Towards a Sexual Pluriverse: Queering International Law’s Sexual Subject Through Islamic Legal Histories

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The emergence of rights for sexual minorities as a subject of concern in international human rights discourse has prompted opposition from Muslim-majority states and Muslim scholars claiming that such rights are fundamentally antithetical to Islamic law. Other scholars, however, have disagreed, justifying the extension of rights and legal protection for sexual minorities using arguments drawn from the Qur’an, the sunnah (practice and sayings of the Prophet Muhammad), and classical fiqh (jurisprudence). Interventions on all sides, however, tend to omit the question of how sexual identity is produced and configured as an object of legal regulation in the modern nation-state (in contrast to the pre-modern polity in which Islamic law developed), instead taking these basic terms of the debate largely for granted. However, the rupture effected by the (violently colonial) transition to modernity in the interrelationships between the state, the law, and sexuality renders the grafting of classical Islamic legal norms—whether supporting or opposing contemporary formulations of human rights—onto the modern nation-state problematic.

Drawing on the recent work of historians of sexuality and criminal law in Muslim-majority societies, I will re-situate the current discourse against the backdrop of the construction of modern sexual identities—and their legal regulation—through processes of colonialism, modernization, and nation-state formation. I will use the contestations over sexual minority rights as a site for considering the broader problematic of how human rights are formulated and debated—and the question of their universality or relativity considered—in the shadow of (post?)colonial modernity: its institutions, epistemologies, and identity formations.

Pre-Modern Legal Traditions and Modern Identity Politics

In his analysis of the pre-modern Islamic legal tradition’s norms relating to governance of non-Muslim populations—the “dhimmi rules”—Anver Emon alerts us to the difficulties in translating the intelligibility of these rules to our shared modern context. “Using the dhimmi rules as a mechanism for comparing pre-modern and modern conditions of intelligibility,” he suggests that:

[W]hat made Islamic legal doctrines intelligible in the pre-modern world, arguably, inhibits them from retaining that same intelligibility in the modern world. This does not mean that pre-modern doctrines are wrong in some abstract, metaphysical sense. Indeed the question of right and wrong runs the risk of anachronism when considering a legal tradition as old as Islamic law. Rather, pre-modern rules such as the dhimmi rules might be viewed as inappropriate answers to modern questions of governance amidst diversity, non-responsive if not entirely irrelevant. One cannot assume that pre-modern doctrines such as the dhimmi rules retain some original intelligibility when the conditions that gave them such intelligibility have fundamentally altered. If the dhimmi rules anticipated an imperial model of governance, that model has yielded to the modern nation-state model. [ . . . ] [A]ny Rule of Law analysis of the dhimmi rules today cannot appreciate their
intelligence without also taking account of fundamental historical shifts in the way law relates to and constitutes the prevailing political order.¹

Emon holds that asking whether “Islam” is “tolerant” or “intolerant” of religious minorities is neither helpful nor coherent, since the inquiry elides the shifts in structures of governance and formations of identity that have made “tolerance” meaningful as a mode of majority-minority relationship from our modern perspective.² Instead, he avers, “the Islamic legal treatment of non-Muslims is symptomatic of the more general challenge of governing a diverse polity. Far from being constitutive of an Islamic ethos, the dhimmī rules are symptomatic of the messy business of ordering and regulating a diverse society”³ – and these legal rules simultaneously assume and produce particular configurations of difference and hegemony, which do not necessarily or easily map on to modern contexts.

Working along lines congruent to Emon’s, I similarly gesture towards the incongruity of interrogating the pre-modern Islamic legal tradition for its tolerance or intolerance of “sexual minorities,” since the background regimes producing, ordering, and regulating bodies and desires in the Muslim pre-modern were very different from those in the modern. The very terms we almost-invariably use to interpret and discuss this pre-modern history – “woman” and “man,” “heterosexual” and “homosexual,” “same-sex” and “opposite-sex,” “gender” and “sexuality” – are not stable in meaning or relevance across time and space.⁴ The template of gender binary which often structures our understanding of gender and sexuality (so that we think we may talk sensically about “women” or “men,” and “same-sex” or “opposite-sex” practices and desires in places and times distant from our own) is, as Afsaneh Najmabadi remarks, “a very modernist concept in many societies, including the Islamicate world, emerging along such other ideas as ‘complementarity of the sexes’ over the past couple of centuries.”⁵ Indeed, the fact that the word for “sex” in Persian and Arabic (jins, meaning kind or species, as well as grammatical gender) is of such recent provenance – emerging in the first half of the 20th century⁶ – raises questions about the utility and applicability of “gender” and “sexuality” as categories of analysis “beyond the modern” and “beyond the Americas” and Europe.⁷ “Given that so many of gender history’s analytical categories were first developed for the European context,”⁸ as Strasser and Tinsman observe, their trans-geographical and trans-historical appropriateness should not be taken for

² Ibid.
³ Ibid at 3.
⁵ Ibid at 17.
⁷ Najmabadi, supra note 4.
granted; rather, their imposition as “natural,” “universal” categories of identity and analysis reproduces the Eurocentric- and modern-biases of their provenance.

If identities acquire their meaningfulness contextually and relationally – that is, if Norm and Other emerge together and through each other “in the context of a matrix of meaning-making”\(^9\) – then we may commit serious errors and epistemic violence in superimposing modern identity concerns onto pre-modern discourses. In what follows, I attempt to tease out some of these errors. I begin with a brief exposition of the development and conceptualization of “sexual rights” in international law, and then move to elaborate pre-modern notions of law and sexuality underlying the Islamic legal tradition’s rules prohibiting liwat (anal intercourse): rules lying at the epicenter of modern debates about Islam’s position on same-sex sexual orientations. The distance between modern and pre-modern contexts presents problems for simple translocation of norms from one “matrix of meaning-making” to the other; however, this space also represents a site for contesting modern hegemonic formations of heterosexuality/homosexuality, and the exercise of modern state power in disciplining sexuality.

*International Human Rights Law: Sexual Rights, Colonial Genealogies*

While sexual minorities are not formally protected by any international human rights law instrument\(^10\), sexual rights issues connect to universal human rights discourse at several nexuses, including the rights to privacy, non-discrimination, and freedom of expression.\(^11\) On June 17, 2011, the UN Human Rights Council passed the first UN resolution on sexual orientation; the resolution asked the Office of the UN High Commissioner for Human Rights to detail “discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world,” and to consider “how international

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\(^10\) Sexual orientation is not explicitly mentioned as a prohibited ground of discrimination in Article 2 of the Universal Declaration of Human Rights (UDHR) or Article 26 of the International Covenant on Civil and Political Rights (ICCPR), and arguments that it falls within the category of “other status” in these instruments are not widely accepted, at least at the level of law, outside of Europe and a few other countries. Jack Donnelly, “The Relative Universality of Human Rights” (2007) 29:2 *Human Rights Quarterly* 281 at 304. For the argument that sexual orientation is a protected “other status” under Article 2 of the UDHR, see Vincent J Samar, “Gay Rights as a Particular Instantiation of Human Rights,” (2001) 64 *Albany Law Review* 983.

\(^11\) Judith Avory Faucette, “Human Rights in Context: The Lessons of Section 377 Challenges for Western Gay Rights Legal Reformers in the Developing World” (2010) 13 *Journal of Gender, Race and Justice* 413 at 431-434. In the 1994 *Toonen* case, the UN Human Rights Committee held that Tasmania’s sodomy law violated Mr Toonen's right to privacy under Article 17 of the ICCPR. United Nations, *Views of the Human Rights Committee Under Article 5, Para 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* UN Doc CCPR/C/50/D/488/1992 (1994). However, this holding did little to clarify the meaning of "other status" under Article 26 of the ICCPR or Article 2 of the UDHR, since the decision was limited to the right to privacy and did not extend more broadly to discrimination based on sexual orientation. Sharon Yecies, “Sexual Orientation, Discrimination, and the Universal Declaration of Human Rights,” (2010-2011) 11 *Chicago Journal of International Law* 789 at 797.
human rights law can be used to end violence and related human rights violations based on
sexual orientation and gender identity.”

Among the nineteen countries voting against the
resolution were several Muslim-majority countries: Bahrain, Bangladesh, Jordan, Malaysia,
Pakistan, Qatar, and Saudi Arabia.

The 2007 *Yogyakarta Principles* (developed by an international group of experts to
explicate “the application of international human rights law in relation to sexual orientation and
gender identity”) assert that “[s]exual orientation and gender identity are integral to every
person’s dignity and humanity and must not be the basis for discrimination or abuse.”

They define sexual orientation as:

> each person’s capacity for profound emotional, affectional and sexual attraction to, and
> intimate and sexual relations with, individuals of a different gender or the same gender or
> more than one gender;

and gender identity as:

> each person’s deeply felt internal and individual experience of gender, which may or may
> not correspond with the sex assigned at birth, including the personal sense of the body
> (which may involve, if freely chosen, modification of bodily appearance or function by
> medical, surgical or other means) and other expressions of gender, including dress,
> speech and mannerisms.

On the one hand, as Vanja Hamzic contends, the *Yogyakarta Principles* are quite open
and flexible; Hamzic endorses the Principles as “represent[ing] a successful attempt to overcome
binary representations of gender (male—female) and sexuality (heterosexual—homosexual) [. . .]
Instead of ‘reify[ing] sexual preferences’, as imputed by some critics, these definitions
acknowledge diversity, choice and individual experience as relevant factors in each person’s
formation of desire and self-identification.” On the other hand, however, the Principles still
maintain the privileged connection of “gender” with “sexual orientation”; that is, they assume
that gender is the sole or dominant axis along which sexuality is oriented, ignoring the complex
and multifarious webs of power relations beyond gender (social status, age) that may structure
desire and imbue it with meaning. Moreover, they assert the categories of “gender identity”

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14 Ibid.
15 Ibid.
17 Eve Kosofsky Sedgwick, *Epistemology of the Closet* (199) at 8; Matthew Waites, “Critique of ‘Sexual Orientation’ and ‘Gender Identity’ in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles” (2009) 15:1 *Contemporary Politics* 137. “Does it matter, for instance, that two lovers were depicted in medieval Persian or Arabic love poetry with the same androgynous, genderless
(combining internal feeling, individual experience, and external expression) and “sexual orientation” (combining emotion, affection, sexual attraction, and sexual practices) as not only 
coherent, but integral to the selfhood of individuals – endowing these constructions with a putatively universal relevance that transcends diversity in social contexts.\textsuperscript{18}

The \textit{Yogyakarta Principles}, then, are not neutral in their privileging of certain ways of being human; for, as Sara Ahmed reminds us, “to become a subject under the law one is made subject to the law that decides what forms lives must take in order to count as lives ‘worth living,’”\textsuperscript{19} Samera Esmeir’s work on “juridical humanity” in colonial Egypt demonstrates how law’s recognition of human subjects excludes even as it includes, foreclosing some ways of being even as it valorizes others.\textsuperscript{20} Conversely, coloniality operates not simply through mass expulsion of the colonized from the zone of humanity, but also through selective recognition of certain colonized subjects as human – on terms and conditions formulated by colonial state power, and presented as universal.\textsuperscript{21} Along similar lines writ global, as Nicola Perugini and Neve Gordon assert, international human rights discourse “can be interpreted as the articulation of an \textit{international juridical humanity}” which “[lays] out the conditions for having one’s [ . . . ] humanity recognized and protected within the post-war international order.”\textsuperscript{22} The figure of the human (as well as the figure of the non-human), then, is assembled and brought to life by currents of colonial and sovereign power, with sexuality being one “especially dense transfer point” in this hominizing field of power.\textsuperscript{23}

In \textit{The History of Sexuality}, Michel Foucault famously analyzed the 18\textsuperscript{th}- and 19\textsuperscript{th}-century genesis of “sexuality,” as a “historic construct” which discursively unified bodies, organs, and affects having no necessary or inherent connection.\textsuperscript{24} The establishment of “heteronormative” sexuality concurrently produced “homosexuality” as its constitutive and denigrated Other. However, Foucault’s Eurocentric focus occluded the imperial-colonial context surrounding and

\begin{thebibliography}{9}
\bibitem{Ahmed2006} Sara Ahmed, \textit{Queer Phenomenology: Orientations, Objects, Others} (Duke University Press, 2006) at 84.
\bibitem{Foucault1990} Michel Foucault, \textit{The History of Sexuality, Volume One: An Introduction} (Vintage, 1990) at 103. “By this Foucault meant that sex is particularly well suited to the projects of control, denigration, regulation or governance. It is an especially good lever by which to wield power of various sorts.” Katherine Franke, “Sexual Tensions of Post-Empire” (2004) \textit{Columbia Law School Public Law Research Paper No 04-62} at 2.
\end{thebibliography}
supporting the emergence of sexuality in its hetero-homo formation. "In short-circuiting empire," Ann Laura Stoler argues, "Foucault's history of European sexuality misses key sites in the production of that discourse, discounts the practices that racialized bodies, and thus elides a field of knowledge that provided the contrasts for what a ‘healthy, vigorous, bourgeois body’ was all about." In fact, the heteronormalization of European society was intimately linked to the imperatives of empire. The representation of non-European sexualities as not only immoral but comparatively retrograde – located on a lower rung of the ladder of social evolution – provided important justification for the "civilizing mission." The identification of Muslim societies with male-male sexual practices was particularly powerful, with fantasies of homoeroticism and the penetrability of the Orient(al) pervading the Orientalist imagination. Globalization of European constructions of gender and sexuality – through direct imposition of legislation in many cases, or more diffuse promulgation of norms along vectors of power in others – rendered male-male sexual practices, desires, and sociality as homosexual perversion, requiring disciplining for modernization. In other words, colonial and modernization processes produced new normative sexual subjectivities (even while gender and sexual expressions in post-colonial Muslim societies continue to exceed the boundaries imposed by these disciplinary forces). International human rights discourse conceptualizes and organizes “sexuality rights” around modernity’s sexual subject. This is a subject marked by the coloniality of its production, the traces of which persist even as they are disavowed through human rights’ assertion of universality. “[W]hat is at stake here,” as Leticia Sabsay declares, “is the hegemony of a western

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28 Ibid.
30 British colonial legislation prohibiting “unnatural sexual intercourse” spread throughout the British colonies and protectorates in the late 19th-century, including Sudan, the Colony of Aden (in present-day Yemen), Bahrain, Kuwait, Oman, Qatar, and the Trucial States (now the United Arab Emirates.) Language based on the British law was also adopted in the Syrian, Lebannese, and Moroccan codes, where it survives to this day. Douglas E Sander, “377 and the Unnatural Afterlife of British Colonialism in Asia” (2009) 4:1 Asian Journal of Comparative Law 1.
mode of understanding the sexual subject who would become, by virtue of this sexuality, a potential claimant of rights.”

To the extent that human rights discourse depends upon a stable and transcendental notion of the “universal” human, excavation of the history of sexuality presents a serious challenge to its asserted universalism; moreover, recognition of the coloniality of this history calls into question the ethics of universalization. The historical and geographical contingency of modern understandings of law, gender, and sexuality is thrown into relief by elucidation of pre-modern Muslim discourses. Exploration of the classical Islamic legal tradition’s criminal prohibition of liwat (anal intercourse), and the particularities of the background assumptions and concepts informing these rules, highlights the hazards in transposing pre-modern norms into modern terms – a translation exercise often only made intelligible by the assumption or assertion of a universal human subject, who travels through time and space essentially unchanged.

**The Prohibition of Liwat: Criminal Law Rules, Their Background Conditions of Intelligibility, and Modern Shifts**

The Islamic legal tradition developed in the centuries following the death of the Prophet Muhammad. In the early years of its development there were hundreds of schools of jurisprudence, but currently there are four Sunni schools (Hanafi, Maliki, Shafi’i, and Hanbali) and several Shi’i schools (predominant among them the Ja’fari and Zaydi). The sources of law are the Qur’an, the sunna (the custom or tradition of the Prophet Muhammad, as captured in reports of his sayings and doings called hadith), reasoning by analogy (qiyyas); and the consensus of the community (ijma). While pre-modern Muslim jurists recognized the political ruler’s monopoly on the legitimate use of punitive violence, this exclusivity of authority did not extend to interpretation of legal norms. On the contrary: the Muslim jurist (in theory, if not always in practice) stood outside the political structures of authority – “s/he was accountable to no one but God,” and “the process of acquiring and passing on legal authority took place entirely

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35 Although this principle was not absolute: it did not hold, for example, in the domain of the family, since Muslim parents were permitted to physically discipline their children. Sherman A Jackson, “Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?” (2006) 30 Fordham International Law Journal 158 at 168.

36 Ibid.

outside the apparatus of the State” – and the four major Sunni schools of law were accorded equal recognition.  

What we now refer to as “criminal law” in the classical Islamic legal tradition comprised three categories: hadd (offences with fixed, mandatory punishments defined by the Qur’an or Sunnah), qisas (offences punished by retaliation by the injured party), and ta’zir (offences punished at the discretion of the judge or temporal ruler). Jurists agreed that zina (illicit sexual relations), defamation (slanderous accusations of sexual offences), theft, and public consumption of alcohol constituted hudud crimes. However, they disputed whether apostasy, blasphemy, highway robbery, and murder were also included in the hudud corpus.

Jurists generally understood the primary purpose of the “divinely ordained punishments” to be threat and deterrence (zair), rather than demanding maximum and frequent dispensation of legal violence by worldly authorities. And so in practice, the hudud provisions tended to be interpreted and applied very restrictively, through narrow construction of the law and imposition of high evidentiary requirements. “In attempting to avoid as much as possible imposition of the severe hadd penalties (stoning, amputation, and flogging),” Everett Rowson writes, “the jurists appealed to a prophetic hadith instructing the believers to ‘avert the hadd penalties by means of ambiguous cases’ (idra’u l-hudud bi l-shubuhat).” The injunction to avoid hudud penalties in cases of doubt emerged as a foundational principle of Islamic criminal law; in addition to supporting arguments for narrow construction, doubt was invoked to avoid applying hudud punishments in a wide variety of particular cases.

38 Jackson, supra note 35 at 167.
41 Ibid.
42 Lange, supra note 39 at 699.
45 Examples in fiqh literature of doubt suspending the application of hudud encompassed a broad range of circumstances, such as: liquor drunk mistakenly for vinegar or medicine; zina committed with a woman mistaken for a man’s wife, or between a finally divorced couple who thought they were still in a lawful marriage; theft from the public treasury, in which the thief is deemed to have a share; a father’s theft of his son’s property, in the mistaken belief that he was permitted to take it; retraction of a defendant’s confession. Mohammad Hashim Kamali, “Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia” (1998) 13:3 Arab Law Quarterly 203 at 231-232. However, the doubt maxim did not apply to crimes of “strict liability,” such as rape. Rabb, “Lenity,” supra note 40 at 1346-1347.
The case of the criminalization of liwat illustrates the Islamic legal ethos and climate of legal pluralism. The word “liwat” is not employed in the Qur’an: jurists derived the term from the Qur’anic story of the Prophet Lut, which describes the destruction of the people of Sodom ostensibly for sexual transgression (although this interpretation is disputed). And same-sex practices are not directly criminalized in the text of the Qur’an; jurists in the classical period debated whether liwat was analogous to zina, and therefore subject to hadd penalties. While all of the major schools of law considered liwat a punishable offence, they disagreed on the reason and the punishment. In brief (and the extreme brevity of this account perforce omits a great deal of the legal discourse’s complexity and variety): the Maliki, Shafi’i, Hanbali, and Ja’fari schools considered any form of penetrative sex outside the bonds of a licit relationship zina, and therefore punishable as a hadd crime. However, the stringency of the evidentiary requirements were commensurate with the harshness of the hadd penalty: testimony by four qualified witnesses to the actual act of penetration, making prosecution virtually impossible. Abu Hanifa (eponym of the Hanafī school), in contrast, rejected the use of analogical reasoning (qiyas) to define the ambit of hudud provisions, invoking the doubt maxim to limit the scope of their application. And so the majority of Hanafī scholars held that the hadd prohibition of zina could not be interpreted to apply to anal intercourse; instead, liwat was considered a ta’zir offence and subject to lower levels of punishment (with rules of evidence correspondingly relaxed).

The classical legal tradition’s censure of the act of anal penetration was not castigation of homosexual identity; the fact that jurists generally considered female-female sexual practices a separate class of transgression from sexual behaviour between males testifies to the absence of an overarching juridical category concerned with the “homosexual.” As Khaled El-Rouayheb’s seminal study of multiple strands of discourse on sex and desire in the Ottoman Empire concluded: “Arab-Islamic culture on the eve of modernity lacked the concept of ‘homosexuality,’ and writings from the period do not evince the same attitude toward all aspects of what we might be inclined to call homosexuality today. [. . .] The term [homosexuality, referring to a particular complex of desires, behaviours, and practices] is anachronistic and unhelpful in this particular context.”

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performance of particular acts,” notes Kecia Ali, “these were not consistent across time and place, nor are they identical to contemporary notions of ‘homosexual,’ ‘gay,’ or ‘queer.’”  

Projection of modern, dualistic constructions of “sexual orientation” and “gender identity” obscures salient distinctions in the pre-modern legal discourse – between the “active” and the “passive” partner, between anal intercourse and other sexual acts (such as kissing or fondling), and between sexual acts and passionate but chaste infatuation – by subsuming them all under the rubric of “homosexual” identity.  

Furthermore, the description of pre-modern sexual practices and behaviours as “same-sex” or “opposite-sex” assumes the fixity of the man-woman gender binary: a rigid construction inadequate for apprehending the complexity of pre-modern gender formations. Dror Ze’evi, for example, argues that Ottoman discourses conceptualized “men” and “women” as belonging to the same essential “type” – albeit with women representing a more imperfect version.  

And Afsaneh Najmabadi’s analyses of 18th-century Qajar Iran reveal a triadic structure of gender and sex: beautiful beardless young men and women were described using similar epithets, and both were considered appropriate objects of male desire (although marriage was restricted to male-female couplings).

State modernization and European encounters (including, but not only, in formally colonial relationships) in the 19th and 20th centuries effected fundamental transformations in structures of gender and desire in Muslim societies. The propagation and internalization of Victorian constructions and norms of gender and sexuality, the classification of certain “desires” as unnatural and pathological through medical discourse, the production of a modern nation-state and capitalist economy through the gendering of public and private spheres, the romanticization of marriage – all contributed to the reconfiguration of gender as a male-female binary, and the disavowal of same-sex sexuality.  

Modernity, colonialism, and the emergence of the nation-state

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52 Ali, supra note 44 at 84.  
53 El-Rouayheb, supra note 6.  
54 Dror Ze’evi, “Hiding Sexuality: The Disappearance of Sexual Discourse in the Late Ottoman Middle East” (2005) 49:2 Social Analysis 34; Dror Ze’evi, Producing Desire: Changing Sexual Discourse in the Ottoman Middle East, 1500-1900 (University of California Press, 2006).  
55 “Sometimes the only way one can distinguish male from female in visual representations is by the style of headgear. Other times it remains very difficult to tell if we are looking at a man or a woman. In written sources, the same descriptions, such as moon-faced, cypress-statured, narcissus-eyed, ruby lips, bow eyebrows, black scented hair, narrow waist, were used to depict male and female beauty.” Afsaneh Najmabadi, “Mapping Transformations of Sex, Gender, and Sexuality in Modern Iran” (2005) 49:2 Social Analysis: The International Journal of Social and Cultural Practice 54 at 59; Afsaneh Najmabadi, “Gendered Transformations: Beauty, Love, and Sexuality in Qajar Iran” (2001) 34:1-4 Iranian Studies 89; Afsaneh Najmabadi, Women With Mustaches and Men Without Beards: Gender and Sexual Anxieties of Iranian Modernity (University of California Press, 2005); Afsaneh Najmabadi, “Types, Acts, or What? Regulation of Sexuality in Nineteenth-Century Iran” in Kathryn Babayan and Afsaneh Najmabadi, eds. Islamicate Sexualities: Translations Across Temporal Geographies of Desire (Harvard University Press, 2008).  
also produced profound changes in the role, nature, and constitution of Muslim legal systems/notions of legality, including *inter alia*: in conceptualizations of law – from pluralistic legal discourse to a state-centric monistic (and largely codified) system of rules/ruleds;\(^{57}\) in the source of law – from jurists’ interpretations of sacred texts to positive enactment by the state (so that legal recognition of *shari’ā* depends on inclusion in state laws);\(^{58}\) in the locus of legal authority and interpretation – from jurists (independent from the polity to varying degrees) to national judges and legislatures;\(^{59}\) and in the status of *Islam* – from the ground and ultimate horizon of law, to a subject of regulation by the state, and largely displaced as the source of positive legal norms during colonial state transmutations.\(^{60}\) The objects, modes, and effects of modern regulation of sexuality therefore differ significantly from pre-modern exercises.

**Rights of Sexual Minorities in Muslim Societies: Contemporary Legal Regimes and Discourses**

In the Middle East and North Africa (MENA)\(^{61}\), for example, the criminal legal landscape currently includes:

- States that have continuously applied uncodified *fiqh* as substantive criminal law – same-sex sexual activity criminalized as *hudud*: Saudi Arabia\(^{62}\);
- States that have preserved *fiqh* as the basis of criminal law, but also introduced codification – same-sex sexual activity criminalized as *hudud*: for example, Yemen and Qatar\(^{63}\);


\(^{61}\) A term I use for convenience but not without caution, given its colonial provenance.


\(^{63}\) *Ibid.*
States that have “Islamized” previously-Europeanized penal codes – same-sex sexual activity criminalized with\textsuperscript{64} or without\textsuperscript{65} the hadd penalty: Iran, Sudan, Libya, and the United Arab Emirates\textsuperscript{66};

States that have penal codes based on European (mainly French or Italian\textsuperscript{67}) law – same-sex sexual activity often (but not always\textsuperscript{68}) criminalized, but hadd penalties not attached: including Syria, Lebanon, Jordan, Morocco, Algeria, Tunisia, Egypt, and Turkey.

The official sanctions for unlawful sex in jurisdictions incorporating hudud as criminal law include corporal punishments – flogging and/or execution\textsuperscript{69} (although with possibility of commutation to imprisonment in several systems) – whereas non-hudud jurisdictions penalize such offences exclusively with imprisonment or fine.\textsuperscript{70} However, whether the source of legal norms is European or Muslim legal traditions, the contemporary criminalization of certain sexual acts, relations, and identities is inevitably an expression of modern, state-centric criminal law power\textsuperscript{71} – a manifestation of the state’s “vastly expanded powers [ . . . ] to influence even the

\textsuperscript{64} Iran, Sudan, and the United Arab Emirates.

\textsuperscript{65} Libya; some of the emirates have suspended the hudud penalties, and replaced them with imprisonment and fines. Diana Hamade, “Defining Sharia’s role in the UAE’s legal foundation” The National (27 June 2011), online: <http://www.thenational.ae/thenationalconversation/comment/defining-sharias-role-in-the-uaes-legal-foundation>.


\textsuperscript{67} Jan Michiel Otto, ed. Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present (Leiden University Press, 2010).

\textsuperscript{68} Same-sex sexual activity has been decriminalized in Turkey, Jordan, and Egypt, although other legal provisions not explicitly targeting same-sex practices may still be deployed for this purpose. See, for example, Sadiq Reza, “Egypt” in Kevin Heller and Markus Dubber, eds. The Handbook of Comparative Criminal Law (Stanford University Press, 2010) at 200.

\textsuperscript{69} See: article 146 of Sudan’s Penal Code; articles 2 and 3 of Libya’s Law 70/1973 (extra-marital sex); article 1 of the United Arab Emirates’ Penal Code (establishing application of figh to hudud crimes); and articles 12, 263 (adultery), and 264 (same-sex sexual relations) of Yemen’s Penal Code. Qatar’s code does not specify the punishment for adultery, merely stating that “Islamic Sharia provisions [ . . . ] are applicable if the suspect [ . . . ] is a Muslim” (article 1).

\textsuperscript{70} See: articles 339 (adultery) and 333 of Algeria’s Penal Code (same-sex sexual relations); article 316 of Bahrain’s Penal Code (adultery); articles 273 to 277 of Egypt’s Penal Code (adultery); article 377 of Iraq’s Penal Code (adultery); article 282 of Jordan’s Penal Code (adultery); articles 193 (same-sex sexual relations), 194 and 195 (adultery) of Kuwait’s Penal Code; articles 487 and 489 (adultery) and 534 (same-sex sexual relations) of Lebanon’s Penal Code; articles 490, 491 (adultery) and 338 (same-sex sexual relations) of Morocco’s Penal Code; articles 225, 226 (adultery) and 223 (same-sex sexual relations) of Oman’s Penal Code; articles 239 to 242 (adultery) and 520 (same-sex sexual relations) of the Syrian Penal Code; and articles 236 (adultery) and 230 (same-sex sexual relations) of the Tunisian Penal Code.

most intimate activities of daily life.” 72 To the extent that modern states target individuals “who identify as ‘gay’ on a personal level and who seek to use this identity as a group identification through social and public activities,” 73 they reify these identities through persecution. 74

Contemporary implementations of hudud reflect the modern conceptualization of state criminal law as a technology for disciplining citizens: modern codes depart from the classical Islamic legal tradition’s well-known preference for avoiding trials and punishment for illicit sexual behaviour 75 by relaxing the classical tradition’s stringent evidentiary and procedural requirements. Iran’s Penal Code, for example, permits the judge to “act upon his own knowledge” in hadd cases, 76 “grant[ing] the judge a subjective power that amounts, in effect, to a negation of the intricate rules devised by classical judges for establishing zina, which make conviction almost impossible.” 77 The very fact that criminal law dealing with sexuality in all MENA states (with the exception of Saudi Arabia) is codified is significant. As Rudolph Peters explicates, the introduction of hadd penalties through criminal codes indicates that “the Western idea that it is the state that lays down the law has been accepted, even by those countries that are re-Islamising their legal systems. [. . .] The result of the reintroduction of Islamic criminal law, in most countries, is that something new is created, a form of criminal law consisting of Islamic substantive rules in a Western garb [. . .] with Western-type courts and Western institutions such as the state prosecutor.” 78 The enactment of hudud, therefore, is not simply a return to pre-modern law, but a potent exhibition of modern sovereign power. 79

The heterogeneity of the MENA legal terrain reflects the diversity and complexity of the tectonic forces that have shaped it – Islamicate, European, colonial, international – confounding the Orientalist expectation that a totalizing “Islam” is all-determining in Muslim-majority societies. Nevertheless, “Islam” has become a central battleground in contestations over the universality of sexual rights. A preponderance of scholars insist that “homosexuality” is

73 Joseph A Massad, Desiring Arabs (University of Chicago Press, 2007) at 183.
77 Peter, supra note 62 at 147-148.
78 Ibid at 146.
categorically forbidden in Islam, either condemning it as an unnatural perversion of natural heterosexuality, or characterizing it as a natural disposition that is impermissible to act upon.

However, this position is not universal or unopposed. Scholars challenging the dominant heteronormative readings of the Islamic ethical and legal traditions tend to make a number of similar argumentative moves: 1) assertion of the “naturalness” and “innateness” of same-sex sexual orientation, as “proven” by modern scientific research; 2) affirmation of the Qur’an’s celebration of diversity in aspects of identity such as nationality and ethnicity, and extrapolation from this celebration acceptance (if not endorsement) of sexual and gender diversity; 3) attribution of the imputed heteronormativity of the tradition to the biases and limitations of exegetes, which have distorted Qur’anic interpretation and obscured its “true” message of toleration; 4) articulation of “progressive” interpretations of religious texts, which free the “natural,” pre-discursive homosexual body from the shackles of heteronormative culture.

**Queering Identity, Querying the State**

The value of “sexuality-sensitive” interventions in challenging both modern Muslim homophobia and “queer secularity” (which steadfastly maintains that “[t]he queer agential subject can only ever be fathomed outside the norming constrictions of religion”) should not be underrated. However, their naturalization of the homosexual-heterosexual binary entraps them in the confines of modern identity discourses, and a politics of recognition which entrenches the “minoritization” of identities constructed through difference from the “majority.” This impedes critique of the exclusions and oppressions of the modern heterosexual/homosexual binary itself, and the regimes of neoliberal economics and imperial nationalism. It has been deployed to bolster. Both heteronormative and anti-heteronormative stances anachronistically project modern sexual subjectivities (homosexual and heterosexual) onto the pre-modern tradition, while invisibilizing the background political, legal, and social structures which make any system

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80 For example, Yusuf al-Qaradawi on “Shari’a and Life” Al-Jazeera (8 June 2006).
83 Kugle, “Homosexuality in Islam” supra note 46.
85 Ibid at 13.
88 Puar, supra note 84.
regulating bodies and desires intelligible: a mode of argument which takes for granted the perdurance of contemporary constructions of sexuality, subjectivity, and nation-state, limiting our ability to think (and live) beyond them. Turan Kayaoglu posits that aggressive assertion of state sovereignty, and not fidelity to the Islamic legal tradition, is the primary obstacle to protection of rights in contemporary Muslim-majority polities.\textsuperscript{89} What is needed, then, is a discourse that is attuned and responsive to the conditions of modern state power and legality\textsuperscript{90}, but does not simultaneously assume/entrench colonial modernity’s categories of ontology and epistemology.

If heteronormativity and homophobia are so bound up with the modern state and its contemporary politics – and are not purely, or even predominantly, the result of religious interpretations denounced as outdated\textsuperscript{91} – then any critique which treats sexual identities as independent of political structures and processes misses a key site where those identities are produced, imbued with meaning, regulated, and punished/rewarded. What is required to address the use of modern state violence to persecute sexual minorities, therefore, is not a “new” reading of Islamic texts which accepts or tolerates homosexuality, but a discourse which enables us to denaturalize the state organized through the heterosexual/homosexual, majority/minority binary. Insisting on the alterity of what Judith Butler calls “the strange, the incoherent, that which falls ‘outside’” might “[give] us a way of understanding the taken-for-granted world of sexual categorization as a constructed one, indeed, as one that might be constructed differently.”\textsuperscript{92} Instead of drawing on past tradition to simply further reinforce the normativity of heterosexuality or affirm hegemonic homosexual identities, could Islamicate sexual histories like those explored in Part III serve as a resource for more radically questioning the sexual structure of the modern nation-state? In other words: instead of assimilating the past into the categories and narratives of the present, could the Islamic legal and ethical tradition be used to “queer” the modern heteronormative state?\textsuperscript{93} The motivation of such an undertaking, to use the words of Lisa Duggan, would be “to destabilize heteronormativity rather than to naturalize gay identities” – an objective perhaps unattainable through reliance on human rights discourse.\textsuperscript{94}

Universal human rights are \textit{meant} to serve the function of restraining, if not preventing, the exclusions and violence of the state. As multiple critics have pointed out, however, human rights have an ambivalent, if not paradoxical, relationship with the state – purporting to


\textsuperscript{91} And indeed, Turan Kayaoglu posits that aggressive assertion of state sovereignty, and not fidelity to the Islamic legal tradition, is the primary obstacle to protection of rights in contemporary Muslim-majority polities. Turan Kayaoglu, “A Rights Agenda for the Muslim World? The Organization of Islamic Cooperation’s Evolving Human Rights Framework” Brookings Doha Center Analysis Paper No 6 (January 2013).

\textsuperscript{92} Judith Butler, \textit{Gender Trouble: Feminism and the Subversion of Identity} (New York: Routledge, 1990) at 110.

\textsuperscript{93} Duggan, supra note 87; Doris E Buss, “Queering International Legal Authority” (2007) 101 American Society of International Law Proceedings 122.

\textsuperscript{94} Duggan, supra note 87 at 10.
discipline its violence, even while depending on it to “respect, protect, and fulfill” the human rights of its citizens. “Not only is the state concomitantly the major perpetrator of abuse and the one responsible for securing human rights,” Nicola Perugini and Neve Gordon remark, “but the postwar human rights regime also offers the state itself protection by bestowing upon it the authority to arbitrate and protect human rights.” International sexuality rights discourse bolsters the institution and power of the state, which is identified and elevated as the premier site for sexual minorities’ struggle for recognition. At the same time, as the study of this discourse in Part II suggests, the identity-based language of human rights tends to reify, not deconstruct, hegemonic sexual identities, entrenching them as the exclusionary (and essentializing) terms of inclusion in law and polity. If homophobia can serve as a technology of “state building and entrenchment,” so too can “homoprotectionism”: “an approach in which political actors harness the power of the state to protect LGBTQ people from persecution and domination.” Jasbir Puar’s incisive examination of what she names “homonationalism” shows how US state recognition of certain (liberal gay and lesbian) sexual minorities within a heteronormative framework can validate “heterosexual nationalist formations,” while simultaneously fostering a sense of Western “sexual exceptionalism.” Achievement of human rights for lesbian and gay subjects, then, does not automatically undermine – and, on the contrary, may sustain – the heteronormative sexual “discursive structures which maintain ‘the nation state.’” Sexuality rights as human rights do not necessarily queer the state, or the international order built around it.

Umbilically tethered to the nation-state, international human rights’ ability to denaturalize the state and its constitutive sexual constructions is restricted. Efforts to perfectly align Islam with human rights tend to impose similar restrictions on the Islamic legal and ethical tradition – as do

100 Puar, supra note 84.
lucubrations proclaiming the absolute incompatibility of Islam and contemporary sexuality rights, but without fundamentally challenging the terms of the discussion. Can we imagine Islamic law otherwise and additionally, as a site of difference inhabited by a range of human subjectivities existing beyond human rights law’s current catalog of acknowledged identities? And as a vantage point for perceiving the contingency, and therefore contestability, of the production and disciplining of sexuality through modern state power (particularly, but not only, when justified as straightforward application of “Islamic law”)?  

Recognition of the distance between pre-modern and modern social, political, and governmental contexts curbs the impulse to assume easy translatability and applicability of pre-modern Islamic norms to the present. From one perspective, this chasm may appear terrifying, an unbridgeable void between tradition and our contemporary situation; from another, however, it represents a productive space for conceiving other ways of being sexual, being subject, being human. Resting in this lacuna, “[t]he past,” as Boaventura de Sousa Santos writes, “is made present, not as a ready-made solution, as in reactionary subjectivity, but rather as a creative problem susceptible of opening up new possibilities.”

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