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Is Green a Part of the Rainbow? *Sharia*, Homosexuality and LGBT Rights in the Muslim World

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FEATURED ARTICLE

IS GREEN A PART OF THE RAINBOW? *SHARIA*, HOMOSEXUALITY, AND LGBT RIGHTS IN THE MUSLIM WORLD

Javaid Rehman & Eleni Polymenopoulou***

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INTRODUCTION

On June 17, 2011, the United Nations Human Rights Council (“HRC”) passed Resolution 17/19 on “Human Rights, Sexual Orientation and Gender Identity.”¹ The adoption of this first ever resolution within the United Nations has been described as a momentous and historic occasion in the struggle for the rights of Lesbian, Gay, Bisexual, Transgender (“LGBT”)² individuals. On that momentous occasion, the HRC expressed grave concern at the violence undertaken against LGBT individuals and reiterated the imperative nature of the application of fundamental human rights for every human being without any form of discrimination. Further, in December 2011, the UN High Commissioner Navi Pillay, with the mandate of the HRC Resolution, presented to the United Nations a report highlighting the disastrous effects of the criminalization of homosexuality.³ This report was followed by a UN-constituted panel of experts in the following HRC session in March 2012,⁴ while a more generalized attitude against homophobia has also been evident within other organs and agencies of the United

1. Human Rights Council Res. 17/19, Rep. of the Human Rights Council, 17th Sess., May 31–June 17, 2011, U.N. Doc. A/HRC/17/L.9/Rev.1 (June 15, 2011).

2. Other common abbreviations include “LGBTI,” which includes “intersex individuals” and “LGBTQ” which includes those “questioning their sexual identity.”

3. U.N. Human Rights Council, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity: Rep. of the U.N. High Comm’r for Human Rights*, ¶ 42, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011).

4. This was the first global panel discussion on Sexual Orientation and Gender Identity (“SOGI”) held in the UN Human Rights Council on Mar. 7, 2012. See U.N. Office of the High Comm’r for Human Rights, *Combatting Discrimination Based on Sexual Orientation and Gender Identity*, <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx> (last visited Nov. 8, 2013).

Nations, particularly the United Nations Education, Scientific, and Cultural Organization (“UNESCO”).⁵

The work of hundreds of activists and experts for the protection and promotion of LGBT rights around the globe leaves no doubt that the repression of homosexuality and queerness is a global phenomenon. Indeed, as highlighted in the HRC 17/19 Resolution, as well as in the High Commissioner’s Report and in several other UN Committees’ reports, violations of human rights are frequently visited upon LGBT communities, even in the most liberal and democratic states.⁶ It is particularly alarming that in 2011, seventy-six states had criminal laws and penal sanctions attached, as a consequence of sexual orientation, to sexual behavior or gender identity.⁷ This number increased to seventy-eight in 2012.

A first reading of these statistics suggests that both homophobia and the criminalization of homosexuality are phenomena of global reach. In fact, it is only half of these seventy-eight states that are Muslim-majority or *Sharia*-compliant

5. See e.g., UNESCO, *Message from Irina Bokova, Director-General of UNESCO on the Occasion of International Day against Homophobia and Transphobia (IDAHO)* (May 17, 2013), available at <http://unesdoc.unesco.org/images/0022/002208/220888e.pdf> (calling for the decriminalisation of homosexuality to combat homophobia and “transphobia” and paying particular attention to homophobic bullying).

6. See, e.g., Navanethem Pillay, U.N. High Comm’r for Human Rights, *Ending Violence and Criminal Sanctions Based on Sexual Orientation and Gender Identity* (Sept. 17, 2010), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10367&LangID=E>; COUNCIL OF EUR., *DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE* 51–62 (2d ed. 2011), available at http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf; Thomas Hammarberg, Council of Eur., *Hate Crimes: The Ugly Face of Racism, Anti-Semitism, Anti-Gypsism, Islamophobia and Homophobia* (July 21, 2008), available at www.coe.int/t/commissioner/viewpoints/080721_en.asp. On discrimination against LGBT individuals in the United States, see Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415–67 (2012). See generally Holning Lau, *Sexual Orientation & Gender Identity: American Law in Light of East Asian Developments*, 31 HARV. J.L. & GENDER 67, 86–91 (2008); Laurence Helfer & Alice Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, 99 (1996) (describing the efforts of the International Lesbian and Gay Rights Association (“ILGA”), an organization consisting of about five hundred different advocacy groups from around the world).

7. U.N. Human Rights Council, *supra* note 3, at 13–14 (citing INT’L LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX ASS’N, *STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS CRIMINALISING SAME-SEX SEXUAL ACTS BETWEEN CONSENTING ADULTS* 9 (May 2011)).

states.⁸ Yet it seems that there is a certain “privileged” connection between Islam and the repression of homosexuality. All five states that currently punish same-sex relations by the death penalty are *Sharia*-compliant: Iran, Yemen, Saudi Arabia, Mauritania, and Sudan.⁹ The death penalty is also applied in the northern region of Nigeria, which has predominantly Muslim populations, and the southern parts of Somalia.¹⁰ The most brutal punishments, including lashes and public stoning, as well as arbitrary executions, also occur in Muslim-majority states (namely, Iran, Yemen, Saudi Arabia, Sudan, Qatar, Pakistan, Afghanistan, and Malaysia).¹¹ Some of the Islamic states that impose life imprisonment do so on the basis of the *Sharia* injunctions (for example, Maldives).¹² Even the most “tolerant” states still punish the offense of “unnatural intercourse” (Bangladesh).¹³ Furthermore, the Muslim-majority states that criminalize same sex relationships have also proved to have the

8. These states are, according to the ILGA 2012 Report: (Africa) Algeria, Angola, Benin, Botswana, Burundi, Cameroon, Comoros, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Libya, Malawi, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Nigeria, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, South Sudan, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe; (Asia and the Middle East) Afghanistan, Bangladesh, Bhutan, Brunei, Iran, Kuwait, Lebanon, Malaysia, Maldives, Myanmar, Oman, Pakistan, Qatar, Saudi Arabia, Singapore, Sri Lanka, Syria, Turkmenistan, United Arab Emirates, Uzbekistan, Yemen—the status of homosexual acts seems uncertain in Iraq; (Latin America & Caribbean) Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St Kitts & Nevis, St Lucia, St Vincent & the Grenadines, Trinidad and Tobago. LUCAS PAOLI ITABORAHY, ILGA, STATE SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS CRIMINALISING SAME-SEX SEXUAL ACTS BETWEEN ADULTS 13–14 (2012) [hereinafter ILGA], available at <http://www.aidsfreeworld.org/PlanetAIDS/~/media/796515F2D74A4158AC599504E042F4A8.pdf>.

9. *Id.* at 13.

10. *Id.* The Uganda’s 2011 “Anti-homosexuality Bill,” which would punish homosexuality by death, is still today under consideration. See *Uganda Pro-Gay Groups Face Ban by Ethics Minister Lokodo*, BBC NEWS (June 21, 2012, 6:20 AM), www.bbc.co.uk/news/world-africa-18531948.

11. See RITA J. SIMON & ALISON M. BROOKS, *GAY AND LESBIAN COMMUNITIES THE WORLD OVER* 3–4 (2009); see also Jehoeda Sofer, *Sodomy in the Law of Muslim States, in SEXUALITY AND EROTICISM AMONG MALES IN MOSLEM SOCIETIES* 131, 134–46 (Arno Schmitt & Jehoeda Sofer eds., 1992).

12. The Maldivian Penal Code does not explicitly regulate sexual conduct, “homosexual acts” being merely an “arrestable offense”; however, the punishment for homosexual acts under uncodified *Sharia* law includes imprisonment for up to one year, lashing, and house confinement.

13. The Penal Code, Act. No. XLV of 1860, ch. XVI, art. 377 (Bangl.).

highest levels of homophobia and intolerance towards sexual diversity.¹⁴

Throughout cultures and traditions, religion has played a considerable role in the repression of homosexuality. Unsurprisingly, many religious scholars of the three monotheistic religions—Christianity, Judaism, and Islam—find homosexuality unacceptable.¹⁵ Divine revulsion features prominently amidst a range of justifications for rampant discrimination and violation of the fundamental human rights of LGBT communities. Nevertheless, it is frequently Islam that is portrayed as “the source of unbridgeable difference,”¹⁶ and the one that continues to prescribe the most serious penalties both in this world as well as hereafter. Furthermore, in the contemporary world, it is arguably faith in Islam that is most likely to contribute to the creation of stereotypes and Islamic extremism.

More alarming is the specificity of the debate in the Muslim world. Homosexual relations have been culturally and historically rooted within the Islamic traditions.¹⁷ And yet, not only do Muslim societies negate LGBT rights, but they sometimes completely refuse to recognize the existence of homosexuals, using religion as an ideological argument for this

14. See Tilo Beckers, *Islam and the Acceptance of Homosexuality: The Shortage of Socioeconomic Well-Being and Responsive Democracy*, in 1 ISLAM AND HOMOSEXUALITY 57, 79 (Sameer Habib ed., 2010); see also Badruddin Khan, *Longing, Not Belonging, and Living in Fear*, in 1 ISLAM AND HOMOSEXUALITY, *supra*, at 23; *Sexual Orientation and Gender Identity*, AMNESTY INT’L, <http://www.amnesty.org/en/sexual-orientation-and-gender-identity> (last visited Nov. 20, 2013); Juliane von Mittelstaedt & Daniel Steinvorth, *The Gay Sons of Allah: Wave of Homophobia Sweeps the Muslim World*, SPIEGEL ONLINE INT’L (Sept. 17, 2009, 10:29 AM), <http://www.spiegel.de/international/world/the-gay-sons-of-allah-wave-of-homophobia-sweeps-the-muslim-world-a-647913.html>; *Islam and Homosexuality: Straight but Narrow*, ECONOMIST, Feb. 4 2012, <http://www.economist.com/node/21546002>.

15. See Gilbert Herdt, *Homosexuality*, in 6 ENCYCLOPEDIA OF RELIGION 445, 452 (Mircea Eliades ed., 1987). Herdt observes generally that polytheistic religions have been more tolerant than monotheist ones. The leader of the Catholic Church has also implied the incompatibility of homosexuality with Christianity. See, e.g., Philip Pulella, *Gay Marriage a Threat to Humanity’s Future: Pope*, REUTERS, Jan. 9, 2012, <http://www.reuters.com/article/2012/01/09/us-pope-gay-idUSTRE8081RM20120109>.

16. Tom Boellstorff, *Between Religion and Desire; Being Muslim and Gay in Indonesia*, in SEXUALITIES IN ANTHROPOLOGY 306, 306 (Andrew P. Lyons & Harriet D. Lyons eds., 2011).

17. See *infra* Section III.

negation.¹⁸ Culture, tradition, and, ultimately, religious norms are used to sanctify brutal punishments, discrimination, and the exclusion of LGBT persons from society. Government representatives and officials emanating from Muslim-majority and Islamic states openly refer to the Islamic religion as a justification for human rights abuses against queer individuals, treating them publicly as inferior to human beings or simply declaring that homosexuality is a sin worse than murder.¹⁹ In states such as Iran, Pakistan, and Malaysia, LGBT individuals are treated as abnormal and sub-human, police raids constantly occur, and any attempt by the media to advocate for LGBT rights is immediately censored.²⁰ Furthermore, religious preachers who advocate the incompatibility between Islam and homosexuality, and suggest that homosexuality is against nature, are primarily responsible for the rise of hate speech against LGBT individuals—a hate speech that is particularly visible among youth in both Muslim-majority states and the Muslim diaspora.²¹

18. The most outrageous denial undoubtedly being Ahmadinejad's speech at Columbia University in the United States, stating "In Iran, we don't have homosexuals, like in your country." *Ahadinejad Speaks; Outrage and Controversy Follow*, CNN (Sept. 24, 2007, 9:07 PM), www.cnn.com/2007/US/09/24/us.iran.

19. See Saeed Kamali Dehghan, *Homosexuals Are Inferior to Dogs and Pigs, Says Iranian Cleric*, *GUARDIAN* (Apr. 18, 2012, 10:57 AM), <http://www.theguardian.com/world/iran-blog/2012/apr/18/iran-cleric-condemns-homosexuality>. Also, some time ago, in 2005, the Iranian Aytollah Ali Sistani, had released a *fatwa* in which he told his followers that homosexuals have to be killed. See Petra Doan, *Disrupting Gender Normativity in the Middle East*, in *DEVELOPMENT, SEXUAL RIGHTS AND GLOBAL GOVERNANCE* 145, 149 (Amy Lind ed., 2010). Likewise, in Malaysia, the Head of the Islamic Affairs Department declared in 2000 that homosexuality is a crime. See *Homosexuality is a Crime Worse Than Murder*, *TIMES.COM*, Sept. 26, 2000, <http://www.time.com/time/world/article/0,8599,2040451,00.html#ixzz2PILyWkCt>.

20. See *infra* Section II.B.

21. See *supra* note 6; see also Joke Swiebel & Dennis van der Veur, *Hate Crimes Against Lesbian, Gay, Bisexual and Transgender Persons and the Policy Response of International Governmental Organisations*, 27 *NETH. Q. HUM. RTS.* 485 (2009); CHRISTINE LOUDES & EVELYNE PARADIS, *INT'L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASSOC., HANDBOOK ON MONITORING AND REPORTING HOMOPHOBIC AND TRANSPHOBIC INCIDENTS* (2008). It is however, particularly visible among Muslims, especially the youth. See Esther Addley, *Three Muslim Men Convicted over Gay Hate Leaflets*, *GUARDIAN* (London), Jan. 20, 2012, <http://www.guardian.co.uk/world/2012/jan/20/three-muslims-convicted-gay-hate-leaflets> (discussing the recent debate on hate speech against homosexuals in the UK); Jessica Geen, *Man Arrested, Released over East End Anti-Gay Stickers*, *PINK NEWS* (Mar. 11, 2011, 5:34 PM), <http://www.pinknews.co.uk/2011/03/11/man-arrested-released-over-east-end-anti-gay-stickers>.

When, occasionally, any of these states have amended criminal laws or other discriminatory legislation, the psychological conviction of the unlawfulness and unacceptability of homosexuality within Islam and Muslim societies persists.²² As a result, LGBT individuals in the Muslim world see their rights massively abused. In the few cases where they can publicly acknowledge their sexuality,²³ they end up marginalized, victims of parental or conjugal violence, absorbed by the countries' sex industries, or self-exiled.²⁴

The present article examines the legitimacy and validity of the claims for criminalization of homosexuality and discrimination against LGBT individuals from within the *Sharia*, as practiced in modern Muslim societies. It demonstrates that several passages of the *Qur'an* acknowledge homosexuality and celebrate sexual diversity, and that it is therefore inaccurate to suggest there is a prohibition of homosexuality in Islam and to advocate criminalization or adoption of discriminatory practices targeting sexual minorities. Furthermore, it is argued that religious views and societal practices that suppress queerness or discriminate against LGBT persons are not only incompatible with human rights law, but also contradict the fundamental principles of the *Sharia*. Contrary to most of the established scholarly approaches,²⁵ this Article argues that the *Sharia* neither

22. This is, for example, the case of Indonesia, where "Muslims believe it is forbidden by their religion." *Climate of hostility against homosexuals in Indonesia*, BBC NEWS (June 16, 2010, 11:37 PM), http://news.bbc.co.uk/2/hi/world/asia_pacific/10337220.stm; Boellstorff, *supra* note 17.

23. See generally HIJAB: UNVEILING QUEER MUSLIM LIVES (Pepe Hendricks ed., 2009) (a collection of testimonials by young LGBT Muslims in South Africa).

24. See Khan, *supra* note 14; see also *Islam and Homosexuality*, *supra* note 14.

25. See, e.g., MASHOOD BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 117 (2003) ("Homosexuality is generally seen to be strongly against the moral fabric and sensibilities of Islamic society and is prohibited morally and legally under Islamic law."). Tariq Ramadan equally advises that "homosexuality is not Islamic per se" and that "we are asking each other not to promote something which could be perceived as wrong to the common good." See "Mosque for Gays" to Open in French Buddhist Hall, PEOPLE OF SHAMBALA (Nov. 25, 2012), <http://peopleofshambhala.com/mosque-for-gays-to-open-in-french-buddhist-hall> (featuring an interview with Ramadan). Ramadan likewise argues that "Muslims are now being called upon to condemn the Qur'an, and to accept and promote homosexuality to gain entry into the modern world." Tariq Ramadan, *Islam and Homosexuality*, MUSLIMPRESENCE.COM (May 29, 2009), <http://www.tariqramadan.com/Islam-and-Homosexuality,10683.html?lang=fr>. Shykh Hamza Yusuf submits that homosexuality is prohibited in the *Qur'an*. Shykh Hamza Yusuf, Keynote Address on Behalf of Oxford University Islamic Society:

prohibits nor punishes homosexuality. To the contrary, a genuine enforcement of the laws based upon the *Sharia* in contemporary Muslim societies requires absolute recognition and celebration of diverse gender identities.

The Article is divided into five parts. After these introductory comments, Part I proposes a more rational and contextually-sensitive understanding of the *Sharia*, and ascertains relevant *Sharia* principles on the repression of homosexuality. Part II provides an overview of LGBT rights in international law and in the Muslim world, highlighting the politicization of this issue by the Organization for the Islamic Cooperation (“OIC”) member states. Part III explores the regional and domestic standards in the Islamic states, including a cultural reading of these standards, and explains the paradoxical interpretations of the *Sharia* developed by Muslim scholars with regard to homosexuality. The final section provides a number of concluding observations.

I. *THE EVOLUTION OF FIQH ON HOMOSEXUALITY*

The prohibition of homosexuality is rooted in the theologico-juridical *corpus* of Medieval Islam. This *corpus* consists mainly of jurisprudence of the major Islamic Schools of Thought (*madhhab*) or *fiqh*, within Sunni Islam,²⁶ and is followed by most contemporary Islamic scholars. Their views are based principally upon the *Quranic* parable of the Prophet Lot, or *Lūt* in Arabic, as discussed below.²⁷

Rethinking Islamic Reform (May 26, 2010), *available at* <http://sheikhhamza.com/transcript/Rethinking-Reform>. Sheikh Yusuf al-Qaradawi also states that “this perverted act [i.e. homosexuality] is a reversal of the natural order, a corruption of man’s sexuality, and a crime against the rights of females. (The same applies equally to the case of lesbianism.)” *The Qaradawi Fatwas*, MIDDLE E.Q., Summer 2004, at 78 (interview with Sheikh Yusuf al-Qaradawi and the Editor of *Middle East Quarterly*); Imam Yusuf Saleem, *An Islamic Response to the Washington Post Article on Gay Muslims*, 5 J. ISLAMIC L. & CULTURE 87 (2000).

26. Mohammed Mezziane, *Sodomie et Masculinité Chez les Juristes Musulmans du IXe au XIe Siècle*, 55 ARABICA 276, 278 (2008).

27. Most of Islamic scholars relate the parable of Lūt to homosexuality. *See, e.g.*, Nurdeen Deuraseh, *Protection against STDs: An Islamic Criminal Law Approach*, 22 ARAB L.Q. 88, 97 (2008) (“Muslims are aware that the people of *Lūt* were the first people on earth who were materially advanced, and preferred to practice sex with males, rather than with females.”). Opposite opinions are scarce. *See e.g.* Hassan El Menyawi, *Same-Sex*

A. *General Prohibition of Same-Sex Relationships According to the Primary Sources of Sharia Law?*

Islam attaches immense significance to traditional heterosexual marriage as the only lawful and religiously acceptable vehicle for sexual contact amongst consenting heterosexual men and women. However, this emphasis on legitimizing and regularizing heterosexual conduct through the institution of marriage does not impact the *Qur'an's* positive view upon the celebration of sexual diversity, and the recognition of homosexuality and lesbianism as a legitimate practice for those whom Allah Almighty has endowed with homosexual and lesbian tendencies.

1. Classical Interpretations of *Sharia* Law

As noted above, in the context of marriage, Islam takes a positive view of sexuality. Sexual pleasure between spouses is an integral part of the marriage. Even more importantly, sexual intercourse, as the consummation of marriage, is a condition of its validity (marriage and *coitus* are associated in the term *nikah*).²⁸ The 'sexual duality' of those associated by *nikah* is a form of sacred relationship,²⁹ and that is the reason as to why sexual conduct must be performed within the bounds of the *Sharia*.³⁰ The *Qur'an* and the *Sunna* indeed explain in detail the sexual practices between spouses, who are described in the

Marriage in Islamic Law, 2 WAKE FOREST J.L. & POL'Y 375, 435–39 (2012); *infra* Section I.A.1.

28. See ABDELWAHAB BOUHDIBA, *SEXUALITY IN ISLAM* 17–18 (Alan Sheridan transl., 2012).

29. See *QUR'AN*, Sūra II: Al-Baqarah, verse 187; Sūra XXX: Ar-Rūm, verse 21; Sūra IV: An-Nissa, verse 1; Sūra III: Ā'lay Imrān, verse 41; Sūra VII: Al-A'rāf, verse 81; Sūra XXVII: An-Naml, verse 55. Throughout this Article, translations of the *Qur'an* are taken from ENGLISH TRANSLATION OF THE MEANING OF AL-QUR'AN: THE GUIDANCE FOR MANKIND (Muhammad Farooq-i-Azam Malik trans., 1997), unless otherwise indicated. See also Bouhdiba, *supra* note 28, at 30.

30. See Abdessamad Dialmy, *Sexuality and Islam*, 15 EUR. J. CONTRACEPTION & REPROD. HEALTH CARE 160, 161 (2010). Further, see Deuraseh, *supra* note 27, at 98, who bases his arguments on several Islamic traditions to argue that sodomy is the main reason for the emergence of new epidemics and diseases. See also FIDA SANJAKDAR, *LIVING WEST, FACING EAST: THE (DE)CONSTRUCTION OF MUSLIM YOUTH SEXUAL IDENTITIES* 63 (Shirley R. Steinberg ed., 2011) (citing GHULAM SARWAR, *SEX EDUCATION: THE MUSLIM PERSPECTIVE* (The Muslim Educational Trust, 2004)).

Islamic scriptures as “garments” fitting each other.³¹ Some authors have even claimed that there is a certain relationship between the magico-religious spheres of life and the sacralizing character of the *nikah*.³²

Outside of a lawful marriage, as prescribed by the *Sharia*, no other form of sexual activity is permissible. In accordance with the classical understanding of the *Sharia*, any extra-marital (i.e., unlawful) sexual relations are illegal, with corresponding criminal law sanctions. Unlawful sexual intercourse is identified as *zina*,³³ which is a major offense.³⁴ As Fida Sanjakdar notes, “deviating from the Islamic narrative of heterosexual relations within *zawaj* (marriage) is a highly charged and politically sensitive act, which can subject persons to ‘harsh criticism from fellow Muslims’ as well as becoming ‘ostracised from the Muslim community.’”³⁵

It is therefore not surprising that there is unanimity amongst scholars of the major Islamic schools of thought (*Sunni*

31. *QUR'AN*, Sūra II: Al-Baqarah, verse 223 (“Your wives are a place of sowing of seed for you, so come to your place of cultivation however you wish and put forth [righteousness] for yourselves. And fear Allah and know that you will meet Him. And give good tidings to the believers.”).

32. See BOUHDIBA, *supra* note 28, at 17; see also SANJAKDAR, *supra* note 30, at 59 (citing SALMAWI ASHRAF, *THE CONCEPT OF SEX IN ISLAM AND IN SEXUAL EDUCATION* (1998)).

33. The definition of *zina* differs from one Islamic School of thought to another (in *Sunni* Islam there are four schools [*madhabs*], while the main *Shii'a* School is *Jafari*). The most pertinent analysis is provided by the *Hanafi* School: sexual intercourse between a man and a woman without legal rights, or without the semblance of a legal right. *Zina*, according to all Schools, is one of the six *huddud* offenses (*the plural form of hadd*). *Hadd* literally means “limit” or “prohibition”: *hadd* punishments refer to those punishments, which have been fixed for certain crimes and are non-discretionary provided evidentiary requirements are met. *Hadd* punishments are also applicable for theft (*sariqa*), highway robbery/brigandage (*hriaba, qat'al tariq*), alcohol consumption (*sharb al-khamr*), and apostasy (*rida*).

34. See MOHAMED S. EL-AWA, *PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE PERSPECTIVE* 16–19 (2d ed. 2000); Noel J. Coulson, *Regulation of Sexual Behaviour under Traditional Islamic Law*, in *SOCIETY AND THE SEXES IN MEDIEVAL ISLAM* 63, 63 (Afaf Lūtfi Al-Sayyid Marsot ed., 1977); Azman bin Mohd Noor, *Stoning for Adultery in Christianity and Islam and Its Implementation in Contemporary Muslim Societies*, 18 *INTELL. DISCOURSE* 97 (2010); see also NISRINE ABIAD, *SHARIA, MUSLIM STATES AND INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS: A COMPARATIVE STUDY* 22–27 (2008).

35. Fida Sanjakdar, *Sex Education: Sexuality, Society and Learning*, 13 *SEX EDUC.* 16, 21 (2013).

and *Shi'a*) that homosexuality is forbidden (*haram*),³⁶ while at the same time considered to be a moral, physical, and psychological disorder.³⁷ All the major doctrines within the *Sunni* and *Shi'a* traditions, and most notably the *Shafi* School, agree that homosexual intercourse (*liwat*) is analogous to heterosexual *zina*, and should therefore be rejected.³⁸ Apart from the *Hanafi* school, all Islamic schools take the position that homosexual conduct amongst men, and particularly the act of *sodomy* (i.e., anal penetration), attracts the *Hadd* punishment.³⁹ Only minor doctrines, like *Zahirism* (a *Sunnite* doctrine) and *Rafida* (a *Shi'ite* doctrine), suggest that homosexuals should not be punished.⁴⁰ Such prohibitions may be related, among many things, to the Islamic preoccupation to avoid filthiness, as prescribed in the *Qur'an* and the *Sunna*,⁴¹ as well as to the connection between the sexual relationship and the effect of

36. Dialmy, *supra* note 30, at 162; Deuraseh, *supra* note 27, at 96 (citing ABD-AL-MALIK ABD-AL-RAHMAN AL-SA'DI, AL ALAQAT AL-JINSIYAH GHAYRA AL-SHAR'IYAH 169–72 (1976)). Deuraseh argues further that “having unnatural sexual relationships [i.e., sodomy], particularly with members of the same sex, is regarded as a means to new epidemics (*tā'ūn*).” *Id.* at 98.

37. Many authors highlight that, even in the early Islamic period, homosexuality could be regarded as a form of sickness, when it amounted to a will to penetrate other men—but this should be the case only when done regularly. Hence, El-Rouayheb notes that a man who wanted to penetrate regularly other men was therefore regarded as having a disease since the time of the first caliph Abu Bakr al Razi (925). This continued to be the case under the early Ottoman period, where a lot of medical treaties state the same thing, providing even evidence for the causes of the disease (described as ‘anal itch’) and ways to remedy with several ingredients, such as yogurt, mastic and lapis lazuli. See KHALED EL-ROUAYHEB, BEFORE HOMOSEXUALITY IN THE ARAB ISLAMIC WORLD, 1500–1800, at 19 (2005) (citing several authors, such as Antaki, Al Nuzhzh Al Mubhijah, Sharani, Qalyubu, and Jazairi).

38. BOUHDIBA, *supra* note 28 (referring analogically to *QUR'AN*, Sūra IV: An-Nissa, verses 22, 26, 31: “Homosexuality (*liwat*) incurs the strongest condemnation/ It is identified with *zina* and is advocated that the most horrible punishment should be applied to those who indulge it”); Dialmy, *supra* note 30, at 161–62.

39. Muhsin Hendricks, *Islamic Texts: A Source for Acceptance of Queer Individuals into Mainstream Muslim Society*, 5 EQUAL RTS. REV. 31, 33 (2010); see SANJAKDAR, *supra* note 31, at 155–78.

40. See Dialmy, *supra* note 30, at 162.

41. See *QUR'AN*, Sūra IV: An-Nissa, verse 43 (regarding the imperative of cleansing a man's body after having “contacted a woman” [i.e. sexually]); Sūra V, verse 6 (describing the purification procedures (ablution) in order to perform prayers); Sūra VII, verse 31. See also Deuraseh, *supra* note 27, at 96–97, with regard to the prohibition of sexual relations during women's menstruation.

procreation.⁴² As for female homosexuality (*musahaqa*), references to its punishment are scarce. It is argued that female homosexuality is “treated with relative indulgence”: those who indulge in it incur only the same reprimand as those condemned for auto-eroticism, bestiality, or necrophilia.⁴³

Regarding the punishment for homosexuality, there is a consensus among the four leading *Sunni* schools of thought and most Islamic scholars that homosexual acts are a major sin (*fahicha*) and may be punishable by death. The *Shafi*, *Maliki*, and *Hanbali* schools generally prescribe the death penalty for penetrative same-sex intercourse, with general disagreements surrounding the mode of execution.⁴⁴ Likewise, the *Jafari* School (*Shi'a*) also prescribes the death penalty. Only for the *Hanafi* School is homosexual conduct considered a slightly less serious offense and is punished through physical chastisement (at the discretion of the court);⁴⁵ however, even for this School, the penalty of death may be awarded for a persistent offender.⁴⁶ Likewise, for Islamic scholars who consider that the punishment of homosexuality is equivalent to the punishment for *zina*, the death sentence, provided the evidentiary requirements are met, may be also applied; married men who are offenders of *zina* (*muhsan*) face a mandatory death sentence, while flogging is applied to unmarried men (*ghayr muhsan*).⁴⁷

42. See Deuraseh, *supra* note 27, at 97, who argues that “rationally, there is no possibility of offspring being obtained through the anus.” Interestingly, however, several Islamic scholars have argued that *sodomy* in the context of marriage is permissible, quoting *QUR'AN*, Sūra II: Al-Baqarah, verse 223.

43. And might, therefore, escape the punishment by death. See BOUHDIBA, *supra* note 28, at 31.

44. See Deuraseh, *supra* note 27, 98–99.

45. In their legal context, *tazir* (i.e., punishment, admonishment) offences are referred to as offences or harmful acts against the public welfare, safety, and morals, either against individuals or private interests (they do not come within the category of *Quisas* or *Hudood* and are generally considered less harmful). The prosecution and punishment of *tazir* offences is discretionary. See EL-AWA, *supra* note 34, at 92.

46. See *Islam and Homosexuality*, WIKISLAM, http://wikiislam.net/wiki/Islam_and_Homosexuality (last visited Nov. 20, 2013); Vanja Hamzic, *The Case of Queer Muslims*, 11 *HUM. RTS. L. REV.* 237, 257 (2011). In fact, only early Islamic scholars from the *Hanafi* School rule out the death penalty.

47. See BOUHDIBA, *supra* note 28, at 15 (referring only to *muhsana* as “the person who, by virtue of legal marriage is reserved to his/her spouse”); EL-AWA, *supra* note 34, at 16 n.72, 19 n.108.

2. Challenging the Orthodoxy of the *Sharia*

The strong advocacy for the application of *hadd* punishment (i.e., death) for consensual, private adult homosexual activity derives from the interpretations of the primary sources of the *Sharia*—the *Qur'an* and the *Sunna*—as well as the explanations drawn from the secondary sources of the *Sharia*. Muslims believe that the *Qur'an* represents the accumulation of the verses revealed by God to Prophet Muhammad (Peace be Upon Him). According to this belief, while other religious scriptures have been polluted through human intervention, every word of the *Qur'an* is divine and therefore beyond any challenge. Whilst the *Qur'an* is aimed at establishing core religious standards for Muslim societies and guiding these communities in terms of their rights and responsibilities, the *Qur'anic* text is not a legal document and its primarily ethico-religious revelations should not be equated to *lex lata*—“the law as it exists.” In fact, there is little in the *Qur'an* with strict legal content. From over six thousand verses of the *Qur'an*, strict legal content is arguably only attached to approximately eighty verses and “even in these verses there are both gaps as well as doubts as to whether the legal injunction is obligatory or permissive, as indeed whether it is subject to public or private sanctions.”⁴⁸

However, contrary to the common belief, the *Qur'an* does not use any terms corresponding to “homosexuals” or “homosexuality” within the entirety of its text.⁴⁹ There are no terms used within the *Qur'an* which specifically refer to same-sex relations, although there are certain terms that are frequently interpreted and are associated with same-sex practices.⁵⁰ Nor indeed does the *Qur'an* prescribe death or any form of

48. DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* 3 (3d ed. 1998); Shaheen Sardar Ali, *The Conceptual Foundations of Human Rights: A European Perspective*, 3 EUR. PUB. L. 261, 266 (1997); see PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 159 (2000) (arguing that “the Koran has some law, but not much, and it’s been hard to find”).

49. Islamic societies generally held a more tolerant, informal attitude towards homosexuality, and there is nothing in the *Qur'an* similar to the references to homosexuality in *Leviticus*, for example. See *infra* note 57; see also Herdt, *supra* note 15, at 447; *infra* Section II.A.

50. See SCOTT SIRAJ AL-HAQQ KUGLE, *HOMOSEXUALITY IN ISLAM: CRITICAL REFLECTION ON GAY, LESBIAN, AND TRANSGENDER MUSLIMS* 50 (2010).

punishment for consensual homosexual or lesbian activity. Juristic interpretation of homosexuality as an offense and sanctifying stoning by death (*rajm*) is derived from the narrative of the struggles of Prophet Lūt with his people.

Lūt, or Lot, is referred to in the first book of the Bible, *Genesis*, and is described as the nephew of Abraham and guardian of the wealthy and ancient cities of Sodom and Gomorrah.⁵¹ These two cities, situated in the land of Canaan, provided a resting point for travelers and traders en route to trade highways, and were known from antiquity as places where prostitution and excessive sins were taking place.⁵² The litigious passage of the Bible states that, after Lot was visited by two messengers of God, the Sodomites came to Lot's house and asked him "where are the men [i.e., the messengers of God, the angels] which came in to thee this night? bring them out unto us, that we may know them."⁵³ Lot worries about his guests and says that they can have his two virgin daughters instead ("who have not known a man").⁵⁴ The Sodomites nevertheless insist and break the door, after which, the messengers of God blind them. According to the Bible, the Sodomites were destroyed by God, Lot and his family being the only survivors.⁵⁵ The exception from within Lot's family was his wife, who was one of those who "looked behind" despite God's prohibition.⁵⁶

Even though homosexuality is "cursed" in the third book of the Bible, *Leviticus*,⁵⁷ it is mentioned neither in the Old nor the

51. See *Genesis* 11:27, 11:31, 13:12.

52. Prostitution, including homosexual prostitution, was known in ritual cults of Mesopotamia and Canaan. See, e.g., *Genesis* 13:10–13:18, 24:10–24:14 ("But the men of Sodom [were] wicked and sinners before the Lord exceedingly."). See also Herdt, *supra* note 16, at 447.

53. See *Genesis* 19:4–19:5.

54. See *id.* 19:5.

55. See *id.* 11:31, 19:1–19:29.

56. See *QUR'AN*, Sūra VII: Al-A'rāf, verse 83 (King Fahd transl., 1411) ("In the biblical narrative, she looks back, a physical act . . . of those who lag behind, i.e., whose mental and moral attitude, in spite of their association with righteous, is to hark back and glitter of wickedness and sin.").

57. *Leviticus*, of the Old Testament, is the only text in the Hebrew and Christian tradition to prohibit male homosexuality. See *Leviticus* 18:22, 20:13, (proscribing that "[t]hou shalt not lie with mankind, as with womankind," and that as a punishment, both men "shall surely be put to death"). The *Leviticus*, however, was a particularly harsh text, which suggested the death penalty for a variety of other occasions, including, for example, the one who cursed his father or mother, see *id.* 20:9, or the

New Testament as the reason for the destruction of Gomorra. Homosexual prostitution was known in ritual cults of Mesopotamia and Canaan.⁵⁸ However, Lot's parable, as provided in the Bible, is not relevant to the prohibition of homosexuality per se; it rather refers to God condemning those with exceeding *lust*.⁵⁹ As an extension, the story of Lot in the Bible also refers to incest, since Lot's two daughters, "held alone in a cave with their father, get drunk and sleep with him, in order to perpetuate the race threatened by extinction by the destruction of Sodom."⁶⁰

In the *Quranic* version of the story, there is no reference to incest as there is in the Bible.⁶¹ Lūt, in Islam, was a virtuous Prophet, while his people were criminals and wrongdoers. After God destroyed the cities of Sodom and Gomorrah, the only survivors were Lūt's family, excluding his wife. The *Quranic* version of the story in *Sūra XI*, which is generally suggested as aiming at the prohibition of homosexuality, reads as follows:

And his people came rushing toward him, and they had been long in the habit of practising abominations. He said: "O my people! Here are my daughters: they are purer for you (if you marry)! Now fear Allah, and do not cover me with shame about my guests! Isn't there among you a single right-minded man?" They said: "You know well we have no need of your daughters: indeed, you know quite well what we want!" He said: "Would that I had power to suppress you or that I could betake myself to some powerful support."

man who committed adultery with the wife of another, particularly with his neighbor's, see *id.* 20:10. Furthermore, many Apostles condemned homosexuality in their numerous letters, the most known example is Paul, who stated that "neither fornicators, nor idolaters, nor adulterers, nor effeminate, nor abusers of themselves with mankind . . . shall inherit the kingdom of God." See *1 Corinthians* 6:9–6:11. And that, "God also gave them up to uncleanness through the lusts of their own hearts, to dishonour their own bodies between themselves . . . For this cause God gave them up unto vile affections: for even their women did change the natural use into that which is against nature." See *Romans* 1:24–1:26.

58. See Herdt, *supra* note 15, at 447; see also, H. Sadia et al., *Prophet Lot (Lūt) in the Bible and the Holy Quran*, 3 INTERDIS. J. CONTEMP. RES. IN BUS. 1030 (2011); BOB RHODES, SODOM & GOMORRAH: INTRO TO THE HEBREW BIBLE (2008), available at <http://www.bobrhodes.org/wp-content/uploads/2009/01/sodom.pdf>.

59. *Genesis* 13:10–13:18 ("But the men of Sodom were wicked and sinners before the Lord exceedingly.").

60. See BOUHDIBA, *supra* note 28, at 31.

61. See *id.* at 32 (noting that the extension of the story as to cover incest would be unthinkable for Islam, even though "the crime of incest was never actually mentioned in the *fiqh*").

(The Messengers) said: “O Lūt! We are Messengers from your Lord. By no means they shall reach you! Now travel with your family while yet a part of the night remains, and let not any of you look back: but your wife (will remain behind): to her will happen what happens to the people. Morning is their appointed time: is not the morning near?” When Our decree issued, We turned (the cities) upside down, and rained down on them brimstones hard as baked clay, spread, layer on layer.⁶²

The *Qur'anic* parable of Lūt is also narrated in several parts of the *Qur'an*. In *Sūra VII* of the *Qur'an*, the Prophet Lūt is represented as reprimanding his people for committing *lewdness*.⁶³ In *Sūra XI*, his people are described as having the “habit of practising abominations”;⁶⁴ in *Sūra XV* the people are described once more as being “a people (deep) in sin”;⁶⁵ in *Sūra XXVI* as “people transgressing (all limits)”;⁶⁶ and in *Sūra XXIX*,

62. *QUR'AN*, *Sūra XI*: *Hūd*, verses 78–83.

63. *QUR'AN*, *Sūra VII*: *Al-A'rāf*, verses 80–84. (“We also [sent] Lūt: He said to his people, ‘Do you commit lewdness such as no people in creation [ever] committed before you?’ For you practise your lusts on men in preference to women: you are indeed a people transgressing beyond bounds. And his people gave no answer but this: they said, ‘Drive them out of your city: these are indeed men who want to be clean and pure!’ But We, saved him and his family, except his wife: she was of those who lagged behind. And we rained down on them a shower [of brimstone].”). On the significance of the phrase “clean and pure,” see ABDULLAH YUSUF ALI, *THE MEANING OF THE GLORIOUS QUR'AN: TEXT, TRANSLATION, AND COMMENTARY* 98 (1934): “an instance of the withering sarcasm that hardened sinners use against the righteous.”

64. *QUR'AN*, *Sūra XI*: *Hūd*, verses 78–83.

65. *QUR'AN*, *Sūra XV*: *Al-Ĥijr*, verses 58–71 provide:

“[They] said: ‘We have been sent to a people (deep) in sin, Excepting the adherents of Lūt: we are certainly (charged) to save them (from harm), -all- Except his wife, who, we have ascertained, will be among those who will lag behind.’ [...] And We made known this decree to him, that the last remnants of those (sinners) should be cut off by the morning. The inhabitants of the City came in (mad) joy (at news of the young men). Lūt said: ‘These are my guests, do not disgrace me: But fear Allah, and shame me not.’ They said, ‘Did we not forbid you (to speak) for all and sundry?’ He said: ‘There are my daughters (to marry), if you must act (so).’”

66. *QUR'AN*, *Sūra XXVI*: *Ash-Shu'arā*, verses 165–171, notes that: “‘Of all the creatures in the world, will you approach males, And leave those whom Allah has created for you to be your mates? Nay, you are a people transgressing (all limits)!’ They said: ‘If you do not desist, O Lūt! you will assuredly be cast out!’ He said: ‘I do detest your doings.’ ‘O My Lord, deliver me and my family from such things as they do!’ So We delivered him and his family, -all- Except an old woman who lingered behind.”

as people who commit lewdness, approach men, “cut off the highway”⁶⁷ and practice wickedness.⁶⁸

A primary feature of the parable, as narrated in the aforementioned parts of the *Qur'an*, is that the elders of Sodom—described as *Quam-e-Lūt* (people of Prophet Lūt)—engaged in the violent rape and victimization of men, notwithstanding consistent warnings from the Prophet.⁶⁹ They mocked Lūt, and challenged God’s authority and asserted God to show vengeance upon them.⁷⁰ The elders of Sodom are identified in this parable as people defying the word of God through idolatrous practices and patriarchal pursuits of power, dominance, immorality, and greed. Their immorality was evident in that these were married men who, despite having wives, remained insistent upon the rape and abuse of foreigners and travellers.⁷¹ In these circumstances, God’s punishment through the destruction of the cities of Sodom and Gomorrah was inevitable. The lust and *fahashi* (indecent and scandalous behavior) absorbing these men was reflected in many ways, including their greed for worldly gains, possessions, and pleasures. In its appropriate context, the story of the people of Lūt represents an important message to the evil-doers, those who disobey God and defile and attempt to humiliate his chosen

67. For other proposed translations of the phrase “cut off the highway,” see *Qur'an-English Translation*, <http://corpus.quran.com/translation.jsp?chapter=29&verse=29> (last visited Nov. 20, 2013) (listing alternative translations including: “cut ye not the road (for travellers),” “commit robbery on the highway”; “rob the wayfarer [travellers, etc.]”).

68. According to the *QUR'AN*, Sūra XXIX: Al-ʿAnkabūt, verses 28–29. “And (remember) Lūt: behold, he said to his people: ‘You commit lewdness, such as no people in Creation (ever) committed before you.’ Do you indeed approach men, and cut off the highway? - and practise wickedness (even) in your councils?’ But his people gave no answer but this: they said: ‘Bring us the wrath of Allah if thou tell the truth.’” *Id.*

69. See *supra* text accompanying notes 63–64.

70. See *supra* text accompanying note 66.

71. See *supra* text accompanying notes 63–64, 68. A linguistic remark from the text of the *Qur'an* reinforces this argument. In fact, the *Qur'an* does not generally reprimand those who “approach men,” but only the people of *Lūt*, who approached men *and* committed robbery (*cut the road / the way*). See YUSUF ALI, *supra* note 68, at 270 (“They infested highways and committed their horrible crimes not only secretly, but also openly and publicly, even in their assemblies. Some commentators understand ‘cutting off the highway’ to refer to highway robberies.”). In this sense, the term “approach men” does not specifically refer to fornication or to same-sex partnership; it could be interpreted as referring to general hostile and violent behavior towards other men.

Prophets. However, it is patently unfair to place this parable out of its historical, social, sociological, and political context and to apply it in the modern paradigm of a debate focused upon private, consensual non-heterosexual activities between adults.

Furthermore, classical jurists who advocated the death penalty for private, consensual homosexual acts take the position that Prophet Lūt was sent exclusively to forbid anal sexual intercourse between men. They coined the term *liwat*, referring to anal intercourse, as the “act of the people of Prophet Lūt” and corresponded *liwat* to the English terminology of *sodomy*.⁷² Having established the new term of *liwat*, classical jurists managed to intrinsically link anal sexual intercourse with the “acts of the people of the Prophet Lūt.”⁷³ The term *liwat* has thus made an entrance in the vocabulary of the *Sharia*, despite the fact that it is used neither in the *Qur’an* nor in the *Sunna* of the Prophet.⁷⁴

B. *Sunna of the Prophet and Ahadith Reporting*

A supplementary source of *hadd* punishment for homosexual activity has been based on the *Sunna* of Prophet Muhammad (PBUH)—the second principal source of the *Sharia*. While representing model behavior, *Sunna* is derived from the tradition, actions, and practices of the Prophet. More controversially, the *Sunna* of the Prophet has been expanded through the practices of the Prophet’s followers and other Islamic leaders.⁷⁵ The memorization and transmission of the *Sunna* in a literary form is characterized as *hadith*. The term *hadith*, meaning “occurring, taking place,” represents the “report” of Prophet Muhammad’s *Sunna*, with the *Sunna* of the Prophet having been communicated to succeeding generations in the form of *ahadith*.⁷⁶ While the *Qur’an* was recorded within a

72. KUGLE, *supra* note 50, at 50.

73. *Id.*

74. *Id.*

75. See JAVAID REHMAN, *ISLAMIC STATE PRACTICES, INTERNATIONAL LAW AND THE THREAT FROM TERRORISM* 12–13 (2005). The four most reliable *hadith* collectors are Bukhari, Muslim, Abu Dawud and Tirmidhi. See also SANJAKDAR, *supra* note 31, at 153.

76. SAYYID HASHIM AL-MUSAWI, *MANHAJUL-FIQHIL-ISLAMI: A COURSE IN THE ISLAMIC JURISPRUDENCE* 21–22 (1997).

relatively short time, the recording of the *ahadith* took a much longer period.⁷⁷

Several elements of the *ahadith* were derived from sources not readily identifiable or reliable. Over the proceeding centuries, there has developed a significant debate regarding the authenticity and accuracy of some of the *ahadith*, with legal scholars suggesting the possibility of substantial fabrication. Commenting on the subject, Noel Coulson makes the point that “the extent of [Mohammad’s] extra-Qur’anic law-making is the subject of the greatest single controversy in early Islamic legal history.”⁷⁸ Placing emphasis on particular *ahadith* is therefore fraught with risks, because of the questions regarding their authenticity and accuracy. It is in this context of continuous debate and ambiguity that one needs to review the existing *ahadith* literature of the Prophet that relates to non-heterosexual behavior. There is a dearth of material that engages this subject matter or captures accurately the Prophet’s attitude towards homosexuality and lesbianism. From all the reported cases, however, one established fact emerges: during his lifetime, the Prophet never ordered the punishment of a person within his community for same-sex acts, either homosexual or lesbian.⁷⁹ Similarly, the Prophet is supposed to have condemned the people of Lūt in one *hadith* of Al-Nuwayri without, however, explicitly referring to homosexuality: “Doomed by God is who does what Lot’s people did”⁸⁰

Notwithstanding the limited historical analysis on homosexuality in the Muslim world, the presence of transvestite or effeminate men during the time of the Prophet is well documented.⁸¹ It is also well established that these men played

77. Sobhi Mahmassani, *The Principles of International Law in the Light of Islamic Doctrine*, 117 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 205, 226 (1966).

78. NOEL J. COULSON, *A HISTORY OF ISLAMIC LAW* 22 (1964).

79. KUGLE, *supra* note 50, at 76 (“[T]he Prophet Muhammad never condemned an actual person for homosexual relationships or meted out punishment for homosexual intercourse.”).

80. See Beckers, *supra* note 14, at 61 (quoting Khalid Duran, *Homosexuality and Islam*, in *HOMOSEXUALITY AND WORLD RELIGION* 181, 182 (Arlene Swidler ed., 1993)).

81. Everett K. Rawson, *The Effeminate of Early Medina*, 111 J. AM. ORIENTAL SOC’Y 671, 671–72 (1991); Jim Wafer, *Muhammad and Male Homosexuality*, in *ISLAMIC HOMOSEXUALITIES: CULTURE, HISTORY AND LITERATURE* 87–96 (Stephen Murray & Will Roscoe eds., 1997).

an influential role in arts and poetry, and were socially identifiable through their habits and dress code.

There is a noticeable amount of documentation on the role played by effeminates during the time of the Prophet Muhammad, with reported incidents of interaction between effeminate men and the Prophet. Effeminate men (or *mukhannaths*, *mukhannarhiin*, or *mukhannithiin*) are not homosexuals per se. In the Effeminates of Early Medina, Everett Rawson notes that in pre-Islamic and early Islamic Arabian societies, “unlike other men, these effeminates or mukhannathūn were permitted to associate freely with women, on the assumption that they had no sexual interest in them, and often acted as marriage brokers, or, less legitimately, as go-betweens.”⁸² That *Mukhannis*, according to Rawson, had “a well-defined role already in pre-Islamic Arabian society is suggested by a number of Prophetic *hadith*, which at least purportedly tell us something about the situation in the Prophet’s time.”⁸³ However, as Kugle elaborates, Islamic jurisprudence has often conflated and confused effeminate tendencies with homosexuality. Kugle notes,

An effeminate man (*mukhannath*) is one who is anatomically male and raised as male but who in adult life dresses and acts in the social role of a woman. The *mukhannath* exhibits transgender behaviour rather than homosexual behaviour, but Islamic traditionalists often conflate these, assuming that homosexual men behave like women and are therefore addressed by how the Prophet treated effeminate or transgender men. This is not an assumption that is supported by sociological research or actual reported experience of gay and lesbian Muslims.⁸⁴

There is thus this lacuna in the critical understanding of the differences between effeminate men and homosexuality amongst early Islamic jurists; the conflation of homosexual tendencies with effeminacy appears to have continued amongst subsequent Muslim historians and analysts.

That said, there are also *ahadith* reporting the Prophet’s interaction with these effeminate men. The most cited of these

82. Rawson, *supra* note 81, at 671.

83. *Id.*, at 672.

84. KUGLE, *supra* note 50, at 92.

instances is reported in the *Sahih Hadith* collection of al-Bhukari. The *Sahih Hadith* collection presents three variants of the same incident according to which the Prophet had to deal with an effeminate man, known as Hit. According to this *hadith*, one day, when the Messenger of God was at home, Umm Salma, one of the Prophet's wives, was visited by Hit in her room. Hit spoke with Abdullah, the brother of Umm Salama (who was also present) in the following way:

O Abdullah! If Ta'if should be conquered tomorrow, I shall take you to the daughter of Ghailan, for [she is so fat that] she has four [folds] in the front [of her belly] and eight [folds] [seen from behind]. Her mouth? A veritable poppy! When she walks, she folds herself in two! When she speaks, she enchants! The space between her legs is an upturned jar!

As a result, the Prophet said to his wives, "These effeminate (men) should not enter upon [your houses]." ⁸⁵ This order of exclusion from the female quarters was based principally because the Prophet noticed that the effeminate man, in fact, had sensual feelings for women. ⁸⁶ The effeminacy of Hit did not correlate with his sexuality, a point detected by Prophet Mohammad through his wisdom and foresight. On this interpretation, and given the sensitive status of the Prophet's wives, the order of exclusion of an effeminate man, suggesting heterosexual tendencies with probable sexual desires for women, is understandable.

There are other versions of the reported *hadith*, according to which the Prophet ordered the banishment of Hit from Medina and he was allowed only to occasionally enter the city

85. BOUHDIBA, *supra* note 28, at 41. Another version of the same incident is narrated by Umm Salama: "Once the Prophet was in her house, and an effeminate man was there too. The effeminate man said to 'Abdullah, (Umm Salama's brother) 'O 'Abdullah! If Ta'if should be conquered tomorrow, I recommend you the daughter of Ghailan, for she is so fat that she has four curves in the front (of her belly) and eight at the back.' So the Prophet said (to his wives) 'These effeminate (men) should not enter upon you (your houses).'" Sahih Al-Bukhari, *The Hadith: Book 72, Volume 7, Number 775*, available at http://www.luvu4luv.com/Hadith_Bukhari_Book72.html (last visited Nov. 20, 2013); *Book 72, Number 774; Book 62, Number 162; Volume 5, Book 59, Number 613*. Rawson, *supra* note 81, at 674; see also KUGLE, *supra* note 50, at 92.

86. See Al-Bukhari, *supra* note 87 and accompanying text, where Hit is referred to as describing the physical features of Ghailan's daughter.

and beg for food.⁸⁷ Further variations have been added within the context of this *hadith*, a subject that will be addressed shortly. That said, it would be completely inaccurate to suggest that the Prophet ever recommended death, violence, or hostility towards effeminate men. To the contrary, this *hadith* demonstrates the tolerant, indeed liberal, approach of Prophet Muhammad (PBUH) towards effeminate men. The liberalism is demonstrated, in the first instance, through the Prophet allowing effeminate men employment in his personal quarters. The exclusion of Hit, subsequent to Hit's expression of sexual knowledge or interest in women, has to be viewed in the wider context of gender sensitivity and protecting the integrity and dignity of the Prophet's wives. Importantly, the rebuke of Hit and his termination of employment were based upon the Prophet's response towards an individual's actions rather than a general condemnation of all effeminate men in the society.

Islamic scholars have based their arguments for the prohibition on homosexuality mostly on *ahadith* with several states using them officially to impose torturous punishments against LGBT persons. The *ahadith* which are referred to by Islamic preachers in Malaysia, for example, are the following: "The Apostle of Allah (PbUH) cursed the man who dressed like a woman and the woman who dressed like a man"⁸⁸ and "The Prophet cursed effeminate men; those men who are in the similitude (assume the manners of women) and those women who assume the manners of men, and he said, 'Turn them out of your houses.' The Prophet turned out such-and-such man, and 'Umar turned out such-and-such woman."⁸⁹

Several issues can be raised about the aforementioned two *ahadith*. As noted earlier, there is the debate surrounding the

87. Narrated by Ibn Abbas, "the Prophet cursed effeminate men (those men who are in the similitude (assume the manners of women) and those women who assume the manners of men, and he said, 'Turn them out of your houses.' The Prophet turned out such-and-such man, and 'Umar turned out such-and-such woman.'" See Al-Bukhari, *supra* note 86, *Volume 7, Book 72, Number 774; Volume 8, Book 82, Number 820*; Rawson, *supra* note 81, at 673.

88. SUNAN ABU-DAWAK, BOOK 32, NUMBER 4078, narrated by Abu Hurairah. In Yik Koon Teh, *Politics and Islam: Factors Determining Identity and the Status of Male-to-Female Transsexuals in Malaysia*, in *ASIAPACIFIQUEER: RETHINKING GENDERS AND SEXUALITIES* 92, 85–98 (Fran Martin et al. eds., 2008); see also, Rawson, *supra* note 81, at 674.

89. SAHIH BUKHARI, BOOK 7, NUMBER 72, narrated by Ibn Abbas.

context of the *ahadith*. The Prophet's treatment of the effeminate man Hit is sometimes inaccurately linked to his rebuke of men or women who misrepresent their sexuality and gender. The actions of the Prophet expressing anger and unhappiness (followed by the *Hazrat Umar*) do not reflect the condemnation of homosexuality or lesbianism for a number of reasons. Firstly, in the specific social and political paradigm and within the highly gender sensitive context, these prescriptions appear to have been directed towards the majority (straight men and straight women) not to deliberately fabricate or distort their gender identities. This is especially the case where men with heterosexual tendencies (e.g., Hit in the earlier example) might find an opportunity to enter and be intimate with women in their private quarters. Secondly and importantly, the Prophet (unlike other Islamic scholars and jurists) had the wisdom and the ability not to conflate effeminacy with homosexuality and lesbianism. In fact, the probable cause for the Prophet's unhappiness towards Hit was the breach of trust that Hit had initially placed in the Prophet. Hit had given the impression of being a homosexual with a lack of interest in women, and it was on this basis that he was employed within the Prophet's family quarters. It is this concern and the breach of trust on the part of Hit that is most likely to have been the cause of the Prophet excluding Hit from his household.

C. *Evolving Sharia Principles*

While a libertarian, tolerant and indeed positive picture emerges from the *Qur'an* and the *Sunna*, disagreements are manifested in the study of the secondary sources of the *Sharia*.

1. A Historical Understanding of Homosexuality in *Sharia* Law

The applicability of *ijma*⁹⁰ is held to account for the initial evidence of the application of stringent criminal sanctions for homosexual actions. A report during the rule of Hazarat Abu Baker (632–634 AD), the first of the Islamic *Khalifa*, suggests that it was during this period that the punishment for sodomy was applied. After the Prophet's death (632 AD) a number of

90. Meaning: consensus.

the Arab tribal leaders rebelled against the first *Khalifa's* rule; among these tribal leaders was a person subsequently charged with having done “the deed of the Tribe of Lūt.”⁹¹

In an uncertain environment, and in the absence of any precedents from the *Qur'an* and the *Sunna*, Abu Baker gathered key companions of the Prophet and sought *ijma* of the rather embattled Muslim community. Alī Ibn Abī Tālib identified the *Quranic* verses narrating the treatment visited upon the *Quam-e-Lūt*: God's destruction of the Tribe by raining down burning stones. It was apparently upon Alī Ibn Abī Tālib's advice that Abu Baker took the unprecedented decision to order the burning of the man—a disloyal and rebellious military commander—accused of homosexuality.

This execution, however, needs to be examined in the backdrop of a violent military campaign where the first *Khalifa* was desperate to assert his authority over Arab Muslims as the rightful successor to the Prophet Mohammed. Strong arguments have been made that it was in fact the rebellious nature of the commander, his mutiny, and, above all, his apostasy (rather than homosexuality *per se*), which forced Abu Baker to order his execution through burning.⁹² While the reporting sources confirm the burning incident, the apparent justifications for such an action, as suggested by the jurists, remain a matter of contestation and controversy.

Commentators have pointed out that such an action was probably undertaken in the context of repressing the rebellion, rather than due to the homosexuality of the offender; it would be impossible for such close associates of the Prophet (Abu Baker and Alī Ibn Abī Tālib) to authorize the application of *hadd* punishment without the presence of corresponding evidentiary requirements.⁹³ However, the incident does illustrate that while execution for homosexual activity or sodomy was sanctioned neither by the *Qur'an* nor the *Sunna* of the Prophet, this practice was adopted by later followers of the Prophet in accordance with their own understanding of the *Sharia* and having regard to the then prevailing specific customs and

91. KUGLE, *supra* note 50, at 99.

92. *Id.*

93. For a discussion of relevant issues, see *id.* at 135–137.

traditions.⁹⁴ It is hardly surprising to note—as we have already alluded to earlier—the variety of views and consequent levels of severity in which consensual homosexual acts have come to be dealt with in the different schools of Muslim jurisprudence.

Therefore, over a period of time, the traditional approaches of the *Shafi*, *Maliki*, and *Hanbali* Schools have come to form differences with the *Hanafi* School. As considered earlier, the Schools, relying upon the secondary *Sharia* source of *qiyas*,⁹⁵ equated male homosexuality with heterosexual *zina* and therefore applied the death punishment for consensual male homosexual penetrative acts. In segregated, sexually hierarchical, and male dominated societies, it is also hardly surprising that the *Sharia* has continued to be interpreted by subsequent jurists and scholars in a manner prejudicial to sexual minorities.

2. Valuing Diversity and Recognizing Homosexuality

The *Qur'an* and the *Sunna* of the Prophet present significant examples of valuing human diversity based, inter alia, upon race and color, as well as upon physical, gender, and sexual orientation attributes. On innumerable occasions this diversity is portrayed within the *Qur'an* and the *Sunna* as evidence of God's powers and prowess. The *Qur'an* emphasizes differences based on differing tribes, racial and linguistic characteristics, and ethnicity. To cast doubt upon this diverse universe created by the Almighty amounts to doubting the existence of Allah and in the process contradicting the many verses of the *Qur'an* which promote unity in human diversity.⁹⁶

More specifically in the context of the LGBT communities, Muhsin Hendricks, an Islamic scholar and openly gay South African Imam, makes the valid assertion that,

Themes in the *Qur'an* such as social justice, gender equity, inclusiveness of different faiths, diversity in humanity, the prophetic example and a forgiving and merciful God, make it difficult to dismiss people of different sexual orientation or gender identity who have played a significant role in

94. KUGLE, *supra* note 50, at 149.

95. Meaning: analogy by deduction.

96. Hendricks, *supra* note 39, at 39.

many civilizations. Taking stock of the contribution that homosexuals and transgendered people have for centuries had to the growth of humanity, it is a mistake and contrary to the core principles of the *Qur'an* to perceive these classes of people as detrimental to social institutions such as marriage, the family and even society as a whole.⁹⁷

In appreciating human diversity, the *Qur'an* notes, “Everyone works in accordance with his belief, and your Lord knows best which ones are guided in the right path.”⁹⁸

Sūra Al-'Isrā' (The Night Journey), verse 84, of the *Qur'an* represents a very profound statement accepting human diversity, which would include varied beliefs and practices, including varying sexual orientation. Not only is the *Qur'an* and *Sunna* appreciative of the existence or the rights of LGBT communities, the *Sharia* actively promotes human diversity and acknowledges the rights of non-heterosexuals. The *Quranic* Sūra An-Nūr (The Light) states:

And say to the female believers to cast down their beholdings, and preserve their private parts, and not display their adornment except such as is outward, and let them fix [literally: strike] closely their veils over their bosoms, and not display their adornment except to their husbands, or their fathers, or their husbands' fathers, or their sons, or their husbands' sons, or their brothers, or their brothers' sons, or their sisters' sons, or their women, or what their right hands possess, or [male] followers, men without desire [literally: without being endowed with 'sexual' desire⁹⁹] or young children who have not yet attained knowledge of women's privacies, and they should not strike their legs [i.e., stamp their feet] so that whatever adornment they hide may be known. And repent to Allah altogether, (O) you believers, that possibly you would prosper.¹⁰⁰

In a strictly gendered and hierarchical society, the full implications of Sura An-Nūr (The Light), verse 31, have never been appropriately articulated. The believing women are asked to lower their gaze and be modest and not to reveal their

97. *Id.* at 43–44.

98. *QUR'AN*, Sūra XVII: Al-'Isrā', verse 84.

99. Another translation for this is “male servants who lack sexual desire.” See Deuraseh, *supra* note 27, at 94.

100. *QUR'AN*, Sūra XXIV: An-Nūr, verse 31.

adornments to the public. However, amongst the select group of men for whom this restriction does not apply are those men “who have no desires for women.” There could not be any clearer assertion that the *Qur’an* recognizes the existence and appreciates the value of men with different sexual orientation. These men, by definition, would include homosexuals, eunuchs, men with no sexual drive, or impotent men. Relying upon this verse, Farik Malik makes the incisive comment “the *Qur’an* recognizes that some men are “without the defining skills of males” and so, as domestic servants, are allowed to see women naked.”¹⁰¹

Furthermore, the *Qur’an* recognizes that there are people who are neither men nor women:

To Allah belongs the dominion of the heavens and the earth; He creates what he wills. He gives to whom He wills female [children], and He gives to whom He wills males. Or He makes them [both] males and females, and He renders whom He wills barren. Indeed, He is Knowing and Competent.¹⁰²

One interpretation of the above verses is that the Almighty in all his powers can combine male and female characteristics, making those individuals ineffectual or sexually unattractive within society. It is accepted that there is insufficient understanding of the *Sharia* approaches towards lesbianism. However, without concrete evidence inferences cannot be made from all the available sources. One striking interpretation that is available is related to the *Qur’an* noting “of the women, those not reproducing who do not wish for intercourse, it is no harm for them to lay aside their clothing as long as they do not overtly display their beauty.”¹⁰³ The verse may be interpreted to mean those women who are not reproducing for the reason that they do not desire to have sexual intercourse with men. A final comment in the context of homosexuality both in the Islamic jurisprudence as well as in the Islamic tradition relates to a perceived distinction between pederasty and sodomy. A more detailed exposition of this dichotomy is presented in a

101. Faris Malik, *Queer Sexually and Identity in the Qur’an and Hadith*, WELL.COM, <http://www.well.com/~aquarius/Qurannotes.htm> (last visited Nov. 20, 2013).

102. *QUR’AN*, Sūra XLII: Ash-Shūraá, verses 49–50.

103. *QUR’AN*, Sūra XXIV: An-Nūr, verses 24– 60.

subsequent section. For the present purposes, it is sufficient to note that pederasty has manifested itself throughout Islamic history. The “boy-love” syndrome was acceptable because like eunuchs, adolescent boys were also lacking in “defining skills of males.” Indeed, references have been made to the *Quranic* verses to support pederasty. In supporting such an assertion, the International Commission of Jurists cite *Quranic* verse 52:24, where the Almighty promises the inhabitants of the heaven, boys “[a]s if they were pearls well-protected.”¹⁰⁴ Furthermore, promises are made by God in many parts of the *Qur’an* that “immaculate” young boys will be among them in Paradise.¹⁰⁵

II. REPRESSION OF LGBT INDIVIDUALS IN THE MUSLIM WORLD

The coercive and intolerant interpretation of the *Sharia* has its counterpart in the harsh domestic laws and social repression of LGBT individuals within the Islamic states. However, this interpretation contrasts vividly with the *laissez-faire* attitude towards the practices of homosexuality in many cases. As subsequent sections analyze in some detail, there is substantial hypocrisy embedded within modern Muslim societies.

A. A Cultural Reading of Islamic Domestic Laws

Male-to-male sexual intercourse and a rather “open” approach to erotic relations have always been an intrinsic element of Arab and Muslim societies and never explicitly criminalized.¹⁰⁶ Hence, homoerotic poetry, passionate love for boys and male-to-male penetration have been particularly common, both in the Islamic “Golden Age” and at least until 1800, as demonstrated by the rich imagery, anecdotes, and

104. See INT’L COMM’N OF JURISTS, SEXUAL ORIENTATION, GENDER IDENTITY AND INTERNATIONAL HUMAN RIGHTS LAW: PRACTITIONERS GUIDE NO. 4, at 6 (2009).

105. *QUR’AN*, Sūra LVI: Al-Wāqī’ah, verse 17 (“[T]here will circulate among them young boys made eternal”); *QUR’AN*, Sūra II: Al-Baqarah, verse 25 (“And they shall have immaculate partners in [the gardens]”); *QUR’AN*, Sūra LXXVI: Al-’Insān, verse 19 (“There will circulate among them young boys made eternal. When you see them, you would think them [as beautiful as] scattered pearls.”).

106. As noted by Herdt, Mesopotamian Law codes did not prohibit homosexuality and the Hittite codes prohibited only father-son incest, while the Middle-Assyrian code prohibited only homosexual rape. See Herdt, *supra* note 15, at 447.

representations on the matter—poetry in particular was abundantly about wine, women and young boys¹⁰⁷—and the research undertaken by several scholars.¹⁰⁸

Indeed, Islam has been tolerant towards same-sex-love among men and particularly towards sexual intercourse with youth—as long as it did not go public. Khaled El-Rouayheb notes that “[f]alling in love with a teenage youth and expressing his love was not a punishable offense and a significant number of Islamic scholars asserted that such behavior was not objectionable.”¹⁰⁹ As discussed already, there are references within the *Qur’an* to martyred Muslims being surrounded by boys like “scattered pearls.”¹¹⁰ Subsequently, most of the scholars generally agreed with the paradox that writing homoerotic poetry or developing passionate love for boys should not be prohibited. Passionate kissing or caressing was likewise not considered to be a serious sin.¹¹¹ On the other hand, sodomy in the form of anal intercourse was prohibited by extremely harsh punishments.¹¹² Furthermore, scholars’ interpretations have included a difference between the *will to realize the act* and the act itself, as well as the differentiation between an *active* and a

107. See, e.g., Stephen Murray, *The Will Not to Know*, in ISLAMIC HOMOSEXUALITIES, *supra* note 81, at 14. Murray refers, for example, to some traditional dances, theatre plays in Persia, Anatolia and other regions performed by boys, but much more feminine than masculine (in Farsi and Turkish there is a special word *kocek* for a young dancer dressed as a woman). He also refers to other costumes or traditions, such as the truck drivers in Pakistan being usually accompanied by a *chela* (young boy), language idioms, and most notably, to the rich iconography on the subject. In this book, Murray reproduces images from the Topkapi palace (Istanbul) depicting, for example, a father giving his son to the use of others, one man penetrating a young boy while two others are lining up to be served, a young (beardless) man penetrating an older man, etc. *Id.* at 19, 33, 38.

108. See EL-ROUAYHEB, *supra*, note 37; LOUIS CROMPTON, HOMOSEXUALITY AND CIVILIZATION 178–81 (2003); see also DROR ZE’EVI, PRODUCING DESIRE: CHANGING SEXUAL DISCOURSE IN THE OTTOMAN MIDDLE EAST 1500–1900 (2006); KECIA ALI, SEXUAL ETHICS IN ISLAM: FEMINIST REFLECTIONS ON HOLY QUR’AN, HADITH, AND JURISPRUDENCE (2006); DAVID GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY (1990); COLIN SPENCER, HOMOSEXUALITY: A HISTORY (1996); Bessam Nathan, *Medieval Arabic Medical Views on Male Homosexuality*, 4 J. HOMOSEXUALITY 26, 37–39 (1994).

109. EL-ROUAYHEB, *supra* note 37, at 153; Louis Crompton, *Male Love and Islamic Law in Arab Spain*, in ISLAMIC HOMOSEXUALITIES, *supra* note 81, at 142, 153; see also CROMPTON, *supra* note 108.

110. QUR’AN, Sūra LXXVI: Al-’Insān, verse 19; *supra* note 107 and accompanying text.

111. CROMPTON, *supra* note 108, at 153–61.

112. See *supra* notes 44–47 and accompanying text.

passive male homosexual.¹¹³ Most authors agree in this respect that one thing was the *sodomite*, who is the perpetrator of the act of the sexual intercourse (as a result of his “lust”), and another thing is the *male homosexual*, who is inclined to do the action (as a result of his “passionate love”), but will not necessarily do it.¹¹⁴

As a result of these historical *laissez-faire* approaches to same-sex relationships in Muslim societies, paradoxical and ambivalent interpretations of the *Sharia* were developed. Indeed, it could be convincingly argued that due to the intimacy of the sexual act, religious laws and subsequent domestic laws were introduced aiming to limit the public visibility of the act of sodomy only (*liwat*, which derives from the Arabic root “*Lūt*”).¹¹⁵ The predominant patriarchal model within Islamic societies, related to the construction of sexualities according to a certain type of masculinity, is equally a reason why what was evidently a cultural reality should not be made visible.¹¹⁶ This means that male honor and moral prescriptions should be preserved at all costs, and that, in public, men should follow a certain masculine model. Ghazzali refers in this respect to Ibn Abbas: “[t]he best man of his community is he who has the greatest number of wives.”¹¹⁷ Likewise, several authors note that there was a powerful Islamic ethos of avoidance in acknowledging sex and sexualities in the public sphere.¹¹⁸ Khan, for instance, points out

113. See Hamzic, *supra* note 46 (citing EL-ROUAYHEB, *supra* note 37) (“Instead, the law and the society have distinguished between passionate but chaste love (*‘ishq*) and ‘carnal lust’, as well as between permissible and prohibited sexual acts. Further, there has been neither an overarching concept nor universal punishment covering all types of same-sex sexual activities.”).

114. EL-ROUAYHEB, *supra* note 37, at 1, 51; KUGLE, *supra* note 50, at 11.

115. See *supra* note 72 and accompanying text.

116. See e.g., Sharon Preves, *Unruly Bodies: Intersex Variations of Sexual Development*, in *INTRODUCING THE NEW SEXUALITY STUDIES* 127, 129 (Steven Seidman et al. eds., 2d ed. 2011).

117. Johann C. Bürgel, *Love, Lust, and Longing: Eroticism in Early Islam as Reflected in Literary Sources*, in *SOCIETY AND THE SEXES*, *supra* note 34, at 81, 87 (citing 2 AL-GHAZZALI, *IHYA ULUM AD-DIN* 37 (1096)).

118. ZE’EVI, *supra* note 108, at 87; Will Roscoe & Stephen O. Murray, *Introduction to ISLAMIC HOMOSEXUALITIES*, *supra* note 18, at 3 (referring to the Lebanese political scientist Abu Khalil: “Originally Islam did not have the same harsh biblical judgement about homosexuality as Christianity. Homophobia, as an ideology of hostility toward people who are homosexual, was produced by the Christian West. Homophobic influences in Arab cultures are relatively new, and many were introduced . . . from Western sources”); see Asad Abu Khalil, *A Note on the Study of Homosexuality in the*

that “[F]requent and recurrent homosexual behavior does not matter in Islamic societies as long as a man continues his family line and does not throw away property indulging in his vices.”¹¹⁹

B. Harsh Domestic Law Standards

Homosexuality in the Muslim world today is punished in a harsher way than all the others states, both under religious and state laws.¹²⁰ Certainly, this is not only the result of the impact of the classical interpretation of the *fiqh* by today’s eminent religious scholars.¹²¹ As Vanja Hamzić observes, “[e]ntrapped between *Orientalist* and *anti-Orientalist* discourses and the underlying dichotomies they have produced (such as ‘traditional’ *versus* ‘modern’), the new Muslim laws are prime examples of legal hybridity resulting in an unprecedented cacophony of theories and practices, all of which simultaneously claim to be the right interpretation of *Shar’ia*.”¹²² Hence, those found guilty of homosexuality in Saudi Arabia, which is one of the few states that enforces *Sharia* law, may be subject to the death penalty, imprisonment, and flogging.¹²³ The Saudi Arabian Commission for the Promotion of Virtue and Prevention of Vice, a state-funded body implementing a strict version of *Sharia* law, is responsible for the enforcement of these punishments. It is unclear how many LGBT individuals have been executed on charges of homosexuality. Nevertheless, as the International Lesbian and Gay Association (“ILGA”) reports, “if the *mutaween* [of the Commission for the Promotion of Virtue] learn that a person is homosexual or engaging in homosexual activity they are likely to be subject to lifelong harassment

Arab/Islamic Civilization, ARAB STUD. J., Fall 1993, at 32; see also Rusmir Music, *Queer Visions of Islam*, in 2 ISLAM AND HOMOSEXUALITY, *supra* note 14, at 327, 339 n.42.

119. Murray, *supra* note 107, at 16 (referecing Khan).

120. See *supra* notes 9–14.

121. See *supra* notes 26–27.

122. Hamzić, *supra* note 47, at 259 n.138.

123. In Saudi Arabia executions occur regularly, mostly against women. For example, in 2011, seventy-three executions through beheading were reported, even though the exact number is not known. See *Rule of Law: Country Studies—Saudi Arabia*, DEMOCRACY WEB, <http://www.democracyweb.org/rule/saudi-arabia.php> (last visited Nov. 20, 2013); Human Rights Watch, World Report Chapter: Saudi Arabia (2012), available at <http://www.hrw.org/world-report-2012/world-report-2012-saudi-arabia>.

(including sexual) and blackmail.”¹²⁴ Furthermore, in April 2012, this State ordered all public schools and universities to ban the entry of gays and tom boys “and to intensify their efforts to fight this phenomenon, which has been promoted by some websites.”¹²⁵ Other homophobic incidents in Saudi Arabia include a man being arrested for maintaining a Facebook gay date site in February 2012,¹²⁶ and a gay British national charged with the death sentence in April 2011.¹²⁷

The Islamic Republic of Iran is another state that has a poor human rights record and that is hostile to LGBT individuals.¹²⁸ The Iranian Penal Code criminalizes all homosexual acts and actively punishes homosexuals with death.¹²⁹ As observed by the ILGA, in some cases, rapists are not prosecuted, while in some instances it is the victims of rape, either male or female, who are held accountable for extramarital relationships (*zina*).¹³⁰ Therefore, non-conformist sexual orientation in Iran may be punished by stoning, lashing, and public execution. In fact, Iran deliberately uses the pretext

124. *British Gay Man Arrested and Beaten in Saudi Arabia*, INT’L LESBIAN, GAY, TRANS AND INTEREX ASS’N (May 2, 2011), <http://ilga.org/ilga/en/article/mXJzYZ61JF>.

125. Stephen Gray, *Saudi Arabia: Schools “Ban Tomboys and Gays”*, PINKNEWS (Apr. 16, 2012, 10:17 AM), <http://www.pinknews.co.uk/2012/04/16/saudi-arabia-schools-ban-tomboys-and-gays>.

126. Dan Littauer, *Man Arrested for Facebook Gay Date in Saudi Arabia*, PINKNEWS (Jan. 13 2012, 10:32 PM), <http://www.pinknews.co.uk/2012/01/13/man-arrested-for-facebook-gay-date-in-saudi-arabia>.

127. Nick Parker, *Execution Fear of Gay Brit Battered in Saudi*, SUN (U.K.), Apr. 1, 2011, <http://www.thesun.co.uk/sol/homepage/news/3503178/Execution-fear-of-gay-Brit-Stephen-Comiskey-battered-in-Saudi-Arabia.html>.

128. Saeed Kamali Dehghan, *Iran’s Persecution of Gay Community Revealed*, GUARDIAN (London), May 17, 2012, <http://www.guardian.co.uk/world/2012/may/17/iran-persecution-gay-community-revealed>. See generally Human Rights Watch, *We Are a Buried Generation: Discrimination and Violence Against Sexual Minorities in Iran* (2010), <http://www.hrw.org/sites/default/files/reports/iran1210webwcover.pdf> (reporting findings based on testimony from more than one hundred Iranians, documents discrimination and violence against LGBT people and others whose sexual practices and gender expression do not conform to government-endorsed socio-religious norms); IGLSHRC & Iranian Queer Org., *Human Rights Violations on the Basis of Sexual Orientation, Gender Identity, and Homosexuality in the Islamic Republic of Iran* (2011), <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/537-1>.

129. As noted by the ILGA, “the Iranian Penal Code fails to adequately differentiate between consensual and non-consensual sex and in some instances wrongly convicts victims and recuses rapists.” ILGA, *supra* note 8, at 32.

130. IGLHRC, *supra* note 128, at 1.

of divine laws for the application of the death penalty. It has been reported that in 2011, a number of young men were executed on charges of “unlawful acts” soon after the implementation of the UN Resolution on combating discrimination and violence against sexual minorities.¹³¹ In 2007, police and *basisj* units raided a private birthday party in an apartment building in the city of Esfahan and arrested eighty-seven persons, who were subsequently tortured.¹³² In 2005, two young men in their mid-twenties were publicly hanged on the basis of accusations of consensual homosexual conduct.¹³³ Earlier the same year, two gay Iranian teenagers, also accused for homosexuality, were publicly executed.¹³⁴

In Afghanistan, homosexuality is considered an extremely serious crime, resulting in atrocious punishments. *Sharia* law for *zina*,¹³⁵ as applied during the Taliban era in particular, included the cutting of hands, lashing, and death by stoning.¹³⁶ The death penalty may be also pronounced by local religious authorities,

131 . Three, according to Kamali Dehghan, *Iran Executes Three Men on Homosexuality Charges*, GUARDIAN (London), Sept. 7, 2011, <http://www.guardian.co.uk/world/2011/sep/07/iran-executes-men-homosexuality-charges>. Six, according to *Annual Report on the Death Penalty in Iran—At Least 676 Executions in 2011*, IRAN HUM RTS. (Mar. 4, 2012, 2:25 PM), <http://iranhr.net/spip.php?article2440>. See also *Gay Iranian Granted Asylum in UK*, BBC NEWS (May 21, 2008, 9:56 AM), http://news.bbc.co.uk/2/hi/uk_news/7411706.stm.

132. UK BORDER AGENCY, IRAN, COUNTRY OF ORIGIN INFORMATION REPORT 172 (2011), available at www.ukba.homeoffice.gov.uk/sitecontent/.../coi/.../report-0611.pdf.

133. See *Iran: Two More Executions for Homosexual Conduct*, HUM. RTS WATCH (Nov. 22, 2005), <http://www.hrw.org/news/2005/11/21/iran-two-more-executions-homosexual-conduct>; see also *Gay Iranian Granted Asylum in UK*, *supra* note 131.

134. *Iran Majlis Deputies Endorse Execution of Minor*, IRAN FOCUS NEWS & ANALYSIS (July 19, 2005), http://www.iranfocus.com/en/index.php?option=com_content&view=article&id=2917:iran-majlis-deputies-endorse-execution-of-minor&catid=3:special-wire.

135. The punishment of homosexual intercourse (*liwat*) is analogous to the punishment of heterosexual *zina*. See *supra* notes 33, 38.

136. See *supra* notes 38–43 on the punishment of homosexuality according to the different Islamic schools of thought. According to the Afghan law in the Taliban period, an unmarried adulterer should be flogged a hundred times, and a married adulterer should be stoned to death. See Sayed Salahuddin, *Taliban Flog Woman, Cut Off Two Men's Hands*, REVOLUTIONARY ASS'N WOMEN AFG. (Feb. 27, 1998), <http://www.rawa.org/handcut.htm>. Today, male-to-male relationships are punished by less than ten years imprisonment and female-to-female relationships are not punished. See *Country Reports, Afghanistan*, INT'L LESBIAN, GAY, BISEXUAL, TRANS, & INTERSEX ASS'N, <http://ilga.org/ilga/en/countries/AFGHANISTAN/Articles> (last visited Nov. 20, 2013).

which apply the *Sharia* law, even though the death sentence for homosexuality has been officially abolished since 2010. Reports from the Taliban period, in particular, reveal extremely harsh arbitrary executions, including homosexuals being buried alive.¹³⁷

In Pakistan, the *Hudood* ordinances punish any form of extramarital relation, including the offense of *zina*.¹³⁸ The offense is punished under Section 377 of the Pakistani Penal Code,¹³⁹ both by local Courts and by the *Sharia* Bench of the Supreme Court of Pakistan, including the award of capital punishment until 2009.¹⁴⁰ As a result, many gay men and women have been punished, incarcerated, and executed;¹⁴¹ LGBT individuals are condemned to “hiding their sexualities,” and “do not take the risk of revealing themselves as gay.”¹⁴² On the contrary, pederasty is widely spread in the rural areas, and in

137. ASMA JAHANGIR, REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS (submitted to the Commission on Human Rights (“Comm. HR”), 13 Jan. 2003, E/CN.4/2003/3, ¶ 67).

138. These ordinances were promulgated by the dictator General Zia ul-Haq and played a crucial role in the Islamization of Pakistan in 1980. The Ordinance relating to *zina* provides for a category of sex crimes, including rape, adultery and fornication (pre-marital sex), which are all treated as crimes against the state. See Saadia Toor, *How Not to Talk About Muslim Women: Patriarchy, Islam and the Sexual Regulation of Pakistani Women*, in NEW SEXUALITY STUDIES, *supra* note 116, at 166; see also ASMA JAHANGIR & HINA JILANI, THE HUDOOD ORDINANCES: A DIVINE SANCTION? (1990).

139. Pakistan Penal Code, Act XLV of 1860, PAK. PENAL CODE *amended by* Protection of Women (Criminal Laws Amendment) Act, 2006, Criminal Laws (Amendment) Act, 2004 (I of 2005), Criminal Law (Amendment) Ordinance (LXXXV of 2002), Criminal Laws (Reforms) Ordinance (LXXXVI of 2002) (“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which shall not be less than two years nor more than ten years, and shall also be liable to fine. Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section.”).

140. Toor, *supra* note 138, at 170–71. Interestingly, however, as a result of widespread pederasty, the age of consent in cases of sexual relations, including with adults, is only twelve years of age, according to Section 90 of the Pakistani penal code.

141. *Id.*

142. Hadi Hussain, *Pakistan Queer Movement*, GAYLAXY (Feb. 20, 2011), <http://www.gaylaxymag.com/articles/world/pakistan-queer-movement>; see *Pakistan: Focus on Gay Rights*, INTEGRATED REGIONAL INFORMATION NETWORKS NEW & ANALYSIS, (May 10, 2005), <http://www.irinnews.org/Report/28594/pakistan-Focus-on-gay-rights> (“No one speaks openly about the *Hijra*.”).

many cases with the consent of the father “giving his son to the use of adults.”¹⁴³

Similarly, in Malaysia, queer individuals are regularly prosecuted by religious authorities. Sodomy and oral sex, in particular, are criminalized on the basis of both *Sharia* and colonial laws, and punishment includes fines, flogging, and incarceration.¹⁴⁴ Malaysia is also particularly strict with transvestites and cross-dressing. In 1983, the “Conference of rulers” issued a *fatwa* prohibiting all sex change operations performed by Muslim surgeons.¹⁴⁵ Additionally, repression of homosexuality is accompanied by general censorship on LGBT rights advocacy.¹⁴⁶ In countries in North Africa, the Gulf, and in the Middle East, laws are equally harsh. Until 2010, the United Arab Emirates (“UAE”)¹⁴⁷ punished homosexuality by death.¹⁴⁸ Today, it is punishable by ten years of imprisonment, and religiously motivated harassment is likely to occur. Article 80 of the Dubai Penal Code in particular criminalizes consensual sodomy with a punishment of fourteen years in prison.¹⁴⁹ The interpretation of this provision is ambiguous; some sources suggest that it punishes rape of women and *forced* sodomy with a man, while others indicate that it punishes rape of women and *consensual* sodomy between men.¹⁵⁰ However, it seems that the application of the law depends on the context; for example,

143. See, e.g., Asool Asif et al. v. State (2006) Criminal Appeal No. 81/1 of 2006 and 35 of 2008, at 6, available at http://federalshariatcourt.gov.pk/HCJ_Judgements/Jail%20Cr.App.No.81-1-%20of%202006%20LW.pdf (judgement imposing a death sentence in a case related to the murder of a child as a result of pederasty in the rural areas of Lahore).

144. See Koon Teh, *supra* note 88, at 92.

145. See *id.* at 95

146. See Samar Habib, *Introduction to 1 ISLAM AND HOMOSEXUALITY*, *supra* note 14, at xvii.

147. The United Arab Emirates (“UAE”) consists of Abu Dhabi, Dubai, Sharjah, Ajman, Umm al-Quwain, Ras al-Khaimah, and Fujairah.

148. Former article 354 of the UAE FEDERAL PENAL CODE stated, “Whoever commits rape on a female or sodomy with a male shall be punished by death.” This provision has been abolished, and the UAE is not included in the ILGA report. The punishment for *zina* however, remains, and it is generally common in the Gulf countries, as in Iran, to punish homosexuality similarly to rape.

149. *Laws, United Arab Emirates*, GAYLAWNET, <http://www.gaylawnet.com/laws/ae.htm#> (last visited Nov. 20, 2013).

150. *Id.*

while prostitution in the country flourishes,¹⁵¹ in 2008, twelve men were arrested and imprisoned for cross-dressing and participating in an alleged gay wedding,¹⁵² and in 2009, the government deported and sentenced to imprisonment several individuals accused of “homosexual activity.”¹⁵³ Egypt is also known for LGBT abuses: the much discussed “Queen-52” incident in 2001 led to fifty-two men being arrested on a boat, and, subsequently, tortured for “practising immorality” and “offending religion.”¹⁵⁴

Even in these Muslim-majority states, which have abolished, or virtually abolished, anti-gay legislation,¹⁵⁵ LGBT individuals may be arbitrarily tortured, discriminated against, and highly stigmatized. In Iraq, for example, Ali Hili, head of a group called “Iraqi LGBT,” reports that since the 2003 invasion more than seven hundred people have been killed because of their sexuality.¹⁵⁶ In Indonesia, LGBT individuals are still perceived as

151. See e.g., JOHN BRADLEY, *BEHIND THE VEIL OF VICE: THE BUSINESS AND CULTURE OF SEX IN THE MIDDLE EAST* 240 (2010).

152. See *Dubai Detains Foreigners Accused Of Being Gay*, Huffington Post (July 17, 2008, 1:28 PM), http://www.huffingtonpost.com/2008/07/17/dubai-detains-foreigners_n_113443.html; *Lesbians Jailed in Dubai—Rex Wockner International News, ASYLUMLAW* (July 19, 2012), http://www.asylumlaw.org/legal_tools/index.cfm?category=341&countryID=233 (describing a similar incident where two lesbians were jailed and then deported for public display of affection).

153. 2010 Human Rights Report: United Arab Emirates, U.S. DEP’T ST. (Apr. 8, 2011), <http://www.state.gov/j/drl/rls/hrrpt/2010/nea/154475.htm>.

154. On May 11, 2001, Egyptian police officers raided the Queen Boat in Cairo and arrested fifty-two LGBT individuals. Doan, *supra* note 19, at 149. Further, see the discussion of this incident within the EU Commission, 2002/C 160 E/027, written question E-2613/01 by Lousewies van der Laan (ELDR) and Bob van den Bos (ELDR) to the Commission (Sept. 27, 2001). Professor Shalakany criticised the absence of reaction from the Egyptian NGOs in his paper presented on March 28, 2007 at the ASIL Annual Meeting on the topic of “Queering International Law” in Cairo. Amr Shalakany, *On a Certain Discomfort with Orientalism*, in 101 PROCEEDINGS ANN. MEETING ASIL 9 (2007).

155. The OIC states which have abolished laws on gender and sexual expression are, according to the ILGA Report: (in Africa) Burkina Faso, Chad, Côte d’Ivoire, Djibouti, Gabon, Guinea Bissau, Mali, Niger; (in Asia) Bahrain, Indonesia, Jordan, Kazakhstan, Kyrgyzstan, Tajikistan and Turkey, excluding the Turkish Republic of Northern Cyprus; (in Europe) Albania and Azerbaijan; and (in the Caribbean) the Suriname. See ILGA REPORT 2012, *supra* notes 8, 11–12.

156. *Islam and Homosexuality: Straight but Narrow*, *supra* note 14; see also Brian Whitaker, *The Targeting of Gay Men in Iraq*, NEAR E.Q., Nov. 2010, at 1.

criminals, and gay film festivals are either banned or attacked.¹⁵⁷ In Lebanon, there is a high rate of homophobia, perceived by many LGBT individuals as “compulsory heterosexuality.”¹⁵⁸ In Turkey, “honor killings” of homosexuals are on the rise¹⁵⁹ and gay-dating related websites are banned.¹⁶⁰

C. *The Politicization of the Debate by the OIC*

LGBT human rights protection is a relatively new subject for international human rights law. The debate on sexual orientation emerged in the Western world after the feminist movements and the calls for gender equality.¹⁶¹ A significant element in generating awareness and recognition of the rights of LGBT individuals has been the advocacy and campaigns instituted by Non-Governmental Organizations (“NGOs”) at both the domestic as well as at a supra-national level. However, in so far as member states of the OIC are concerned, the picture is less clear.

1. Sexual Rights and the OIC

The OIC—the premier organization representing Muslim-majority states, headquartered in Jeddah, Saudi Arabia—and its subsidiary organs (including three Islamic universities in Bangladesh, Niger, and Uganda, and the “Islamic *Fiqh* Academy,” also based in Jeddah) have been repeatedly ignoring sexual rights.¹⁶²

157. See *Indonesia’s Top Muslim Body Seeks Ban on Gay Film Fest*, A.F.P. (Oct. 10, 2010, 2:10 PM), available at <http://www.thejakartaglobe.com/archive/indonesias-top-muslim-body-seeks-ban-on-gay-lesbian-film-festival/>; see also *supra* notes 16, 22.

158. Ghassan Moussawi, *Not Straight but Still a Man: Negotiating Non-Heterosexual Masculinities in Beirut*, in *NEW SEXUALITY STUDIES*, *supra* note 16, at 159, 165.

159. See Jodi Hilton, “*Honor Killing*” *Targets Turkey’s LGBTs*, GLOBAL POST (Oct. 12, 2011, 5:14 AM), <http://www.globalpost.com/dispatch/news/regions/europe/turkey/111011/honor-killings-target-turkeys-lgbts> (describing an incident where a father murdered his gay son and fled his town).

160. Heber Tito Galvez, *A Glimpse into the Realities of the LGBTs in Southern Turkey*, ILGA-EUROPE (Oct. 5, 2012), http://www.ilga-europe.org/home/guide/country_by_country/turkey/A-glimpse-into-the-realities-of-the-LGBTs-in-Southern-Turkey.

161. Carmen Barroso, *From Reproductive to Sexual Rights*, in *ROUTLEDGE HANDBOOK OF SEXUALITY, HEALTH AND RIGHTS* 379, 381 (Peter Aggleton & Richard Parker eds., 2010).

162. Sexual rights include the right “to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how

Indeed, the OIC has been regularly launching arguments not only against sexual rights, but, even more substantially, against gender equality and the universality of women's rights. An indication of the problem is the controversial reservations that Muslim states have placed upon the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁶³

The states that criminalize homosexual conduct represent more than two-thirds of OIC Member States.¹⁶⁴ Yet, even more substantially, UN forums have been constantly "bracketing" out sexual rights precisely due to the OIC's pressure.¹⁶⁵ The final document of the International Conference held in Cairo in 1994 on Population and Development ("ICPD") by all the participating Muslim-majority and OIC Member States was an indication of the lack of will of these states to accept, respect, promote, and fulfill women's sexual rights and *a fortiori* LGBT rights.¹⁶⁶

States such as Iran, for example, argued for the unacceptability of applying "some expressions that could be interpreted as applying to sexual relations outside the

often to do so." Sexuality is "a characteristic of all human beings." See the Report of the Special Rapporteur on the Right to Health, Paul Hunt which was presented at the 60th session of the U.N. Comm. HR. Special Rapporteur on the Right to Health, *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, U.N. Doc. E/CN.4/2004/49 (Feb. 16, 2004).

163. See LARS ADAM REHOF, GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE CEDAW 257–58 (1993); Hanna Beate Shöpp-Schilling, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women: An Unresolved Issue or (No) New Developments?*, in RESERVATIONS TO HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION REGIME: CONFLICT, HARMONY OR RECONCILIATION 3 (Ineta Ziemele ed., 2004); see also Lau, *supra* note 6, at 76 n.47 (referring, for example, to Morocco, which proposed an amendment to article 2 to accommodate Muslim practices). See also the extremely hostile views of the *Islamic Fiqh Academy* towards both women's rights and homosexuality, expressed in Khalid Baig, *Beijing Plus 5: What is in Store?*, ALBALAGH.NET (Apr. 25, 2000), http://www.albalagh.net/current_affairs/beijing.shtml.

164. Thirty-nine States out of fifty-seven states of the OIC punish homosexuality, see *supra*, note 8. This number is equivalent to a percentage of 68.4% of the OIC members.

165. Ignacio Saiz, *Bracketing Sexuality: Human Rights and Sexual Orientation—A Decade of Development and Denial at the United Nations*, in CULTURE, SOCIETY AND SEXUALITY 459, 465 (Richard Parker & Peter Aggleton eds., 2d ed. 2010).

166. Lau, *supra* note 6, at 76 n.48.

framework of marriage.”¹⁶⁷ Likewise, all of these OIC states placed reservations upon those parts that are not in conformity with Islamic *Sharia*, or more generally, the parts that contradicted ethical, cultural, and religious values. The main objections of these States were mainly related to Chapter VII of the final document with regard to reproductive rights and reproductive health.¹⁶⁸

Further, the OIC has adopted an overtly distasteful position towards the rights of LGBT persons, considering homosexuality an “abnormal sexual behavior.” Using religion as a pretext, the OIC takes the position that any advocacy of rights for the LGBT communities amounts to a reliance upon “vague and controversial notions” without “legal foundations in international law.”¹⁶⁹ Additional opposition is based upon the apparent licentious behavior that the provision of these rights would supposedly encourage: the legitimization of pedophilia and incest, a negative health impact, and a weakening of the institution of family and society. That said, any consideration of the rights of sexual minorities or communities with diverse sexual orientation has been loaded with opposition, tensions, and hostility.

2. The Perception of HRC Resolution 17/19 in the Muslim World

The HRC 2011 Resolution 17/19 on sexual orientation did not come *ex nihilo*. It represents the fruition of long-time struggles on the part of NGOs, related agencies, and some UN Member States. Indeed, the first state-representatives initiative for such an attempt had already started a decade earlier, in

167. See ICPD, Report of the International Conference on Population and Development, A/CONF.171/13 (Oct. 18 1994).

168. The OIC States, which placed these reservations are Afghanistan, Brunei Darussalam, Jordan, Libyan Arab Jamahiriya, Yemen, UAE, and Iran. See *id.*

169. The Pakistani Representative (acting on behalf of the OIC), while denying the application of any existing rights for LGBT communities, made the following point: the “international community only recognizes those rights that are enumerated in UDHR which were codified in the subsequent international human rights instruments.” Letter from UN’s Islamic Group to UNHRC President Opposing Panel on Violence against Gays (Feb. 14, 2012), available at <http://blog.unwatch.org/index.php/2012/02/17/letter-from-uns-islamic-group-to-unhrc-president-opposing-panel-on-violence-against-gays>.

August 2003.¹⁷⁰ At that time, the OIC Member States, and particularly the UN representatives of Malaysia, Pakistan, Egypt, and Saudi Arabia, as well as Muslim-majority states' local governors and Muslim states' media, massively opposed it.¹⁷¹ As a result, UN Members were not able to arrive at the necessary consensus and the vote was cancelled at the last minute.¹⁷² Likewise, in March 2004, Brazil's attempt to introduce a new resolution for the protection of sexual minorities within international human rights protections to the UN Economic and Social Council faced considerable OIC opposition, opposition that was also joined by the Vatican.¹⁷³ The OIC went even further on that occasion, threatening Brazil with economic pressure and the termination of trade relations if the Brazilian government continued with the resolution.¹⁷⁴ In a letter distributed to all the states' Missions in Geneva by Pakistan, its representative asserted that "sexual orientation is not a human rights issue,"¹⁷⁵ and the resolution was once again postponed until 2005.¹⁷⁶ According to the director of Human Right Watch ("HRW") for homosexual, bisexual and transgender issues, Brazil came under "massive pressure" from several Islamic states.¹⁷⁷

170. See e.g., Press Release, Commission on Human Rights, Commission Adopts Three Resolutions on Violation of Human Rights in Occupied Arab Territories, U.N. Press Release HR/CN/1086 (Apr 15, 2004).

171. See IGLHRC, *supra* note 128. A deputy minister in the Malaysian PM's department allegedly stated at that occasion: "we must oppose it. This resolution is horrible."

172. *Id.* at 10.

173. Pratima Narayan, *Somewhere over the Rainbow... International Human Rights Protections for Sexual Minorities in the New Millennium*, 24 B.U. INT'L L.J. 313, 341 (2006), The Resolution was introduced with the support of twenty-six other states. *But see* LOUDES & PARADIS, *supra* note 21 (according to which Brazil has the highest crime rates against homosexuals).

174. Betsy Pisik, *Homosexual Rights Resolution Withdrawn at United Nations*, WASH. TIMES, Mar. 30, 2004, <http://www.washingtontimes.com/news/2004/mar/30/20040330-120645-4241r/?page=all>.

175. See Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 228 n.114 (2008) (referring to a letter from the Ambassador and Permanent Representative of the Permanent Mission of Pakistan, Geneva, Feb. 26, 2004).

176. See MARIE JUUL PETERSEN, DANISH INST. INT'L STUD., ISLAMIC OR UNIVERSAL HUMAN RIGHTS? THE OIC'S INDEPENDENT PERMANENT HUMAN RIGHTS COMMISSION 31 (2012); Pisik, *supra* note 174.

177. PETERSEN, *supra* note 176.

Meanwhile, in 2007, the international experts who initiated the *Yogyakarta principles* managed to overcome the Muslim states' pressure and initiate the process of a new initiative for LGBT rights.¹⁷⁸ Their efforts were supported and empowered by specific states' Permanent Missions to the United Nations—Argentina, Brazil, Croatia, France, the Netherlands, Norway, and Sweden—which had organized another UN panel discussion on LGBT rights at the International Day of Human Rights in New York on the December 10, 2010. New negotiations for a Resolution were therefore initiated. Thenceforth, it can be presumed, that it is only due to the United States—which joined the HRC in 2009—that the OIC members' firm opposition was overcome by the Western states. The HRC Resolution 17/19 on sexual rights was passed in July 2011,¹⁷⁹ with the approval of the US government,¹⁸⁰ and only a few weeks before New York State, in a political move with immense financial interests, legalized same-sex marriages.¹⁸¹

The OIC's opposition to the 17/19 Resolution is reminiscent in many respects to the OIC's campaigns to advocate for UN resolutions on “defamation of religions” (i.e., the creation of an international offense for blaspheming Islam).¹⁸² This approach is also reminiscent of the OIC's campaign for bringing an “end to Islamophobia” and subsequent calls for the increased protection of Muslim

178. See generally O'Flaherty & Fisher, *supra* note 175; PAULA L. ETTLEBRICK & ALIA TRABUCCO ZERÁN, THE IMPACT OF THE YOGYAKARTA PRINCIPLES ON INTERNATIONAL HUMAN RIGHTS LAW DEVELOPMENT (Sept. 10, 2010), available at http://www.ypinaction.org/files/02/57/Yogyakarta_Principles_Impact_Tracking_Report.pdf.

179. *Supra* note 2.

180. See Press Release, U.S. President Barack Obama, *Statement on U.N. Rights Council LGBT Resolution*, (June 17, 2011), <http://iipdigital.usembassy.gov/st/english/texttrans/2011/06/20110617190328su0.3136103.html#axzz1zWD6xUUt>.

181. New York legalised gay marriage on July 24, 2011. See generally Matt Williams, *New York's Gay Marriage Industry Is Booming One Year After First Weddings*, GUARDIAN (July 24, 2012, 11:23 AM), <http://www.guardian.co.uk/world/2012/jul/24/new-york-gay-marriage-year?newsfeed=true>.

182. From 1999 to 2010, the main battleground of opposition of the OIC with the Western states—and vice-versa—was not the LGBT rights, but the “defamation of religions” debate, with resolutions voted alternatively within the General Assembly and the HRC, calling for an end to Islamophobia and pressing to include blasphemy laws in freedom of expression limitations. See Stephanie Berry & Javaid Rehman, *Is “Defamation of Religions” Passé? The United Nations, Organisation of Islamic Cooperation and Islamic State Practices: Lessons from Pakistan*, 44 GEO. WASH. INT'L L. REV. 431, 433 & n.6 (2012).

minorities in Europe and the United States.¹⁸³ It is in this sense that one should understand the OIC representatives' walk-out of the UN panel on LGBT rights in March 2012,¹⁸⁴ and the subsequent statement regarding the OIC's position on LGBT rights, which was submitted by Mr. Zamir Akram (the OIC's coordinator on Human Rights issues) to the Human Rights Council. In that statement, Mr. Akram did not only condemn LGBT rights, he also clarified that the OIC was concerned about "the attempts to create controversial 'new notions' or 'new standards' by misinterpreting the Universal Declaration of Human Rights and international treaties to include such notions that were never articulated or agreed to by the UN membership."¹⁸⁵ Furthermore, he noted that the OIC was "even more disturbed at the attempt to focus on certain persons on the grounds of their *abnormal sexual behaviour* [sic], while not focusing on the glaring instances of intolerance and discrimination in various parts of the world, be it on the basis of colour, race, gender or religion."¹⁸⁶

One may, therefore, legitimately question the real impact of this Resolution, which was passed only by twenty-three states voting in favor, with nineteen against and three abstentions,¹⁸⁷ other than to corroborate the domination of western states within the HRC. Indeed, the very recent consecration of LGBT rights within the international law discourse does not refute the

183. See generally Javid Rehman, *Islamophobia after 9/11: International Terrorism, Sharia and Muslim Minorities in Europe—The Case of the United Kingdom*, 3 EUR. Y.B. MINOR. ISS. 217 (2005).

184. See Stephen Gray, 'Milestone' LGBT Discussion at UN Human Rights Council Welcomed Despite Walkout, PINKNEWS (Mar. 8, 2012, 9:55 AM), <http://www.pinknews.co.uk/2012/03/08/milestone-lgbt-discussion-at-un-human-rights-council-welcomed-despite-walkout>; Robert Evans, *Islamic States, Africans Walk Out on U.N. Gay Panel*, REUTERS (Mar 8, 2012, 12:07 AM), <http://in.reuters.com/article/2012/03/07/un-gays-idINDEE8260GT20120307>.

185. OIC, *Letter from UN's Islamic group to UNHRC President Opposing Panel on Violence Against Gays*, PERMANENT MISSION OF PAKISTAN TO THE U.N. AND OTHER INTERNATIONAL ORGANIZATIONS, POL/S0/2012, Feb. 14, 2012, paras. 4–5, <http://www.unwatch.org/atf/cf/%7B6deb65da-be5b-4cae-8056-8bf0bedf4d17%7D/OIC%20TO%20PRESIDENT.PDF>.

186. *Id.* para. 6 (emphasis added).

187. See U.N. Doc. A/H.R.C./17/L.9/Rev.1; *56 Islamic States Reject U.N. Debate on Anti-Gay Violence*, U.N. WATCH (Feb. 17, 2012), <http://blog.unwatch.org/index.php/2012/02/17/outrage-at-un-as-56-islamic-states-slam-gays-for-abnormal-sexual-behaviour-urge-silence-on-anti-gay-violence>.

fact that queerness and LGBT rights are subject to political pressure from both western and non-western states.¹⁸⁸

III. PROSPECTS FOR CHANGE IN THE MUSLIM WORLD

It follows from our analysis of both international human rights law and the *Sharia* that change is a necessity for the Muslim world. As we have already argued, however, any change should take into account not only the prospects of implementation of international human rights standards, but also, equally, the local realities, including both domestic law and practice.

A. Change as a Global Necessity

The maintenance of patriarchal structures and laws, which repress LGBT rights, has further dangerous ramifications and consequences, including questions related to adolescents' sexual education,¹⁸⁹ treatment of asylum claims,¹⁹⁰ and global population health. A thorough analysis of these problems certainly exceeds the remit of the current study. Therefore, only two of these issues will be succinctly mentioned here: the dangerous implications of the Islamic states' attitude vis-à-vis global health, and the problems encountered by transsexual and intersex individuals who might be having a sex-reassignment surgery.

1. Rise of HIV/AIDS and Dangers for Global Health

We have suggested that the debate surrounding the rights based on sexual orientation might be equally conceived as the new battleground between the Muslim world and the West. We

188. See, e.g., Saiz, *supra* note 165.

189. SANJAKDAR, *supra* note 30, at 61 (noting that LGBT youth are described as "susceptible to western influences" and that in many cases, the teachers themselves contribute to homophobia since the "story of Prophet Lot was perceived by many of the teachers as Islamic capital and 'pedagogy of positive fear' designed to deter Muslim youth from engaging to similar [homosexual] behaviour").

190. Rithu Ghai, *Deciphering Motive: Establishing Sexual orientation as the "One Central Reason" for Persecution in Asylum claims*, 43 COLUM. HUM. RTS. L. REV. 521 (2012); UNHCR, GUIDANCE ON REFUGEE CLAIMS RELATING TO SEXUAL ORIENTATION OR GENDER IDENTITY 17-18, paras. 37, 41 (2008); see UHJ (Iran) and HT (Cameroon) v. Sec'y of State for the Home Dep't [2010] UKSC 31.

also advance the view that the opposition to LGBT rights is symptomatic of a general opposition to Western values, as manifested by the OIC efforts to combat “blasphemy against Islam” and Islamophobia.¹⁹¹ This time, however, the debate has an extremely negative impact on global health, specifically with regards to the AIDS endemic. Indeed, it is by now generally accepted that HIV infection and other sexually transmitted diseases (“STDs”) are directly linked to the penalization of homosexuality. Most authors and scientists agree that the decriminalization of homosexuality would decrease the propagation of the virus.¹⁹² As stated by the Joint United Nations Program on HIV/AIDS (“UNAIDS”) representative Michel Sidibé, “[t]he AIDS response has shown that when people are stigmatized because of their sexual orientation or gender identity, they are less likely to access the HIV services they need” and that “this leads to new HIV infections and AIDS deaths.”¹⁹³ The same position is adopted by other UN organs, notably by the United Nations Development Programme (“UNDP”).¹⁹⁴ It has also been suggested that the repression of homosexuality, as well as sex trafficking and prostitution, have equally disastrous effects on mental and psychological health and can lead to traumatic situations and depression.¹⁹⁵

Yet, Islamic scholars ostensibly hold the West responsible for homosexuality and are unwilling to recognize that

191. See generally Berry & Rehman, *supra* note 182; see also Rehman, *supra* note 183, at 217–18 (describing “Islamophobia”).

192. See, e.g., Joint U.N. Programme on HIV/AIDS (UNAIDS), Expert Group Meeting on “The HIV/AIDS Pandemic and its Gender Implications,” *The Gender Aspects of the HIV/AIDS Pandemic*, Nov. 13–17 2000, EGM/HIV-AIDS/2000/OP 1 (Oct. 16, 2000) (Stephen Matlin & Nancy Spence).

193. U.N. News Centre, *Homophobic Hate Crimes on the Rise, U.N. Human Rights Chief Warns*, May 17, 2011, <http://www.un.org/apps/news/story.asp?NewsID=38406&Cr=Pillay&Cr1>.

194. See also United Nations Development Programme (UNDP), Joint U.N. Programme on HIV/AIDS (UNAIDS), Rep. of the Global Comm’n On HIV and the Law: Rights, Risks and Health (July 2012), <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/hiv-and-the-law—risks—rights—health.html> (finding that criminalisation undermines the fight against HIV/AIDS). Also, Associate Administrator Rebecca Grynspan said in a message that anti-gay prejudice and discrimination harm not only individuals but broader economic development as well.” U.N. News Centre, *Homophobic Hate Crimes on the Rise, U.N. Human Rights Chief Warns*, May 17, 2011, <http://www.un.org/apps/news/story.asp?NewsID=38406&Cr=Pillay&Cr1>.

195. See, e.g., MELISSA FARLEY, PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS (2003).

homosexuality may be an inherent characteristic of human nature rather than a product of the West.¹⁹⁶ Malik Badri represents a significant lobby of religious Islamic scholars. He advances the claim that western societies have failed in preventing the transmission of AIDS because “they are greatly influenced by homosexuals and lesbians.”¹⁹⁷ According to Badri, western media and scholarly literature are responsible for the “ideologies and practices of the gay revolution, which has enticed homosexuality” in that “the message of [the western] literature is more or less to abandon childish attitudes and practice anal sex.”¹⁹⁸ Badri proposes the Islamic faith as a “remedy,” arguing that, “[i]f western societies cannot do anything about changing its people, other societies that can still do it should do so by all means.” He says that “they must motivate their people to shun all the practices that brought the epidemic and to lean an ethically cleaner life.”¹⁹⁹

2. Reassignment Surgeries in Homophobic Societies

The aspects of the debate that are related to economics in the Muslim-majority and OIC Member States are a supplementary feature of the homophobic agenda. The absence of a neo-liberal capitalist discourse in many parts of the Muslim Middle East and South Asia have certainly contributed to the lack of protection for LGBT individuals and related homophobia.²⁰⁰ Nonetheless, it remains the case that the OIC

196. See, e.g., DAVID HAPLERIN, HOW TO DO THE HISTORY OF HOMOSEXUALITY (2004); see also Hendricks, *supra* note 23 (providing the testimonials from LGBT individuals from South Africa).

197. MALIK BADRI, THE AIDS CRISIS: AN ISLAMIC SOCIO-CULTURAL PERSPECTIVE 230 (1998). See generally Deuraseh, *supra* note 28.

198. “AIDS became a problem for homosexual men only when rampant promiscuity, frequent anal forms of intercourse, new and sometimes physically traumatic forms of sex and the frequent concomitants of drug use multiple concurrent infections paved the way.” BADRI, *supra* note 197 (quoting ROBERT ROOT-BERNSTEIN, RETHINKING AIDS).

199. According to the same author western modernity has pushed hard to dominate other civilizations, while the United Nations has been utilized by the United States and the West to subjugate other cultures. The author suggests therefore that the Ramadan is the way to “combat homosexuality”: abstain from promiscuity, adultery and fornication and, ultimately, follow “Islam as a way of life guards against [homosexuality and] against HIV.” *Id.* at 185–189, 217, 236–237.

200. For some scholars, the gay rights movement, as it had been the case for the human rights movement in the post-war era, has been the fruit of both economic

and the Muslim-majority states agenda are well implemented to the extent that it is beneficial for the economy. OIC's pressure on the "sexual orientation" resolution in July 2011 could be particularly interesting if read in a contextual manner. For example, this contextualized analysis takes into account the fact that the accession of the OIC Members to the World Trade Organization ("WTO") has been under progress since June 2011,²⁰¹ that Muslim-majority states are competitors of exporting states that will benefit from the recent liberalization in agriculture (Australia, New Zealand, Brazil, Argentina, and Thailand),²⁰² and that the opposition to LGBT rights may be a battleground more pertinent than Islamophobia or blasphemy laws.²⁰³ The Turkish President He Ahmet Necdet Sezer, in his inaugural address at the Opening Session of the Standing Committee for Economic and Commercial Cooperation of the OIC ("COMCEC") in Istanbul on November 24, 2004, seemed to advance an abstract commitment to human rights in this context, noting that "the establishment of better and independently operating political and economic mechanisms compatible with universal values and based on principles such as democracy, the rule of law, human rights, good governance, transparency, accountability, gender equality, and rejection of violence [are] among [the Islamic states'] important tasks."²⁰⁴

growth and individuality, since it is the capitalist model that separated sexuality and procreation. See, e.g., John d'Emilio, *Capitalism and Gay Identity*, in *CULTURE, SOCIETY AND SEXUALITY*, *supra* note 165, at 250, 253 (stating that "under the family based models of production that preceded capitalism, sex was primarily a means to produce labour that would make families self-sufficient. The advent of industrial capitalism led to the separation of sex from procreation and allowed the concept of 'sexual identity' as defined by one's sexual desires to flourish"); see also Joshi, *supra* note 6, at 431 n.63 (citing John d'Emilio, *Capitalism and Gay Identity*, in *THE LESBIAN AND GAY STUDIES READER* 467, 467-68 (Henry Abelove et al. eds, 1993)).

201. The number of the OIC member states that have applied for accession to the WTO is estimated at fourteen, including Afghanistan, Algeria, Azerbaijan, Comoros, Iraq, Iran, Kazakhstan, Lebanon, Libya, Sudan, Syria, Tajikistan, Uzbekistan and Yemen. Report of the Follow-up Comm. of the Standing Comm. for Econ. & Commercial Cooperation of the Org. of the Islamic Conference, 27th Meeting, June 1-2, 2011, OIC/COMCEC-FC/27-11/REP (2011).

202. *Id.* at 181-84.

203. See *supra* notes 182-83.

204. Report and Resolutions of the COMEC, 21st Sess., November 22-25, 2005, OIC/COMCEC/21-05/REP, Annex 2 (2005).

However, the negation of gender variance in a way that admits the existence of intersex and transgender individuals, but excludes the existence of homosexuals and lesbians, is extremely paradoxical. As the Director of Programs of the International Gay & Lesbian Human Rights Commission Jessica Stern notes, “[i]n Iran, while homosexual activity is policed in the strictest of ways, there is official state recognition for transgender people, and Iran allegedly has one of the highest rates of sex reassignment surgery in the world.”²⁰⁵ In many cases, these individuals are subject to the religious authorities’ will to either allow or prohibit such an operation (or to oblige, in the case of hermaphrodites).²⁰⁶ In Saudi Arabia, for example, according to a decree by the Saudi Ministry of Health issued in May 2011, only intersex individuals are allowed to undergo sex-reassignment process,²⁰⁷ while another religious ruling imposes the reassignment of individuals who have been converted from men to women, back to men.²⁰⁸ On the other hand, the reassignment surgery is not accompanied by any sort of rehabilitation, in most of the cases leaving the individuals who have had such surgery in an entirely hostile environment. ILGA reports: “Despite the high number of sex-reassignment cases, the Kingdom of Saudi Arabia does not have adequate post-surgical psychological care. As a result, 60% of those who go through the ‘sex-correction process’ cannot adapt to their new gender role and suffer from psychological problems, which may, in some cases, lead to suicide. In many instances, intersex

205. Interview with Jessica Stern, Dir. of Programs, Int’l Gay & Lesbian Human Rights Comm’n (July 13, 2013), *available at* <http://yulr.org/yulr-interview-jessica-stern-director-of-programs-international-gay-lesbian-human-rights-commission>. Inversely, she notes that “on the other hand, in the U.S., the high costs of sex reassignment surgery and the lack of available hormones mean that many transgender Americans struggle.”

206. *The Malay Rulers’ Council Issues Fatwa Prohibiting Sex Re-assignment Surgery, Except in Hermaphrodite Cases*, ISLAMOPEDIAONLINE (Apr. 22, 2010), <http://islamopediaonline.org/keyword/gender-reassignment-surgery>.

207. ILGA, *supra* note 7.

208. Salman al-Oadah, *Rulings on Transgender and Sex-Change Matters*, ISLAMOPEDIAONLINE (Apr. 22, 2010), <http://islamopediaonline.org/fatwa/al-oadah-saudi-arabia-rulings-transgender-and-sex-change-matters>. The relevant *fatwa*’s justification is that “it is wrong for his female relatives and other women to distance themselves from him or to oppose him as long as the visible signs of womanhood are clearly manifest.” *See also* Sebastian Usher, *Gender Correction for Saudi Girls*, BBC NEWS (June 17, 2004, 1:57 AM), http://news.bbc.co.uk/1/hi/world/middle_east/3814041.stm.

individuals are harassed by family members, society, and the religious police, and sometimes end up in jail. Even though their sex-reassignment is legally approved, the police often consider them to be gay.”²⁰⁹

B. *Changing Laws, Religions, and Morals*

A change of the traditional Islamic views on the matter of homosexuality is certainly a gradual and long-term process; the “traditional” interpretation of the Islamic scriptures benefits both from the authority of established Islamic scholars, who promote discrimination and stereotypes by excluding LGBT individuals from the Islamic *Ummah*, but, also, from the widespread censorship of opposite views. However, traditions change, and should be subject to change, when they are contrary to international human rights standards.²¹⁰ A distinction should be made here. On the one hand are the states that impose torture and death penalty for homosexual behavior or same-sex relations (sodomy and related offenses). On the other hand are the states that do not impose torture or death penalty for such activity, but do maintain penal laws criminalizing homosexual practices and related behavior. Furthermore, there are states that do not even regard homosexuality and lesbianism as attracting any form of criminal sanctions, but nevertheless remain reluctant to include sexual orientation as valid grounds for the non-discrimination principle.

In recent years, however, several Muslim states have started reformulating their harsh domestic laws. In 2010 and 2011, for instance, the death penalty for homosexuality was abolished in some OIC member states; namely, the UAE, Afghanistan, and

209. See *Saudi Arabia: 425 Cases of Sex-Reassignment in 27 Years*, ILGA NEWS (May 31, 2012), <http://ilga.org/ilga/en/article/nyXgHBz104> (last visited July 19, 2012).

210. Hence, some progress has been remarked upon in Africa, after the controversy on Uganda’s “Homosexuality Bill” in 2010. See ACDHRS, TRES/011/4/12, *Resolution on the Human Rights on the Basis of Sexual Orientation and Gender Identity in Africa*, (Apr. 16, 2012), which was promoted by NGOs in the 51st Ordinary Session of the African Commission on Human and Peoples’ Rights, held in Banjul, The Gambia from April 14–16, 2012. Similarly, in India: *Gay Sex Decriminalised in India*, BBC NEWS (July 2, 2009, 10:02 AM), <http://news.bbc.co.uk/2/hi/8129836.stm>.

Iraq.²¹¹ Additionally, many others have, at least formally, abolished laws limiting gender and sexual expression over the last decade; namely, Burkina Faso, Chad, Côte d'Ivoire, Djibouti, Gabon, Guinea Bissau, Mali, Niger, Bahrain, Indonesia, Jordan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkey (excluding the Turkish Republic of Northern Cyprus), Albania, Azerbaijan, and the Suriname in the Caribbean).²¹² In 2012, Iran also amended its criminal code: execution by stoning was abolished, and some mitigating circumstances have been introduced in the criminal code that could save some LGBT individuals from the application of the death penalty.²¹³

One can also identify similar positive trends in Muslim states' domestic jurisprudence. On the one hand, several recent judgments reveal a progressive understanding of issues related to *gender* orientation. For example, in May 2012, the Pakistani Supreme Court issued its judgment in the famous “transgender” case, acquitting two persons who had been accused for same-sex marriage—one of them being a transsexual who had already had a sexual assignment operation.²¹⁴ On the other hand, domestic courts have shown a more decisive position against homophobia. For example, in July 2012, a domestic court in Morocco indicted an Islamic cleric on the grounds of incitement to hatred. The cleric was calling for the murder of a journal editor who was urging for larger sexual freedoms in the

211. In UAE, until 2010; in Afghanistan, during the Taliban rule; in Iraq, under an Iraqi decree of 2001. See *Homosexuality and Islam*, RELIGIONFACTS, <http://www.religionfacts.com/homosexuality/islam.htm> (last visited Nov. 20, 2013). See also the EU Commission's proposal for a Council Directive on “implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation”, EU COM 426 ¶ 5 (2008).

212. See ILGA Report 2012, *supra* note 8, 11–13.

213. Salah Al-Nasrawi, *A Lesson from Iran: Islamic Sharia is Flexible after All*, AHARAM ONLINE (Feb. 26, 2012), <http://english.ahram.org.eg/NewsContentP/4/35434/Opinion/A-lesson-from-Iran-Islamic-Sharia-is-flexible-aft.aspx>; see SOS Homophobie, Rapport sur l'Homophobie 109 (2012), <http://www.sos-homophobie.org/rapport-annuel-2012>.

214. See Lahore High Court, *Tariq Hussain*, June 28 2007, with regard to Mr. Shumail Rah, who had been living as a woman for sixteen years before having a surgery. See IGLHRC, *Human Rights and Transgender People in Pakistan* (2008), <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/.../73-1.pdf> (last visited July 17, 2012).

country.²¹⁵ Despite their weaknesses,²¹⁶ these types of judgments mark the beginning of a more modern understanding of Islam, and may therefore provide fertile ground for further social and legal transformations. Other domestic courts' jurisprudence, particularly from the states that have had the experience of colonial domination, could also play an essential role for future legal amendments. The judgment of the Delhi High Court, for example, in the *Naz Foundation* case,²¹⁷ could be a useful paradigm for the future empowerment of sexual minorities in the Muslim world.

CONCLUSION

This Article has examined the validity of the claims for the criminalization of homosexuality, from both an Islamic and international law standpoint. It has proposed that an unbiased and neutral reading of the *Qur'an*, and an objective understanding of the *Sunna*, establishes recognition of LGBT rights emphasizing sexual and gender diversity. In so doing, it strongly argues for absolute de jure and de facto equality for LGBT communities.

More specifically, the Article has demonstrated that Islam in its early manifestations provided a more egalitarian and positive attitude towards homosexuality and lesbianism than did the other monotheistic religions (i.e., Judaism and Christianity). It was, however, ironic, as well as disappointing, that over a period of time the inherent egalitarian and progressive spirit of

215. Youssef, *Moroccan Cleric Indicted for Editor's Death Edict*, MAGHREB CHRISTIANS (July 18, 2012), <http://www.maghrebchristians.com/2012/07/18/moroccan-cleric-indicted-for-editors-death-edict>.

216. For example, in the first case, the lawyer's argument, which was accepted by Pakistan's Supreme Court, was that this individual's physical characteristics should be "conformed to social and cultural expectations of masculinity." And, in the second case, the incitement to hatred was accompanied by incitement to an unlawful act, since the Imam was calling specifically for the journalist's death.

217. The judgement has been challenged by the state and the decision of the Indian Supreme Court is awaited until this day. See Notes of Proceedings in *Suresh Kumar Kaushal v. Naz Foundation*, Feb. 23 to Mar. 27, 2012, Supreme Court of India, available at http://orinam.net/content/wp-content/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf (last visited July 18, 2012). In fact, Section 377 of the Indian Penal Code (1860), which was drafted in accordance to the British colonial laws and included public execution for sodomy, criminalised all "unnatural offenses," i.e., any "carnal intercourse against the order of nature."

Islam was repressed by subsequent generations of jurists and statesmen. Muslim jurists were not able to differentiate between violence and coerced sex (as prohibited in the *Qur'an* and *Sunna*) as opposed to consensual, adult intimacy and sexual relationships. Consensual, adult homosexual relationships were deemed sinful, attracting the most serious of physical and mental punishments. Subsequently, in addition to a misconstrued understanding of the spirit of the *Qur'an* and *Sunna*, Muslim societies continue to be deeply patriarchal and profoundly hostile to libertarian values of personal sexual autonomy—an attitude that has weighed most heavily against LGBT minority communities. This Article has equally put the emphasis on the disastrous effects of “traditional” interpretations of *Sharia* Law for both LGBT individuals (marginalization, exclusion, prostitution, drug use, high number of suicides) and the global population’s health. It also has observed that specific advocacy in favor of the prohibition of homosexuality, on the grounds of LGBT people’s supposed responsibility for the propagation of the HIV/AIDS virus and other STDs, also violates international human rights law. Today, seven Islamic states (namely, Saudi Arabia, Iran, Sudan, Yemen, Mauritania, and Nigeria) apply the death penalty against homosexuals and in some instances against young persons or juveniles.

Certainly, recent international law trends (most notably, the Yogyakarta principles in March 2007, the HRC 17/19 Resolution in July 2011, the subsequent UN High Commissioner Report in December 2011, and the UN global Panel on LGBT rights in March 2012) have emphasized the need to respect the right to equality for LGBT individuals, and the principle of non-discrimination on the grounds of sexual orientation. As this Article has demonstrated, however, these initiatives are often subject to political pressure, mainly between the “West” (particularly the United States) and the OIC. The soft law on the matter is not at the slightest taken into account by OIC member states, and the Yogyakarta principles are certainly an optimistic, but not sufficient, step to impose on Muslim-majority and *Sharia* compliant states an end to the repression of queerness and discrimination against LGBT individuals.

It might be conceded that not all is doom and gloom. Despite the political and economic issues involved and the significant opposition to LGBT rights from the OIC member states, some signs of positive change can be discerned. These signs, along with the global movement for the empowerment of LGBT communities, particularly through the several NGOs and human rights activists working on the matter, are indications of hope for the future. Their efforts, however, as this study has demonstrated, should not be based solely on the implementation of human rights standards, but equally on a thoughtful and matured understanding of the Islamic religion.