinian society in Israel, the first group of actors – heads of family and community – are often merely symbolic leaders, without the influence or power to actually intervene to prevent femicide. As the chief *Imam* stated:

“These days those who used to be considered “well respected” and leading figures within society have no power... they are not what they once were”.<sup>24</sup>

Moreover, they are often complicit in femicide through their silence before, during and after such murders.<sup>25</sup> Until 1998-1999 there was in fact informal collaboration between the police and the “well-respected persons” (*Muhktar*) in Ramleh, including incidents where police asked a *Muhktar* for help in sending a woman back to her family, or gave the protection of a potential victim over to the *Muhktar* (Touma-Suleiman, 2005; Hassan, 1999). This was a

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<sup>23</sup> As stated by several speakers at the aforementioned conference, and the *Imam* of the Big Mosque in Ramleh in an interview conducted on 27 August 2008.

<sup>24</sup> As stated by several speakers at the aforementioned conference, and the *Imam* of the Big Mosque in Ramleh in an interview conducted on 27 August 2008.

<sup>25</sup> As stated by several speakers at the aforementioned conference, and the *Imam* of the Big Mosque in Ramleh in an interview conducted on 27 August 2008, and an unplanned interview held with Aida Touma-Suleiman, the General Director of WAVO, on 24 March 2007.

troubling and potentially deadly alliance, which in fact cost some women and girls their lives.

It was found that clergymen, the second group of actors, tend to intervene when women are victims of death threats, if they receive a request, be it from a family member, the woman herself, or the police. Clergymen we interviewed noted that killing “in the name of honour” is un-Islamic, and said that they preach against killing during mourning rituals and Friday sermons, though they do not speak out explicitly on the issue of femicide.<sup>26</sup> Our data indicates that the prevailing approach of religious leaders and institutions to threats against the lives of women and girls is that it is a matter to be resolved within the family; they believe this is more effective than collaborating with the police or the formal legal system, and, crucially, protects the family from shame and “dishonour”, which may itself endanger the lives of women.

According to the *Imam* the third group—“informal police brokers”, work in cooperation with the Israeli police.<sup>27</sup> That is, the police call on these individuals for help in solving problems or resolving social conflict. According to interview subjects, these brokers are a group of Arab individuals from Ramleh who completed a course on restorative justice and conflict management at the Center for Restorative Justice and Arbitration in Ramleh, and have undertaken to apply their skills and training to work with community leaders.<sup>28</sup> However, the data gathered revealed that there is no informal group in Ramleh working to prevent women’s murders and indeed, some contend that the attitudes and beliefs of these brokers generally align with the attitudes of femicide perpetrators. Our documentation suggests that in most cases they do not respond to threatened women’s requests for assistance; in fact one woman testified: “They didn’t help; women can’t trust them...” (Zinger-Heruti, 2007d).

Fourthly, NGOs are key players around all issues linked to femicide in Ramleh, specifically women’s human rights organizations. According to

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<sup>26</sup> From statements made by the *Imam* of the Great Mosque in Ramleh at the aforementioned conference.

<sup>27</sup> Interview conducted on 27 August 2008.

<sup>28</sup> See the website of the Municipality of Ramleh: <http://www.ramla.muni.il/gisurr/activities.html>.



individuals working in the field, NGO activism focuses on both prevention and documenting of femicide. Our informants said that generally prevention efforts are made in collaboration with formal systems, including the police and welfare department within the municipality of Ramleh. These efforts primarily consist of attempts to remove the woman or girl under threat to a shelter.<sup>29</sup> While various NGOs and both formal and informal institutions focus on removing threatened females from danger, no interventions target those remaining who clearly pose a threat, including aggressors who have stated violent intentions. Several organizations run hot-lines for women facing domestic violence, and though these services may go some way to preventing VAW, because the NGOs operating them are bound by the law and because law enforcement agencies, including the police, are often reluctant to intervene, a number of cases dealt with by NGOs ended in the murder of the woman or girl.<sup>30</sup>

### **The West Bank and Gaza Strip: Framing the Context**

According to the cases documented by the Palestinian NGO Against Domestic Violence Against Women (ADVAW), forty-eight women and girls were killed in the West Bank and Gaza Strip between 2004 and 2006, thirty-two of which were officially deemed as killings “on the ground of honour.”<sup>31</sup> In the first ten months of 2007, ADVAW documented fifty-eight cases of femicide, twenty-six (10 in the West Bank, 16 in Gaza) of which were classified by police as killings “on the ground of honour.”<sup>32</sup> In 2012, thirteen cases were documented: seven from the Gaza Strip, and six from the West Bank. In 2013, twenty-six cases were documented, and twenty-seven in 2014.

In the West Bank and Gaza Strip, the classification of a death as suicide or murder is based on the assessment of the forensic examiner. However, the process of determining cause of death is not always reliable, because, as our research discovered, the system is under-equipped. According to most of

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<sup>29</sup> As stated by various interview subjects.

<sup>30</sup> As stated by several speakers at the aforementioned conference, and the *Imam* of the Big Mosque in Ramleh in an interview conducted on 27 August 2008.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

the interviewees the forensic medical operations fall short of several crucial professional requirements: examiners are not always able to access the crime scene (because of Israeli military restrictions and movement limitations between the various cities and villages), and when they do have access they often lack the necessary equipment. The result is that perpetrators are often able to clean up the crime scene and manipulate the incriminating evidence; it is thus often difficult to determine whether a woman's death was caused by suicide or murder.

According to ADVAW, one case of femicide occurred in the West Bank and Gaza in 2004,<sup>33</sup> fourteen cases in 2005, twenty-three in 2006, and fifty-eight in 2007,<sup>34</sup> with half of the murders in the West Bank and half in Gaza (ADVAW, 2007). Considering that the population of the West Bank is larger than that of Gaza Strip, the relatively high number of murdered women in the Gaza Strip is, we believe, a reflection of the harsher and more complex social, economic, and political conditions that prevail there relative to the West Bank. Gaza is under siege: it is kind of a no-man's land and seems to be the world's biggest ghetto.<sup>35</sup> Despite some discrepancies in the figures, what is apparent is that the number of cases of femicide is increasing steadily year by year, in line with the steady decline in socio-economic and political conditions.

Other findings shed light on the location of femicide cases in the years 2004, 2005 and 2006. Of the thirty-two victims documented by ADVAW for these years, fifteen lived in villages, nine in refugee camps and eight in cities (ibid.). It is significant in interpreting these figures that villages are generally the most geographically isolated and marginalized of these locales.

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<sup>33</sup> According to the Palestinian NGO ADVAW, the data they collected for 2004 is incomplete, and the real numbers are higher.

<sup>34</sup> According to the second and third annual reports of the Palestinian Independent Commission for Citizen's Rights, seventeen Palestinian women in the West Bank and Gaza Strip were killed in 2005, fourteen in 2006 and fifty-eight in 2007.

<sup>35</sup> By using the word ghetto we mean that all the borders of Gaza strip are controlled by the Israeli forces, who don't allow a free movement of the people and don't allow free transportation from and to Gaza strip.

### *The West Bank*

It was found that there were several systems of both a formal and informal systems that shape the lives of Palestinian women in the West Bank.

#### *Formal legal systems:*

Several interviewees spoke about the features and limitations of the formal Palestinian legal system (based on the Jordanian legal system). One tribal leader stated, “There is no strong central authority which exercises sovereignty over the Palestinians”.<sup>36</sup> A lawyer noted:

“Israeli practices deconstruct the systems of authority, such as the legal system, and the sovereignty of its occupation limits the functioning of the legal system and prevents it from operating as it should. As a result of the absence of the rule of law, as in Hebron, people are seeking the help of informal legal systems. Living under Israeli oppression, most Palestinians are concerned with issues of daily survival, like their finances, food, passing checkpoints, mobility from one area to another, moving across the massive and intrusive wall, and other basic issues that affect them on a daily basis. Developing and promoting systems such as the legal system is not amongst the priorities of the people.”<sup>37</sup>

Another tribal leader stated: “The formal legal system is inactive and people don’t trust it. It’s perhaps as a result of the occupation, which controls all aspects of Palestinian lives”.<sup>38</sup> Another tribal leader told us, “People are requesting the help of the tribal legal system where the formal legal system has no sovereignty, as in Hebron”.<sup>39</sup>

Palestinian / Jordanian law is based in large part on a masculine and patriarchal ideology. A Palestinian police officer stated: “Our problem lies in

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<sup>36</sup> Interview conducted on 5 April 2008.

<sup>37</sup> Interview conducted on 24 June 2008.

<sup>38</sup> Interview conducted on 22 May 2008.

<sup>39</sup> Interview conducted on 28 April 2008.

the law and not in the application of the law; because we apply the Jordanian Penal Code, issued in 1960, in the West Bank there are no Palestinian laws that deal with violence against women” (ADVAW, 2007). The Palestinian National Authority (PNA) enforces the original version of the 1960 law, Article 340, Law no. 16, according to which the declaration by a perpetrator that his motive for murder was “family honour”, immediately halts an investigation, since an “honour killing” is considered to be a private affair in which the police do not interfere. (Article 308 of the same law provides that legal proceedings will be dropped against a rapist who marries his victim, and Articles 285-286 stipulate that if a female minor wishes to make a complaint of violence or abuse, the complaint must be filed by a male relative) (Ibid.). These provisions clearly hamper efforts to tackle femicide through the legal system. The collected data revealed that a priority of many Palestinian women’s rights NGOs is the radical reformulation of these laws and development of a legal system that guarantees the rights of women and girls to life and protection from violence.

*The tribal system :*

“Crimes on the ground of honour are committed with the agreement of the family members... the act limits the intervention of tribal leaders, because the killer and the killed are from the same family. The tribal leaders intervene only if someone asks them to do so. It’s a purely internal matter based on a vague logic, and hence always remains a mystery.”

The above quote was provided by a tribal leader describing how internal community interactions and private social agreements help ensure that femicide remains as invisible and muted as possible, and women’s voices are silenced.<sup>40</sup> He further stated:

“In honour cases we don’t make any contact with the formal systems. We try to keep it secret. It should remain a mystery to protect the honour of the girl and the family. Sometimes, when the girls face the threat of being murdered and we feel that her life is at risk, we try to make contact with the police

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<sup>40</sup> Interview conducted on 28 April 2008.

system to save her life. However, when a family kills their daughter for honour we do not usually interfere. Sometimes we do before the killing in order to prevent it. Sometimes we wait for someone to ask us to interfere, be it a member from the girl's family or a representative of the state authorities" (ADVAW, 2007).

Crime against women in Palestine is thus regulated by co-existing formal and informal structures. The political conditions generated by the Israeli military occupation, in place since 1967, and since 1993 by the Oslo Accords as well, and their effects on Palestinian society and the PNA, coupled with the shortcomings of PNA especially in guarding social order and security; have all hampered the development of effective semi-state "formal" structures capable of enforcing the judicial system. The lack of an effective formal judicial system has in turn allowed the informal structures that predated the establishment of the PNA in 1994 to endure and grow in power. Informal structures, including the tribal system, play a role in the demarcation of the physical and social boundaries within which female and male individuals can act and behave (Shalhoub-Kevorkian, 2005; Shalhoub-Kevorkian and Abdulhadi, 2003; see also ADVAW, 2007). Furthermore, the tribal legal system places the entire responsibility for maintaining "appropriate" gender and sexual norms and conduct on woman. In the words of one tribal leader, "Killing on the ground of honour always takes place because of the girl. She is making herself available when she starts an illicit relationship with a man..."<sup>41</sup>

### *The family:*

Of the 32 femicides documented by ADVAW in 2004-2006, brothers were the killers in 17 cases, fathers in five, other paternal relatives in three, and an unidentified person in the remaining case. The figures clearly demonstrate that brothers are primarily responsible for "cleansing the honour from the shame".<sup>42</sup> In some of the cases documented more than one person participated in the killing. Family members complicit in planning a murder generally agree on who will shoulder the responsibility and report the

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<sup>41</sup> Interview conducted on 28 April 2008.

<sup>42</sup> A common phrase used among those complicit in femicide.

incident to police, according to the following statements by tribal leaders and police officers: “The killer is a member of the family of the murder victim...”, “It’s something that the whole family agreed to do...”, “Usually there is cooperation between the male family members...”, “... the perpetrators plan the execution of women’s murders carefully, create a whole scenario that involves several family members...”<sup>43</sup>

*The impact of Intifada and political organizations:*

During, after and as a result of the first *Intifada*, local branches of the various political organizations, such as Hamas, Al-Jihad Al-Islami and Fatah partially replaced the *hamula* (extended family), often becoming the primary authority dealing with crime, including violence against women. Political factions and organizations began designating femicide and sexual assaults, sexual offences, and rape as “crimes against state security”, regarding “family honour” killings as crimes with national significance.<sup>44</sup> The pervasive political instability and perpetual violence empowered political activists, who became points of reference in cases of internal Palestinian violence, including VAW. During both the first and second *Intifada* political organizations and other actors played a role in imposing law and order, and gained increasing responsibility for protecting society and individuals as police, the courts and other official systems of protection failed due to political restrictions and instability. This was especially true during periods of intensive Israeli military aggression, such as the Israeli military invasions of 2002. As the new political leadership (Hamas, Al-Jihad Al-Islami and Fatah organizations leaders) gained authority it began to police women’s bodies and sexualities, making moral pronouncements concerning “appropriate” behavior for women and demanding that women abide by these norms or face physical penalties.<sup>45</sup> Policing and disciplining women's bodies has expanded as one measure for demonstrating power and control in the context of powerlessness. This hierarchy of control clearly illustrates that as the colonized becomes increasingly impotent under the colonizer, he turns

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<sup>43</sup> Interviews conducted on 28 April 2008.

<sup>44</sup> “Honour” for some Palestinian social groups became the medium for maintaining control over the body as symbol of controlling the land, which has been lost. Keeping the “family honour” in the eyes of these who trust the phrase, acts to maintain the Palestinian entity in the context of lost lands.

<sup>45</sup> According to B. Yizhar of “B’Tselem”, a human rights organisation.

whatever power remains him towards controlling the marginalized groups of his own society.

*The Israeli military system:*

The Israeli military system has always empowered its militaristic-colonial control over the lives and bodies of Palestinian women, especially during and since both Intifada's. Israel's control of the borders of the West Bank, through its system of military checkpoints and the Separation Wall, has isolated Palestinians from the outside world. Palestinians must obtain permission from Israel, which is often denied, in order to travel or move to another country, and even to move from one area (ghetto) to another within the Palestinian areas of the West Bank. Our research shows a strong correlation between isolation and femicide; the isolation and marginalization of Palestinian communities weakens marginalized individuals within those communities and empowers collective ideology along with informal social systems, which impose patriarchal ideologies on women's bodies and sexuality.

*The Gaza Strip*

The extremely poor socio-economic and political conditions in the Gaza Strip make it the most complex context examined in this study. Israel imposes severe control over the Gaza Strip and dominates its borders and airspace, in effect rendering it a closed geographic zone where Palestinians may exit and enter only in exceptional circumstances. Palestinians in Gaza live in a severely oppressive and uncertain environment, and with the knowledge that Israel can, at any time destroy the Strip's limited infrastructure and social and state/political structures. One recorded consequence of this external regime of control is that men in Gaza have begun to assert more rigorous control over women in their communities (Sha'ath, 2009). As a result, the lives of women living in the Gaza Strip are circumscribed by the control exercised by both the occupier and the patriarchal system within their own society, in which tribal and traditional norms dominate.

The data revealed that through 2006 and 2007, the lives of Palestinian women were affected by the increasing militaristic practices of the Israeli

army in the Gaza Strip. The Israeli siege which began on June 2007 operates in parallel to the international blockage imposed on Gaza since January 2006.<sup>46</sup> These practices affected all aspects of the daily lives of Palestinians. According to the data 14 women from Gaza Strip were killed in 2007 as a result of Israeli restrictions; nine died at the Rafah crossing, three died in Gaza hospitals due to a lack of appropriate medicines or because they were denied travel permission to seek necessary medical treatment unavailable in Gaza.<sup>47</sup> Concurrent with external Israeli oppression, women in Gaza also face oppression from within their own patriarchal society.

*The family:*

As mentioned earlier, in most cases of femicide in Palestine the killer is the murdered woman's brother. In one recorded case in Gaza, a brother and his cousin killed three of his sisters in a single night (Reuters, 2007). The following is from the testimony of a man who murdered his sister in the Gaza Strip:

“My sister went out to visit her friend, and the next day I could see she wasn't okay. I watched her and became worried when she became dizzy in the afternoon. I took her to the hospital, and after the doctor examined her he asked me if my sister was married. I said no, and he responded by saying that she was seven months pregnant. I couldn't believe what I had heard. When a police woman questioned her, she told her that her boss had sex with her. Her boss was out of the country at the time and his father came. We signed the marriage contract, and took her home at two o'clock in the morning so no one would see us. I don't know how the *Hamula* found out what had happened, but they attacked us and they blamed me for not informing them about the incident. I was threatened by them, and they all cut off their relationships with me and my family. We were physically attacked in our home. I was forced to end the story. I killed her...

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<sup>46</sup> According to the Palestinian Centre for Human Rights in a document published by the Arabic Network for Human rights Information, on 25 November 2007, “Palestinian women paying expensive price by losing their right to live”.

<sup>47</sup> See previous footnote.



they wanted us to kill her, they burned our home. The police took her away for a week, to a house with policewomen. When she returned she stood in front of me and asked me to kill her... She said give me poison and drank it. She screamed from pains. I couldn't handle it anymore so I got a knife and cut her throat."<sup>48</sup>

The brother, the family and the pressure they were subjected to by members of the close community all took this girl's life. As the brother testified, after he killed her, part of the *Hamula* restored normal contact with the family. However, his mother and two other sisters have since been forced to stay inside their house, and he was jailed.

*Formal legal systems:*

Criminal law in what is now called the Gaza Strip was formalized in 1936 during the French colonial period when the area was part of Egypt. Article 18, Law no. 74 of the Penal Code grants exemption from prosecution or a reduced penalty to husbands and male blood relatives who kill or assault their wives or females relatives on the ground of "family honour". The legal system in the Gaza Strip is extremely fragile and ineffective, primarily due to the poor security situation. Over the last decade, the weakness of the rule of law, regular Israeli attacks on the Palestinian infrastructure, high and rising levels of poverty and unemployment, restricted mobility within Gaza and the closure of Gaza's borders with Israel and Egypt have all weakened the economy, the social fabric and political relations. The increasing military oppression by Israel and the resurgence of patriarchal hegemony in the Gaza strip have conspired to expand and intensify moral policing of women's bodies and sexuality, and to make women more vulnerable to violent crimes, including femicide.<sup>49</sup> Alongside the actual provisions of the law, the weakness of the rule of law—thanks in main part to the inability of representatives of the formal legal system to function and enforce due process—has debilitated

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<sup>48</sup> Interview conducted on 23 April 2008.

<sup>49</sup> As documented in "The situation in Gaza Strip through the first quarter of 2007", by Al Mezan Center for Human Rights (March, 2007).

the formal legal system in Gaza.<sup>50</sup> Further exacerbating the problem, Hamas has taken the law into its own hands, appointing judges with limited legal knowledge and sometimes no formal legal education. Lawyers have been offered the choice of working with and for Hamas or losing their jobs. As a result, in many cases judgments and verdicts are biased in support of Hamas ideology.<sup>51</sup> It was found that Hamas also interferes in how cases of femicide are dealt with by the formal and informal legal systems, including the aforementioned case of the three murdered sisters.

*The tribal system:*

The Office for Tribal Affairs operates in the Gaza Strip with 35 affiliated chieftains (*Mukhtars*) and a committee appointed by the PNA following the Oslo accords. The statements made by tribal leaders we interviewed including the following:

“Once the courts proceed with the cases, cases that the formal legal system fails to address, [are referred] to the tribal legal system, because as you know, the nature of the society in Gaza is tribal...”<sup>52</sup>

The interviews exposed some contradictions regarding the role of tribal leaders in tackling crime. Some tribal leaders stated that courts are failing to address and punish crimes, and therefore society requires the intervention of the tribal system. However, others stated that the attack on the social and economic fabric of society has diluted the power of family heads (predominantly men) and in turn undermined their ability to assume responsibility for family members in times of crisis. It is argued that this situation was further exacerbated by the fact that the PNA has awarded formal status to the tribal system, even within the formal state criminal justice system (Shalhoub-Kevorkian and Abdulhadi, 2003).

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<sup>50</sup> As documented in “Research on security chaos and the weakness of the law sovereignty in the Palestinian Territories”, by the Palestinian Information Centre in 2005. Available via: <http://www.palestine-info.co.uk/en/>.

<sup>51</sup> As stated by a lawyer interviewed on 22 May 2008.

<sup>52</sup> Interviews conducted on 5 April 2008.

Many Gazans resort to tribal mechanisms for dispute resolution, for several reasons, including the slow pace of the formal legal system and the lengths of time involved in resolving social problems, the lack of rule of law, the social acceptability of the tribal legal system and the popular perception of this system as the most authentic, natural system available. With regard to femicide, some of the tribal leaders interviewed stated that the killing of women for the sake of “honour” should be considered an internal family affair. Indeed, in most of its verdicts, the tribal legal system has refrained from intervening in cases of femicide, expressing tacit approval of the killings and thus illuminating the system’s view of the status of women in society.

*The political organizations:*

“Today the organizations have weakened the family’s presence, which has weakened the family structure. In the same home you can find brothers belonging to different organizations. Weakening the family is the target of military occupation: in this way they destroy Palestinian society.”<sup>53</sup>

“ Hamas has its people. There is no more connection between the tribal system and the new management of Hamas. Their decisions are for organizational interests and not justified by legal evidence. Several cases of killing women have been implemented by political organizations as a way of announcing that they are the ones in control.”<sup>54</sup>

## **Femicide and the Modalities of Power**

This study has revealed that femicide constitutes one of the modalities of power that arise in conflict-ridden areas. The silence and silencing that surrounds the crime, and the descent into the intimacy of madness it entails (the killing of family members), are symptoms of the horror of life within the

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<sup>53</sup> Interview with a tribal leader conducted on 5 April 2008.

<sup>54</sup> Ibid.

confines of militarized space and the vulgarity of tyranny and violence that is the context for analyzing femicide in the Palestinian context.

Femicide—the execution as examined by Foucault—is a public, highly visible act, that script power over women dead bodies. The killers’ need to define themselves by ending the life of a female relative is a performance motivated by the desire to render “heroic” acts before family and community, in a context of dispossession, disempowerment and oppression where the potential to exercise power under colonization is limited. The performative aspect demands that it appear impulsive and intimate, in order to showcase male power and dominance in “protecting” “their” community.

In light of the uneasy fit between the formal legal perception of gender and related issues of sexual crimes and “honour”, it should come as no surprise that informal modes of dispute processing coexist with the formal system. The endless Israeli violence and the incessant loss, fear and uncertainty, the proliferation of military checkpoints, road blocks, and other restrictions on movement, have all contributed to the incapacitation of the formal Palestinian legal systems. This in turn has rendered the institution of tribal adjudication and other familial and religious legal codes—parallel legal systems—into important recourses to deal with crime, including crimes of sexual abuse and femicide. These ‘non-formal’ institutions have been further empowered by culturalist orientalist approaches, the ‘War on Terror,’ growing Islamophobia in the West, local and international political instability, and the failure to entrench due legal process in the formal legal system in the post-Oslo period.<sup>55</sup>

The current study has illustrated that all the various actors function in an economy of death and dying and a politics of death. The study confirmed the need to look carefully at the way the structure, politics and economy of death function in militarized and settler colonial spaces and contexts. Researching femicide in the Palestinian context has clearly demonstrated the need to go beyond internal institutions, written rules and laws, and formal positions of power, to examine how the global and the local, the “intimate” and the Otherized bodies of women, life and death, are interwoven. The

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<sup>55</sup> See also Al-Rais (2000). Sardar Ali and Arif (1998) argue that parallel legal systems do not necessarily violate due process.

practices of the masculine commanders of the global arena, global crimes such as the attacks of September 11<sup>th</sup>, 2001, and practices of commanders in the regional and local arenas conspire to render the powerful ever more obscenely empowered, while orchestrating the further exclusion of those who fail to obey. It is such situations of severe exclusion and unending evictions, of powerlessness in both the global sphere and the local context, that produce new modes of vulgarity and VAW, and new modalities of power, including femicide—the ultimate eviction from life.

Problematically, the focus of the work that is being done to address femicide in Palestinian society, for example by women’s rights NGOs, remains squarely on individuals, while the problem is clearly systemic. Our findings suggest that efforts to fight femicide should be re-examined.

In the context of Palestinian society inside Israel femicide is dealt with and addressed primarily by men. The work of state institutions and NGOs trying to address femicide is confined by the state’s laws and law enforcement systems. The formal Israeli systems view Palestinian men and women through an Orientalist, colonial lens as potential terrorists who pose a “security” threat to the state. The militarized-masculine context compounds the strategy of divide and rule employed by the Israeli law enforcement system to co-opt internal actors, weaken society, and strengthen traditional and tribal mentalities in order to free the Israeli state systems from its responsibility towards murdered and threatened females.

As demonstrated through our study, the analyses, policies and strategies of official governmental institutions and NGOs in Israel lie outside the militarized context in which the killing takes place; most of the interventions and preventions are directed at women, despite the greater need to work with/against the system, the masculine and military structure, and with individual men. Israeli police absolve themselves of their responsibilities by framing femicide as a cultural phenomenon. NGOs and feminist activists stress that police react only after a killing has been committed. The police further argue that the local community refuses to assist their inquiries, and that they are therefore powerless to combat so-called “honour crimes”. This spurious claim depoliticizes and ahistoricize the actual context in which femicide takes place and denies the difficulties that Palestinian individuals face when they cooperate with the Israeli law enforcement system, and is

simply a tactic used by Israeli authorities to pardon themselves of all responsibility for preventing femicide.

When the police do intervene in a threatened femicide, which is generally in response to a request made by a human or women's rights organization, they do so by taking the targeted woman or girl to a shelter, removing her from her neighborhood and her family, and, as statistics we presented show, increasing the possibility of her murder as a direct result of her removal. Thus a woman or girl from Al-Gawareesh, for example, faces four-fold exclusion: firstly as a marginalized woman in a patriarchal society, secondly as an occupied and colonized woman and member of the Palestinian minority in Israel, thirdly as a resident of the marginalized Al-Gawareesh neighborhood of Ramleh, and fourthly as an abused woman living in a shelter. The act of removal/exclusion not only increases the risk to a woman's life; it makes women fugitives, isolating and alienating them from their children, sisters and mothers. It is no surprise that most girls and women choose to return to their homes, despite the danger that awaits them.

We have also noted that social and religious institutions also absolve themselves of responsibility for femicide. Religious leaders intervened only when they were asked to do so, on the pretext that "honour crimes" are a family matter. Furthermore, even when they do intervene the methods they employ are incompatible with those of the Israeli authorities.

The men whom Israel has appointed as mediators to enable Israeli intervention in the internal affairs of the Arabs in Ramleh are no more than a group of local mediators between the colonized and the colonizer (see Memmi, 1991). They work with the community leadership, the *Mukhtar* or *Sheikh*, man to man, to decide the fate of women. They have black skin but wear white masks.<sup>56</sup> Their appointment is a means through which the police relinquish responsibilities and a way of further excluding the Other. The various formal and informal systems feed into each other, working as a network within which Palestinian women fall, while the killers remain outside.

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<sup>56</sup> In his book *Black Skin White Masks*, Franz Fanon (1967[2008]) refers to the colonized who became intermediaries, serving the occupiers to help manipulate their own people. The local mediators in Ramleh are Arabs who serve the interests of the Israeli state.

Finally, shifts that have occurred at the global level since the events of September 11<sup>th</sup>, 2001, including the portrayal of Islam as a religion of terrorism and violence, and the growing oppression of Muslim community members in general and in Israel in particular, have lent Israel greater legitimacy in otherizing Palestinians, dealing with them as a violent, “primitive” people. This in turn has granted Israel greater legitimacy in its approach to femicide as a “cultural language and practice” in which it has no role to play in developing prevention policies, a clearly colonialist and Orientalist approach. Our study clearly demonstrated that both feminist and human rights organizations in Israel perceive Israeli law and Israeli legal systems as employing policies and tools that will help address femicide in Palestinian society; a misguided perception rooted in colonial notions of the oppressed brown woman in need of rescue by the white male colonizers from the brutality of the brown man (see more, Lila Abu-Lughod (2002), in her article ‘Do Muslim Women Need Saving?’).

As regards the West Bank context, the number of victims of femicide were found to have increased over the years, alongside the deterioration in the social, economic and political situation. The numbers of killings rise whenever there is a political emergency, which exacerbates economic hardship and intensifies social crises. In addition, the number of victims of femicide in the Palestinian villages is higher than in the cities and in the refugee camps. This can be explained in part by demonstrating how exclusion and greater distances from centers and formal services, which in conjunction with militarized roads and restrictions on freedom of movement, and the inaccessibility of the already erratic and vague Palestinian legal system in the context of a stateless state, have all deepened the vulnerability of Palestinian women. The data analyzed in this study revealed, for example, that the farther away from the center (Ramallah), the greater the power of the informal social structure and the less effectively the law is implemented overall. The Palestinian territories in the West Bank are divided into areas that have been cut off from one another by the Wall and Israel’s military checkpoints. Thus the efficacy of the law in areas that lie far from the economic center is low, and the inability of law enforcement personnel to reach the courts, police stations, and workplaces results in greater use of internal methods of social control, including tribal, religious and customary laws. This trend has in turn further marginalized vulnerable women,

consolidated the position of local, informal social power-holders, and strengthened the existing patriarchal structure.

Furthermore, the loss of trust in formal institutions and in the Palestinian judiciary nourishes the existing power of Israeli militarism and settler colonialism, and increases the vulnerability of women to crimes of femicide. Moreover, in treating crimes of femicide as “honour crimes”, the honour of the whole village or community—not only that of the women’s family—is invoked, objectifying women’s bodies and sexuality as collective objects. This objectification is also revealed in the spoken familiar language, such as, “we lost the land, we don’t want to lose the honour”. Such a claim requires that we always recognize that violence and crimes are committed within contexts and are embedded in legal and socio-historical ideologies, and therefore require a careful genealogical (historical, economic, bio-political, geographical, etc.) reading. Vulnerable groups, that are hindered from defending or confronting violence due to political and structural constraints, stand to lose their rights to protection and safety. Their inability to defy oppression and restrictions results in part from the imbalance of power between the occupied and the occupier, which receives open support from the Western world, and indirect support even from the Arab world. The events that followed September 11<sup>th</sup>, 2001, which encouraged the treatment of Palestinian society as a violent, terrorist society, have also allowed each act of Palestinian resistance and rejection of the Occupation to be portrayed as an act of terror. Conversely, as a result of these events, each act of domination by Israel—even when expressed through killing—is deemed a credible act.

The subjection of an entire society to unending dispossession, domination and oppression has had the effect of fostering patriarchal practices, reinforcing the concept of the family as a unit and the community as collective, and further weakened the category of the individual, especially those who are already marginalized. Palestinian law, tribal law, the family, the political parties and Israeli military rule all combine to nurture acts of violence against women in the West Bank. It is usually women activists, with a small number of men, who work against violence against women, generally supported by external, foreign sources of funding: thus once again it is the white man who rescues the brown woman from the brown man.



In relation to the Gaza Strip, in the various periods of its history Gaza has been separated, at times almost cut off, from the other Palestinian areas. However, through the past ten years Gaza has endured ever-greater violence, socio-economic amputation and geographic separation. The exclusion and severance of Gaza has turned it into a no-man's land, intensifying the tension and stress experienced by those who are trapped there and fueling internal power conflicts, including gender-related conflicts. Two systems of control operate within the Gaza Strip, one affiliated to the PNA and the other to Hamas. Thus while there is a partial subordination to the PNA, the prevalence of Hamas forces inside Gaza has in effect turned it into Hamas state. We found that authority of the PNA is only partly recognized, and social, patriarchal and tribal authority has increased due in significant part to the vagueness and lack of clarity that characterize the formal legal system. Women's bodily safety and lives are used as an additional site of contestation between various power-holders, upon which all forms of violence are practiced.

The vice-like grip of Israeli colonialism and militarism, the severe economic stranglehold, deteriorating health conditions, and psycho-social exclusion of Palestinians in the Gaza Strip, added to the global denial of Palestinian's rights, have exacerbated internal conflicts between the PNA and Hamas, and reconstructed and empowered patriarchal social structures. Such reconstructions, as many of the interview subjects and documents revealed, have restricted Gazan Palestinians, deprived them of access to educational and health services and economic means, and resulted in many instances of self-destruction and self-deconstruction. In such conditions women do their utmost to care for their families, and create safe havens within chaotic, unsafe and hostile contexts. However, women are also an arena wherein various forces wage their battles and their bodies and beings are the site of practices of domination that leave external military practices unscathed. Femicide, like other modes of violence against women, has become another language through which power holders have expressed their severe incapacitation. The military practices that have created unlivable, inhuman economic conditions, turned women's bodies into a site of contestation of power, a punching bag for the occupied man.

## **Conclusion**

The history of colonized societies and conflict zones are replete with examples of how hegemonic power-holders from both sides—the colonizer and the colonized—have used women’s bodies and sexuality to re-script their authority and empower themselves. Projects of militarization and colonization aim at excluding, evicting, and/or eliminating the Other, and colonization through occupation scripts domination over bodies and the land. The manipulation of women’s bodies, sexuality and spaces (including the domestic space) has been well documented as a tool of domination, militarization and occupation.

The three Palestinian contexts examined revealed how the parallel social/tribal legal systems have been maneuvered by the colonial power—the the Jewish State—and used as tools to entrench its own power and exercise control over land, minds and bodies, using women’s bodies and sexualities as the tool and the site of violence. By turning the militarized, occupied and colonized land into *terra nullius*, power-holders have increased the likelihood for violence to occur in violated spaces. The parallel legal system (like many other indigenous social systems) tries, within its own domain, to resist colonial violence. In doing so, it exercises its power in order to regain lost influence, generating counter-power through practices such as controlling women’s bodies, movement, space and time. The militarization and colonization by the Jewish State—in the various forms it assumes within the three contexts studied—and the reactions of internal patriarchal power-holders to these processes, have exposed the lives of Palestinian women to danger and subjugation.

Studying the crime of femicide in conflict zones requires that one pay close attention to the spiral method in which global and local militaristic politics intertwine with body politics. It entails examination of all relevant bio-political, geo-political, psycho-social and historical factors. The racism embedded in the politics of exclusion and politics of control revealed femicide to be prevalent within politically, geographically, socially and economically marginalized and excluded groups. It was also found that both the offenders and victims came from these marginalized and excluded communities. It is contended that the global politics of exclusion, and Israel’s racialized and racist colonization and ethno-centrism—which was both challenged and

supported by those who wield the “culture of control,” including human rights and women’s organizations which entrust the task of tackling femicide to modern, formal legal systems alone—has created a local state of exclusion and exception within Palestinian society in which VAW is exercised, normalized, and even encouraged. Given the enduring nature of Israeli colonialism and occupation, of which there is no end in sight, particularly in the aftermath of the 2008-2009 military attack on the Gaza Strip, Palestinian society faces a serious challenge in combating VAW in general and femicide in particular.

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## **Appendix A**

Questions guiding the interview and other data collection methods related to this research included the following:

- How do the discourses surrounding femicide construct the ways in which these cases evolve?
- How do space and territorial structure construct the daily and bodily lives of women, given that the Occupied Palestinian Territories are divided into small enclaves, and in many instances closed geographical zones? Here it is critical to consider how these restrictions circumscribe the daily lives of Palestinians, and affect how they are situated and constructed in a space of “included exclusion” (Agamben, 1998). Also relevant are the ways in which this social-political location turns women’s lives into “bare” lives, and their deaths into “bare deaths” (ibid.). The related issue of how racial sovereignty is anchored spatially will also be analyzed.
- How do global, national, local and geopolitical power structures (both formal and informal) construct the politics of sexuality over time and through space, particularly in femicide cases?
- What is the nature of the interrelated functioning of both the informal and the formal Palestinian legal system leaders? What factors enable or limit their work together, and how?
- How do socio-economic factors construct the daily-bodily lives of Palestinian women?
- How do hegemonic power-holders on both sides – Palestinian and Israeli – use women’s bodies and sexuality to further empower themselves and their institutions, in a conflict context?
- How do the occupying powers use and maneuver informal Palestinian social systems through women’s bodies, in order to Otherize and culturalize women’s murders?
- How do informal Palestinian social systems use women’s bodies and sexuality as tools with which to reject and resist the control of the occupier?
- How does the bureaucratic logic of the Israeli security theology construct and manipulate the bureaucratic logic of formal and informal Palestinian legal, medical, religious, political and gender systems?



## An Analysis of the ‘Conservative Democracy’ of the Justice and Development Party in Turkey

Pinar İlkkaracan

### Introduction

At a meeting with sixty representatives from women’s organizations on 18 July 2010, Turkish Prime Minister Tayyip Erdoğan declared: “I do not believe in equality between women and men. Sorry! I believe only in equal opportunity for women and men. How can they be equal? Women and men are different, they can only complement each other”.<sup>1</sup> Erdoğan’s statement shocked Turkish women’s organizations—as captured by the daily *Cumhuriyet*’s headline “Words Like Ice” (Kaplan, 2010). Despite the criticisms and protests that followed, Erdoğan repeated his statement at various party meetings and rallies.

The Prime Minister’s statement was the first public, and, in a sense sincere declaration by his right-wing Justice and Development Party (JDP)<sup>2</sup> of its politics concerning gender equality: “We believe that women and men cannot be equal!” In line with his statement, a year later, Erdoğan announced his decision to abolish the Ministry for Women and Family, to be replaced by a Ministry of Family and Social Policies. This change occurred on 8 June 2011, just four days before the 12 June general elections, as part of a revised structure for the Council of Ministers. The abolishment of the women’s ministry was much more than a mere name change, symbolizing the government’s view of women not as equal citizens, but rather only as wives, mothers or daughters.

In 2003, a year after coming to power, the JDP’s construction of a new ideology emerged with the declaration of the party’s manifesto in a book entitled *Conservative Democracy* by one of Prime Minister Erdoğan’s chief

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<sup>1</sup> The author was present at the meeting to represent Women for Women’s Human Rights-New Ways (<http://www.wwhr.org>).

<sup>2</sup> Adalet ve Kalkınma Partisi (JDP).

consultants, Yalçın Akdoğan (2003). In the forward he contributed, Erdoğan states that the book’s principal aim is to set the main parameters of JDP’s political ideology—‘conservative democracy’—an ideology which has no precedent or reference in international political literature. This new ideology was presented to the wider public at an international symposium in Istanbul organized by JDP in January 2004. Interestingly, the newly coined ideology was criticized both by liberal supporters of JDP, who argued the concept is theoretically and politically hollow and without substance, and thus lacking legitimacy (Bayramoğlu, 2004), and by Islamists, who claimed that it represents a form of Westernized pragmatism that is incompatible with Muslim values.<sup>3</sup>

As will be argued and explored in this chapter,<sup>4</sup> JDP’s preferred ideology of ‘conservative democracy’ is singular, and very unlike the European notion of conservatism, which aims at upholding traditional economic and political institutions. It is much more similar to American social conservatism with a primary focus on conservative social policies specifically regarding gender equality, the status of women and LGBT people.

The JDP government’s policy towards LGBT people has ranged from non-recognition to discrimination, and appears increasingly hostile. For instance, on International Women’s Day in 2010, the Minister for Women and Family (a ministry that would shortly thereafter cease to exist), Selma Aliye Kavaf, triggered huge public debate and criticism when she stated that homosexuality is a treatable biological disorder. In the same interview, she accused women’s organizations of overstating the problem of domestic violence (Bildirici, 2010). These comments came shortly after she was broadly criticized for expressing discomfort with kissing and love scenes in Turkish soap operas as incompatible Turkish family values.<sup>5</sup> The Turkish LGBT movement and women’s groups protested through press statements and demonstrations demanding she resign and be tried for incitement to enmity and hate crimes against LGBT people. The LGBT association KAOS-GL in Ankara filed a criminal complaint against the minister for inciting public

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<sup>3</sup> “Muhafazakar Demokrasi Tartışması” [The Conservative Democracy Debate] *Evrensel*, 14 January 2004.

<sup>4</sup> This paper was written in 2012.

<sup>5</sup> “Homosexuality is a Disease Says Turkish Minister,” *Hurriyet Daily News*, 7 March 2010.

hatred and hostility against homosexuals, based on Articles 216 and 218 of the Turkish Criminal Code.

This study aims to examine JDP's ideology of conservative democracy and its major parameter and to analyze competing public and legal discourses on morality /public morality utilized by JDP as a tool in its construction of conservatism. In particular, the study addresses three questions: (1) What are the constituent elements and basic parameters of JDP's discourse on "conservative democracy" and how does this discourse target gender relations? (2) How does the concept of morality/'general morality' used in JDP's discourses target mainly gender relations? (3) What are the competing legal discourses on the use of 'general morality' clauses regarding the freedom of association and expression of LGBT people and organizations?

## Methodology

The methodology of the research on which this chapter is based includes discourse analysis, textual analysis and in-depth interviews. The discourse analysis examines JDP's ideological construction of conservative democracy as expressed in the publications of its ideologues. The textual analysis includes JDP's party manifesto entitled "*Conservative Democracy*," JDP leaders' statements on morality, and the press statements delivered by women's and LGBT organizations. Extra-textual accounts were obtained through 14 in-depth face-to-face interviews with leaders or founding members of women's and LGBT organizations in five Turkish provinces: Ankara, Çanakkale, Diyarbakır, İstanbul and Van, as well as with representatives of various women's and LGBT national platforms.<sup>6</sup>

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<sup>6</sup> These include Women's Platform for the Reform of the Constitution, Çanakkale Women's Counseling Center, The Association for Women's Work (EL-DER), The Center for Women's Rights at the Diyarbakır Bar; Diyarbakır Development Center; KAOS-GL, KA-DER (The Association for the Support of Women's Candidates), Lambda İstanbul LBTT Solidarity Association, The Purple Roof Women's Shelter, Women's Platform for the Reform of the Turkish Penal Code, Van Women's Association, and Women for Women's Human Rights.

## **Background: The Rise of Neo-conservatism in Turkey**

Until the 2000s, conservatism was not present as a driving political ideology in Turkey. For many decades, Turkish conservatism framed political, economic and social demands as culturally driven demands (Çiğdem, 2003). However, as Bora (2009) observes, nationalism, conservatism and Islamism have always been basic interactive elements of Turkish right-wing movements. Moreover, the Kemalist political ideology<sup>7</sup> and the center-right, which has traditionally opposed it, have often intersected in ideological interventions that foster conservatism, especially through their nationalistic policies and ideologies.

The 1990s witnessed growing electoral support for religious right and nationalist parties in Turkish politics. Some researchers argue that was due to major geopolitical and economic shifts at the end of the Cold War, which created a climate of uncertainty in Turkey. For instance, Kalaycıoğlu (2007) argues that the end of the Cold War and the development of the New World Order have increased perceptions of instability, fear, and threat in Turkey, precipitating a rally-around-the-flag syndrome. Others emphasize domestic factors or the role of globalization and rapid urbanization (Yıldırım, İnaç & Özler, 2007; Taşkın, 2008).

Until the 2000s, studies on conservatism in Turkey have focused on cultural conservatism. However, in recent years, new and wider intellectual interest has emerged, as demonstrated by a rash of publications on issues related to conservatism. Between 2002 and 2009, twenty-five books, mostly by academics, were published in Turkey with the key words “conservative” or “conservatism” in their titles. A significant factor in this development is the adoption of “conservative democracy” as the ruling JDP’s official ideology.

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<sup>7</sup> Kemalism, named after Mustafa Kemal, the leader of the War of Independence and the first president of the Turkish Republic (1923), reflects the ideological foundations of the transformation from an Islamic empire to a secular nation-state. The essence of Kemalism was the unity and independence of the country, secularism and republican principles (i.e., the separation of state and religion), modernisation and the creation of a society without classes and privileges. There is an ongoing debate in Turkey regarding the essentials and the dictatorial aspects of “Kemalism”.

Following a decade of coalition governments, *Adalet ve Kalkınma Partisi* (JDP) came to power as a majority government in 2002, with thirty-four percent of the vote. Ever since, JDP has been the subject of controversy and ongoing public and academic debate including on whether and to what extent the party retains a legacy of ‘political Islam’, given its leaders’ previous involvement with the pro-Islamic *Milli Görüş* (National Outlook) Movement.<sup>8</sup> Both the party, and its leader Tayyip Erdoğan have clearly distanced themselves from political Islam from the outset, underlining that the party has neither religious roots, nor takes religion as a point of political reference. Prime Minister Erdoğan has also opposed the term ‘Muslim democrats’.<sup>9</sup> He also rejects the concept of ‘moderate Islam’, a term originated in the US following 9/11, stating “This expression is wrong. The word Islam is uninflected, it is only Islam. When you say moderate Islam, then there will be another alternative like non-moderate Islam. As a Muslim, I can’t accept such a concept”.<sup>10</sup> Thus, from its inception JDP has sought to portray itself as a conservative and democratic, but not a religious party, and to construct a new ideology to appeal to its voters while systematically establishing legitimacy as a "non-Islamic" party both nationally and internationally by advocating EU membership, supporting globalization and rejecting the anti-Western discourse of the National Outlook Movement.

A review of research on JDP’s ideology and policies reveals competing views among academics. While all researchers agree that JDP’s economic policies are very much in line with current global neo-liberal policies and economic globalization, they disagree on whether JDP’s ideology has religious roots or not. Hale (2005), comparing JDP with Christian democratic parties in Europe, claims that there are intriguing similarities between JDP and the Christian democrat parties of Western Europe especially in terms of the stand on moral, cultural and educational issues. But he also notes a most striking

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<sup>8</sup> JDP was founded in 2001 by a group of politicians who dissociated themselves from the Milli Görüş (National Outlook Movement) after the Virtue Party, which represented the movement, was shut down in July 2001 by the Constitutional Court.

<sup>9</sup> “Erdoğan: Türban Siyasi Simge Bile Olsa Yasaklayabilir misiniz?” *Milliyet*, January 14, 2008. See: <http://www.milliyet.com.tr/2008/01/14/son/sonsiy31.asp?prm=0,7267049> [Accessed April 15, 2008].

<sup>10</sup> “Turkish Prime Minister: Expression of Islamic Terrorism Unacceptable,” *Anadolu Agency*, 13 June 2004. See: <http://www.turkishpress.com/turkishpress/news.asp?ID=21036>. [Accessed April 15, 2008].

contrast in that the Christian democrat movement in Western Europe generally developed in a pro-status quo direction, while JDP is culturally conservative but projects itself as an anti-establishment force in Turkish politics, opposing the state-centered authoritarian secularists. For Turunç (2007), JDP's conservatism is a continuation of historical political conservatism in Turkey—as a political approach which accords importance to history, social culture and, in this context, religion as well—which re-establishes itself in a democratic format. However, he also notes that JDP's conservatism emphasizes family, religion, and morality.

The steady rise of the JDP's share of votes led to several surveys examining the nature of conservative values of Turkish voters. They also shed light on the extent of the popularity of JDP's discourses and policies related to morality. A survey conducted by Yılmaz (2008), aiming to identify the major variants of conservatism in Turkey, found that religious conservatism, that is, a person's reliance on religious norms and values in making personal, social, and political decisions, was by far the most widespread dimension of conservatism in Turkey, followed by what can be called "sexual conservatism", i.e., the attempt to regulate sexuality in particular regarding women's roles and behavior. Kalaycıoğlu's (2007) survey also indicated a high concentration of conservative attitudes based on family values and morality. Comparing the results of two surveys conducted in 1999 and 2006, Çarkoğlu and Toprak (2006) conclude that religion-based conservatism diminished in Turkey between 1999 and 2006. However, their measure for religion-based conservatism consisted mainly of attitudes toward non-Muslims, and not values regarding sexuality, gender relations, or family.

The results of a qualitative study undertaken in various Anatolian cities by Bozan, Morgül, Şener and Toprak (2009), based on 401 interviews, demonstrated that males and females with alternative identities or lifestyles, including young people, Alevis, Kurds, Roma and non-Muslim minorities in Anatolia are subject to intense religious/conservative pressure and 'otherization' from the broader community. The manifestations of this pressure and 'otherization' include public harassment, social exclusion, marginalization, exclusion from the public sphere, discrimination in work and business. The study—the first academic research to examine pressures faced by secularists or people with alternative lifestyles since JDP came to power in 2002—triggered a wide public and media debate in Turkey. Yet, until now,

no research has examined JDP's discourses on conservative democracy as stated in the party's official statements and by authors representing the party, although there has been criticism about the doctrine's vagueness (Tekin, 2004; Ataay, 2008).

In the next section I provide an analysis of JDP's discourse on conservative democracy and its basic parameters, based on three books written by high ranking JDP ideologues: Yalçın Akdoğan (2003), a chief consultant to Prime Minister Erdoğan and member of parliament since 2011; Bekir Berat Özipek (2004), who played a leading role in the formulation of the party's ideology of conservative democracy through his study on conservatism; and İsmail Safi (2007), a co-founder of the party and the Deputy Chairman of the Foreign Relations Committee.

### **Analysis of JDP's Discourse on 'Conservative Democracy'**

Yalçın Akdoğan, who can be called the father of JDP's ideology of conservative democracy with the publication of his book *Conservative Democracy* in 2003, argues that the party's doctrine is in line with global and historical codes of conservatism, yet "it is also based on the social and cultural traditions of the geographical space within which it operates" (Akdoğan, 2003:5). While he declares that JDP embraces modernity, universal values and human rights, he also makes many references to tradition, local values, family and morality. Throughout the book, he exhibits a painful effort to link modernity and universal values with traditions and local values, demanding and arguing for their convergence. Akdoğan justifies this by claiming:

"A large number of people in the (Turkish society), who cannot be ignored, demand:

- a modernity that does not exclude traditions;
- a universality that accepts local values;
- a rationality that does not reject spirituality;
- social change which is not radical" (2003:5)

However, he does not define, name or identify the traditions or local values that JDP considers important to protect. Another significant theme in the

book regards the importance of social and political change for Turkey, while he vehemently criticizes any form of revolution, which he associates with radical and abrupt social change. Although he does not name the Kemalist revolution, it is clearly a target of his critique of revolutions. Akdoğan glorifies conservatism as an ideology that “protects society and its traditional structures against totalitarian revolutionist interventions” (2003:11) and the “annihilating irrationalism of revolution” (2003:14).

He repeatedly refers to the need to limit individual and women's rights in order to protect the family and traditions: “While AK Party (JDP) accepts that individual choices should be protected within the framework of human rights and freedoms, it believes that there is a need for sensitivity on implementations that could threaten the institution of family” (2003:38). Family is seen as the most important institution of society, because the “break- up of family, which is the fundamental carrier of traditions and social values, is the worst aspect of modernity” (2003:21). Using references from Turkish and Western conservative thinkers, Akdoğan argues that freedoms can or should be restricted by moral values, for instance by referring to Burke: “Freedom, as supported by Burke, is a freedom that is based on morality and rules” (2003: 19).

Çıtak and Tür (2008) claim that JDP's construction of “tradition” consists of three main and interrelated components: Islam, family, and morality—emphasizing the key role of women in the creation and continuity of a morally upright society. However my analysis reveals that Islam is not once mentioned in Akdoğan's book, while the terms “traditions” and “local values” come up again and again—specifically, seventy-six references to ‘traditions’ and seventeen references to ‘local values.’ This shows that JDP, in its attempt to legitimize itself as an un-Islamic party both at home and at the international level, seems to have replaced religious values by ‘traditional values’. Thus, JDP's construct of ‘conservative democracy’ studiously avoided from the outset any references to religion or Islam, instead crafting a neo-conservative vision which relies heavily on re-constructions of family, traditions, and morality.

Berat Özipek's doctoral thesis on conservatism seems to have hugely influenced Akdoğan's construction of JDP's conservative democracy, to the extent that Akdoğan was accused of plagiarizing the work prior to its



publication. Akdoğan, in his column in the daily newspaper *Yeni Şafak*, has acknowledged the significance of Özipek's work and its impact on his book. Özipek published his doctoral thesis in 2004 under the title *Conservatism: The Mind, Society and Politics*. In it, he claims that “conservatism is experiencing the most brilliant time of its history” (2004:3). According to Özipek, conservatism's four most important pillars are: (1) Its opposition to enlightenment and rationality, which he claims to be harmful for the humankind; (2) its protection of the society from rationalist revolutionist projects; (3) its defense of evolutionary change against revolutionary change; and (4) its opposition to secularism and pressures on traditional social structures that contribute to social disintegration. A striking feature of his thesis is that conservatism “embodies a utopian element in its essence” (2004:190) and “carries the potential for a new radicalism after the collapse of socialism” (2004: 193).

Ismail Safi (2007), a co-founder and high-ranking member of JDP, is more critical of Western conservatism than Akdoğan and Özipek and less convinced of the links between JDP's conservatism and Western political conservatism. Safi argues that the JDP ideology is in fact much more deeply impacted by Necip Fazıl Kısakürek or and Mehmet Akif Ersoy, protagonists of a religious rather than nationalist or liberal conservatism, rooted in uncompromising opposition to the Republican People's Party (*Cumhuriyet Halk Partisi*), westernization and communism.

My analyses of the books by high level JDP ideologues, Akdoğan (2003), Özipek (2004) and Safi (2007), show that while there are points of disagreement concerning JDP's ideology of conservatism, they all intersect in claiming that the priority of political conservatism should be the 'protection of family.' They make a special effort to claim that the priority of Western conservatism is also the protection of the family to defend their thesis, claiming that Western conservatism is against the right to diverse sexualities, gay marriages, abortion and contraception. For instance, Özipek (2004:167) argues that according to conservative ideology in the West, “an individual does not have the right over his/her own body to have a free choice on issues such as abortion, sexual orientation or euthanasia”. Contrary to the claims of these authors, the conservative ideology in the West is diverse. Among European conservatives, these issues have never been as significant as they have been for the American ‘social conservative’ movement that

emerged during the Reagan era and garnered strength over the last two decades (Bell, 2007). In fact, the social conservative movement in the US is widely criticized even by its Republican constituents. Thus, JDP's ideology conservatism seems to be imported from American social conservatism, recently represented by the Tea Party movement in the US.

### **Instrumentalization of 'General Morality' as a Pillar of JDP's Neo-conservatism**

In 2007, the JDP government prepared a draft constitution, allegedly to reform the 1982 Constitution imposed by the military during its three-year rule following the 1980 military coup d'état. Democratic constitutional reform had long been expected by the Turkish public, and the move was strongly supported by the majority.

However, JDP's draft constitution was prepared by a small group of seven academics chosen by the government, without any consultations with the public, unions, NGOs or other political parties. The draft drew extensive criticisms from almost all sectors of civil society, all political parties and the media, for both its content and the way it was prepared. As criticism reached a peak at the end of January 2008, the JDP government took a step that withdrew even more criticism, declaring that it had decided to shelve the constitutional reform project, and instead to make a proposal for a constitutional amendment to remove the headscarf ban at Turkish universities.<sup>11</sup> The amendment proposed adding a clause to Article 42 of the constitution on education and schooling, to read: "Nobody can be denied the right to higher education for her/his clothing, unless it is against the criminal law or general morality."<sup>12</sup> The inclusion of a reference to general morality concerning dress code in the constitution on an already highly charged issue triggered wide debates on morality in the media and public.<sup>13</sup> Even some

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<sup>11</sup> The ban was declared by the Higher Education Council (HEC) in 1997.

<sup>12</sup> The amendment was supported by the far right Nationalistic Action Party (Milliyetçi Hareket Partisi).

<sup>13</sup> "JDP-MHP Türban Değişikliğinde Uzlaştı; Kadınlar Tepkili" (JDP and NAP agree on the headscarf amendment; women angry), *Bianet News Agency*, 24 January 2008. Available at <http://www.bianet.org/bianet/kategori/bianet/104388/JDP-mhp-turban-degisikliginde-uzlasti-kadinlar-tepkili> [Accessed Nov. 26 2008]; "Kaboğlu: 'Genel ahlaka uygun kız yaratma projesi'"

faith-based women's NGOs that had been championing the removal of the headscarf ban for years, criticized the JDP's proposal.<sup>14</sup>

The leader of the academic team appointed by JDP to prepare the draft, Professor Özbudun, defended the inclusion of the term 'general morality': "If you do not bring any limitations on dress codes, then even those wearing a Nazi uniform, *burqa* or a bikini can enter the university".<sup>15</sup> While the debate drew international attention, the reference to general morality in the constitutional amendment was finally eliminated after wide public outcry in Turkey.<sup>16</sup> The amendment removing the headscarf ban was initially accepted by parliament; but in June 2008, the Constitutional Court rejected it on the grounds that it was unconstitutional.<sup>17</sup>

### What's in a Name?: 'General Morality' vs. 'Public Morality'

The Turkish term denoting public morality in Turkish laws differs from the terms used in Western or international law. The correct translation of 'public morality' into Turkish would be *kamu ahlakı*. Yet, the term used in Turkish laws *genel ahlak*, is more accurately rendered in English as general morality,

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(Kaboglu: The project to create girls suitable for general morality), *Milliyet*, 28 January 2008. Available at: <http://www.milliyet.com.tr/2008/01/28/siyaset/siy02.html> [Accessed November 26, 2008]; "Ahlak Anayasaya Giremez" (Morality has no place in the constitution), *Aksam*, 27 January 2008. Available at: <http://www.aksam.com.tr/yazar.asp?a=106576,10,190> [Accessed Nov. 26 2008].

<sup>14</sup> "Türban yasağı mağduru kadınlar da anayasa değişikliğine tepkili" (Women who have suffered under the headscarf ban also react to the proposed amendment), *Bianet News Agency*, 28 January 2008. See: <http://www.bianet.org/bianet/kategori/bianet/104474/turban-yasagi-magduru-kadinlar-da-anayasa-degisikligine-tepkili> [Accessed Nov. 26, 2008].

<sup>15</sup> Bülent Sarıoğlu, "Kayıt Konmazsa Burkalı da, Bikinili de Girer," (If there is no regulation, both the ones wearing Burka and those with Bikinis can also enter) *Hurriyet*, Jan. 26, 2008.

<sup>16</sup> Christopher Torchia, "Divided Turkey Debates Rights, Religion," *Associated Press*, 13 February 2008.

<sup>17</sup> This decision has also been much debated and criticized by the Turkish public and in the media, in terms of the boundaries of the duties and authority of the Constitutional Court. The political turmoil instigated by these developments finally led to a Constitutional Court case for the termination of the JDP filed by the Court of Appeals Chief Prosecutor, on the grounds that the party had become a focal point of anti-secular actions. The Constitutional Court narrowly voted on 31 July 2008 to allow JDP to remain active, but imposed heavy fines for its anti-secular activities.

a term roughly meaning morality as accepted by the majority of a society. General morality, in contrast to public morality, blurs the distinction between private and public, leaving it open to various interpretations based on subjective prejudices or values. This chapter thus uses the term ‘general morality’ rather than ‘public morality’, as a more accurate translation of *genel ahlak*, the term referring to morality in various clauses of Turkish law.

The distinction between general and public morality has been the subject of many legal and philosophical debates in the West, generally between conservatives and liberals. Arguments based on general morality are usually associated with religious values, and have been used in particular to argue against sexual freedoms. For example, in Great Britain in 1957 when the Wolfenden Committee issued its *Report of the Committee on Homosexual Offenses and Prostitution*, which recommended that “there must remain a realm of private morality and immorality” that is “not the law’s business” (Hart, 1963), Devlin, a British High Court judge, criticized this view, arguing that general morality, i.e., the generally shared moral values of the society, requires prohibition of homosexuality (Richter, 2001). In Turkey though, the concept of general morality has not been debated in legal circles until the court cases against LGBT organizations.

### **Competing Legal Discourses on ‘General Morality’ and LGBT**

Since 2005, almost all LGBT groups in Turkey—such as KAOS-GL and the Pink Life Association in Ankara; The Rainbow Association in Bursa; Lambda in Istanbul and Black Pink Triangle in Izmir—that applied to register as official non-governmental organizations were refused and charged with offences against ‘general morality.’ Below, based on various petitions, and decisions of public prosecutors and courts on the right to freedom of association of LGBT organizations, I examine the controversial legal discourses on the issue.

Lesbian, gay, bisexual, and transgender activism has been publicly visible in Turkey since the 1990s. Lambda Istanbul, the first gay and lesbian organization in Turkey, was founded in 1993 in response to a ban imposed by the Istanbul Governor’s Office against a series of public activities intending to bring gay and lesbian issues to public attention for the first time in Turkey.

A year later, in September 1994, another gay and lesbian group, KAOS-GL, was founded in Ankara to fight discrimination against gays and lesbians. Both organizations have since been very active, though they were not registered as associations until recently.

KAOS-GL was the first LGBT organization to file for registered association status, in 2005. The new Law on Associations of 2004, intended to democratize and strengthen the legal framework for non-governmental organizations in Turkey, played a significant role in this step.<sup>18</sup> This much awaited democratization of the law on associations had come as a result of years long of criticism and activism of NGOs in Turkey, as well as pressure from the European Union and the European Court of Human Rights (ECHR). The language of the Law on Associations in fact poses no expressed restrictions to the formation of LGBT organizations. However, public authorities in various provinces have demonstrated that they can use various interpretations of the law to restrain what they perceive as ‘immorality’. Thus, LGBT organizations were soon to discover that in their case, democratization had limits.

KAOS-GL’s application was sent to the Ministry of Interior in July 2005. The ministry forwarded the application to the Governor’s office, asking for its opinion. Ankara’s deputy governor responded by opening a lawsuit to shut down the organization, based on claim that both its name (KAOS Gay and Lesbian Cultural Research and Solidarity Association) and its aims were against Article 56 of the Turkish Civil Code, which stipulates that an association that contravenes law or morality cannot be established.

However, the Office of the Attorney General in Ankara was quick to reject the petition by the governor’s office, upholding the right of KAOS-GL to form an association, with an exemplary justification. In his refusal of the petition, the Ankara prosecutor Kürşat Kayral, after noting that homosexuality was no longer considered an illness according to the DSM IV (The Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association) and that *gay* and *lesbian* were common terms widely used in both everyday language and academic discussions, engaged in a discussion on the subjectivity and relativity of the notion of morality. He referred to the

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<sup>18</sup> *Dernekler Kanunu*, Law no: 5253, dated 4 November 2004.

very first debates on sexual orientation by the Turkish public and in the parliament, triggered by a demand from the Women's Platform for the Reform of the Turkish Penal Code from a Gender Perspective that discrimination based on sexual orientation should be criminalized.

He stated:

“In examining the notion of morality.... while noting that the concept includes a notion of subjectivity and varies from society to society; at a time in which discrimination against sexual orientation is debated within the context of the reform of the Turkish Penal Code, being a homosexual cannot be identified with immorality. The reality should be based on a notion of morality based on freedom of human will, as all experts of ethics concur.”<sup>19</sup>

He maintained that the new law on associations should be implemented according to the principle that “the state should not adopt an oppressing, but a facilitating manner towards associations,” in accordance with international human rights conventions, the European Human Rights Convention (EHRC), the decisions of the European Court on Human Rights (ECHR), as well as norms set by international bodies of which Turkey is a member.<sup>20</sup>

The Governor's Office in Ankara complied with the decision of the public prosecutor and KAOS-GL was allowed to officially register as an organization. However, only a year later, in 2006, the same governor's office rejected the application of a transgender organization, the Pink Life Association, again filing a lawsuit for its closure. While the content of the petition was similar to the previous one, its legal reasoning had become more sophisticated. It claimed that the name and the aim of the association were not only in breach of Article 56 of Turkish Civil Code, but also in breach of Article 41 of the Turkish Constitution, which states that that the “Family is the foundation of Turkish society... The state takes necessary precautions....to protect the peace and welfare of the family”. Moreover, most probably in response to the previous decision of the state prosecutor referring to the EHRC on the right to freedom of association, the petition argued that the case should be considered as one where freedom of association can be

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<sup>19</sup> Ankara Office of the Attorney General, Decision no: 2005/1491, 10 October 2005.

<sup>20</sup> *Ibid.*

limited by the state according to Article 33 of the Turkish Constitution and Article 11/2 of the EHRC, which refer to ‘general morality’ and ‘morals’ respectively as legitimate grounds to restrict freedom of association.<sup>21</sup>

Accordingly, the response of the Ankara prosecutor Kürşat Kayral from the office of the Attorney General, again refusing the petition, was also more nuanced. In addition to his previous reasoning, Kayral maintained that notions of homosexual, bisexual, lesbian, gay, transvestite and transsexual are concepts that define human beings’ orientations. Thus, an interpretation of ‘general morality’ in a manner preceding the freedom of expression would mean limitation of individual freedoms. He again argued for the Turkish state’s responsibility to protect the right to freedom of association based on various international human rights conventions and decisions of the ECHR, adding a reference to the International Covenant on Civil and Political Rights (ICCPR).<sup>22</sup>

However, in his 2006 decision, he added a small, but significant restriction regarding the right of LGBT people to freedom of expression. While asserting that the precedence of the legal principle of the right to freedom of expression regarding sexual orientation over the protection of general morality should be the norm, he stated that an exception could be made “in case this self expression/self-disclosure should extend its limits, becoming an aim to encourage a certain sexual orientation”.<sup>23</sup> A similar argument was to be echoed by the Supreme Court of Appeals later in Lambda’s case.

The initial petitions by the Ankara governor’s office to shut down LGBT associations KAOS-GL and Pink Life Association, despite their refusal by the prosecutor's office, established a blueprint for legal action and debates for other public authorities. It became a rule of thumb that whenever an LGBT

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<sup>21</sup> According to Article 33 of the Turkish Constitution, the freedom of association can be restricted on the grounds of protection of national security, public safety, general morality, public health, freedoms of other citizens and prevention of crime. Article 11/2 of ECHR states that no restrictions shall be placed on the exercise of the right to freedom of peaceful assembly and to freedom of association with others, other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

<sup>22</sup> Ankara Office of the Attorney General, Decision no: 2006/1456, 14 October 2006.

<sup>23</sup> *Ibid.*

organization applies for official registration, the responsible Governor’s Office files a lawsuit for its closure. Following the Ankara cases the Governor’s Offices in Bursa, Istanbul and Izmir have respectively filed lawsuits against The Rainbow Association in Bursa, Lambda in Istanbul and Black Pink Triangle in Izmir. Their common argument has been that the associations’ names, which include the words gay, lesbian, bisexual, transvestite and/or transsexual, as well as their aim, are in breach of Turkish Civil Code and Turkish Constitution articles in place to protect general morality and the family.<sup>24</sup> The lawsuit petitions also refer to the 33rd article of the constitution referring to ‘general morality’ and the EHRC article referring to ‘morals’ as possible grounds for restricting freedom of association in the case of LGBT organizations. In the case of Lambda Istanbul, the Governor’s Office also claimed that the group’s name contravenes the Law on Associations since the word ‘Lambda,’ which is the 11<sup>th</sup> letter of the Greek alphabet, is not Turkish<sup>25</sup> and has no Turkish translation. This is a telling example of the arbitrary nature of the pressure on LGBT organizations by local authorities.

Similar to the cases in Ankara, Attorney General’s offices in Bursa and Istanbul rejected the appeals of the Governor’s Offices to shut down the LGBT associations, with justifications similar to Ankara public prosecutor Kayral’s.<sup>26</sup> Istanbul public prosecutor Muzaffer Yalçın, whose decision is almost verbatim the same as Kayral’s, added that homosexuality is not a crime according to the Turkish Penal Code or other laws.

In all cases, except for Lambda, Governor’s Offices complied with the public prosecutors’ decisions and allowed the registration of the associations. However, in the case of Lambda, the Istanbul Governor’s Office persisted, taking the case to criminal court. The court accepted to allow the Governor’s office denial of official status to Lambda, arguing that freedoms can be restricted on grounds of general morality, public order, protection of family and children or protection of the Turkish language. It also stated that while

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<sup>24</sup> Article 56 of the Turkish Civil Code and Article 41 of the Turkish Constitution

<sup>25</sup> Letter to the Board of Lambda Istanbul by the Istanbul Governor’s Office, Directorate of Provincial Associations, June 9, 2006, no: B.05.4VLK4340800-07/34-130/005.

<sup>26</sup> Bursa Office of the Attorney General, Decision no: 2006/26401 and Istanbul Office of the Attorney General, Decision no: 2007/991, 8 February 2007.



contemporary values vary from country to country, one cannot conclude that “what exists in another country would be definitely right for our own country [Turkey]”.<sup>27</sup> This statement by a judge, which rejects international legal norms and principles on the basis of what he perceives to be ‘appropriately Turkish’ is not only open to criticisms from a legal perspective; it also reflects the judicial construction of a national (Turkish) values system. It is also noteworthy that the decision referred extensively to ‘general morality’ as an inaccurate translation of provisions in international conventions or covenants that evoke ‘public authority’ or ‘morals’ as grounds for restricting freedom of association, a translation mistake with significant implications.

Even though the court appointed expert argued against the closure of Lambda Istanbul, the court decided for its the closure, referring to the ‘strong patriarchal family structure’ in Turkish society, ‘the sacredness of the family’ and ‘religious rules’ in its as justification.<sup>28</sup> The organization appealed to the Supreme Court of Appeals to oppose the local court's decision. The Supreme Court of Appeals ultimately ruled in 2008 that Lambda Istanbul has the right to be registered as an official association.

An analysis of the local and Supreme Court decisions and the legal debate on general morality reveals that although courts’ interpretations can vary, subjective interpretations of general morality remain a significant obstacle for LGBT organizations in Turkey. Though the Supreme Court ultimately allowed the registration of Lambda Istanbul as an NGO, it mentioned ‘general morality’ as a possible ground for restricting the freedom of association for LGBT people if they intend to “motivate, encourage or spread lesbian, gay, bisexual, transvestite or trans sexuality”.<sup>29</sup> This perspective suggests a perception of sexual orientation as a contagious threat to public order, rather than as an individual right. The Supreme Court also claims that “sexual identity or orientation is not something that people choose with their own will, but a situation that people are *unwillingly*<sup>30</sup> faced with, through birth or

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<sup>27</sup> Istanbul 5<sup>th</sup> Criminal Court, Decision no: 2007/556, 30 May 2007.

<sup>28</sup> *Ibid.*

<sup>29</sup> Supreme Court of the Turkish Republic, Decision no: 2008/4109 2008/5196, 25 November 2008.

<sup>30</sup> Emphasis mine.

upbringing”, implying that the Supreme Court views non-heterosexual orientation or gender identity as a genetic or psychological disorder, despite the general agreement in the academic/scientific literature that having sexual orientation outside the heterosexual norms is not a disorder.<sup>31</sup>

A positive aspect of the Supreme Court’s decision, which can be viewed as a step forward in terms of pluralism and liberal democracy in Turkey, is its rather elaborate statement on the benefits of LGBT organizing:

“It is understood that the aim of the association to strengthen solidarity among lesbian, gay, bisexual, transvestite or transsexual individuals will contribute to the evidence that they are constituents of the society and the creation of an environment of freedom in the society through facilitation of their rights to freedom of expression, prevention of social prejudices against them, and the prevention of their marginalization and social discrimination.”<sup>32</sup>

### **Contestations: Perspectives and Advocacy of Women’s and LGBT Organizations**

Women’s and LGBT groups were the first to react to clauses in the draft constitution referring to ‘general morality’ as a means of legitimizing constitutional restrictions of individual rights and freedoms. A press statement on 28 January 2008, entitled ‘We are Alarmed!’ issued by the Women's Platform for the Reform of the Constitution, a coalition of over two hundred 200 women's and LGBT organizations, stated that JDP’s attempt to include references to general morality in the constitution targets women and contributes to their oppression.<sup>33</sup>

“There should be no place for vague and relative concepts such as ‘general morality,’ ‘traditions,’ ‘customs’ or ‘*urf*’ in the

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<sup>31</sup> Supreme Court, Decision no: 2008/4109 2008/5196.

<sup>32</sup> Ibid.

<sup>33</sup> Kaygilyiz! (We are Alarmed!). Available at: <http://www.kadinininsanhaklari.org/haberler.php?detay=14> [Accessed 24 November 2008]

constitution. Such concepts cannot be taken as criteria to restrict fundamental rights and freedoms.... History is full of examples of how law-makers have interpreted these concepts particularly to oppress women. Violence and discrimination against women are often legitimized in the name of morality, customs or honour.... Concepts such as ‘general morality,’ the content of which is extremely vague, are always utilized to control and oppress women, their bodies and their lives.”

Prime Minister Erdoğan responded immediately on the next day, bringing a new dimension to the debate by positing a dichotomy between Turkish and Western morality: “We have not acquired the sciences or arts of the West. Unfortunately, we have acquired its immorality”, a statement that made headlines in the Turkish media.<sup>34</sup>

In various interviews I conducted concerning their fight against the inclusion of ‘general morality’ in the Constitution, representatives of women’s organizations expressed not only concern about JDP’s policies related to morality, but also astonishment at the government’s attempt to reverse legal rights gained through decades of struggle:

“We were shocked because while we are demanding that such concepts as morality and customs should be completely removed from all legal texts, they are trying to insert morality as a criterion for women’s clothing and restriction of several fundamental freedoms into the constitution.” (Respondent 1, Istanbul)

“Struggles over morality became much more visible and loud during the debates on the Constitution. Moreover, we also hear it in the discourses of public authorities and in courts. Their discourse on morality is based on a framework of traditional gender roles.” (Respondent 2, Van)

While noting that morality has always been invoked to control women’s behavior in Turkey, respondents have expressed their observation that JDP’s

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<sup>34</sup> *Sabah*, 24 January 2008; *Milli Gazete*, 24 January 2008.

discourses and policies have instrumentalized morality in a new manner as a tool of political manipulation:

“There was always this problem of morality for women, but now JDP is bringing it as a rising value, with a revised ideological content that [the government believes] should hold a dominant place.” (Respondent 11, Istanbul)

“If you really want to sustain morality in a society, you should work to enhance people’s autonomy. However, this is not what JDP is doing, their efforts are geared towards giving the power of social control on morality to a certain privileged group in the society.” (Respondent 8, Çanakkale)

“I can’t say if such pressures have really increased, but it’s definite that they have gained a new shape. There were always such discourses that morality is important for the society, religious people are more concerned about morality, etc.. But in recent years, we see a more conservative definition of morality that targets women, women’s bodies, women’s honour or homosexuals rather than a definition which refers to being charitable, being a good person or not stealing for instance... Of course, a morality that targeted women existed earlier too, but it was not instrumentalized politically to this extent by a government.” (Respondent 1, Istanbul)

“I think JDP’s general ideology is that a woman’s place is home, they are associating morality with this and what they perceive as women’s duties, such as her clothing.” (Respondent 4, Diyarbakır)

“Morality has become politics now. Everything is now linked to morality, especially women’s morality.” (Respondent 7, Çanakkale)

This politicization of morality, specifically targeting women’s bodies and sexuality, is seen by respondents as an insidious combination of social control using selective patriarchal ideals of family, gender roles and

traditions within a larger political paradigm and powerful socio-political discourses.

### **Rising Discourses on Morality, Women's Dress Codes and the Headscarf**

When asked about the impact on women's lives of these increasingly prevalent moral discourses, almost all representatives of women's organizations noted that one of the most visible signs was growing emphasis on women's dress codes.

“They are targeting women's sexuality, bodies and reproductive capacity, for example how many children a woman should bear,<sup>35</sup> and of course women's dressing and headscarf. They are claiming that religion commands women to cover themselves, this has become an issue of morality concerning how women should appear in the public sphere.” (Respondent 5, Istanbul)

“At the women's shelter, the increasing pressure on women to cover themselves has started to have a significant impact on our work. For us, working at the shelter, it has never been important for us if the women who come here, to run away from domestic violence, are covered or not and of course we never intervened in their choices. Yet, now we receive accusations that allegedly we would force women to uncover their heads or we would turn them into prostitutes. It may happen that a woman chooses to uncover her head after she comes to the shelter, but this has nothing to do with us. Moreover, the issue of headscarf has become a significant factor if a woman who is in the shelter received social aid or not. When municipal workers, who are supposed to give them aid, note that a formerly covered woman is not wearing a headscarf anymore, they react negatively and might refuse to give them social aid. Women are very angry about this. They say it's our right to receive aid from the municipality, do we have to cover our heads for it or beg them for aid?” (Respondent 6, Istanbul)

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<sup>35</sup> Referring to Prime Minister's many times repeated statement that every Turkish woman should bear at least three children for the future of Turkish economy.

“Let me give examples from my own life here, in Southeastern Turkey. In recent years, morality is defined much more over women’s clothing and this is increasing. For example, I used to work at GAP (the Regional Development Administration of Southeastern Anatolia Project). Earlier, we used to dress freely, but now there are a lot of covered women in GAP. Everybody became more careful about their clothing even if they do not cover their heads, for example they wear longer skirts, longer sleeves, covering their bosom. If for example women want to go to the governorate to ask for a service, they are very careful about their dressing.” (Respondent 4, Diyarbakır)

The increased pressure to adhere to certain dress codes noted by respondents in a sense reflects the conflation of the private and the public through the use of morality: while constructions of honour, family and tradition under the morality paradigm attempt to reinforce more traditional domestic gender roles, perceived pressure to follow a dress code restricts women’s freedoms in the public sphere.

### **The Rise of Neo Conservatism as a Backlash to Women’s and LGBT Movements**

Both women’s and LGBT organizations think that the increased visibility and power of the feminist and LGBT movement in Turkey has led to increased contestations concerning morality.

“As women have gained more power in public life and politics, starting to shape daily life according to their own ideologies, men in powerful positions started showing strong reactions. The present discourses are a reflection of this fact.” (Respondent 3, Istanbul)

“We were very successful in reforming the Turkish Penal Code in 2004. We were able to show an alternative ideology during the debates on the penal code and criminalization of adultery. We showed them that we have a right to define and live our own notion of morality. But men in politics are resisting this. They are now accusing us, feminists, of being immoral,

as defending immorality. This is such an unjust accusation. They are using this to discredit the women's movement." (Respondent 5, Istanbul)

"There are two sides in the present process. On the one hand, a conservative discourse on morality, that is a notion of morality targeting the control of people's bodies and sexuality, has become much more vocal in the public sphere. On the other hand, the discourses of those whom they call immoral, for example LGBT people, have also become much louder and more visible, opening up new spaces in the society. Several issues that used to be taboos, that were suppressed, are now being discussed.... I think there is now a sharp polarization between the two sides of the debate because now both sides claim their views on issues that were not talked about before." (Respondent 9, Ankara).

## **Conclusion**

The JDP government in Turkey has been highly praised by many researchers and commentators at home and abroad for its role in Turkey's democratization process. Yet, as this chapter demonstrates, the JDP government's understanding of democratization has never included the concept of gender equality despite much lip service at the international level. Instead, a conservatism mainly targeting gender relations was devised as a political strategy by the JDP as a solution to the political dilemmas it faced. The dilemma for JDP, as it was founded in 2001 as a party with Islamic political roots, and later, as it came to power in 2002, has been on the one hand to legitimize itself towards the Turkish secular establishment at home and towards the West—the US and the EU—and at the same time remaining loyal and committed to its faith-based, religious/conservative constituency on the other. It has attempted to achieve this by constructing and inculcating a new ideology, 'conservative democracy', which, it claims, embraces modernity, universal values, freedoms and human rights while also defending traditions, local values, family or morality. This of course has engendered other dilemmas and inconsistencies.

Since it has come to power in 2002, the JDP government's conservatism has mainly targeted the private sphere of the Turkish citizens, such as issues related to sexuality, women's bodies and reproductive rights, sexual

orientation, LGBT rights, sex work and abortion, while it has embraced neo-liberalism and undertaken almost revolutionary reforms on other issues such as minimizing the role of the army in Turkish politics.

Though much debated, JDP's ideology of conservative democracy remains vague and understudied. The public and legal debates on 'general morality', which I have analyzed in this article shed light on the public contestations on the rise of neo-conservatism in Turkey after a decade of JDP government in power. Analysis of new forms of religious activism and use of religion for political legitimation show that there is a shift from earlier conceptions of religion as an indirect legitimator of the status quo, to religion as a means to combat secular legitimations and competing moral claims. Contemporary religious activists attempt to legitimate their moral claims through the use of secular conservatism, targeting lifestyles, family or gender relations, rather than evoking religious narratives, because in many contemporary societies they find it "necessary to play more by political rules than by religious rules".<sup>36</sup> In this context, the instrumentalization of morality as a political tool and means of legitimation by religious activists is a widespread phenomenon in the contemporary Muslim societies, as this chapter demonstrates seems to be the case for Turkey.

As this study portrays, while JDP's 'conservative democracy', claims to embrace modernity, universal values, freedoms and human rights; it is in contradiction with these universal values especially on issues regarding the state's duties to protect of women's human rights, the rights of LGBT people and the rights in the private sphere.

The main pillar of JDP's constructed party ideology of conservatism is the protection of the family and traditional values through the roles of women as mothers, wives and daughters. It goes so far to claim that freedoms and human rights can be restricted to uphold these values. As I have briefly tried to demonstrate, JDP's conservatism is very similar to American social conservatism of the new Christian right movement in the US, which peaked during the Bush era, but is now represented by the Tea Party movement.

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<sup>36</sup> Wuthnow (1998: 207), cited in Dwight B. Billings and Shauna L. Scott, "Religion and Political Legitimation", p. 178.



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## **Moral Policing in Malaysia: Causes, Contexts and Civil Society Responses**

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### **Introduction**

In October 2008, the National Fatwa Council of Malaysia issued a *fatwa* (religious opinion) stating that ‘tomboyism’ in women was against Islam.<sup>2</sup> The stated rationale for this edict was that tomboyish behaviour was a precursor to lesbianism. Although the BBC attempted to make light of the development, describing it as a *fatwa* against women wearing trousers (see Lee, 2010a: 132), for the targeted women the *fatwa* could well have legal implications. The Fatwa Council’s edicts can rapidly become enforceable in Malaysia’s thirteen states and three territories after being subjected to relevant state<sup>3</sup> and territory processes. Transgressors face potential prison, fines and/or caning.

There are wider implications as well. Evident in the ‘tomboy’ *fatwa* is hostility to divergence from heteronormative identities and behaviours; moreover, this hostility carries with it the sanction and enforcement capabilities of the State. This is perhaps most clearly and notoriously illustrated by allegations of sodomy laid in 1998 and again 2008 against Anwar Ibrahim, the former Deputy Prime Minister of Malaysia, and his subsequent conviction in 2015 under Section 377 of Malaysia’s Penal Code, which criminalises ‘carnal intercourse against the order of nature’ (Doherty, 2015).

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<sup>1</sup> This paper is written by the authors on behalf of the research team at Sisters in Islam.

<sup>2</sup> See statement by Sisters in Islam (SIS) for a discussion on the fatwa’s implications at: <http://www.wluml.org/node/4886>.

<sup>3</sup> In this chapter, where ‘state’ is uncapitalised, we refer to the sub-region of a country. Where ‘State’ is capitalised, it refers to the federal government (Malay: *negara*)/infrastructure; where it is not it refers to the state/territorial jurisdiction/level of government (Malay: *negeri*), as opposed to the federal level of government.

Certain heterosexual behaviours are also liable to prosecution. Thus, similar to Shari'a laws in some other countries, *zina* (adultery) and *khalwat* (illicit proximity between two unmarried and unrelated members of the opposite sex) are criminal offences.<sup>4</sup> Indeed *khalwat* has been one of the most common charges brought before Malaysia's Syariah courts.<sup>5</sup> Mostly it is Malaysia's Malay Muslim population that feels the force of Syariah law even though technically the law can be applied on any Muslim in the country, local or otherwise.

Malaysia experiences periodic public moral panic over the alleged sexual behaviour of some of its citizens. These sometimes sensationalist and perhaps prurient outbursts of alarm are over a range of issues, including reportedly high rates of pre-marital sex and pregnancy, the 'immodest' attire of female school children and young women, sex parties, and the 'problem' of effeminate men (Malay: *lelaki lembut*) and butch women (Malay: *wanita keras*) (e.g. Stivens, 2006). While, like many sensationalist topics, these often ephemeral in the media, the sexuality of Malaysians, and especially Muslim Malaysians on whom this chapter focuses, has increasingly been subject to policing even when media attention has moved on.

The discussion presented in this chapter is motivated by a desire to understand the causes for the authoritarian, pervasive and conservative moral policing in contemporary Malaysia. In order to address the issue in a holistic and rigorous manner it is necessary to examine the sociological and historical landscape of Malaysia spanning from before the 19<sup>th</sup> century to today, and including the interactions between government, religion and gender. Such an examination must also include a discussion of contemporary reactions to the effects of this moral policing and the intrusion of a State-backed Islam into people's personal lives.

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<sup>4</sup> For more on the spread of such laws across Muslim societies see, Mir Hosseini and Hamzic (2010).

<sup>5</sup> In Malaysia, 'Syariah' is the spelling used to refer to what is elsewhere often spelled 'Shari'a'. For details about the system of courts in Malaysia, see the 'Malaysian Judicial Structure' on the website of The Office of the Chief Registrar, Federal Court Malaysia: <http://bit.ly/2hLDwnw>. See also Peletz (2002).

Thus the Findings and Analysis section of this chapter treats the following topics in turn:

- Moral policing as the result of the politicisation of Islam;
- The mechanisms of moral policing;
- The impetus behind the growth of moral policing;
- Controversies over moral policing and effects on those targeted; and
- Contesting moral policing.

We thus consider the rise of State-backed moral policing in Malaysia, how it is conducted, why the scope of such policing has expanded, how it has been covered in the media, the negative impacts on those targeted, and countervailing movements and discourses challenging the increasing intrusion of law in the realm of sexuality.

For the purposes of this chapter, we have focused primarily on the policing of sexual morality—referred to throughout this chapter simply as moral policing—as it affects Muslim Malaysians and as carried out by institutions of the State. While such policing of ‘errant’ sexuality may appear to be a singular phenomenon, we will argue that, while apparently promulgated and enforced by State mechanisms, a variety of factors have contributed to its rise.

## **Methodology**

The findings of this research are based on interviews, extensive bibliographic research, as well as media analysis. Between 2008–2009, we conducted over forty interviews, mostly in the state of Selangor and the federal territory of Kuala Lumpur. We sought a wide range of interviewees, representing diverse perspectives and opinions, to draw a broad picture of moral policing in Malaysia. For instance, to understand how moral policing is conducted by State institutions, we spoke with Syariah lawyers and employees of State Islamic bodies. To develop an understanding of how ordinary Malaysian citizens have been affected, we interviewed numerous people who have been subject to policing. Our social and historical account of moral policing was informed by discussions with academics and activists; the latter provided

us with insights into civil society responses as well. The names of some individuals have been changed or omitted, and non-substantive details modified, to protect either their identities or those of people to whom they have referred.

Extensive bibliographic research was also undertaken to acquire statistics, historical data and the results of relevant contemporary research. We drew on library resources from Universiti Malaya (Malaysia), The University of Kent (United Kingdom), Monash University (Australia), as well as resources, newspaper clippings, and government and legal materials archived by Sisters in Islam (Malaysia).<sup>6</sup> Additionally, we examined newspaper reports of moral policing incidents during the period of research between 2008 and 2009.

Instead of disaggregated distillations of ‘findings’ and subsequent ‘analysis’, we present instead a narrative account of moral policing in Malaysia. By bringing together diffuse material from numerous and disparate sources, we have aimed to provide a coherent and integrated account that illuminates why and how moral policing occurs in Malaysia, and the responses it has elicited. This account is followed by our findings and analysis.

## **Background**

Malaysia is a country in Southeast Asia, divided into East and West Malaysia. East Malaysia shares borders with Brunei and the Indonesian state of Kalimantan. West or Peninsular Malaysia, which is across the South China Sea from East Malaysia and shares a border with southern Thailand, is regarded as the mainland. Kuala Lumpur, the capital of Malaysia and its most populous city, is on this peninsula and is Malaysia’s political epicentre.

As of 2016, Malaysia is inhabited by over 31 million persons. Malays, the country’s largest ethnic group, constitute over 68% of the population. According to Article 160 of Malaysia’s Constitution, a Malay is defined as one who speaks the Malay language, practices Malay customs, and is Muslim. The

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<sup>6</sup> Sisters in Islam (SIS) is a Malaysian non-governmental organisation that works to uphold Muslim women’s rights within the framework of Islam: <http://www.sistersinislam.org.my>. See below for details.

oft-noted conflation between Malay ethnicity and Islam is not only legal; it is also widespread among Malaysians. In former times, if a non-Malay were to embrace Islam, it was sometimes said that he or she had become Malay (Malay: *masuk Melayu*) rather than having become Muslim (Malay: *masuk Islam*).

The second and third largest ethnic groups in Malaysia are diaspora Chinese (over 23%) and Indians (7%). Chinese populations tend to speak any one of the southern China dialects (with Hokkien and Cantonese predominating) and tend either to follow ‘traditional’ Chinese beliefs (sometimes referred to as Taoism and Confucianism), Buddhism, or Christianity. Indians often speak Tamil and are frequently Hindu or Christian. However, there are significant numbers of Chinese and Indian Muslims. The majority of the Chinese and Indian populations in Malaysia arrived during the British colonial period, particularly in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. Indians often worked on rubber plantations, while the Chinese were often tin miners. Whereas the Chinese tended to be concentrated in towns, Malays until the mid-20<sup>th</sup> century were predominantly rural and agrarian and lived in villages (Malay: *kampung*). Along with a range of other (non-Malay) indigenous groups (13% in sum), Malays are politically positioned as indigenous to Malaysia and are termed *Bumiputera* (Malay for ‘sons of the soil’). While Malay remains the national language, English is widely spoken amongst all groups and is the *lingua franca* of the urban middle and upper classes.

Common Law is one legacy of British rule. At Independence in 1957, and in the midst of an ongoing Chinese-led Communist insurgency, another legacy of the recently departed British was the Malaysian Constitution. The Constitution of the Federation of Malaya (as Malaysia was called until 1963) included Article 153, which enshrined the various political and economic privileges of *Bumiputera* Malaysians. The political pre-eminence of the Malay ethnic group was further cemented in Article 3, which declared “Islam is the religion of the federation”.

The ethnically divided society left by the British is reflected by Malaysia’s highly ethnically defined political parties. While some are overtly ethnically chauvinist (e.g. The United Malays National Organisation (UMNO), The Malaysian Chinese Association, The Malaysian Indian Congress), others,

despite claims of ethnic neutrality, are in practice dominated by one or another ethnic group.<sup>7</sup> For the most populous ethnic group in Malaysia, the principal Malay party is UMNO, which has led the ruling coalition since 1957. For most of Malaysia's history, UMNO's nemesis has been Parti Islam SeMalaysia (PAS, the Islamic Party of Malaysia). Significantly, Malay politics frequently moves into the register of Islam, with rhetoric often drawing on Islamic tenets (e.g. Hoffstaedter, 2011; Holst, 2016).

### **Sexuality, Social Change and Islam in Malaysia**

Scholarly interest in gender and sexuality in Malaysia is not new. Michael Peletz, for example, has described the significant diversity in gender identities in the Malay archipelago, noting that the early modern period (15<sup>th</sup> to 18<sup>th</sup> centuries) in Southeast Asia was a time of considerable sexual egalitarianism and female autonomy (2006: 312). Various Indonesian and Malaysian ethnic groups have historically had culturally sanctioned positions in society for transgendered individuals. In Indonesia, among the Bugis of South Sulawesi, there were transgendered ritual specialists known as *bissu*. *Bissu* were males who dressed as women and married same-sex (male) partners (ibid.; Davies, 2007). In Malaysia, meanwhile, a comparable social position was occupied by the *sida-sida*, though less is known about them (Peletz, 2006: 312-3). The extent to which non-hetero-normative individuals were accepted in Malaysia was such that Peletz notes that even into the 1960s there was evidence of "specialized homosexual villages" in the state of Kelantan. Residents lived in these villages of their own volition and there is no evidence of their persecution. In fact, one such village abutted the Sultan of Kelantan's palace (Peletz, 2002: 243; Raybeck, 1986). Thus, Malaysia and the Malay archipelago in general was a site of "relative tolerance and indulgence with respect to things erotic and sexual" (Peletz, 2006; see also Peletz, 2009; Lee, 2010a).

A permissive Malay society, however, did not endure. While there was tolerance of individuals referred to in Malaysia as '*pondan*'<sup>8</sup> (men who

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<sup>7</sup> *Parti Keadilan Rakyat* (The People's Justice Party) is somewhat of an exception. While Malays dominate, there is ethnic diversity amongst its leaders.

<sup>8</sup> Due to the negative connotations often ascribed to this term, the preferred alternative of the local transgender community since the 1980s is '*mak nyah*'.



dressed and comported as women) up until the 1980s (Peletz, 2002: 243), significant social and cultural shifts taking place in Malaysia around that time greatly narrowed the space for non-hetero-normative gender identities. Three such shifts included an increasing Islamic consciousness and orthodoxy, the effect of the heteronormative discourse, and social transformations relating to the evolution of the nation's economy and urbanisation.

Numerous authors have provided accounts for the development of Islamic consciousness amongst Muslims in Malaysia (e.g. Lee, 2010b; Mutalib, 1990, 1993; Muzaffar, 1986; Nagata, 1982, 1984, 1997; Roff, 1998). It is not our intention here to recount the complex factors contributing to this Islamisation; however, noting some of its main features will help to contextualise the research presented below.

Jomo Kwame Sundaram and Ahmed Shabery Cheek have argued that Islamisation in Malaysia “is foremost a response to developments within Malaysia’s domestic politics” (1988: 843). Important protagonists, in their view, have been the Malaysian Islamic Youth Movement (ABIM) and Parti Islam SeMalaysia (PAS, the Islamic Party of Malaysia). The ABIM is an ostensibly non-partisan organisation involved in *dakwah* (Islamic proselytising) which regards “Islam as the panacea to the problems of a plural society” such as Malaysia (*ibid.*: 853). It was once headed by the above-mentioned charismatic Anwar Ibrahim who later joined UMNO, a move widely regarded as an attempt by the party to co-opt some Islamic credibility. The profile and influence of ABIM was at the time considerable and the Islam they promoted was conservative and orthodox.

The other important protagonist has been PAS, which evolved from a stridently Malay party to one which champions Islam over ethnicity (*ibid.*: 851). The efficacy of PAS—a party which has held state power but has never been the ruling party at the federal level—in vying for UMNO’s constituency of (Muslim) Malays has, in the view of many commentators, resulted in UMNO increasingly attempting to prove its Islamic credentials. While UMNO’s cooption of Anwar Ibrahim to this end has already been noted, the party has also introduced legal and bureaucratic changes to bolster its Islamic image.

The most significant of these was undertaken during the administration of former Prime Minister Mahathir Mohamad (1981-2004). From 1983, the Mahathir government established the International Islamic University, Bank Islam Malaysia, Takaful (an Islamic insurance agency) and Lembaga Urusan Tabung Haji (Malay for the Hajj Pilgrims Management Fund). Jabatan Kemajuan Islam Malaysia (JAKIM, the Department of Islamic Development in Malaysia) was upgraded from a pre-existing body<sup>9</sup> and moved into the Prime Minister's Department to oversee the standardisation of Islamic law and administration in the country (which, as noted earlier, varied significantly across states).

While some have suggested that Mahathir's policy of Islamisation was intended more as a means of imbuing the civil service with a sense of ethics and industriousness, its effect has been to centralise Islam in the political realm and to increase the infrastructural and legal powers of various Islamic authorities. Also passed into law during the Mahathir administration was the Syariah Criminal Offences Act (SCOA)<sup>10</sup> in each of Malaysia's states and territories. As will be elaborated in the findings section below, the SCOA criminalises an array of non-marital and non-heterosexual behaviour. A sophisticated understanding of these developments in any case requires an examination of the historical antecedents that led to Islam becoming integrated into Malaysia's legal and governmental infrastructure.

### **The Colonial Legacy: Syariah Laws and the Religious Bureaucracy<sup>11</sup>**

Upon independence in 1957, the Federal Constitution of Malaysia (then the Federation of Malaya) affirmed the Sultan of each state as the 'head of the

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<sup>9</sup> JAKIM was formally established in 1997. It is an upgraded version of the secretariat to the Majlis Kebangsaan Hal Ehwal Agama Islam (National Council of Islamic Affairs) established in 1968 and subsequently upgraded in 1974 to a *bahagian* (division), coinciding with the creation of Federal Territory of Kuala Lumpur, and again in 1985 to the Bahagian Hal-Ehwal Islam (BAHEIS), when it was relocated in the Prime Minister's Office.

<sup>10</sup> When state laws are enacted in federal territories (as opposed to states), they are referred to as Acts rather than Enactments. However, in this text, SCOA will be used to refer to both Acts and Enactments.

<sup>11</sup> The following sections also draw from the PhD thesis of tan beng hui titled 'Sexuality, Islam and Politics in Malaysia: A study on the shifting strategies of regulation', which was submitted and examined at the National University of Singapore in 2012.

religion of Islam'.<sup>12</sup> This in turn confirmed that authority over matters pertaining to Islam was to remain under the separate jurisdiction of each state. This arrangement had been established under British rule as part of an exchange<sup>13</sup> wherein the sultans surrendered political authority in return for being left in charge of “Malay religion and custom” (Means, 1969: 274). It was during this period that the colonial administrators imposed the British legal system and confined the domain of Islamic law to Malay personal status issues, which included marriage, divorce, inheritance, moral offences, and crimes against the religion (Mackeen, 1969).

Since independence, there have been calls to elevate the status of Syariah law and courts on grounds that they have been subordinate to English common law and civil courts for too long. These calls are sometimes justified by claims that Islamic law was already well established in the Malay states before the British arrived (as evinced, for example, in the existence of the fifteenth century *Undang-undang Melaka* (Laws of Malacca)). Other promoters of wider jurisdiction for Islamic law point to an observation made in 1908 by then colonial educationist R. J. Wilkinson, that “[t]here can be no doubt that Moslem law would have ended by becoming the law of Malaya had not the British law stepped in to check it...” (quoted in Roff, 1998: 211; see also Ahmad Mohamed Ibrahim (1997) and Zainul Rijal (2009), arguing that Syariah should carry at least equal if not greater weight than the English legal system.

Scholars like Yegar (1984), Horowitz (1994) and Roff (1998) offer an alternative perspective, however. For them, even though Islamic law may have been relegated to second place, the assimilation of Islam into the State actually has its roots in British colonialism. According to Yegar, for instance, prior to the “gradual British penetration during the last quarter of the 19th century... Islam was a state religion in symbolic form, hardly more” (1984: 189). Horowitz concurs, pointing out that while there may have been some Islamic legal digests prior to the coming of the British, “there was nothing like a uniformly-enforced Islamic law” (1994: 255). In fact Roff suggests that

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<sup>12</sup> See Article 3(2). For states without a Sultan, this role is assigned to the King.

<sup>13</sup> The exchange kicked-in under the 1874 Treaty of Pangkor that saw the British residency system being introduced in Perak followed by the rest of the Federated Malay States before subsequently spreading to the Unfederated Malay States from 1909 onwards.

colonial administrators facilitated the influence of Islamic law owing to “that signal feature of British law, the statutory enactment”(1998: 211), a channel through which the substantive rules of the religion came to be codified and applied, giving Islam a far greater reach among the Malays. From this perspective it would seem that the British did more to assist the flourishing of institutional Islam rather than impede its development.

The spread of Islamic law through statutory enactments went hand-in-hand with another British establishment: the State Council or legislative assembly. Whatever powers the sultans and the traditional elite had remaining were further decentralised with the introduction of this body (Roff, 1998). Through it, various laws for Muslims were passed from the late 19<sup>th</sup> century, including the Muhammadan Laws Enactment in 1904 which penalised adultery in the Federated Malay States (FMS), and the Muhammadan Offences Enactment, 1938 which criminalised “*kheluat*” (*khalwat*, illicit proximity) amongst other things. More importantly, starting in 1952, the comprehensive Administration of Muslim Law Enactment came into being, covering a broad range of Islamic matters including the powers, duties and procedures of the religious bureaucracy, namely the *Majlis Agama Islam* (Council of Islam), the religious courts, and the *mufti* (jurisconsult).<sup>14</sup>

The passage of these laws demanded a corresponding expansion of the machinery to implement them. In tandem with the introduction of new Islamic laws was the advancement of “special committees and sub-committees of the State Councils” (Roff, 1998: 214).<sup>15</sup> Further, with the formalisation of *kathi* (religious judge) court practices in the Malay states through the adoption of the Courts Enactments, additional authority came to be vested in religious officials like the *kathi* and the *ulama* (Horowitz, 1994). During this time too, the British institutionalised the position of the *mufti*, placing it on the official payroll.<sup>16</sup> These developments were significant

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<sup>14</sup> The Administration of Muslim Law Enactment 1952 also elaborated on issues of conversion, marriage and divorce, maintenance, and religious offences.

<sup>15</sup> Islamic institutions already existed when the British incursion began in Malaya. For example, the earliest religious bureaucracy, complete with a *kathi*, *mufti* and *imams*, was established in the 1880s in Johore, while the *Majlis Agama Islam dan Istiadat Melayu* in Kelantan was independently set-up in 1915. However, such bodies were not common (Abu Talib, 2003).

<sup>16</sup> Prior to this the *mufti* were paid out of a collection of monies derived from local fines and taxes (Hasnan, 2008: 14).

because prior to this, Islamic administration had “largely been ignored” (Yegar, 1984: 189).

As the above suggests, the colonial reign set in place a more formal and organised system of religious institutions. Certainly over time, state religious agencies like the Council of Islam (*Majlis Agama Islam*)—originally only present in Kelantan—were replicated across the nation. Similarly, with the Office of Religious Affairs (*Pejabat Agama Islam*), which later became the Department of Religious Affairs (*Jabatan Agama Islam*), and the *kathi* or Syariah court.

It is also the case that during the colonial era, compared with other state programmes, the religious legal and administrative system had less jurisdiction, staff and funding (Syed Husin Ali, 1981). For instance, although the British institutionalised the Syariah court system, they did very little to support the actual development of these courts or their judges and officials, instead directing effort and resources into their secular counterparts. This bias was also reflected in the placement of the Syariah courts at the bottom of the judicial hierarchy (Abdul Monir Yaacob, 1997). Ahmad Ibrahim (1981) argues that British interest in regularising Islamic laws and bodies was limited to management of matters—including matrimonial offences and breaches of religious observances—which could affect peace and order. Muslim administration thus remained “haphazard and lethargic” (Means, 1969: 275) during the colonial period because the British invested only enough to ensure that their interests were served.

This imbalance in the dual legal and administrative systems—secular and Islamic—continued after Independence and gave considerable impetus to calls to expand Syariah jurisdiction and upgrade its bureaucratic machinery. Criticisms of the British, however, also need to take into account the fact that despite the self-serving and limited nature of colonial support for Islamic institutions, the colonial authorities laid down important legal and governmental groundwork that paved the way not only for the vast expansion of Syariah laws and the religious bureaucracy during the 1980s phase of state-directed Islamisation, but also the latter’s subsequent ascendance today.

## Moral Policing as the Result of the Politicisation of Islam

Over the last 30 years, the process of State-led Islamisation, stemming in large part from a desire to woo the support of Malay voters, has resulted in the increasing social and political hegemony of Islam in the country. This has come at the cost of greater restrictions on the lives of Malaysians, predominantly the Malay populace, and as will be shown below, these have played out to a considerable extent in the realm of personal sexual expression and behaviour. However, it should be noted that anyone who transgresses the Malaysian State's vision of appropriate Islam—whether as a transgressor of sexual norms, a follower of unorthodox practices, an apostate, or for falling afoul of authorised *halal* standards—will likely find themselves on the wrong side of an unforgiving construction of orthodox Islam endorsed by the State (Maznah Mohamed, 2008).

The version of official Islam that has developed in Malaysia has been primarily imposed through the Syariah Criminal Offences Act (SCOA) introduced in Malaysian states from the 1980s. Where the setting of moral standards is concerned, SCOA's are an elaboration of religious sins codified through the early Muhamaddan laws introduced under the colonial administration.<sup>17</sup> They originated along with major legal reforms, in reaction to the subordination of Islamic law and the Syariah court jurisdiction under British rule, particularly over criminal matters (a situation that continued beyond Independence).

Taking their cue from the model set by Kelantan in 1985, each Malaysian state has since instituted Syariah provisions covering a range of moral offences, usually listed under a section called "Offences Relating to Decency".<sup>18</sup> This section includes specific offences concerning sexual

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<sup>17</sup> Under the 1904 Muhammadan Laws Enactment of Perak, for example, the only moral sins criminalised were adultery and incest.

<sup>18</sup> Other components gleaned from the Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559) are offences against (i) *aqidah* (faith), e.g. wrongful worship, false doctrine, etc.; and (ii) the sanctity of the religion and its institution, e.g. insulting Islam, defying a Court order, holding contrary opinions to *fatwa*, failure to perform Friday prayers, disrespect for Ramadhan, gambling, consuming intoxicating drink, non-payment of *zakat* or *fitrah*, etc. There is also a section for "miscellaneous offences", e.g. giving false evidence, destroying places of worship, encouraging vice, causing marriages to breakdown, *qazaf* (false accusation), etc. and another covering "general matters" such as the appointment of rehabilitation centres and

transgressions, some of which were already included in the pre-existing Administration of Muslim Law Enactment/Act (e.g. sex work, pimping, incest, sex outside marriage, and *khalwat*). However, new offences have also been named in state religious statute books starting in 1985, including *liwat* (anal sex), *musahaqah* (same sex relations between women), cross-dressing, and indecent acts in public places.<sup>19</sup> Like the earlier Muhamaddan laws, the SCOA also criminalises moral offences such as gambling and the consumption of alcohol. Classified as religious crimes, these can be punished with a maximum fine of RM 5,000 (approximately USD 1,100), three years imprisonment, six lashes of the *rotan* (cane), or any combination of the above.<sup>20</sup>

Most Malaysians remained oblivious to the passage of this legislation until the mid-1990s, after it had been adopted in the more urban states of Selangor and the Federal Territory of Kuala Lumpur. To be precise, public attention was roused following the arrest of three Muslim women participating in the “Miss Malaysia Petite” beauty contest at a hotel in Selangor in 1997, increasing general awareness of the long arm of the State and its religious functionaries. In this striking and illustrative example of the policing of sexual morality, officers from the *Jabatan Agama Islam Selangor* (JAIS, Selangor Religious Department) observed the entire pageant before arresting the women for ‘indecent dressing’ and for contravening a *fatwa* which forbade Muslim women from participating in beauty competitions (Sections 31 and 12c respectively of the 1995 Selangor Syariah Criminal Offences Enactment).<sup>21</sup> While the charges were dropped when the Prime Minister intervened, one effect of these charges was that it highlighted to women’s groups the legal efficacy of *fatwas* and the opaque manner of their being created.

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the court’s power to commit an offender to an approved rehabilitation centre or home (in the case of women).

<sup>19</sup> In some states, there are additional provisions to cover offences related to “indecent” dressing and sex “against the order of nature” (e.g. bestiality), for example. See tan (2008) for a more detailed account of the evolution of this law and the differences between the states.

<sup>20</sup> For some of these offences, whipping is mandatory in some states, for example in the case of alcohol consumption in Pahang. See also footnote 41.

<sup>21</sup> The *fatwa* states, “Adalah haram bagi wanita Islam menyertai apa-apa jenis pertandingan ratu cantik” (It is forbidden for Muslim women to take part in any kind of beauty contest). It was gazetted in May 1995.

Since then, various moral provisions of the SCOA have been invoked, reminding Muslims that deviations from State-sanctioned Islam will not be tolerated. This is most evident in the way local media, particularly the Malay vernacular press, highlight cases involving *khalwat* with increasing frequency. It was not uncommon to see such reports featured at least once a week, profiling the so-called moral transgressions of ordinary citizens, celebrities, politicians and members of high society. Indeed, going by the statistics of the Jabatan Agama Islam Wilayah Persekutuan (JAWI, Federal Territories of Kuala Lumpur Religious Department) for 2006, *khalwat* was the most commonly prosecuted crime under the capital city's Syariah legal system, with 671 arrests that year.<sup>22</sup>

There have also been highly publicised accounts of raids on bars, clubs, and entertainment venues considered off-limits to Muslims. Several have involved women performers charged under respective state Syariah Criminal Offences laws for 'insulting Islam', 'encouraging vice', and 'indecent dressing'.<sup>23</sup> None of these, however, have been as high profile as the controversial 2004 raid of Zouk, a Kuala Lumpur club, by JAWI authorities. This incident, which will be described at greater length below, saw over 100 Muslim patrons detained for alcohol consumption and 'indecent' attire.

Less commonly reported is the attention directed at the bodies of sexually marginalised Muslims. This scrutiny highlights an expanding arena of moral policing enabled by the upgrading of the Syariah legal system—an important component of the state's Islamisation efforts. For example, where *mak nyah* were previously charged under a 'public nuisance' provision of the Minor Offences Act 1955, today transgender Malays are more likely to be prosecuted under a Syariah provision that defines this offence as: "Any male person who, in any public place, wears a woman's attire and poses as a woman for immoral purposes...".<sup>24</sup> One important distinction is that the penalty for 'public nuisance' under the Minor Offences Act is RM25 (USD 7) or 14 days in jail for first time offenders, whereas the Syariah provision includes a maximum fine of RM1,000 (USD 320) and/or 6 months in jail.

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<sup>22</sup> If the statistics from JAWI are any indication, the second most prosecuted offence was sex outside marriage (i.e. *zina*). See JAWI newsletter.

<sup>23</sup> For details of these episodes, see tan beng hui (2012).

<sup>24</sup> Section 28, Federal Territories Syariah Criminal Offences Act. The only states to penalise women who cross-dress as men are Perlis and Sabah.



While the rise of hegemonic Islam has seen renewed efforts to impose a particular standard of morality among the Malay populace—one which rewards procreation within heterosexual marriage, and criminalises other forms of sexuality and gender expression—non-Malays have also been caught in the fallout of religious moral regulation. For instance, even though Syariah laws apply only to Muslims, the question of whether non-Muslims involved with Muslim partners in offences such as *khalwat* should be charged has never been conclusively resolved.<sup>25</sup> As far as attire, ‘Islamic’ notions of decency prevail such that *all* Malaysian women who work in public institutions or offices are prohibited through the policies of their workplaces from wearing clothes deemed ‘revealing’ or ‘tight-fitting’. Islam has become the moral benchmark, to the extent that even non-Muslims publicly displaying affection risk being prosecuted. This was highlighted by the infamous ‘holding hands’ case involving a young (non-Muslim) Chinese couple arrested for ‘disorderly behaviour’ in the gardens of the iconic Kuala Lumpur Twin Towers.<sup>26</sup>

A final significant note: in addition to the applications described above, the SCOAs have the *potential* to be invoked at any time, to reign in those perceived as moral dissidents. In fact, some of the provisions regulating ‘offences against decency’ have never been or are seldom utilised, including those governing *liwat* (anal sex) and *musahaqah* (sexual contact between women).<sup>27</sup> With the exception of those caught for *khalwat* and perhaps ‘indecent behaviour’—which the media widely publicises—most other sexual transgressions make only irregular appearances in the local news. Despite this, the occasional raid or conviction reported is a sufficient reminder of the law’s latent powers, and also encourages self-regulation.

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<sup>25</sup> This explains why such debate continues to surface periodically, the latest being in April 2008 after a news report claimed that the government was coming up with a proposal to prosecute non-Muslim *khalwat* offenders. Following this, and a flurry of protests by members of the public, those responsible dismissed the report as erroneous. (“Ikim: No such *khalwat* proposal”, *Malaysiakini*, 4 April 2008, <<http://www.malaysia.kini.com/news/80883>>, Accessed: 4 Apr 2008.

<sup>26</sup> The couple have maintained their innocence and claimed that they were only holding hands in public. Being non-Muslims they could not be charged under Syariah but were instead arrested under the Parks By-laws of the Local Government Act. (“No kissing please, we are Malaysians!”, *The Sun*, 4 April 2006.)

<sup>27</sup> Thus far, the vast majority of cases involving male same-sex intercourse are dealt with under the Penal Code.

## The Mechanisms of Moral Policing

As discussed, in the 1980s and 1990s increasing Islamisation included the expansion and elevation of the Syariah legal and judicial system, and a corresponding expansion of the religious machinery. These, along with concurrent implementation of Syariah Criminal Offences legislation by most states and federal jurisdictions, are significant factors behind the escalating moral regulation seen in Malaysia over the last three decades.

This growth in the religious bureaucracy was enabled through the majorly revamped Administration of Islamic Law Enactment/Act,<sup>28</sup> which reorganised and expanded the powers of the existing *Majlis Agama Islam* (Council of Islam) and made the authority of these Majlis (Councils), *mufti* and Syariah courts independent of each other. Thus *mufti*—religious scholars appointed to advise the ruler and state government on matters pertaining to *Hukum Syarak* (Syariah law)—were transferred from the jurisdiction of the *Majlis* or *Jabatan Agama Islam*, to run the newly created Department of *Mufti* (*Jabatan Mufti*). Over the years these state departments have grown from in many cases the *mufti* only, to include a staff of up to 10, and sometimes a deputy as well (Mohamed Azam Mohamed Adil, 2004). The *mufti* also heads the state Fatwa Committee, which issues legally enforceable *fatwa* (religious opinions) clarifying the official state position on Islamic matters that are confusing or contentious. Additionally, all 13 state *muftis* sit on the National Fatwa Council (*Jawatankuasa Fatwa Majlis Kebangsaan bagi Hal Ehwal Ugama Islam*), a federal body which is also empowered to issue *fatwa* (but which are non-binding unless gazetted by relevant state authorities).<sup>29</sup>

The Department(s) of Mufti (*Jabatan Mufti*) works closely with the Department(s) of Religion (*Jabatan Agama Islam*), which have also been strengthened and expanded with the expansion of state-led Islamization, from minimally-staffed departments,<sup>30</sup> to ones serviced by hundreds of personnel (the actual numbers of a given department correlate with the size

<sup>28</sup> See for example the 1993 Federal Territories Administration of Islamic Law Act.

<sup>29</sup> Apart from the *mufti*, the Council also has five expert members who are approved by JAKIM. All appointments are made by the Council of Rulers.

<sup>30</sup> Prior to the 1990s, the key officers in a Religious Department were its head (Chair), Mufti or Chief Kadi, Secretary or Administrative Officer, and in some cases, the Director or Secretary of the *zakat* (tithe) and *baitulmal* funds (Jaafar and Mohd. Khialdin, 1984).

of the state's Muslim constituency). Typically, a *Jabatan Agama Islam* today has at least 8-10 divisions, each conducting a similar set of activities in its respective state. These include the enforcement and administration of Syariah laws, prosecution, education, *dakwah*, research and the administration of mosques.<sup>31</sup>

While many of these functions were already in place in the previous religious departments, the establishment of separate law enforcement departments only occurred in the 1990s, specifically to target immorality among the Muslim populace. It was during this period that the current well-known expression “*amar ma'ruf, nahi mungkar*” (enjoin what is good, forbid what is evil) started to gain traction and became increasingly deployed by figures in authority. The newly formed departments augmented the number and qualifications of staff, improved infrastructure and facilities, and had their power increased.<sup>32</sup> The Syariah Criminal Procedure law expanded the authority of the *Jabatan Agama Islam*,<sup>33</sup> enabling them to involve mosque officials, village chiefs and sanctioned religious teachers as moral police when required.<sup>34</sup> Many departments also encourage members of the public to report suspected moral offences, which in the cases of Selangor and the Federal Territory of Kuala Lumpur is made easier through the existence of a toll-free 24-hour hotline.<sup>35</sup>

To further widen their reach, almost all the enforcement units operate with the assistance of volunteers. In states like Selangor, Melaka and Terengganu, volunteers have been enlisted in the *Mat Skodeng* (snoop squads) and are encouraged to report Muslims committing ‘immoral’ acts (Tan, 2008). In

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<sup>31</sup> For details of the activities they conduct, see the various websites of the Jabatan Agama Islam, sometimes known as the Jabatan Hal Ehwal Agama Islam in some states.

<sup>32</sup> In Selangor, the enforcement unit alone has 115 personnel making it the largest in the entire country.

<sup>33</sup> See for instance, the Syariah Criminal Procedure (Federal Territories) Act 1997 (Act 560).

<sup>34</sup> In Kelantan, these volunteers form the *Skuad Amru* which is also responsible for ‘averting immorality’ by providing counselling or motivational programmes, as well as religious talks, particularly for ‘delinquent youth’. See the website of the Jabatan Hal Ehwal Agama Islam Kelantan <<http://www.jaheaik.gov.my/index.php?laman=pentadbiran&id=penguatkuasaan>>, Accessed: 2 October 2009.

<sup>35</sup> See Khairil Anhar, “The dilemma of moral policing”, *The Nutgraph*, 23 October 2008, <<http://www.thenutgraph.com/dilemma-of-moral-policing>>, Accessed: 24 Oct 2008

other states, volunteers from the para-state RELA (Ikatan Relawan Rakyat Malaysia; Malaysian People's Volunteer Corps), regularly participate in anti-vice operations conducted by the religious authorities. Also noteworthy is the coordination between the *Jabatan Agama Islam* and other law enforcement agencies, including the police and local city or town councils. Anti-vice operations often involve all three parties, with volunteer enforcers in tow.

Beyond the state-level religious machinery, we must also consider the workings of JAKIM, the federal apparatus tasked with coordinating Islamic affairs in the country. JAKIM has been an extremely influential player in Malaysia's Syariah reforms, and in shaping the direction of moral policing.

While the prerogative to adopt Islamic laws remains with state governments, the powers of their federal counterpart to shape these laws should not be underestimated. This is done largely through the Technical Committee on Syariah and Civil Law Reform, which thus far has created five model laws—Administration of Muslim Law, Islamic Family Law, Syariah Civil Procedures, Syariah Criminal Procedures and Syariah Evidence Law<sup>36</sup>—that will streamline Syariah legislation across the nation. Because these laws fall within the jurisdiction of states, JAKIM had to lobby for support of the standardisation of these laws; they were ultimately approved by the Conference of Rulers (*Majlis Raja-raja Malaysia*),<sup>37</sup> effectively by-passing any potential dissension by the respective state legislators or religious bureaucracy.

Although, as a federal body, JAKIM does not have any official role in the passage of Islam-related legislation at the state-level, its influence and the regard—or as some might say, awe—in which it is held is considerable. One interviewee who was a former member of the Technical Committee that streamlines Syariah and civil laws noted that some ministries defer to JAKIM to ensure that their proposals or policies are Syariah-compliant before proceeding with implementation, though there is no official directive for them to do so. The empowerment of JAKIM has been facilitated by the

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<sup>36</sup> It has also worked on a model law for Syariah Criminal Offences, however the different states have not yet agreed on its adoption.

<sup>37</sup> This body comprises the titular heads of every State (i.e. *sultan* [Malay ruler] or *Yang Dipertua Negeri* [governor]). Since *sultans* have the ultimate say over Islamic matters of their respective states, this body is symbolically regarded as the apex institution governing Muslims.

reluctance of state-level officials to evaluate what is considered Islamic, and to be held responsible for such decisions. This jurisdictional multiplicity is such that spelling and grammatical mistakes in the drafts of Syariah laws have sometimes slipped through; ultimately the dynamic places significant power in the hands of the religious functionaries at JAKIM.

### **The Impetus Behind the Growth of Moral Policing**

In the foregoing, we have sought to describe how the sexual morality of Malaysian Muslims has been subjected to State regulation in the 1990s and 2000s, and how the enforcement of conservative ‘Islamic’ sensibilities regarding morality has been enabled through State mechanisms. Unaccounted for thus far are the social conditions which have allowed this to occur, and which have legitimised this moral regime.

We have noted that contests between political parties representing Muslim Malays led to competition between parties to ‘out-Islamise’ each other. But domestic politics have not been the only cause of heightened Islamic consciousness in Malaysia; international developments have also had an impact. As has been noted elsewhere, the 1979 Iranian revolution had a significant effect, inspiring a push for Islamisation in many Muslim majority countries.<sup>38</sup> More specific to Malaysia, however, was the development of a discourse deployed by Malaysian and other Asian leaders to try and neutralise accusations of human rights abuses from Western countries. The “Asian values” discourse, to which former Prime Minister Mahathir Mohamad contributed significantly, privileged economic development, political stability and the general welfare of the populace over the liberties of individuals, which purportedly had to at times be curtailed in the pursuit of the former (see Ong, 1999: 73-77; Mohd Azizuddin, 2008; Harper, 1997).

Also according to the Asian values discourse, Asians emphasised ‘traditional family values’, the sanctity of the nuclear family, and decried (allegedly Western) sexual permissiveness. Indeed, the West was portrayed as the source of a corrupting sexual depravity and perversion. This view was most clearly articulated by Mahathir during the 1990s, and expressed in a book he

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<sup>38</sup> For the impact of the Iranian revolution in Malaysia, see Zainah Anwar (1987).

co-authored with the conservative Japanese politician Shintaro Ishihara titled *The Voice of Asia*. In it Mahathir and Ishihara describe the West as rife with single-parent families, incest and homosexuality, with crumbling moral foundations and diminished respect for marriage and family values (1995: 80-81).

While difficult to measure empirically, the impact of the Asian values discourse appears to have been considerable. In particular, it helped entrench an association of non-heterosexual and pre-marital sexual behaviour with ‘the West,’ while Asians were constructed as naturally heterosexual (when not under pernicious Western influences). This is despite the fact that, contradictory to the image portrayed through the Asian values discourse, Southeast Asia as noted earlier was once host to a relatively sexually permissive culture.

In addition to these macro level influences, also to be considered are the micro level motivations of groups and individuals who direct and undertake moral policing in Malaysia. In the view of one highly positioned member of a state religious body we interviewed, this increased policing owes less to a belief that moral transgressions are rising, but rather stems from a conviction that they will escalate beyond control if the situation is not strictly regulated. Other religious functionaries interviewed agreed that, as a first step, Islam prescribes *dakwah* (in this context, education) as the way to address ‘social ills’. However, many do regard legal measures as necessary deterrents to ‘immoral’ behaviour. According to one Syariah expert, an earlier focus on encouraging people to do good without prohibitions against moral transgressions was misguided, as per the stock Islamic notion of “*amar ma’ruf, nahi mungkar*” (enjoin what is good, forbid what is evil). Preventative measures through *dakwah* have limited success, when for example Muslims are enjoined not to commit *zina*, yet continue to have access to pornographic materials (which are not banned). As one scholar of Islamic law noted, while provisions criminalising *liwat* and *musahaqah* are seldom enforced, having them in the statute books is important in terms of underscoring that they are prohibited in Islam.

Such intentions notwithstanding, there are also Syariah policymakers who plainly regard punitive approaches as superior to ‘soft approaches’. Some argue that current maximum Syariah penalties of RM5,000/three years in

jail/six strokes of the cane/any combination of these, do not sufficiently discourage potential offenders, and should be raised. Another religious bureaucrat we interviewed suggested that the current limits of Syariah penalties are an ‘embarrassment’ to the Syariah legal system, indicative of the precedence given to the civil law system. Thus, some are pushing to raise maximum penalties significantly.<sup>39</sup> Datuk Jamil Khir Baharom, a Minister overseeing Islamic affairs did in fact announce that the government was considering harsher punishments for Syariah offences, claiming that people trivialise the law because the caning provision is underutilised, and that this was contributing to an increase in Syariah-related crimes each year.<sup>40</sup>

A number of interviewees, including members of state religious bodies and Syariah legal practitioners, agreed that consuming alcohol, *zina*, prostitution, cross-dressing, etc., should only be criminalised if they take place in the public realm or become publicly known. For instance, while Islam prohibits alcohol consumption, in their view drinking at home or at private gatherings should not be prosecuted. According to several religious authorities we queried, this aligns with the Islamic principle respecting an individual’s right to privacy; furthermore they counsel leniency in first time offences where a perpetrator expresses immediate repentance. However, public drinking, public eating during Ramadan, and cross-dressing, especially in front of non-Muslims, paint “a bad picture of Islam”, as another interviewee put it. Such public ‘transgressions’ also ‘threaten to destabilise society’, because, for example, those who consume alcohol may become intoxicated and “cause havoc”, and commit other crimes, including at worst, murder. Similar logic is applied to the issue of non-martial sex, which it is argued leads to children born out of wedlock who will face the shame of illegitimacy and disrupt the integrity and proper functioning of the family unit.

While at the official level there does appear to be some appreciation for distinguishing between private sins versus public crimes, from the examples

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<sup>39</sup> This was proposed at a meeting between IKIM and the Syariah Judiciary Department to review and resolve gaps in the existing Syariah system. See “Proposal to punish non-Muslims for khalwat”, *The Star*, 2 April 2008. In 2016, a bill, RUU355, seeks to increase potential punishments to RM100,000, 30 years imprisonment and 100 lashes. See: <http://www.sistersinislam.org.my/news.php?item.1455.27> (accessed 17 December 2016).

<sup>40</sup> “Caning mulled for offences under syariah”, *The Star*, 24 April 2009.

detailed earlier, those in charge of enforcing the law do not always recognise this distinction especially where *khalwat* is concerned. Indeed, the incidences involving the *Mat Skodeng* (peep squads) and *Jabatan Agama* (Department of Religion) officers barging into homes of innocent bystanders have also exposed the potential for abuse in the policing of Islamic morality. *Khalwat* charges are far easier to press than charges of *zina* (which require four male witnesses to the act of sexual penetration). This is because of *khalwat's* broad definition, which can result in charges against unrelated men and women merely occupying the same building, without any evidence of intimacy (see Bernama, 2009). While all departments involved in regulating *Syariah* have strict procedural guidelines to ensure such operations are done by the book and can hold up in court,<sup>41</sup> it is difficult to ensure compliance by all enforcement team members, given that an anti-vice squad can range from between 10-100 members, with the possible involvement of volunteers as well. Even with the requirement to don uniforms, carry identification tags, and travel in vehicles with official signifiers, rogue enforcers and imposters are not unheard of.

Those who seek to enforce *Syariah* moral standards do so for a variety of reasons. Conversations with a number of lawyers and others involved in moral policing suggest that some enforcers are entirely motivated by ‘piety’, believing that the policing of private behaviour will eventually bring about a morally-upright Muslim society in Malaysia, closer to “the model promoted in the Quran and the Hadith”. Others, however, have more practical motives: one *Syariah* lawyer averred that many employees of religious bodies dislike conducting nightclub raids but do so once a month “just to meet their [departmental] KPI [key performance indicators]” or because it is part of their job. In the case of *khalwat* offences, it was noted by interviewees that there are many more encounters between enforcement officers and alleged offenders than appear before the courts. This is due in part to difficulties securing sufficient proof for prosecution to take place. Another *Syariah* lawyer was of the view that officers choose to respond to a report of *khalwat* in order to ‘*kau tim*’, a Cantonese word that translates as ‘to settle’, a euphemism for the extortion of bribes.

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<sup>41</sup> See the website of *Jabatan Hal Ehwal Agama Islam Kelantan*, available at: <http://www.jaheaik.gov.my/index.php?laman=pentadbiran&id=penguatkuasaan> (accessed: 1 October 2009).



### Controversies over Moral Policing and its Effects on those Targeted

The strengthened powers and widened reach of religious authorities in Malaysia have resulted in unfortunate and improper exercises of power. One high profile example occurred in October 2006, when religious authorities on the island of Langkawi stormed into a hotel apartment in the early hours of the morning to apprehend a couple suspected of committing *khalwat*. The couple—American married, in their 60s, and most of all, not Muslim—were on a six-week sailing holiday and had stopped at the island. Reports of the couple’s traumatic encounter with religious authorities embarrassed the federal government and, in an uncommon move, those involved in the raid apologised and a goodwill payment was proffered to the couple.<sup>42</sup> In another case, the Director of the Perak *Jabatan Agama Islam* excused three of his officers who had wrongly invaded a woman’s home and humiliated her, claiming that they were “new to their jobs” and had “made a mistake based on wrong information”.<sup>43</sup> But perhaps the most disturbing example of a *khalwat* raid gone wrong happened in June 2009, when a young woman in her 20s fell to her death from a third-storey hotel room trying to flee religious authorities on a raid.<sup>44</sup> As in a subsequent case where a former police officer fell to his death in a *khalwat* raid (Malaysiakini, 2011), there was no public outcry nor any official explanation or apology from the authorities, presumably owing to an assumption that, unlike the American couple, those who died fleeing authorities were at fault both for their crime and for attempting to evade capture.

Much less publicised than heterosexual transgressions are the daily prosecutions of *mak nyah*, in particular those who engage in sex work. Muslim members of the *mak nyah* community told us that they are regularly detained and charged under Syariah law, rather than common law as was the case 10-15 years ago. Whether by police or religious authorities, violations ranging from extortion, to theft of earnings and personal belongings such as cellular phones, are common. Some *mak nyah* have also been physically and verbally assaulted by police and commanded to perform sexual acts. *Mak*

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<sup>42</sup> “Anti-*khalwat* men terrify elderly foreign couple”, *New Straits Times*, 22 October 2006.

<sup>43</sup> “Wife plans to sue religious department over vice raid on house”, *New Straits Times*, 15 August 2008.

<sup>44</sup> “Woman falls to her death while fleeing raid”, *The Star*, 17 June 2009.

*nyah* sex workers seldom file police reports about these violations—or those committed by clients or other members of the public for fear of further humiliation or retribution.<sup>45</sup> In the few cases where harassment and abuse by members of the *Jabatan Agama Islam* (Department(s) of Religion) make headlines, offenders generally still get away with impunity, as in the case of a *mak nyah* who was hospitalized after being assaulted by the religious police in Malacca.<sup>46</sup>

As mentioned in the opening of this article, towards the end of 2008 the National Fatwa Council issued a decree against *pengkid* (tomboys). According to Wan Mohamad Sheikh Abd Aziz, the then head of JAKIM, this was necessary to counter a “disturbing trend” where women were not only dressing and behaving like men, but also engaging in same-sex relations, which is *haram* (forbidden) in Islam. He claimed that if left unchecked, this would become a norm and threaten the institution of the family and society. The *fatwa* was thus to “save the next generation”.<sup>47</sup>

This *fatwa* caused some controversy, with some individuals and two civil society organisations—Food Not Bombs and Katagender—arguing in a statement (Cindy, 2008) that, among other things, women have rights over the way they present themselves and that the *fatwa* constituted discrimination against sexual minorities. Soon after the controversy subsided, the National Fatwa Council sparked off another furore, this time by declaring yoga *haram*. Perhaps more so than the ‘tomboy’ *fatwa*, the ‘yoga’ *fatwa* brought to the fore questions about lawmaking and the powers of religious bureaucrats. As events unfolded, the public learnt that once gazetted, religious opinions become law, *without* going through the usual deliberations process at the state assembly. The fact that this effectively

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<sup>45</sup> It should be noted, however, that in 2010 the civil society organisation Justice for Sisters formed in order to ‘to raise public awareness about issues surrounding violence and persecution against the Mak Nyah community in Malaysia’ and also to ‘raise funds to finance court cases that have been brought up against transgenders who have been charged in Syariah court’ (see their website at <https://justiceforsisters.wordpress.com/about/>) See also Zurairi (2014).

<sup>46</sup> “Transsexual: I was treated like a hardcore criminal”, *Malaysiakini*, 10 Aug 2007. See also Anwar (2009); and for more on the difficulties faced by trans people in Malaysia, see Teh (2001).

<sup>47</sup> Interview with JAKIM director-general in “Fatwa on ‘pengkid’ to prevent lesbianism”, *The New Sunday Times*, 23 November 2008.

gave non-elected religious functionaries the authority to make legally-binding decisions on Muslim citizens of Malaysia, regardless of ethnicity, was not lost on civil society. More than 10 years earlier, women's organisations had already highlighted this concern during the 1997 Miss Malaysia Petite pageant. Until then, few had realised that the Selangor Fatwa Committee had passed the *fatwa* prohibiting Malay women from participating in such contests. Even fewer knew that this *fatwa* had become law some months later, nor that 'non-compliance' had become a punishable offence under the SCOA.

The punitive and potentially violent nature of Syariah criminal laws when applied to moral transgressions was highlighted in 2009 when Kartika Sari Dewi Sukharno, a Malay woman, was caught drinking beer and sentenced to a RM5,000 fine and 6 strokes of the cane (Malay: *rotan*). The story dominated headlines for weeks in Malaysia and was widely reported overseas. Although other Muslims have been similarly punished for consuming alcohol, Kartika would have been the first woman to be caned, as she did not contest her sentence.<sup>48</sup> Appalled, women's groups submitted a memorandum to the Prime Minister calling for an end to whipping and other forms of corporal punishment. They also pointed out the contradiction between state (religious) and federal (common) laws—women may be caned under the former but not the latter.<sup>49</sup>

Before examining some of the responses by Malaysians to the moral policing described here and to the more general trend toward a conservative Islamic hegemony, it is necessary to note that many of the starkest examples of moral policing have been accompanied by public controversy. However, it is also true that much of the enforcement of morality on Muslim Malaysians also occurs without public attention, through less formal or overt processes, and not necessarily through Syariah authorities. The National Registration Department, for example, has been under a directive to deduce from a

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<sup>48</sup> Prior to this, the only state to have caned male beer drinkers was Kelantan. In Pahang, the same judge who sentenced Kartika had meted out the same punishment to another woman some months earlier. That sentence, at the time of writing, however, is pending an appeal. Despite the absence of an appeal, Kartika's sentence has not been carried out at the time of writing, perhaps due to the high stakes involved in part owing to the high and international profile of the case.

<sup>49</sup> As stipulated under Section 289 of the Criminal Procedure Code.

baby's birth date whether or not conception occurred within marriage and, if not, to report the parents to the relevant state religious department (Hewett, 2008). A number of interviewees had direct experience of being told that they ought not register the father's name when the baby was conceived out of wedlock (see The Star, 2009). In 2011, the director-general of the National Registration Department, Jariah Mohd Said, stated that this had been in force since 2000 because, "For a Muslim, an illegitimate child is one who is born out of wedlock as well as a child who is born less than six months from the date of the mother's marriage" (The Star, 2011). Jariah cited the reason for this practice as being based on a 1981 *fatwa* and, when asked if her department had considered the long-term effects of not registering a child's father's name, responded only that the "question should be asked of the Jabatan Agama Islam because that is outside our powers."

From the perspective of many of those targeted by policing, there is a gap between what policy-makers allegedly intended in enacting Syariah criminal laws—i.e. the prevention of *maksiat* (vice)—and the motivations of some religious enforcement officers.<sup>50</sup> Most attribute the current heightened policing of morality to the latter, whom they claim are primarily interested in extortion of bribes or sexual favours (see also Teh, 2001). Our research suggests that in practice, the extent to which abuse or exploitation takes place in anti-vice operation varies. For example, targets who are better acquainted with the law and who have the confidence to confront authorities are less likely to be taken advantage of. As well, the probability of religious officers following departmental guidelines is higher in more visible *khalwat* operations than for night-time operations, for example, on unmarried couples in cars, public parks or secluded areas.

### **Contesting Moral Policing**

The increase in moral policing has been contested in various ways. While the organisations and individuals acting to oppose the increasingly restrictive situation described above are too numerous to be listed, in this final section

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<sup>50</sup> The information here is based on interviews with trans women, activists working on female sex worker and lesbian issues, and heterosexual women who have had encounters with the Jabatan Agama Islam.

we briefly outline some of the most important events, dynamics and actors that have challenged moral policing in recent years. While some are less direct and obvious than others, all contribute to the questioning of the authority and power upon which such moral policing rests.

*Response to the raid of Zouk nightclub and outcry over moral policing: the formation of Malaysians Against Moral Policing (MAMP)*

In 2005 an incident of moral policing occurred which galvanised public opposition and crystallised the issue for civil society groups, placing it high on the advocacy agenda. On 20 January 2005, JAWI conducted a raid on the popular Zouk nightclub, in the heart of Kuala Lumpur, a stone's throw from the city's landmark Twin Towers. Interviewees described how Muslim patrons were taken to a lock-up in Kuala Lumpur, where the men were tested for alcohol consumption, while the women reported being required to parade in front of the officers, who took photographs and adjudicated the women's outfits' 'decency'.

In subsequent days, reports from those detained indicated that the officers had sexually harassed the female detainees. In addition to being ogled, the officers also made comments and asked questions about the women's genitals (Kent, 2005; Jason, 2005). One newspaper reported a detainee's recollection of an officer's comment, "Ini musim panas agaknya sebab dia orang pakai baju puting-puting semua nampak" (It must be the hot season because they are wearing skimpy clothes, even their nipples are visible).

After assessing the women's attire, JAWI officers issued "'summonses' for counselling sessions... under the guise of conducting an investigation under Section 58(1) of the Syariah Criminal Procedure (Federal Territories) Act 1997" (Wong, 2005). The officers also threatened the detainees with arrest if they did not appear at these sessions. However, in a written statement in response to a possible challenge over the legality of the summonses and the threatened arrest, JAWI "clarified" that the sessions were voluntary (Arfa'eza and Nurul Nazirin, 2005; Wong, 2005).

In the wake of the JAWI raid on Zouk nightclub, fifty NGOs and 220 individuals formed a coalition called Malaysians Against Moral Policing

(MAMP) and called for a commission to review Malaysia's civil and Islamic laws, in particular those that infringed fundamental constitutionally protected liberties. While the raid precipitated the formation of MAMP, its concerns were broader. At a press conference in March 2005, many of the concerns outlined earlier in this chapter were affirmed as being unwarranted intrusions by the state into the moral lives of Malaysian citizens. The issues MAMP raised ranged from the right of JAWI to conduct the raid at Zouk, to the legally binding nature of *fatwas* (see Fauwaz, 2005). In its statement, 'The State Has No Role in Policing Morality', MAMP pointed out that the provisions under which moral infractions are prosecuted were vague and open to "interpretation and abuse by enforcement officers, which can lead to selective prosecution and victimisation, usually of those from a marginalised class, gender and/or community" (SIS, 2005); The statement went on to "affirm that morality is a matter best dealt with by individuals and their families."<sup>51</sup> The joint statement also reiterated the signatories' protest against the use of "state instruments, and the individuals and groups enlisted as their surrogates, to regulate morality. How people dress and where, how and with whom they socialise are personal choices" (Ibid.).

The longer-term impact of MAMP however, is difficult to measure owing to the fact that its activities did not extend beyond 2005. Despite being relatively short-lived, it was at the time important in coordinating and crystallising often-inchoate concerns held by many Malaysians about the policing of morality and/or the increasing influence of conservative Islam in Malaysia's socio-political sphere. MAMP brought to consciousness and exemplified the fears of some Malaysians regarding the power that those in State-sanctioned positions of religious authority had in determining the behaviours of others with respect to morality, be they sexual or religious, as

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<sup>51</sup> The signatories to the joint statement called for:

- a) The repeal of provisions in religious and municipal laws that deny citizens their fundamental right to privacy, freedom of speech and expression, and those that overlap with the federal Penal Code;
- b) The appointment of a committee to monitor the process of repealing these laws, including representation from women's groups, human rights groups, civil society organisations, progressive religious scholars and constitutional experts;
- c) The strengthening of pluralism through community dialogue around morals in society, rather than the divisiveness bred by sub-contracting of moral policing and neighbours spying on neighbours.

was evident in a parallel issue that pointed towards similar concerns described below.

*Challenging Islamic hegemony through the issue of freedom of religion: Article 11*

Although the furor over the Zouk raid attracted a great deal of media attention, the issue of the moral policing of sexuality retreated from the foreground of civil society's agenda until late 2008, as we shall elaborate on shortly. Meanwhile, another issue rose to prominence which, although not directly related to moral policing, did contest the increasing political and legal presence of an intrusive, conservative Islam: freedom of religion, specifically the right or lack thereof of Malaysians administratively categorized as Muslims to officially convert to another religion (for more, see Lee, 2010a). Lawyers and activists increasingly noted the restrictions involved for Muslims attempting to convert.<sup>52</sup> The Courts had determined that conversion from Islam for whatever reason required a petition to the Syariah Courts, and large sections of Malaysian civil society regarded this as contravening Article 11 of the Malaysian Constitution, which protects freedom of religion.

A coalition of civil society organisations calling itself *Article 11* formed to advocate for the privileging of a progressive interpretation of the Constitution giving citizens unfettered rights to religious freedom. While it is beyond the scope of this chapter to explore their advocacy in detail (see instead Lee, 2010a), what is relevant here is that while sexuality-related rights dropped from the public advocacy agenda, advocacy seeking to restrict intrusions by Islamic authorities into people's moral lives continued. While not a deliberate manoeuvre by those trying to promote a rights-based approach towards sexuality in Malaysia, the general principle of the right to freedom of conscience underpinning the issue of religious freedom does provide a different channel through which to engage civil society and the general public, rather than the specific issue of sexuality rights. The stake held by all non-Islamist organisations in the issue of freedom of religion was clearer

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<sup>52</sup> The ramifications of being administratively categorized as a Muslim in Malaysia include being subjected to Syariah law, being unable to have total control of the division of estates after death, and being unable to marry a non-Muslim.

(because the status quo construed Islam as having primacy in Malaysia) than if the issue had been related to sexuality (especially considering that some Article 11 coalition members would likely not have supported a progressive interpretation of the rights of women and sexual minorities).

### Pragmatic advocacy

The preceding provides a small window into some of the advocacy pragmatics within the public sphere and civil society in Malaysia concerning issues of sexuality, such that outright advocacy for (progressively interpreted) sexuality rights might not achieve traction with the public or the media, and might in fact do more harm than good. Thus, some civil society members have regarded advocacy on relatively more widely acceptable issues more effective for advancing sexuality rights in the longer term. One such example is an organisation in Malaysia which began its life in the 1980s as a gay rights advocacy group, but which evolved into an organisation that undertook its advocacy in the language of HIV/AIDS prevention and education. Thus for example, a member of that organisation described in an interview for this research how, in response to frequent raids on sex workers, his organisation approached one religious department in Malaysia to discuss the negative public health consequences of these raids. Among the results of the relationship that developed was a reported diminution in the department's raids on sex workers, as well as access to some funding for various upgrades to the organisation's centre where religious classes have regularly taken place.

### Other challenges to state-sanctioned Islamic authority in Malaysia

Within our discussion, mention must be made of Sisters in Islam (SIS), a Malaysian NGO which has gained world renown (e.g. Schroeter, 2009) advocating for understandings of Islam that advance the rights of women in Islam as equal to those of men. In the course of its work and advocacy, SIS has entered the debate over moral policing on a number of occasions, including as a member of the MAMP (Malaysians Against Moral Policing) coalition. To a significant extent, SIS's position on moral policing, drawing from traditional Islamic sources, revolves around the argument that such policing transgresses the fundamental Islamic tenet of the right to privacy (e.g. Malaysiakini 2015). For example, on the issue of *khalwat* raids, SIS wrote



letters to newspaper editors expressing concern over the “the possible over-zealous enforcement of *khalwat* laws” which may “lead to the violation of personal dignity and privacy that is actually forbidden in the Qur’an and hadith.” The letter goes on to cite *Surah an-Nur*, “If you find no one in the house, enter not until permission is given you: if you are asked to go back, go back: that makes for greater purity for yourselves.” To reinforce the notion that, far from a religious requirement, *khalwat* raids are counter to Islam, this letter also cites a number of hadith that forbid spying (SIS, nd).

The authority of Islamic officials, as well as the cogency of some of their views and pronouncements, have likewise been challenged by SIS, using traditional authoritative sources (Quran and Sunnah) and methods of exegesis (*ijtihad*) to support its position. SIS is not alone in this approach, and similar criticisms using an Islamic framework also question the position of Islamic authorities. Most recently these include bloggers (whose influence in Malaysia can be significant) such as Haris Ibrahim<sup>53</sup> and Jahaberdeen Mohamed Yunoos<sup>54</sup> (see also Jahaberdeen Mohamed Yunoos, 2006), as well as individuals working within party structures and State Islamic bodies. One notable voice in the latter regard is Mohd Asri Zainul Abidin, who is best known as the (former) *Mufti* of Perlis. In the past, he frequently dissented from the views of other *muftis*. For example, Asri’s opposition to the ‘yoga *fatwa*’ is well-known within Malaysian civil society, and he later went on to question the appropriateness of the legally binding nature of *fatwas* in Malaysia. He has in fact written that there should be numerous bodies with the authority to issue *fatwa*, none of which should be legally binding (see Al Islam, 2009; (see also Wan Saiful, 2009)).<sup>55</sup>

While some of these examples do not relate directly to the policing of sexual behaviour, advocacy for such things as proliferated and non-legally

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<sup>53</sup> <http://harismibrahim.wordpress.com/>

<sup>54</sup> <http://jahamy.blogspot.com>

<sup>55</sup> In November 2009, Asri was detained by the *Jabatan Agama Islam Selangor* (JAIS) for allegedly holding an unauthorised religious talk (see Zieman, 2009). Asri’s arrest would appear to indicate the hostility of the religious establishment in Malaysia to dissenting opinion. It should be noted that his arrest also precipitated significant public outcry and at the time of writing the matter remains unresolved and has not been addressed by the Syariah court.

empowered *fatwa*-issuing bodies has implications for moral policing in Malaysia, through curbing and decentralizing the power and authority of such bodies. Such measures, however, do not directly address the public or social attitude towards sexual minorities and ostensibly ‘deviant behaviour’. In the remainder of this section, we describe three instances where sexuality rights have been explicitly advocated.

### *Overt advocacy on sexuality rights in Malaysia*

In recent years, images of two Malaysian parliamentary ministers were released to the public in politically motivated attempts to tarnish and/or end those politicians’ careers. The first of these occurred in 2008 when a DVD was anonymously circulated featuring Chua Soi Lek, at the time a vice-president of the Malaysian Chinese Association and Minister of Health, engaged in an extra-marital sexual affair. The second incident occurred in 2009, when private photographs of the assemblywoman for the state seat of Bukit Lanjan were posted on the Internet.<sup>56</sup> On both occasions, while political opponents of these individuals exploited the situation, some members of Malaysian civil society protested the invasion of personal privacy. Support for the assembly woman was especially strong, with a coalition of women’s groups called the Joint Action Group for Gender Equality (JAG)<sup>57</sup> releasing a press statement condemning the invasion of privacy (see JAG, 2009). Wong also garnered support from over 3000 signatories to an internet petition, as well as from members of her own political coalition (Pakatan Rakyat) and the opposing coalition (Barisan Nasional), including, notably, some members of PAS (see Tan, 2009). Wong kept her seat and the support she received clearly indicates the existence of and potential for significant condemnation of privacy invasions, across religious, political or social affiliation in Malaysia.

As noted earlier, while support for sexuality rights from civil society dropped from the agenda after the Zouk raid issue, it has reemerged to some extent

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<sup>56</sup> Those who sought to take political advantage of this situation suggested that these photographs indicated that Wong was immoral (and therefore unfit for office) because she, as a single woman, allowed a man (the photographer) into such intimate proximity that he was able to take the photographs.

<sup>57</sup> JAG is composed of the following civil society organisations: All Women’s Action Society (AWAM), Persatuan Kesedaran Komuniti Selangor (Empower), Sisters in Islam (SIS), Women’s Aid Organisation (WAO), and Women’s Centre for Change, Penang (WCC).

since 2008. One women's rights activist, Meera Samanther, noted<sup>58</sup> that in a conscious "test [of] the water" concerning the position on sexuality issues among JAG member organisations, she and a colleague conducted a survey to elicit members' views on sexuality as an advocacy issue.<sup>59</sup> They found that members felt sexuality and sexual rights were "within their larger ambit of activism, but [they were] not proactively spearheading it". Such issues generally tended to be discussed in conjunction with other issues such as violence against women. At a workshop organized by the Coalition for Sexual and Bodily Rights in Muslim Societies (CSBR), Samanther noted that some activists admitted that though issues of sexuality rights were perhaps outside of their familiar territory, the time had come to "get out of our comfort zone and educate ourselves". Samanther acknowledged the likely sensitivity of the public over sexuality related issues, but drew a parallel with the abovementioned *Article 11* coalition campaign for religious freedom, noting that "the issue of sexuality is equally sensitive" to religious freedom in Malaysia and that "sexuality should be taken from the same angle", namely, one "based on equality and non-discrimination".<sup>60</sup>

Since then, JAG has decided to be proactive in addressing sexuality rights, beyond reacting to violations as they occur. In December 2009, as part of the 16 Days of Activism against Gender Violence,<sup>61</sup> four JAG members, in partnership with a group of artists, held a performance and installation at a monthly alternative arts festival called "*Pekan Frinjan*" (roughly 'Fringe Festival'), to raise public awareness among those other than JAG's usual English-speaking, middle-class crowd, of violations suffered by members of sexually marginalised groups. The event, "*Projek Sentuh: Seksualiti dan tubuh* (Project 'Touch': Sexuality and the body)" was a success among the

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<sup>58</sup> "Challenges and experiences of the women's groups on why they are or are not engaging with sexuality issues, apart from violence against women", Presentation at the Sexuality Institute of the Coalition for Sexual and Bodily Rights in Muslim Societies (CSBR). Held in Cyberjaya, Malaysia, 20 August 2008.

<sup>59</sup> The survey was conducted in advance for a session on the state of sexuality advocacy in Malaysia, held at a workshop organised by Fiesta Feminista, a JAG initiative to develop feminist leadership, among other objectives.

<sup>60</sup> See footnote 55.

<sup>61</sup> Introduced to mark the connections between women's rights and human rights, this global campaign begins on November 25<sup>th</sup>, International Day against Violence against Women, and culminates on December 10<sup>th</sup>, World Human Rights Day.

predominantly Malay youth audience and there are plans to repeat it in the future.

Finally, a significant development that requires noting is the coming into being of Seksualiti Merdeka (Sexuality Independence). This sexuality rights initiative and festival began in 2008 on Malaysia's Hari Merdeka (Independence Day) and has been held since in an art gallery in Kuala Lumpur. Between 2008 and 2010, it grew from a three-day festival featuring talks, workshops and musical performances (see Lee, 2008), to a two-week program which, in 2010 for example, featured a play about coming out that traveled to colleges and universities, an academic panel on sexual diversity, film-screenings, book launches and drag shows that interpreted well-known songs in a way that was supportive of sexuality-rights (see Ong, 2010; Lee 2010a; Lee 2014).

Although coverage of the event in the media between 2008 and 2010 was entirely positive (albeit restricted to English language presses), in the lead-up to the 2011 programme a furor erupted when the highly conservative pro-establishment Malay language paper, *Utusan Malaysia*, carried numerous stories about Seksualiti Merdeka that demonized the initiative and portrayed it as a 'free sex party' (e.g. Zulkiflee, 2011; see Siew, 2009 regarding conservative Malay language press). The Malaysian police subsequently banned Seksualiti Merdeka in view of Section 298A of Malaysia's Penal Code (which regards as an offence the causing 'disharmony, disunity, or feelings of enmity...on the grounds of religion') and Section 27 A1C (which entitles police to stop events if they are 'likely to be prejudicial to the interest of the security of Malaysia...or to excite a disturbance of the peace') (Lee, 2014).

The subsequent outcries over Seksualiti Merdeka included fervent condemnation of homosexuality from some quarters. Two Malaysian states—Pahang and Malacca—announced that they would reexamine their Syariah laws in order to better enable enforcement officers to bring lesbian women and gay men to trial (Roslina, 2011). However, the negative responses did not go without repost. Significant expressions of support for Seksualiti Merdeka also emanated from across sectors of Malaysian society (see Netto, 2011; MCCBCHST, 2011) and internationally (IGLHRC, 2011). Furthermore, some members of Malaysia's political opposition have expressed support for Seksualiti Merdeka's right to exist (Sivanandam and

Chun, 2011). These diverse reactions are evidenced of the divisions within Malaysian society over issues of sexuality.

## **Conclusion**

It is clear from our research and this account that understanding the contemporary policing of sexual morality of Malaysian citizens requires a nuanced and historically grounded perspective. Tracking how the policing of morality in Malaysian has come to be as pervasive, punitive and State-sanctioned as it has, requires a multifaceted analysis in order to account for an array of contributory elements. Our research points to a number of key factors in the development of Malaysia's moral policing. These include the legal and political legacies of colonialism, which in addition to giving Islam the power of statutory law, conflated Islam and Malay ethnic nationalism. In turn, as a result of developments in local politics, increased competition between the two key political parties to establish their Islamic credentials has developed, often demonstrated through the enforcing of conservative Islamic sensibilities on sexual morality.

Developments in the international arena have also been influential, such as the 1979 Iranian Revolution and human rights criticisms emanating from nations in the global north. As a consequence, Asian politicians have been able to sexually/morally 'otherise/demonise' the 'West' in opposition to Asian nations, including Malaysia. Malaysia's government promoted an image of the true Malaysian as a heterosexual who adheres to the 'norms' of marital sex, heteronormative gender roles and respect for the reproductive nuclear family. Non-heterosexual identities and non-marital sexuality have been cast as the result of pernicious external influences, and as un-Islamic and criminal. The deleterious effect of these developments on the freedoms of sexual minorities and anyone who does not conform to sexual norms become further complicated, as noted by some of our interviewees, by the practices of officers who target such individuals for reasons that range from a sense of pious duty to personal gain.

In addition to demonstrating the multiple and complex factors accounting for the policing of sexual morality, the Malaysian case also reveals the opposition

that can arise under and in reaction to such conditions. Over the years, various controversies have emerged over either the passing of particular laws or the manner of their enforcement, and civil society has responded by challenging moral policing on various grounds and by advocating for greater respect for freedom of expression, including religious freedom and individual sexuality-related freedoms. Although activism in Malaysia has tended to be marked by a degree of pragmatism and circumspection concerning advocacy for sexuality rights, sections of Malaysian civil society have emerged that overtly call for sexual minorities and sexuality-related rights to be recognized and respected. While the success of these movements is by no means assured in the Malaysian context, they do indicate an increased willingness on the part of some groups such as JAG and Seksualiti Merdeka to discuss sexuality rights. That there is some space opening up in Malaysia for non-normative identities to be expressed—however constrained—perhaps indicates that *some* legitimacy is being recovered for respecting for diversity in gender and sexual identities, which was in fact once part of traditional Malaysian society.

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## **Women's Sexuality and The Debate on the Anti-Pornography Bill in Democratizing Indonesia**

*Andy Yentriyani & Neng Dara Affiah*

### **Introduction**

On 30 October 2008, the Indonesian parliament passed its Pornography Bill, despite ongoing political and social opposition and debate since the Bill's introduction almost ten years prior. This research examines the impacts of both the debates around the Pornography Bill and the passage of the Bill itself, in terms of the implications for women's sexual rights and for women's agency within the context of ongoing democratization in Indonesia. We argue that the widespread political debate around the Pornography Bill from 2006-2008, and battles over the role of the state in regulating women's sexuality, reflect how gender and sexuality issues are manipulated by competing political and social forces in Indonesia's shifting political landscape.

The Pornography Bill debate is a powerful illustration of how both Islamist groups and state actors deploy identity politics in the quest for political power and legitimacy. While the Bill continues to be criticized for undermining both the diversity of Indonesian societies and women's sexual rights, and for leaving women exceptionally vulnerable to criminalization, we argue that the debate on the Pornography Bill has also stimulated the emergence of strong leadership among, and a stronger role for, women's rights groups and civil society in general in shaping the process and direction of democratization in the country.

### **Methodology**

Negotiation concerning public policy changes is a complex political process involving the manipulation of political opportunities and the creation of social movement. In order to understand the negotiation process as well as its impact, this research adopts an approach known as political process theory

(PPT). In this approach the focus of analysis is less on the structures that shape political opportunity and more on the interaction among supporters, opponents, and third parties (Tarrow, 1999: 75). To understand the processes at play, political process theory emphasizes evaluating the resources available to various groups and the available avenues for making claims, and recognizes that:

...activists do not choose goals, strategies, and tactics in a vacuum. Rather, the political context, conceptualized fairly broadly, sets the grievances around which activists mobilize, advantaging some claims and disadvantaging others. Furthermore, the organization of the polity and the positioning of various actors within it make some strategies of influence more attractive and potentially efficacious than others (Meyer, 1999: 82).

This chapter thus attempts to contextualize the debate on the anti-pornography bill within broader social/political developments and struggles in Indonesia's democratization process, in order to understand the strategies deployed by the various forces in relation to each other. It aims to identify the various groups mobilizing for and against the anti-pornography bill and the arguments used by each to support their respective positions. The interaction of these forces, their respective strategies, and how these shaped the dynamics of the negotiation is the focus of our research. A second aim of the research is to analyze the outcome of this struggle in terms of progress or setback for women's sexual rights in Indonesia in relation to women's agency.

We have been very careful not to fall into the trap of deciphering political opportunity as a pre-existing desire awaiting fulfillment whereby social movements are understood solely as emerging as a result of "expanding" political opportunities (Goodwin, Jasper & Khattrra, 1999). Rather, we take the position that social movements reflect efforts of groups and/or individuals not only to take advantage of opportunity, but also *to respond to limited opportunity* (Meyer 1990: 8, cited in Goodwin, Jasper & Khattrra (1999), author's emphasis).

This research is also informed by Arnstein's (1969) theory of political participation. As Burns, Hambleton and Hoggett (1994) argue, Arnstein's theory offers a helpful starting point for discussion of citizen empowerment. According to Arnstein, there are three degrees of engagement: non-participation, tokenism and citizen power. Non-participation refers to a situation where the illusion of public access to the political process is created by power holders to "educate" or "cure" the people, rather than actually enabling the populace to actively participate in policy planning. Tokenism is defined as a situation whereby citizens have a limited space within which they can exercise their rights to be heard, but do not have access to decision-making processes or implementation. The space is created by authorities through one-way communication (e.g. announcements, pamphlets, posters, annual reports); two-way exchanges (e.g. attitude surveys, neighborhood meetings and public hearings), and co-optation (e.g. citizens sitting on committees but with power-holders retaining control over all decision making). Finally, citizen power refers to the actual ability of citizens to directly impact both the policy making process and service provision. Such a situation becomes possible when the authority (the government/s) promote partnership, the delegation of power and citizen engagement in political processes. We apply Arnstein's theory to examine the extent to which citizens were able to participate in and influence the negotiation process during the debates on the Anti-Pornography Bill, as well as the final decision on the bill.

Data was collected through focus group discussions (FGD), in-depth interviews, analysis of texts and field observations. Three FGDs were held: with sixteen representatives of women's organizations; with fifteen women representing general human rights' organizations and with a group of thirteen prominent women activists. In-depth interviews were conducted with seventeen key high-level politicians, government officers and leaders of religious organizations, including MPs, representatives of various state bodies, the initiators of draft bill, MUI leaders, and leaders of religious organizations and of organizations working on pluralism and/or women's rights. Five of the interviewees were male.

All drafts submitted to parliament by the parliamentary working group, as well as the documents produced by government and civil society both

supporting and opposing the bill were analyzed. Researchers observed debate on the bill in parliament, as well as in separate forums created by the government, and analyzed public dialogue, press briefings and press conferences held by civil society groups.

The research was conducted by a team from *Komnas Perempuan* – the National Commission on Violence Against Women (*Komisi Nasional Anti Kekerasan terhadap Perempuan*).<sup>1</sup> As a point of disclosure, it is worth noting that *Komnas Perempuan* has been very critical of the bill since the initial draft was discussed by the parliament in 2005, and has been part of the advocacy against the passage of the bill. Thus, the research here can be understood as a form of *participatory action research*, which enabled *Komnas Perempuan* and its networks to actively reflect on the negotiation process as it occurred, thus improving researchers' understanding of the issues at stake and refining their strategies for addressing the issue. This approach has ultimately allowed this research to present a comprehensive feminist analysis from the perspective of Indonesian women's rights advocates on the debate around the Anti-Pornography Bill.

## **Background**

Indonesia has the largest Muslim population of any country in the world; approximately 90% of the country's 207 million inhabitants are Muslim. An archipelago in South East Asia with most of its population concentrated on the island of Java. Indonesia is home to more than 300 ethnic groups and almost 800 different languages and dialects. The red stars on the map at right indicate predominantly non-Muslim areas, namely North Sumatra, Kalimantan, Bali, North Sulawesi, West Timor, Maluku, and Papua. Although the majority population is overwhelmingly Muslim, the Indonesian constitution does not make any reference to Islamic Law or Shari'a. Instead, it defines Indonesia as a secular state governing a religious society.

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<sup>1</sup> Komnas Perempuan is an independent state body with a mandate to create an environment conducive to the elimination of all forms of violence against women and gender-based discrimination. Komnas Perempuan was set up by Presidential Decree in 1998 in response to civil society demands that the state assume responsibility to address cases of violence against women, particularly subsequent to the mass rape and other sexual assaults against Indonesian-Chinese women committed during the May 1998 riots.



Nevertheless, the composition of the Indonesian population fuels perpetual discussion on the relation between the state and Islam. The first notable example of this arose during the formulation of the Indonesian constitution leading up to independence in 1945. Various Islamist groups at the time demanded that the *Pancasila* (the national philosophy included in the constitution)<sup>2</sup> have attached to its first principle—“Belief in the One and Only God”—a provision specifying “with the obligation to practice Shari’a for its believers”. The provision was rejected by parliament, but the profound desire for an Islamic state was widespread and through the 1950s various groups attempted to declare independent Islamic states within Indonesia, in Aceh, West Sumatra, West Java, South Sulawesi and South Kalimantan. The Indonesian military, under the command of Sukarno, the country’s first president, curbed the so-called rebels, but the sentiment for an Islamic state remained.

Under the authoritarian New Order Regime (1968-1998) led by General Suharto (who assumed the presidency in 1968 following three years of army-led anti-communist purges that killed about 1/2 million Indonesians (Roosa, 2008), Islamist groups along with civil society movements and organizations were largely discouraged from participating in or interfering with the political process. However, seeking political stability the regime recognized the importance of appeasing Islamic groups as well as controlling them, thus the Suharto regime maintained the plural legal system wherein Islamic law governs family matters for Muslim citizens.<sup>3</sup> In contrast to Sukarno’s liberal parliamentary democracy, Suharto’s New Order was characterized by military-dominated authoritarianism and the cooption of political and societal organizations. After less than ten years in power, the regime had reduced Indonesia’s political parties from more than one hundred to three: all Islam-based political parties were unified as the People’s Development Party (PPP) and reoriented away from the notion of an Islamic state; nationalist and Christian parties became the Indonesian Democratic Party (PDI); while

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<sup>2</sup> *Pancasila* means five principles—which delineate the philosophy of the Indonesian Constitution, and are: (1) Belief in the One and Only God, (2) Humanity based on Justice and Civilization, (3) the Unity of Indonesia, (4) People power lead by wisdom and representation, (5) Social welfare for all Indonesian people.

<sup>3</sup> Only Muslims have the option of using the religious court, as well as public civil court, to settle family disputes. However, the Indonesian legal system also recognizes customary law on civil matters for indigenous communities.

Suharto's New Order regime became the military-affiliated Golkar Party—the official party of secular development and the party to which all those in the professions and all civil servants must belong.

Because Islam was recognized by the regime as the only viable vehicle for mass mobilization and thus a threat to its power and stability, in 1975, as part of its strategy to monitor Islamist groups, the government set up the *Majelis Ulama Indonesia* (MUI, Indonesian Clerics Council) giving the Council sole authority to issue *fatwas* and advise the state concerning Islamic law. In 1985 the regime passed a law making the official state ideology of *Pancasila* the sole foundation of all organizations. Thus, any group whose existence was predicated on any other ideological foundation—on Islam for example—was considered subversive and subject to dissolution, its leaders to imprisonment. And because veiling was seen by the government as a symbol of Islamist separatism, in 1982 regulation SK 052/C/Kep/d.82 was issued through the Ministry of Education prohibiting the wearing of veils in schools (Komnas Perempuan, 2009b). Periodic outbursts of Muslim protest occurred though the 1980s which were curbed, often with violence, by the military.

The sentiment for a Shari'a based state re-emerged following economic collapse and the ousting of the New Order Regime through popular uprising in 1998. Part of the democratization process included debate over whether to amend the first principle of the *Pancasila*—'Believe in God', by inserting the phrase "with the obligation to practice Shari'a for its believers"—the very phrase rejected by the Indonesian parliament more than sixty years previous. Once again parliament concluded that the Constitution, including Indonesia's official philosophical position, the *Pancasila*, should not include any provision on Shari'a. It is noteworthy that the two largest Indonesian Islamic mass organizations, *Nahdlatul Ulama* (NU) and *Muhammadiyah*, continue to support the nationalist perspective in this debate (Mujani, 2007). Nevertheless, support for religion-based constitutional articles is evident, as indicated by two articles that have been inserted into the constitution: Article 28J (2) which states that religious values provide acceptable limitation to the exercise of human rights<sup>4</sup> and Article 31(3) outlining the state's obligation to

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<sup>4</sup> Article 28J(2) In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands

provide a national education system “that increases faith, piety, and noble morality (*ahlak*).”

### **The Emergence of the Pornography Bill**

In 2001 the MUI issued a *fatwa* prohibiting pornography and *pornoaksi* (sexually arousing body movement or gesture), citing the need to uphold morality (Mudzhar, 1993: 79-81). This *fatwa* was referenced by the main governing body of parliament, the *Majelis Permusyawaratan Rakyat* (MPR—People’s Consultative Assembly)<sup>5</sup> to formulate a regulation concerning “Morality of Indonesians”. Based on this regulation, the MUI in cooperation with the Ministry of Religion invited several organizations and NGOs, including mainstream women’s organizations, to form a working group to draft an anti-pornography bill. In 2002, the group submitted a proposed Pornography and *Pornoaksi* Bill to parliament.

In July 2003, 24 members of parliament from various political parties submitted a first draft of the bill to Commission VIII in charge of issues concerning women, children and social welfare. Two years later in June 2005 the Commission submitted the draft “Anti-Pornography and *Pornoaksi* Bill” for parliamentary deliberation. The draft was almost identical to the original submitted by the MUI and protests arose when it was discussed in Parliament, which led to vehement demonstrations in 2006 as will be discussed later.

As shown in Table 1 below, the draft proposed criminalizing various behaviors and materials including almost everything that might be construed as sensual according to a particular Islamic interpretation of (generally understood as body parts Islam requires be hidden from public view). The proposed Bill set the grounds for the establishment of ‘moral police’ and gave the state full power to determine which cultural expressions are

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based upon considerations of morality, religious values, security and public order in a democratic society.

<sup>5</sup> The Assembly is the high chamber in the House of Representatives. It has the authority to change the constitution and to dismiss the president and vice president before the end of their term. Indonesian Constitution, Article 2 & 3.

considered legitimate. All of this made women particularly vulnerable charges of criminalization, as will be further explained later.

**Table 1: Draft Anti-Pornography and *Pornoaksi* Bill 2006** <sup>6</sup>

Issues	Provisions in the draft
Definition of pornography	Any media content, or other forms of communication, which convey sexual, sexually exploitive, obscene, and/or erotic material. (Article.1(1))  Sexual is defined as any object or action related to sex and sexual intercourse; obscenity is objects or actions considered offensive, disgusting, or which violate the norms of decency; eroticism is any thing or action related to sexual desire, lust and/or sexual sensation that violate the norms of decency. (Elucidation Article.1 (1))
Sexual activities prohibited in public	Kissing on the lips; masturbation; any iteration of sexual intercourse; sex parties and sex performances; sexual activities involving a child (Art. 7-11, 15-19)
Body parts that cannot be displayed in public	Genitals, thighs, hips, buttocks, belly button, women's breasts, either wholly or partially displayed. (Elucidation Art. 4)
<i>Pornoaksi</i>	Adult public display of any of the above body parts; public nudity; public kissing on the lips; erotic dancing or movement, masturbation, public sexual intercourse; participation in a sex party or sex performance (art. 20, 25-33)
Exceptions	Sexually-themed materials for educational or scientific purposes; medication for sexual health problems, attire and/or behavior linked with local customs which are part of ritual activities, art activities, sports, and health education (Art. 34-36; author's emphasis)  Art and sports activities can only be performed in specific locales designated for those purposes only (elucidation Art. 36)
Implementing body	National Body on Anti Pornography and <i>Pornoaksi</i> , law enforcement agents and the government

The draft soon became the centre of intense, widespread debate by the public, parliament, religious groups, Islamist organizations, women's rights

<sup>6</sup> Though the draft was submitted in 2003 and the Bill in 2008, it is known better by the year of protest than the year of submission.

advocates, freedom of expression and pluralism activists, culture and arts groups, as well as the LGBTI<sup>7</sup> community. The debate peaked in early 2006 when opposing camps held mass demonstrations attended by thousands.

Women's rights activists were the first to hold a rally against the draft bill, on International Women's Day in 2006. This was followed by series of rallies in Jakarta and other cities, organized by women activists, local artists and indigenous peoples groups, all of whom had common criticisms of the proposed bill. Ultimately a coalition of groups opposed to the draft bill was formed, which organized a march down Jakarta's main street with the slogan "unity in diversity" on 22 April 2006, Indonesia's Women's Day. More than 10,000 women, men and transgendered people from various ethnic and social backgrounds participated, including prominent supporters of pluralism such as key figures from Islamic women's organizations, demonstrating in opposition to the proposed bill.

Some of the bill's supporters declared that in defense of the rights of the majority Muslim population they would not hesitate to use force against the bill's opponents. That this was not an idle threat became clear when the *Forum Betawi Rempug* (FBR, an ethnic-Betawi<sup>8</sup> organization) attacked the marchers. The chair of FBR condemned the march as a disgrace to Islam and Indonesian cultural values, stating "the parade participants are mischievous women whose goal is to ruin the morality of Indonesians".<sup>9</sup>

Exactly a month after the "unity in diversity" march, the "Million (Muslim) devotees action to support anti-pornography bill" counter-rally took place on the same main street, mobilizing far more people than the march against the bill had. Islamic symbols were prominent, including green head scarves printed with the words "*Allahu Akbar*" (God is Great) in Arabic. The rally proceeded to the House of Representatives where participants were

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<sup>7</sup> LGBTI - Lesbian, Gay, Bisexual, Transgender, and Intersex

<sup>8</sup> Betawi are one of Indonesia's ethnic groups. Betawi are primarily Muslim and their population is concentrated around Jakarta

<sup>9</sup> Statement by the chair of FBR, Fadholi El. Muhr broadcast on Indonesian television. Shinta Nuriyah Wahid, the wife of Indonesia's 3<sup>rd</sup> President and a marcher, submitted a complaint of libel against FBR to the police in response to this statement.

welcomed by the Chair of Parliament and several leaders of Islamist organizations—all men.

Rallies organized by both sides continued throughout the country. In response parliament decided to postpone discussion on the draft, and formed a working group to consider all the criticisms of the initial draft. Eva Sundari, an MP whose party initially supported the draft, recounts her experience:<sup>10</sup>

“I did not want to continue the discussion on anti pornography and pornoaksi bill. It criminalized the citizens. It was targeting women...They [the supporters] wanted to have women fully covered. Indonesia is a ‘happy sexual’ nation. Symbols of sexuality are displayed in many public spaces. Sensual dance are commonly watched without resulting in any crime. So, nothing is pornography or indecent regarding to our traditions. Why should we let them set an Arabic standard in Indonesia and make everything related to sexuality a taboo?”

In early 2007, the parliamentary working group submitted a revised second draft of the Anti Pornography Bill to parliament. Parliamentary debate on the bill recommenced in August 2007 and continued for an entire year, culminating in the passing of the bill in October 2008. The final negotiation process and its result is the topic of the research presented here.

### **Pornography, Women's Sexuality, Islam and the Making of Indonesian Identity**

Pornography is a crime under Articles 532, 533, 282 and 283 of the Indonesian Criminal Code. These articles, which do not actually use the term pornography, refer to acts of indecency, production of and distribution of indecent materials, and dissemination of materials that “invoke the lust of young people”. Several verdicts decided by various courts based on these

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<sup>10</sup> Interview, 8 May 2008. Sundari's party walked out when the parliament decided to vote to determine its position on the Bill.

articles are presented in Table 2 (DPR, 2007b).<sup>11</sup> Besides the judicial system, the government also has the right to revoke publishing licenses according to Law No. 21/1982 concerning the press, and according to Law No. 28/1992, to censor or prohibit the distribution of film, which is deemed to contain offensive materials, including sexual content.

**Table 2: Legal Sanctions against Media Publishing Sexually Offensive Materials**

Year	Media	Offensive Materials	Legal Actions
1956	<b>Bikini</b> , Yogyakarta	Short story depicting sexual intercourse in detail	4 days jail or fine
1956	<b>New Look, Surabaya</b> - East Java	The use of the words “kissing”, “voluptuous breast”, and a picture of a couple kissing	30 days jail or fine
1957	<b>Roman</b> , Jakarta	Two short stories translated from western writers which were considered indecent.	One month jail or fine
1958	<b>Mercu Buana</b> , Palembang-South Sumatera	Essay with pornographic content	6 months jail or fine
1959	<b>Suara Andalas</b> , Medan- North Sumatera	Short story with pornographic content	2 months jail or fine
1960	<b>Tjerdas</b> , Medan-North Sumatera	Two editions ran columns deemed to have pornographic content	3 months jail
-	<b>Liberty</b> , Surabaya- East Java	Article on prostitution deemed to have pornographic content	1 month jail
1970	<b>Viva</b> , Jakarta	Pornographic pictures and stories	Imprisonment (no details available)
1971	<b>Varia Baru</b> , Jakarta	Photograph depicting a naked couple lying on bed	6 months jail and 2 years probation
1971	<b>Mayapada</b> , Jakarta	Image of a woman whose breasts are covered with fruit-shaped cloth.	4 months jail and two years probation
1972	<b>Senyum</b> , Jakarta	Pornographic pictures and stories	Warnings from Department of Information
1973	<b>Sport Fashion Film</b> , Jakarta	Photograph of a naked female model	License was revoked without trial
1989	<b>Jakarta-Jakarta</b> , Jakarta	Photographs of women in bikinis with headlines “The Bikinis of Wicked Horse” and “Provoking Calendar”	Warnings from Department of Information
1991	<b>Popular</b> , Jakarta	Cover photograph of a women wearing swimming suit	Warning from Department of Information

<sup>11</sup> DPR - Dewan Perwakilan Rakyat, the Indonesian national parliament.

The first public challenge to the unilateral definition of pornography as unequivocally negative and degrading came in 1992 in the form of assertions that pornography could be a liberating tool for women's sexuality. A public debate on pornography was taking place following the publication of "Madame de Syuga" which included photographs of one of the first Indonesian President's wives, Dewi Soekarno, posing nude. The book not only sparked debate on what constitutes pornographic material, it also raised the issue of morality. These debates however gathered nowhere near the attention the issue of pornography received during the debates on the Anti-Pornography Bill.

In 1998, in the aftermath of the fall of the New Order Regime, new legal provisions on pornography were issued, particularly pertaining to media. According to Law No. 40/1999 on the Press, published materials contradictory to social norms are subject to fines of up to five hundred million rupiah (approximately \$50,000 U.S dollars).<sup>12</sup> Law No. 32/2002 on Broadcasting explicitly prohibits the broadcast of materials exhibiting obscenity (Article 36(5) b), and advertisements offensive to society's sense of decency and to religion (Art. 46(3) d). The law also gives authority to a monitoring body to regulate standards on nobility and decency (Art. 48 (4)c), and provides limitations on the media presentation/coverage of sexual acts (Art. 48 (4)d). Both laws on Press and Broadcasting specifically mention the need to protect children from exploitation and from exposure to indecent materials, in accordance with Law No. 23/2002 on Child Protection. Law No. 11/2008 on Electronic Information and Transaction prohibits the distribution of electronic documents containing indecent materials; infringement results in up to six years imprisonment or a fine of up to one billion rupiah (\$100,000 USD). An additional third of the initial sanction is applied when the sexual materials exploit children.

In a focus group discussion with women activists, many opined that the state debates on pornography after 2006 were less concerned with pornography itself and its impacts on women, and more on how the concept could be manipulated to define women's sexuality as part of the national process to

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<sup>12</sup> For the purpose of this writing, we are using the rate of exchange during the height of the debate on the Pornography Bill in 2006, when 1 US Dollar = 10,000 Indonesian Rupiah (IDR).



manufacture an Indonesian identity, a tactic very familiar to Indonesian women ever since the struggle for independence.

As Yuval-Davis (2007) argues, women's bodies and gender identity play key roles in defining the symbolic characteristics of a nation in the process of manufacturing national identity. Their 'natural' reproductive roles locate women at the center of the construction of ethnic and national identity. In the context of reclaiming power by a colonized and subjugated community, women's compliance to specific codes of behavior is more important than that of men. Such codes are generally defined by the dominant male leadership of the collective and are often in contradiction to women's interests, thus women may "find themselves in an ambivalent position towards these hegemonic projects" (Yuval-Davis 2007: 67). These codes put women under constant scrutiny, as noted by Ivekovic and Mostov (2004). Because women become the "signifiers of ethnic or national difference" and the boundaries of the state, women's bodies not only embody the borders, but also mark the vulnerability of the border:

A common fate of women as members of the community, but not equal political subjects in (ethno) national contexts is that while being held responsible for the continuance of the nation, they are in some way, always suspect; they are a symbol of the purity of the nation, but always vulnerable to contamination; they embody the homeland, but are always potential stranger, "both of and not of the nation" (Ibid.: 13).

Indonesian women's experience in relation to the nationalist project resembles the above description. Women played an active role in shaping the "imagined community" of independent Indonesia (cf. Anderson, 1983). Their biological reproductive role provided women the legitimacy to talk about the birth of the nation they hoped for and what it should provide for them. They thus advocated education for women as a key to educating the nascent nation's next generation. While this position gained wide support from their male counterparts as a channel for building a strong independent country, their vision of equal rights for both men and women in all aspects, including within the institution of marriage as an integral part of the new, modern nation state of Indonesia was not to be realized (Komnas Perempuan, 2009a).

During the independence struggle women challenged the colonial system and feudalism as depriving women their rights, and actively fought to condemn forced and early marriages and polygyny. The women's movement thus advocated for a new notion of the ideal 'Indonesian woman'—no longer simply obedient daughters or dutiful wives, but fully equal to men.

In the infancy of Indonesia independence, the ideal women were educated, liberated and actively involved in the public realm, in literacy programs, organizing farmers and laborers, in political parties and government. But this changed dramatically when Suharto's New Order Regime took power with its notion of the 'proper woman' as a subordinate appendage of her husband, an obedient wife and dutiful mother within a male-headed family. Women did not have autonomy over their own bodies, which were conceived of as vessels for reproducing the nation's next generation and a site for their husband's sexual pleasure. Thus, for example, women could not use contraception without their husbands' consent.

The mission of constructing and defining women's morality was very significant for the New Order Regime, to both build legitimacy and to maintain power (Komnas Perempuan, 2007; Nadia, 2007; and Roosa, 2008). In the New Order Regime's version of Indonesian history the military successfully terminated a coup by communist forces involved in kidnapping and murdering high-ranking military generals. The Regime's historical construction through a public campaign cast the members of *Gerwani* (an important post-independence women's mass movement closely allied with the communist power bloc in Indonesia) as vile whores and sexually perverted women who danced naked as they tortured and castrated kidnapped generals before they were killed. In fact according to Wierenga (2002: 343), *Gerwani* was the only post-Independence women's organization attempting to resist the Regime's relentless re-domestication of women and restoration of absolute male power.

Although there was no evidence to support these stories of castration and perversion in any autopsy reports, the slander campaign against *Gerwani* led to killings, as well as torture and rape during the interrogation and arbitrary detention of women who were associated with *Gerwani* or accused

of being so.<sup>13</sup> Wierenga notes the slander had a lethal impact on the women's movement:

Until Suharto's overthrow, women's courage, their social and political independence and physical autonomy was implicitly associated with unspeakable acts of debauchery and sexual perversion. New Order's women's organizations were entrusted with the task of keeping women in their proper place, just as the political machinery set up by the generals had ensured that any remnant of socialist thought was wiped out (2002: 343).

Suharto's New Order Regime's concerted attack on women's activism outside of its party-affiliated women's organization made it very difficult for Indonesian women to advocate for rights and especially for sexual or bodily autonomy. This in part explains the lack of Indonesian feminist debate on pornography prior to the introduction of the pornography bill.

The New Order Regime's ideology of 'the proper woman' was buttressed by the prevailing patriarchic interpretation of Islam in Indonesia. Although Islam envisions equality between men and women before God and social relations based on mutual respect, the teaching of Islam in Indonesia generally positions women as subordinate (Muhammad, 2007). The most often cited *Qur'anic* verses (*surahs*) to support this include Nisa [4]:34, which refers to men as *qawwam* (leader, educator, or protector); al Baqarah [2]:223 which refers to men's absolute sexual authority over their wives and slaves; and a version of a *hadith* (saying ascribed to the prophet Mohammed) that orders women to always obey the sexual demands of their husbands. However, despite this context, a milestone for the post-Suharto Indonesian women's rights movement occurred in 2004 with the passage of the Anti Domestic Violence Law criminalizing violence against women by husbands and fathers, and marital rape, thus recognizing women's sexual and bodily autonomy in marriage. Though the Shafi'i school, which leans towards patriarchal interpretations, is the predominate influence in Indonesian Islam, customarily the regulation of women's sexuality has generally been moderate

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<sup>13</sup> To date, subsequent to their release, these women have faced discrimination by both the state and society; some have even been forced into isolation at home or expelled by their families (Komnas Perempuan, 2007).

(Muhammad, 2007: 8-9) and historically, prior to Suharto, women's participation in politics, the economy and society has been welcomed.

Indonesia has also been tolerant and diverse in terms of women's dress codes. Like most Indonesia women, Muslim Indonesian women, even the wives of *ulama* (religious scholars) often wear *kebaya* (a traditional blouse-dress combination that is generally very tight-fitting and sometimes made of transparent material) and cover their head with *kerudung* (a traditional Indonesian fabric head covering that leaves some hair and the neck visible). Moreover, Indonesia's valued cultural heritage includes temple images, literature and dance that reference women's sensuality, women's bodies, and sexuality.

Hence aspects of the proposed bill contradict Indonesian women's contemporary and traditional dress codes. Muhammad (2007) suggests that this anti female sensuality phenomenon is linked with the rise of Wahhabism in post-Suharto Indonesia. Wahhabism, the dominant form of Islam in Saudi Arabia (see DeLong-Bas, 2004), purports to be Islam in its purist and most unadulterated form. Muhammad's suggestion accords with Imam's analysis of the Muslim religious right movement and its vision of a boundary-less *umma* (community/nation) incorporating:

“...the centrality of concern with women, an asceticism about the body, a focus on (in particular) women's sexuality as a source of immorality, the increase in means for men to satisfy heterosexual desires, and, the reconstruction of patriarchal control over women and their sexuality” (Imam, cited in Ilkharacan, 2000: 128).

It is important here to consider the significance of the collapse of the New Order Regime in relation to the post-Suharto public discourse concerning rape and violence against women that occurred as the nation rebuilt. Various reports catalogued rape and other forms of sexual attack by state security personnel in regions the state declared military zones, including East Timor, Aceh and Papua, as well as the mass rape of ethnic Chinese women during the May 1998 riots in Jakarta and several other big cities (Tim Relawan untuk Kemanusiaan, 1998; TGPF, 1998; Komnas Perempuan, 2008). The public discussion grew heated as monitoring bodies reported that these assaults also occurred during conflicts with various religious and ethnic groups that

were widespread from 1998 – 2002. These reports emphasized the need to redefine the relation between women and both the state and society.

It is in this context that the Indonesian public embraced the works of a growing number of female writers who tackled not only issues of social injustice and political violence that were taboo in Suharto's rule, but also of the sexual repression endured by women, as well as exploring female desire and sexuality. "Saman" by Ayu Utami (1998) was the landmark publication of this genre, followed by other works, which delved beyond the hetero-normative. The emergence of these writers triggered a debate that has ushered in a renewed gendered dimension to the nationalist project in democratizing Indonesia. One male Indonesian author disparagingly coined the phrase *sastra wangi* (the fragrant literature) to describe these writings, according to Arnez (2005: 2), to convey the message that "the female writers have not much to offer besides distraction". This author was not alone in his views; whilst some, especially those involved with the women's rights movement, found the writings of the female writers exploratory and liberating in term of rights and the redefinition of women's sexuality, others found them extreme and offensive in terms of religious norms and women's morality. The latter linked the works to the rise of 'yellow' journalism following the reduction of state control over the press in 1999. Print media was accused of sensationalism, gossip and focusing on sex and crime in order to boost circulation (Ibrahim (2003), cited in Fanggida, 2006: 17-18). Television stations, whose numbers rose from one (state-run) broadcaster to eleven in just under three years, were accused of broadcasting heavily sexualized talk shows, soaps, and music programs featuring sexually provocative singers and dancers in order to win the market battle. *Dangdut*, a popular folk music style with Indian and middle-eastern influences, has been singled out. Inul Daratista, one of the most popular *dangdut* singers, is treated as the icon of *pornoaksi* because of her tight costumes and the gyrating hip movements of the dances she performs while singing. Although her dancing resembles traditional Indonesian dance, she is accused of being sexually arousing and rendering the art of *dangdut* pornographic. Contemporary female artists and writers have been condemned for degrading the ideal of reformation and conducting *pornoaksi*—they are accused of being symbols of *demokrasi kebablasan* (literally, 'out-of-control democracy').

It is the *pornoaksi* provision that alerted women's rights activists and other opponents of the bill that the bill does not merely address sexual exploitation for the purpose of pornography, but actually is an attempt to regulate women's sexuality based on a particular patriarchal interpretation of Islam. The women's rights movement took leadership in protesting the initial draft and built a coalition with other elements of civil society opposed to the exercise of one particular interpretation of Islam ruling the diversity of Indonesia. Nevertheless, as discussed below, the heated debates on *pornoaksi* in 2005 and early 2006 ultimately did not provide women's groups the opportunity to elaborate different opinions in regards to pornography, and this has impacted the women's rights movement's involvement in the process of revising the draft, as will be explained further in the following section.

### **Mapping the Process: Forces and discourses for and against the Anti Pornography Bill**

As argued by Goodwin, Jasper and Khattra (1999), analysis of a contentious political process needs to emphasize the connections between contesting parties in order to understand what they do and what impact they have. The analysis of the negotiation process on the pornography bill in parliament during 2007-2008 necessitates an examination of the forces involved at the initial stage (1999-2006).

#### *The Initial Phase (1999-2006)*

##### *Proponents of the Anti Pornography and Pornoaksi Bill (APP Bill):*

Islamist groups were the primary proponents of the bill, the draft of which was initiated by the *Majelis Ulama Indonesia* (MUI—Assembly of Indonesian Clerics). When the draft raised public criticism which led to intense public debate, the MUI built a coalition called *Forum Umat Islam* (FUI—Islam Devotees Forum).<sup>14</sup>

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<sup>14</sup> FUI includes the Front Pembela Islam (FPI- Islam Defenders Front), Hizbuttahir Indonesia (HTI), Nadhaltul Ulama (NU), Muhammadiyah, as well as their sister women's organizations

As mentioned in the introduction, NU and Muhammadiyah have always supported the nationalist perspective on the separation of religion and state. However, the elites of both organizations seemed to have no difficulty championing the regulation of women's morality and sexuality based on a particular interpretation of Islam. In defense of this, K.H. Hasim Muzadi, then chair of NU explained:<sup>15</sup>

“Anti pornography bill is not another form of state's intervention to the privacy of its citizens... The anti pornography bill is not an indication of ongoing effort to formalized Shari'a either. Even before this, we have cried for more attention to the problems of pornography. You cannot deny that there has been a dramatic change nowadays in the way of people wearing clothes, presenting soaps on television as well as advertising products. Through this bill, we just want to have things back on track.”

The coalition also included non-Islamic organizations such as the Confucian-based *Mantakin*, the *Forum Betawi Rempug* (an ethnic-Betawi organization referred to earlier), KOWANI (Indonesian Union of Women's Organizations—a secular coalition of women's organizations set up in 1921 and once a progressive leader of the women's movement), as well as NGOs such as the Community to Abolish Pornography and Media Watch.

At the governmental level, the bill was supported by the Ministries of: Religious Affairs, Women's Empowerment, Youth and Sports, and Communication and Information. The bill was also supported by the National Commission on Child Protection. In parliament, the *Forum Umat Islam* coalition was backed by all the Islam-based political parties, particularly *Partai Keadilan Sejahtera* (PKS). PKS is a newcomer to the Indonesian political scene post Suharto that emerged out of the university-based mentoring movement of the 1970s and 1980s linked to *Tarbiyah Ikhwanul Muslimin*, a transnational Islamist movement. Traditional Indonesian Muslim organizations such as NU and Muhammadiyah, which are against the use of religion in

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Muslimat-NU, and Aisyah-Muhammadiyah. The coordinators of the FUI are Muhammad al-Hattah of the HTI, and K.H. Ma'ruf Amin of MUI.

<sup>15</sup> Interview, April 2<sup>nd</sup> 2008. Similar explanation was given by the chair of HTI, Ismail Yusanto (interview, February 12, 2008).

politics, have repeatedly warned their communities to be wary of the potential ascent of PKS, which, in its attempt to establish a *Kilafah Islamiyah* (Islamist Leadership), uses the vehicles of modern democracy including the political party and parliamentary systems in its drive to achieve an Islamic state (Wahid, 2009). These warnings are not unfounded; PKS gained twelve seats in the 2009 general election in addition to the 45 seats they have held since 2004. Their political gains stem in part from their promotion of morality-based regulation, including the Anti-Pornography Bill which they promised to support during their 2009 election campaign.

In parliament the Anti-Pornography Bill also had the support of secular parties including the Democrat Party, headed by Indonesia's current president; Golkar, the current incarnation of the New Order Regime, and the PDI-P, led by former President Megawati. All argued that the draft bill guarded the morality of youth and children, protected the dignity of women, and provided broad moral direction to the democratization process.<sup>16</sup>

Proponents argued that the state had to step in to restore the nation's morality through the bill and address rampant pornography that is evidence of an ongoing moral crisis. Though some members of the parties supporting the proposed bill expressed concern that it constituted the incursion of Islam into Indonesian government, others argued that "majority rule" supports Islamic norms as democratic in a majority Muslim nation.

#### *The Opposition to the APP Bill:*

The opposition force was led by women's rights groups, including a network called White Rose Alliance as well as a coalition of women's organizations for women's rights' legislation (JKP3- Prolegnas). The coalition included both faith-based and secular organizations: Rahima Foundation; Puan Amal Hayati Foundation; Women's Legal Aid Association (LBH Apik), Women's Journal Foundation, Kalyanamitra, Mitra Perempuan, Fatayat NU and the Indonesian Women's Coalition. The opposition forces also included organizations advocating pluralism such as Jaringan Islam Liberal (a network for liberal Islam), the International Centre for Islam and Pluralism (ICIP), and Indonesian Conference on Religion and Peace (ICRP), and non-Muslim

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<sup>16</sup> Academic review on Anti Pornography Bill, DPR, 2007, p. 4-5



religious organizations such as the Hindu Balinese Community, the Indonesian Conference of [Catholic] Churches, United [Protestant] Churches of Indonesia, and the NU Youth Forum. Indigenous peoples' communities also galvanized against the bill, setting up a national coalition called Aliansi Bhineka Tunggal Ika (ANBTI-Alliance for Unity in Diversity), with branch offices at the provincial level. The opposition was not supported by any governmental institutions. Within parliament, only the Christian Peace and Welfare Party (PDS) opposed the bill. The National Commission on Violence Against Women (Komnas Perempuan), an independent state body working to eliminate all forms of violence against women, also opposed to the bill from the outset.

Fatayat NU, a faith-based mass women's organization, was part of the opposition coalition despite the pro-APP bill stance of its umbrella organization, Nahdlatul Ulama (NU – a prominent Islamic mass organization in Indonesia). Fatayat opposed the draft as disadvantageous to women and reflective of a non-inclusive particular religious interpretation upholding non-universal values. As Maria Ulfah Anshor, then chairperson of Fatayat NU, argued:<sup>17</sup>

“We learn that there are various clerics' interpretations of *awrah* (genitalia and other parts of the body to be covered as required by Islam). Some says that the decency in covering *awrah* depends on local customs, which can be very gender biased...As a religious person, of course I put my religion as the highest source of values. But, it doesn't mean that I neglect cultural context, my sense of humanity, my environment as so on...if we relate this to pornography, it is a matter of choice and how we respond to whatever we see...Morality is a very private issue. It is impossible for the state to implement a law regulating what people have in mind.”

Fatayat's high visibility in opposing the draft in 2006 was very important for social movements, particularly the women's movement. The fact that Fatayat stood firm in opposing the NU (Nahdlatul Ulama) position was a significant

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<sup>17</sup> Interview, May 2008

show of agency and independence from its very influential Islamic mass-based parent organization. As well, its challenge to the interpretation of *awrah* championed by the bill's supporters helped women's groups establish a firmer foundation for their struggle for bodily and sexual autonomy in relation to faith. Thirdly, it fed the public desire for critical discourse on the relation between state and religion.

#### **Fatayat Nahdlatul Ulama (Fatayat NU)**

Fatayat NU defines itself as an autonomous body within the NU (Nahdlatul Ulama) for young Muslim women to advance the status of women. From its establishment, Fatayat recognized the overwhelming influence of patriarchal interpretations of religious text as the major challenge impeding Moslem women's human rights. Fatayat was established in April 1950 by several prominent women married to influential clerics to challenge the discriminatory educational practices experienced by girls and young women in boarding schools run by male clerics. For instance, Arabic language and by de facto giving men the sole ability and authority to interpret religious texts.

Fatayat is one of the largest mass Muslim women's organizations in the country, with more than 6 million members ages 20 to 40. Fatayat focuses on illuminating theological grounds for the equal rights of women. In this they often find themselves in opposition to the views of their parent organization, including on such issues as polygyny, abortion and the Anti-Pornography Bill. Many of the male NU clerics condemn Fatayat's views, and frequently warn Fatayat members at the branch offices not to follow their 'misleading', 'westernized' or 'confused' sisters at national level.

The bill's opponents argued that the initial draft of APP Bill criminalizing women's bodies was entirely shaped by patriarchal interpretation of religious texts and appealed to men because it reinforced male dominance in the context of a moral crisis in Indonesia caused by rampant corruption. Ratna Sarumpaet, one of the women activists leading the opposition force explained:<sup>18</sup>

"I am also very concerned about the debates on morality in this country. Morality can be gained through education, not through

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<sup>18</sup> Interview, May 15<sup>th</sup> 2008

formulating mechanic laws such as this anti-pornography *pornoaksi* bill... This is merely to justify their aim to control women...[it] leads young people to hypocrisy... let's talk about more fundamental meaning of morality. The vast corruption is a basic moral issue. Why doesn't the assembly of clerics issue a *fatwa* prohibiting corruption [instead of on pornography]?"

Agreeing that gender discrimination was a primary characteristic of the draft, the groups advocating pluralism also argued that it imposed a uniformity based on a particular interpretation of Islam, promoting the notion of “sexual purity”, for instance, by defining various sexual behaviors as disgusting, by labeling homosexuality as deviant, and by discriminating against traditional cultural practices that include some bodily exposure and sensuality, allowing such practices to occur only in designated “art spaces.” This assault on diversity by a monolithic and patriarchal Islamic interpretation was they argued furthered by the proposal to establish a new national body to enforce the bill and co-opt citizens to act as moral police.

In summary, the opposition to the draft of the APP Bill believed that the bill's main aim was not to address pornography, and demanded that the government advance efforts to eliminate gender-based discrimination that sexually objectifies women and to eradicate the poverty that makes women vulnerable to sexual exploitation, and thus address the root causes of pornography.

### *The Negotiation Process (2007-2008)*

The mass rallies of 2006, as described earlier, split public opinion. During the negotiation process, the gap between proponents and opponents broadened. Two significant events occurred between the initial stage and the negotiation process: the withdrawal of support for the bill by PDI-P, a nationalist political party, and the invitation to women's groups to participate in the negotiation process in parliament. PDI-P began championing the opposition's views during parliamentary debates; women's organizations redefined their strategies (See diagram 1) and, led by the secretariat of JKP3-Prolegnas, built a new coalition to propose new legislation on pornography as a form of sexual violence, envisioning replacing the subjective, morality-based

proposed law with a human-rights-based one that precluded gender discrimination and judgmental sexual norms, while celebrating Indonesian cultural diversity. Ratna Bantara Mukti, coordinator of JKP3-Prolegnas, explained:<sup>19</sup>

“Our call is for the parliament to remove the provision of *pornoaksi* and to redefine pornography in terms of sexual exploitation as an act of crime... In 2006, we successfully impeded the legislation process of anti-pornography bill. It is undeniable that we have made a significant intervention. Together, we can be able to force them to accept substantial changes in the draft... We should monitor [the parliament] and take part in the coming sessions.”

The presence of negotiators from both camps generated a new dynamic in the political contestation around the Pornography Bill throughout the negotiation process, in part because there were members of both camps who believed it was unlikely if not impossible to establish any common ground on which to proceed. While this will be explained in detail in the next section, **Diagram 1** (below) summarizes the connections amongst the contesting parties in this debate.

### **Dynamics and Results of the Negotiation Process**

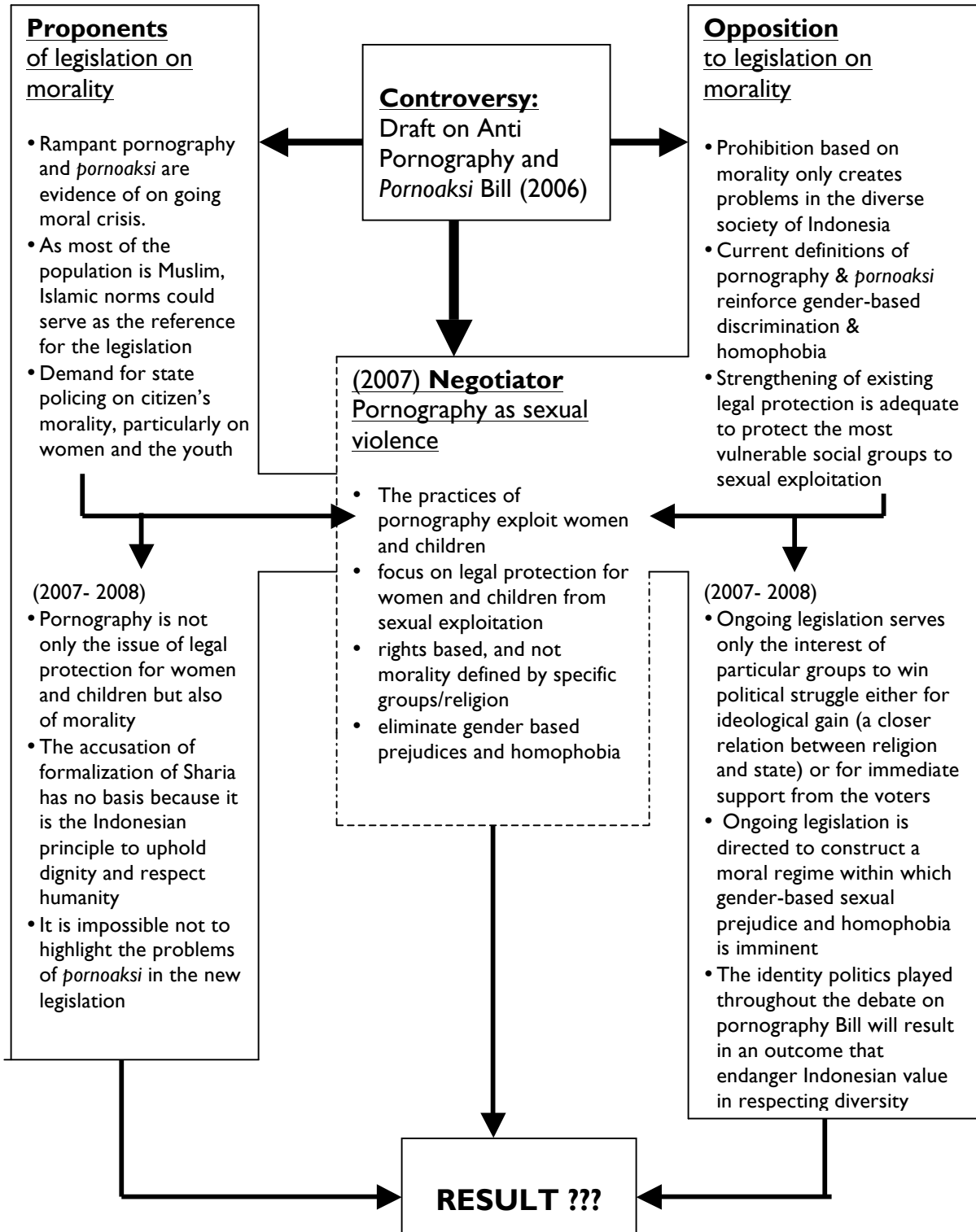
At the start of the negotiation process in 2007, the bill's proponents in parliament claimed they had accommodated opponent's objection to the initial Anti-Pornography and *Pornoaksi* Bill by: deleting the term *pornoaksi* from the title and calling the proposed bill the Anti-Pornography Bill (hereafter referred to as the 2007 draft); accepting opponent's demand to address pornography not simply as a morality issue by adding to the revised draft the objective of providing adequate legal guarantees to protect all Indonesians, particularly children and women, from sexual exploitation and “to prevent and to stop the growth of sexual commercialization and sexual exploitation both by production and distribution of pornographic material.”

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<sup>19</sup> FGD 1, June 2008

**Diagram I**

Political Forces Mobilizing For and Against the Anti Pornography Bill (2006 -2008 )



In an academic paper prepared to support the bill, proponents argued that the need to combat pornography should be a part of the feminist agenda. The paper generously used the arguments of anti-pornography feminists, such as MacKinnon and Dworkin, along with research reports on the relationship between consuming pornographic materials, and mental health problems and sexual violence (DPR, 2007b).

The revised draft also added references to other laws including the Law on Child Protection, the Law on Press, the law on Broadcasting and the Indonesian Criminal Code. In response to opponent's argument that the initial draft violated the right to freedom of expression, supporters argued that the revised draft reflected the constitutional provision on religion and norms (Art. 28J(2)) justifying limitations on human rights. The 2007 draft also included a new article stating the bill should not apply to rituals, customary and traditional practices, or to the domains of art and cultural performance, education, science and medicine. This article was added to address opponent's accusation that the bill forced a uniform Indonesian identity based on a specific interpretation of Islam.

Throughout the negotiation period, the bill's proponents were in a somewhat defensive position, having to prove they were not advocating the formalization of Islam into Indonesian legislation. Thus some Islam-based political parties, such as Partai Kesatuan Bangsa and Partai Amanat Nasional, argued that their support was based on the bill as a solution to social problems, not as a platform for Islamic principles.<sup>20</sup> The secularist party GOLKAR argued it supported the bill as part of honoring the party's commitment to pass all postponed legislation from parliament's previous session.<sup>21</sup> PKS and the Democrats argued that their support was a response to voters' demands. Yoyoh Yusroh, an MP from PKS, explained:<sup>22</sup>

“My party has promised to pass the anti-pornography bill to prevent a deeper damage to the morality of our society... This bill is the aspiration of our constituencies.... Popular issues

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<sup>20</sup> Meeting note of JKP3 with PAN, 26 June 2008

<sup>21</sup> Meeting Note o JKP3 with Golkar

<sup>22</sup> Interview, May 14, 1998

influencing the livelihood of the society have to be a priority of our struggle so that our people can live in peace.”

However, to prove that the pornography bill was not driven by Islamist forces was difficult if not impossible for two reasons: First, its most insistent proponents were religious extremist parties such as FPI and Hizbut Tahrir, which publicly declared that their goal was an 'Islamic state of Indonesia,' and campaigned for the bill based on a call to build Islamic solidarity against the post-September 11 American campaign of “the war on terror”, which they claimed aimed to wipe out Muslims. They also claimed that the rampant growth of pornography and *pornoaksi* in Indonesia was part of the “Jewish Conspiracy” to corrupt the morality of the Muslims women and youth (Soebagio, 2008). They portrayed the Indonesian version *Playboy* as evidence of this.



Figure 1: The Sundanese Jaipongan Langit Biru dance performance in West Java Pavilion, Taman Mini Indonesia Indah, Jakarta. (Credit: Gunawan Kartapranata, Creative Commons-ShareAlike3.0)

Second, some proponents continued to argue that traditional Indonesian dances such as Jaipong, and *tayub*, and the local custom of bathing in the river, were examples of *pornoaksi*, since both included public displays of women’s *awrah*. Thus for instance, an MP from the Islam-based political party PPP, KH. Ismail Muzakki, argued that it is the state’s duty to raise awareness on such matters in a Muslim society.<sup>23</sup> According to Muzzakki and many

other proponents, existing legal provisions on this matter were no longer adequate, as their provisions did not meet Islamic moral standards. Others argued that traditional practices showcasing women’s sensuality, and traditional, somewhat revealing ethnic attire should be tolerated as long as Muslims were not exposed to them, as stated by KH. Hasim Muzadi, then leader of NU:<sup>24</sup>

“I would never blame the Hindu-Balinese for their permissive religion and culture [to the exposure of body]... In the Balinese

<sup>23</sup> MP from Islam based political party of PPP; interview, May 8<sup>th</sup> 2008

<sup>24</sup> Chairperson of NU. Interview, April 2<sup>nd</sup> 2008

culture, those type of clothes are allowed. However, I am shocked whenever I hear that a Moslem justifies nudity. How much are they paid [to say so]?”

Despite some support for revision, the majority of the opposition coalition remained committed to the cancellation of the bill, arguing that the deletion of *pornoaksi* from the title was only cosmetic, since, in their view, the actual content retained the term *pornoaksi* in the bill's definition of pornography:

“All sexual materials in the form of... voice, sound ...conversation, gesture... public performances, which may be sexually arousing and/or may violate the values of decency uphold by the society and/or provoke the growth of *pornoaksi* in the society” (Art. 1, 2007 revised draft)

The revised draft did not explain what specifically constitutes *pornoaksi*; instead it prohibited individuals from posing for pornography or performing pornographic gestures. Opponents continued to object that the bill was harmful to all Indonesians, and particularly damaging to women's rights, as it imposed a uniform moral code in the context of the pluralist Indonesian cultural identity.

The preservation of the term *pornoaksi* in the bill strengthened public opinion that the proposed legislation was linked to a larger hidden agenda of formalizing Shari'a into the Indonesian legal system, a movement which dates back to the eve of Independence and the creation of the Indonesia Constitution in 1945, and which reemerged during constitutional amendment debates in 1998 following the overthrow of Suharto. The decentralization process supporting a policy of regional autonomy has also created concern over similar agendas occurring in various regions. Most particularly, in the region of Aceh, which gained autonomy after years of guerilla warfare against the Indonesian army and where a particular interpretation of Shari'a Law was instituted starting in 2000, with increasingly stringent bylaws being implemented ever since, including prohibiting proximity between unrelated males and females (*khalwat*) and public flogging for adultery. The decentralization process has also enabled some regions to pass local bylaws with an Islamist character, including regulating *zakat* (donation), *shalat*



(praying sessions), fasting, and the recitation of Qur'an. Some bylaws particularly target women, especially young women, imposing veiling, establishing curfews for women, limiting women's mobility by requiring them to be accompanied by an adult male relative, and allowing the arrest of women suspected of engaging in sex work based on clothing and gesture.<sup>25</sup> The suspicion of this hidden agenda, was exemplified by the statement which by Iswanti, a woman active with the Alliance for Unity in Diversity (ANBTI):<sup>26</sup>

“It is easily traced in 2006 draft that the concepts and objectives of the bill reflect the values of a certain group and religion. It aims to standardize our morality, including dress code. Why should the state do so? We come from various cultural backgrounds; let this be an issue of the community or individuals. If they [the supporters] want to improve the existing legal basis, why not talk about pornography beyond the issue of morality? Why do they talk sweet about protecting the dignity of women?”

Nevertheless, some women's rights groups advocating feminist arguments for women's right to bodily autonomy<sup>27</sup> participated in the parliamentary negotiation process, hopeful that the process would provide an opportunity to negotiate better protection for women and children from sexual exploitation. For this purpose, they suggested three distinct categories of pornography, subject to distinct regulation and sanctions, and the deletion of clauses specifying particular parts of body, which if publicly displayed would be considered pornographic. Women's rights participants were also successful in having the clause establishing a specific entity to enact the law deleted. A leading women's rights activist involved in the negotiation argued that women's groups could “... be the winner of the negotiations because we

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<sup>25</sup> Komnas Perempuan in early 2009 reported that there were 154 discriminatory local bylaws of this kind. One hundred and six of the regulations use similar phrases stating that the goal of the bylaws is either “to be a realization of religious teachings” or “to improve faith and devotion”. More than half specifically state that the objective is to “realize an Islamic character of the region”; included here are seven bylaws on dress codes and thirteen policies on prostitution that criminalise women (Komnas Perempuan, 2009b).

<sup>26</sup> FGD 2, August 2008.

<sup>27</sup> FGD 1, June 2008

have shown them our force and the support from the rest of the society in 2006".<sup>28</sup>

However, many groups opposed to the original draft bill did not share this optimism,<sup>29</sup> noting that in prior participation in—consultative legislation processes, for instance on the national education system in 2006, Parliament ignored participants' demands to integrate pluralism into the curriculum. In fact, despite their vehement opposition, the law included new regulations for teaching morality and Islam without addressing the problem of a religious curriculum based on a patriarchal interpretation of Islam. In various regions, local governments and parliaments ignored the objections of invited participating human rights and pluralism groups to implied Islamic dress codes and other moral- and religious-based bylaws being formulated, while claiming that civil society groups had been included in the process.

Believing their involvement would be manipulated by the bill's advocates to legitimize the outcome, the majority of opposition coalition member groups refused to participate in the parliamentary legislation process. They were convinced as well that the main aim of the bill's proponents was simply for some political parties to gain votes in the 2009 general election.<sup>30</sup> A pluralism advocate representative of the groups refusing to participate in the negotiation process, explained:<sup>31</sup>

“We all know the name of the game those groups play...We should not dance with their music, even when they sing about freedom on religion and faith, non religious based discrimination and so forth...We have to carefully look at the political context we are facing currently. It is certainly is a waste of time [to be part of the game].”

Women's organizations in the opposition camp asked their sister organizations participating in the parliamentary negotiations to rethink their involvement, convinced that it would not benefit women's rights and only

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<sup>28</sup> FGD 1, June 2008

<sup>29</sup> FGD 2, August 2008

<sup>30</sup> FGD 1, June 2008

<sup>31</sup> FGD 2, August 2008

serve to distract public attention from proponent's real interest: imposing *their* particular moral standards for political gain. These organizations argued that the best solution to pornography would be improved implementation of existing laws, or the initiation of a completely new draft, a suggestion unlikely to be accepted by the bill's proponents, as a young feminist in one of the focus group discussions argued.<sup>32</sup>

“We cannot start our discussion by utilizing their draft because it is built with a completely different paradigm, namely to control women's body and sexuality. Unless they agree to drop the current draft and restart all over again, there is no point of supporting the legislation process of this issue [pornography].”

Never-the-less, those opposed to participating in the redrafting process did not abandon their fight. As negotiations continued in parliament they created alternative means of galvanizing public support against the bill, through press briefings, public dialogues and rallies. The majority of opponents thus focused on strategies to annul the 2007 revised draft.

However, their task was made more difficult by the (arguably cosmetic) deletion of the term *pornoaksi* from the draft, and by proponent's appropriation of influential feminists' arguments against pornography. Thus women's organizations opposing the bill were increasingly labeled pro-pornography feminists and 'loose women'. This not only hampered the campaign; it created significant divisions within the Indonesian women's rights movement, which as noted earlier, for various reasons had no historical engagement on the issues around pornography. The situation benefitted the bill's proponents in their advocacy for the revised bill.

As the opposition coalition sought new strategies to overcome the backlash, the special parliamentary committee on pornography decided to close its sessions to public participation, arguing for the need to speed up the legislation process. The decision was sharply criticized, especially by participating women's rights organizations,<sup>33</sup> for violating citizens' right to

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<sup>32</sup> FGD 2, August 2008

<sup>33</sup> Meeting notes, JKP3 in Komnas Perempuan.

participate and regulations concerning legislative procedures. Proponents' desire to hasten the passage of the bill exacerbated suspicions that the bill had a hidden agenda – for example using identity politics to gain voter support among specific constituencies, hinted at by a female MP in her account of the APP legislative process (Djakse, 2006). Despite all of these criticisms the Commission presented a final draft for parliamentary discussion in July 2008.

Opponents took this as an opportunity to expand their political strategy. With the return of women's groups which had earlier participated in negotiating the draft to the opponent camp, they turned to building a new campaign against the bill focusing on the demand that parliament open discussion on the final draft to public participation, not only in parliament, but also in the provinces and regions—particularly places where there were strong objections to the draft. Their position was diffused primarily through media coverage, and gained wide support.

In response, the government and the special anti-pornography bill committee agreed to public discussions to be held September 14-17, 2008. However, disregarding an important element of the coalition's demand, all of these so-called public debates were held in areas where support for the bill was overwhelming, such as Jakarta, South Sulawesi, South Kalimantan and North Maluku. Moreover, the hearings were almost inaccessible for opposing groups and organizations (LBH APIK, 2009)—for example, the government required a letter of invitation from its own Ministry of Women's Empowerment be procured by all potential participants.

The opposition coalition loudly criticized the government's rules for the public debate as manipulative and anti-participatory. Led by women's and human rights groups advocating for pluralism, the coalition conducted its own public discussions to gain the support of local authorities and the public in Jakarta, Solo, Surakarta, West Java, Jogjakarta, Bali, North Sulawesi and Papua. Jogjakarta, Bali, North Sulawesi and Papua. The support gained was so substantial that the Bali, North Sulawesi and Papua publicly declared they would seek independence if the anti-pornography bill were to pass.

A prominent concern raised repeatedly in all the hearings was that bill's proponents had a hidden agenda to impose a monolithic Indonesian identity

based on a particular interpretation of Islam that ignored the country's cultural and ethnic diversity. The bill's advocates vehemently rejected this accusation. MUI went so far as to warn the public that the opposition's argument that the bill sought to Islamicize the Indonesian legal system was provocation and fear-mongering.<sup>34</sup> However, once again, it became increasingly difficult for the bill's supporters to reject the accusation since the bill's main and most vocal proponents were religious extremists, and because the Prosperous Justice Party (PKS) stated that the bill would serve as "a Ramadan gift" for Indonesian Muslims (JP, 2008). The statement only confirmed to the public that PKS's support for the bill was based on identity politics, and backfired on the party which had made tremendous efforts to refute accusations of promoting Islamization through its negotiator role in the bill's legislative process. Yoyoh Yusro, a PKS MP attempted to explain the party's position:<sup>35</sup>

"We do not expect additional voters, but we have the obligation to protect the people. So, on issues affecting people's lives, we have to speak up in order to build a peaceful life. Such as the issue on pornography that according to the experts in economics is very disadvantaging."

In response to anger concerning the hearings process in various regions, the bill's special parliamentary committee agreed to a second round of public discussions from 11–13 October 2008, in Yogyakarta, Bali and North Sulawesi. Again the discussions were not in fact completely "open" or public; they also did not focus on any matters of substance in the draft (LBH APIK, 2009). Instead of bringing the two camps closer together, the public debates widened the gap between the bill's supporters and opponents. In Jogjakarta, for instance, the chairperson of the parliamentary special committee, Balkan Kaplale from the Democrat Party,<sup>36</sup> made a racist remark degrading the Papuans (a non-Muslim ethnic group). Previous documented statements show that prior to a meeting of Hizbut Tahrir Indonesia he claimed that Australia and the United Kingdom were obstructing the discussion on

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<sup>34</sup> Interview with Ma'aruf, head of MUI.

<sup>35</sup> Interview with MP from PKS, member of special committee on pornography.

<sup>36</sup> Democrat party holds a nationalist view and is lead by the president Soesilo Bambang Yudhoyono.

pornography. On another occasion, he used anti-democratic rhetoric, boasting of ultimate victory in passing the pornography bill because “like the military that has weapons, we the parliament have voting” (Kompas, 2008).

Parliament finally called for a vote on the bill in October 2008. Several political parties protested by boycotting the vote. PDI-P, the second largest party in parliament, objected on the grounds that the draft had not been thoroughly examined, and its members walked out during the final voting session. PDS, a Christian-based party, also refused to participate in the vote based on their earlier criticism that the bill deployed identity politics. Two members of Golkar from Bali also walked out of the session. The bill nevertheless was passed by the remaining eight parties, Golkar, PPP, Demokrat, PKB (National Awakening Party), PKS, PBR, PAN, and PBB (Crescent Star Party).

Following the bill's passage various regional governments signed a joint statement opposing the enforcement of the Bill or threatening to boycott the 2009 general elections, including Bali's governor, Made Mangku Pastika and the Head of Bali's House of Representatives, Ida Bagus Putu Wesmawa (Kompas, 2008); the Balinese had vehemently opposed the bill from the outset. The Papuan authority announced its intention to use Law 21/2001 on Papua Special Autonomy to oppose to the bill's implementation (Suara Perempuan Papua, 2008). A striking response was also delivered by the West Papuan parliament along with forty West Papua church leaders, urging the government to withdraw the bill and declaring they would boycott the 2009 general elections and raising the possibility of the separation of Papua from Indonesia (Hukum Online, 2008).

Meanwhile, various groups from the opposition coalition, including the JKP3, the Civil Society against Pornography Bill (*Masyarakat Sipil Tolak Pengesahan RUU Pornografi*), the Alliance of Cross-Nation Rainbow (*Aliansi Pelangi Antar Bangsa*), and the Alliance of the Poor (*Aliansi Masyarakat Miskin*), as well as women activists from Yogyakarta proposed going to the Constitutional Court to annul the law and lobbied vehemently to convince the President not to sign the bill. However, their efforts were in vain. In November 2008 the President, who is also the leader of the Democrat Party, signed the Pornography Bill into law despite the ongoing controversy.

## The Outcome

Although the opposition coalition was profoundly disappointed by the Bill's passage, their interventions, led by women's rights groups in and outside of parliament had a significant impact in terms of the degree of public debate and on negotiations, as evidenced by the many revisions the bill underwent. There are many significant differences between the initial draft proposed to parliament in 2002 and the bill that finally passed in 2008. All the revisions came as result of civil society opponents' campaigns (see annex 1 for detailed comparison), as shown in the Table 3 bellow.

**Table 3. Comparison between the 2008 Law on Pornography and the 2006 draft**

Issues	Removed	Maintained	Newly Inserted
Sexual activities considered pornographic (criminal)	<ul style="list-style-type: none"> <li>• Kissing on the lips</li> <li>• Sex party</li> <li>• Sex performance</li> </ul>	<ul style="list-style-type: none"> <li>• Sexual intercourse</li> <li>• Sex with animal,</li> <li>• Sex with dead body</li> <li>• Homosexual acts</li> <li>• Masturbation or onanism</li> </ul>	<ul style="list-style-type: none"> <li>• The term "deviant sexual intercourse"</li> <li>• Oral sex</li> <li>• Anal sex</li> <li>• Lesbian (singled out from homosexual)</li> <li>• Sexual violence (sexual intercourse following any act of violence, and including rape)</li> <li>• Sexual exploitation, defined as acts utilizing or exposing sensuality.</li> </ul>
Body parts considered <i>awrat</i>	Thigh, hips, belly button, breast	<ul style="list-style-type: none"> <li>• Genitals</li> </ul>	
<i>Pornoaksi</i>	<ul style="list-style-type: none"> <li>• Terms <i>pornoaksi</i> and eroticism</li> <li>• Kissing on the lips, erotic dancing or movement, sex party and sex performance</li> </ul>	<ul style="list-style-type: none"> <li>• Public display of nakedness, public sexual intercourse</li> <li>• Sexual exploitation—any act exploiting sensuality</li> <li>• Prohibition of the consumption or performance of prohibited actions that amount to pornography</li> </ul>	<ul style="list-style-type: none"> <li>• Public display or performances that contain obscenity or sexual exploitation that violate the norms of decency in society</li> <li>• Deliberate and/or consensual participation in modeling for pornography.</li> </ul>

The most significant revisions include the deletion of all Arabic terms; all references to particular Islamic norms, and the removal of the term *pornoaksi* from the title and the text. In another significant victory for opponents, resulting from objections by human rights groups and pluralism advocates that the proposed bill disregarded the historic and ongoing plurality of Indonesia, the Law makes exceptions for art, culture, tradition and religious rituals with the stated objective “to respect, protect, and preserve the values of art and culture, tradition and religious rituals”. The proposition to establish a national implementing body with the authority to determine what constitutes pornography was also removed, as were the public’s right to participate in raids or any form of violence to enforce the Law—an attempt to prevent the emergence of ‘moral police’. Provisions on child pornography were also improved based on inputs from women’s groups and child rights’ activists.

It is noteworthy that claims of victory by the bill’s opponents is in fact confirmed by its proponents. Islamists in particular perceive the revisions to the bill as a symbolic political loss, citing the removal of Arabic terms, references to specific Islamic norms defining *awrah* and the word *pornoaksi* as evidence of their failure to insert Shari’a into the Indonesian legal system. Neng Djubaedah, the architect behind the first MUI draft noted “we still want the title to be the Law on Anti Pornography and *Pornoaksi*, not just the Law on Pornography, as passed by the parliament”,<sup>37</sup> while Muslimah HTI argues that the law’s provisions regulate rather than eliminate pornography: “It still tolerates *soft* pornography, excludes erotic performances and ignores the public display of *aurat*”.<sup>38</sup>

Although the Law in many aspects does represent a victory for opponents, the Law’s vague definition of pornography which leaves it wide open to interpretation (“all materials ... that contain obscenity or sexual exploitation that violate the norms of decency in society”), the introduction of the term “deviant sexual intercourse”, which implies criminalization of non-heterosexual sexual acts, and the implied concept of *pornoaksi* in the bill’s articles that may result in the criminalization of women.

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<sup>37</sup> Interview, 21 January 2009

<sup>38</sup> Interview with Muslimah HTI spokesperson, 9 January 2009



It is crucial to recognize the proactive efforts of women's groups in creating “windows of opportunity” for political action, nurturing a civil-society coalition and strengthening alliances with the media throughout the negotiation process. This helped bring the issue of pornography and the pornography legislation to public attention and mobilized support for their objections to the bill. Clearly the Indonesian women's movement played a leadership role in building social movements around the issue. As Meyer (1990, cited in Goodwin, Jasper & Khattrra, 1999) argues, social movements “represent the efforts of groups and individuals not only to take advantage of opportunity but also to alter the subsequent opportunity structure”. In other words, the success of movements is measured not only by the extent to which they achieve their goals, but also by how well they “respond to that limited opportunity and the extent to which they fill or expand the available political space” (Meyer, 1990: 8). In this light, it is important to recognize the importance of alternative avenues created by the women’s rights groups for public participation despite limited opportunities offered by official political mechanisms, including Parliament’s decision to limit public hearings to areas where there was widespread public support for the Bill. The invitation to women's groups to participate in the deliberation process on the Bill also proved to be somewhat token—with parliament holding closed sessions in the last round of talks despite ongoing, widespread public controversy over the Bill. However though citizen’s participation in the deliberation process was thwarted by the government, it was enabled by the opening of alternative channels of participation by the women's movement.

Another highly significant achievement of the campaign led by women’s rights groups was publicly revealing the “authoritarian practice of democracy” demonstrated by the Indonesian government and parliament, which clearly demonstrated “procedural” and “majoritarian” ‘democracy’ over any truly substantive democratic processes aimed at including citizens in decision-making processes. This was a crucial step for the future of democracy in Indonesia, noted Eva Sundari, an MP from PDI-P:

“The public response to women’s movement against the anti-pornography-*pornoaksi* bill was so massive. It became a political education for the public. Public eyes were opened to see that many parties are trying to manipulate legislation

process, to seize away women's rights. Women in particular became aware that they have to question those legislations...Groups wanting to sabotage women's rights were forced to face the public through debates, demonstrations and also, negotiations."<sup>39</sup>

## **Conclusion**

The political debate on the anti-pornography bill in Indonesia from 2006 to 2008 is a powerful example of how women's sexuality is manipulated in the contestation of power by various social forces in the shifting political landscape of post-authoritarian New Order Regime Indonesia. The regulation of women's sexuality can be a powerful means of employing identity politics to gain support, and was used by both Islamist political forces and the government during the debates on the bill. In the end, despite immense opposition and heated public debates, the anti-pornography bill passed because the Indonesian democratic system does not offer real channels for citizens to actually influence the outcomes of legislation processes or policy decisions.

The Law, passed in 2008, is discriminatory to women and criminalizes women's sexual autonomy on the basis of a patriarchal notion of morality. Moreover, it constitutes a threat to Indonesia's historical cultural and religious diversity. However, the extensive campaign of women's rights groups in public and governmental debates on the bill successfully communicated the message to the public that women's sexuality is a key issue in debates on nation-building. The public debates enabled women's rights groups in particular to show leadership in shaping the process and style of democratization in Indonesia. Despite some internal controversies and although there are still grave concerns that the Law inherently leads to the criminalization of women, the leadership of women's groups in this process has been a vital contribution to the advancement of citizen participation in law-making, as women's organizations played a key role in building a wide strategic coalition and alliances, in the expansion of political opportunities, and in impacting the final revisions in the law.

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<sup>39</sup> Interview, 8 May 2008

## **Follow-up Note June 2012**

The coalition that advocated against the law, including women's organizations, human rights groups, groups advocating for pluralism, religious groups, indigenous communities and artists submitted a request for Judicial Review on the Pornography Law to the Constitutional Court in 2009. On March 25, 2010, after a year of exhaustive hearings, the Constitutional Court decided by a vote of eight to one that the Anti-pornography Law does not infringe the constitution. The only dissenting opinion was given by the sole female judge, who argued that the law contravened the Indonesian constitution, violating the constitutional guarantee to the rights of legal certainty and protection as well as posing a threat to the unity of the nation, which is a principle rule of the Constitution.

Komnas Perempuan's monitoring of the Law's implementation confirms that it disproportionately targets women, violates gender equality, and fails to protect women who are victims of sexual exploitation. To cite one example, in West Java four women were accused of violating the Pornography Law by taking part in strip-dancing, although in fact they were victims of human sex trafficking. While the women faced charges, the manager of the venue and its clients were declared innocent and were not prosecuted. In another case a young woman in Central Java was imprisoned for videoing a sexual encounter with her lover in order to convince her parents to allow her to marry him.

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## Notes on CSBR

The Coalition for Sexual and Bodily Rights in Muslim Societies (CSBR) is an award-winning international solidarity network committed to advancing a holistic approach to sexual and bodily rights as human rights across Muslim societies. CSBR's network connects over 30 member organizations and a wide range of allies across 16 countries in the Middle East, North Africa, South Asia, South East Asia and Central Asia.

### **Our Vision:**

CSBR is founded on the fundamental principle that all people, regardless of their gender, citizenship, class, age, mental and physical ability, religion, marital status, ethnic identity, sexual orientation, and sex characteristics, have the right to bodily integrity and autonomy, and the right to freely decide on all matters concerning their sexuality and fertility.

We want to see the recognition, protection and respect of human rights and fundamental freedoms related to sexual and bodily rights in the political, economic, social, cultural, and civil—or any other—fields, for all peoples.

### **Our Mission:**

CSBR members hold as core values that sexual and bodily rights are universal human rights based on the inherent freedom, dignity and equality of all human beings.

We act as a resource hub, strengthen capacities, and increase solidarity across regions, themes and constituencies, so that our movements succeed in accessing and transforming power structures to ensure sexual & reproductive autonomy, bodily integrity, and gender-justice.

**Visit:** <http://csbronline.org>. **Contact us at:** [coordinator@csbronline.org](mailto:coordinator@csbronline.org)

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