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From Kuwait to America, Gender-Based Killings Considered Less Than Murder

JULY 26, 2018 — MOLLY BANGS

In the rationale for its travel ban, President Trump's administration cites[1] instances of "honor killings" at the hands of immigrants from the Muslim-majority countries of Iran, Libya, Somalia, Syria, and Yemen among its reasons for barring people with these nationalities from entering the United States.

It is true that according to the penal codes of many countries in the Middle East and North Africa (MENA) region, from Article 375 in Libya[2] to Article 630 in Iran,[3] should a man kill his wife, mother, sister, or daughter after catching any of them engaging in a sexual act outside of marriage, his actions are legally codified as lesser crimes than murder.

Some researchers were puzzled by the fact that such homicides also occur in the United States, pointing to roughly twenty-five documented honor killings each year occurring in the country.[4] The perpetrators of these domestic murders that have been labeled as honor killings have a key common trait: they are immigrants from the MENA region. Indeed, both Trump's travel ban and media coverage[5] of these murders—mostly at the hands of their male family members—rests on the assumption that accepting a man's honor as grounds for a woman's death is somehow inherent to Arab or Muslim culture.

But gender-based violence and its legal backing know no borders.

The majority[6] of killings of women in the United States are related to intimate partner violence—and of these, 93 percent[7] are committed by current or former romantic partners. When the killers of women are American men who are not Muslim, Middle Eastern immigrants, such instances are not widely associated with "honor." But not dissimilarly to many MENA countries, when the non-immigrant American killer claims he did not execute a premeditated murder, but was instead provoked by his wife's infidelity, the act is dubbed a crime of "passion," thereby allowing the reduction of the crime from first-degree murder to second-degree manslaughter.

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That femicides are considered "honor killings" in the United States only when "brought" to the country by MENA immigrants is not only orientalist, but ignorant of a broad permissiveness of intimate partner violence that has long been an accepted part of American culture.[8] The U.S. legal doctrine reducing murder charges to manslaughter in the case of adultery have been in operation for over 200 years.

In 1997, after extensive lobbying by women's groups, Maryland's delegatesvoted[9] to remove adultery as a viable reason to reduce murder charges to manslaughter. To date, no other state[10] has followed suit.

Twenty years later, advocates in Kuwait successfully pushed legislation to eliminate from its national penal codeArticle 153,[11] which stipulates that such a misdemeanor is punishable by a maximum of three years in prison or 14 Kuwaiti dinars (roughly $46 U.S.). While Kuwait is a small country and is not necessarily representative of gender-based violence across its region, it is a useful case study given its success with Article 153 and the role colonialism played in shaping its laws—not dissimilarly to the formation of the U.S. legal system. This report will therefore comparatively analyze the history behind legal backing of "honor killings" and "crimes of passion" in both countries. Such forms of extreme gender-based violence rest on the fact that women are still legally considered the property of men in many post-colonial societies—from the Middle East to the West.

Kuwait: History and Legal Landscape

Kuwait was under British colonial rule from 1899 until 1961.[12] Just prior to independence, the UK-led Kuwaiti government commissioned Egyptian jurist Dr. Abdul Raazaq Al Sanhuri to lead a judicial committee[13] charged with overhauling Kuwait's legislative framework. Dr. Sanhuri's ideas directly influenced[14] the civil codes of Egypt, Iraq, and Kuwait; Syria and Libya have also borrowed from Egyptian law. The new Kuwaiti system—which remained in place following independence after being adopted as part of the 1962 Kuwaiti constitution[15]—was heavily based on Egyptian law, which was derived largely from French civil code.[16]

This Napoleonic influence[17] on much of the Arab World is clearly depicted in the inclusion of Article 153 in the Kuwaiti Penal Code. The French Penal Code of 1810's Article 324—which was repealed in 1975—declared that murder of spouses is not permitted, but that "in the case of adultery…murder committed upon the wife as well as upon her accomplice, at the moment when the husband shall have caught them in the fact, in the house where the husband and wife dwell, is excusable."[18] Article 153[19] modified this clause to stipulate that if a male catches *any* female family member in "an unsavory sexual (zina) act with a man" and kills the man, the woman, or both, than it is treated as a misdemeanor.[20]

In an interview with Century Foundation senior policy associate Lily Hindy, Dr. Alanoud Al Sharekh,[21] women's rights

advocate and co-founder of the Abolish 153[22] campaign—which aims to raise awareness around and abolish regional provisions[23] like Article 153 of the Kuwaiti penal code that justifies these murders of girls and women on the basis of honor—points to Kuwait's colonial history and the impact of Napoleonic law on Kuwait's penal code to combat the argument that Article 153's defense of "honor killings" is inherently Kuwaiti.

After three years of lobbying work led by Abolish 153, in May 2017, five members of parliament signed a bill[24] to end the honor killing law, giving it urgent status within Kuwaiti parliament. Due to a backlog of legislation, the change remains to be made.

While recorded honor killings are lower in Kuwait than in some of its neighboring countries,[25] Dr. Al Sharekh explains that Abolish 153 chose to start in Kuwait as it has a relatively higher degree of freedom of speech. Furthermore, it seemed a gateway to addressing other problematic Kuwaiti legal codes, such as its domestic violence law: As Dr. Al Sharekh told Hindy, "Our position was that this [Article 153] was the most extreme embodiment of disrespect and male guardianship gone wrong. And if we don't highlight it, if we don't make it about the principle, than everything else can be justified."

On the topic of utilizing the "honor killing" terminology in the region, Dr. Al Sharekh clarifies,[26] "These types of disciplinary violence actions take place everywhere in the world. They're just called different things depending on your background." On the Islamophobic usage of the phrase, she adds, "If you look at the trajectory of Islam, there's nowhere in the holy texts where this *sharaf*, or honor, is mentioned as a premise for killing anyone."

United States: History and Legal Landscape

Legal doctrines to a similar effect of Article 153 continue to operate across the United States under a variety of different names, including: provocation, the "reasonable man" standard, and extreme emotional disturbance. As legal scholar Paul H. Robinson has written, it is difficult to state an "American law" on this issue given that the U.S. legal system is comprised of fifty-two different jurisdictions (fifty states, Washington, D.C., and the federal system).[27] But all U.S. jurisdictions are rooted in British Common Law.[28]

American "crimes of passion," as they are known colloquially, were historically analyzed using a provocation[29] framework for mitigating homicide—typically a felony—to manslaughter, a lesser category of crime with lower sentences. This is the concept that the killer was provoked into committing homicide due to a sudden rage of passion and loss of control,[30] not due to a malicious, premeditated plan, and should therefore be tried with manslaughter[31] rather than first-degree murder. The construct of provocation was developed in 1684–85[32] in response to the rigidity[33] surrounding

homicide law—all murders until this point had been punishable by death.[34] By 1707, English courts had formulated four major Common Law categories of adequate provocation,[35] including the sight of the accused engaging in an adulterous act with another man. The British case *Regina v. Mawgridge* (England, 1707) upheld this justification for manslaughter on the basis that a wife is her husband's property: "jealousy is the rage of man, and adultery is the highest invasion of property… so a man cannot receive a higher provocation."[36]

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Some jurisdictions began to feel that the Common Law categories did not sufficiently cover all of the circumstances under which provocation may occur. Therefore, the reasonable man standard[37]—which leaves to the jury the task of deciding whether there were events or circumstances significant enough to have provoked a reasonable man into killing—was adopted in the United States by *Maher v. People* (Michigan, 1862).[38] British courts followed suit seven years later.[39]

Under Common Law, a man needed to prove that he had actually witnessed his wife engaging in a sexual act with another person. The reasonable man standard, in application, has vastly expanded the circumstances under which a man can claim he was legitimately provoked into violence: *Price v. State* (Texas, 1885)[40] decided that the husband did not need to be an eye-witness of the sexual act.[41] *State v. Yanz* (Connecticut, 1901)[42] held that even if a man is mistaken about his wife's adultery before killing her, his belief "is calculated to induce the same emotions as would be felt were the wrongful act in fact committed" and causes uncontrollable passion.[43] *People v. Barry* (California, 1976)[44] established a wife's admission of adultery as grounds for provocation and relaxed the "cooling period" so that the "heat of passion"—formerly accepted as a man's actions immediately following his discovery of adultery—was still deemed legitimate when the man killed his wife a full twenty hours later.[45]

These legal argumentations have been bolstered in many U.S. courts with the development of theModel Penal Code, which was first drafted in the 1960s and published in 1985.[46] Thirty-four U.S. legal jurisdictions operate under modern comprehensive criminal codes similar to the Model Penal Code. Of them, eleven—Arkansas, Connecticut, Delaware, New York, Hawaii, Kentucky, Maine, Montana, North Dakota, Oregon, and Utah—have adopted measures based on the Model Penal Code's Section 210.3(1)(b), which puts forth the extreme emotional disturbance (EED) formulation.[47]

The modern doctrine of EED states that a killing should be treated as a manslaughter when it is "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." The defense of EED has been used to stretch even further the reasonable man standard. As legal scholar Victoria Nourse put it, "A significant number of the reform cases I studied involve no sexual infidelity whatsoever, but only the desire of the killer's victims to leave a miserable relationship."[48] For example, in *State v. Little* (NH, 1983), the defendant killed his wife because he was upset she left him and had rejected his attempts at reconciliation. The jury found him guilty of manslaughter on the basis of "extreme mental or emotional disturbance caused by extreme provocation."[49]

The mental illness negation has also historically been used by the defense in crimes of passion cases as an extension of EED. About 40 percent of U.S. jurisdictions follow the Model Penal Code's Section 4.02, which lays out the modern doctrine of "mental illness negating an offense element" when a mental disease negates the culpable state of mind required for murder. Nine jurisdictions limit mental health evidence to "specific intent" cases; six apply it to cases that are premeditated.[50]

"Honor" versus "Passion"?

Both the Kuwaiti and American legal systems, rooted in their colonial histories, have maintained —and in the U.S. case, expanded—doctrines that lessen the culpability of a man who kills a woman due, in theory, to her sexual conduct.

But universalist analyses of the legal codification of gender-based violence must not be deaf to the nuances of practices on the ground. Legal scholar Lama Abu-Odeh, in comparing honor crimes and crimes of passion in Jordan versus the United States, notes "the fallacy of both the orientalist construction that the East is different from the West and the almost contradictory idea of international feminism that all violence against women all over the world is the same." She finds deep similarities in legal structures of both countries she analyzed—just as this report does in Kuwaiti and U.S. law. However, a key difference in a "cultural cleavage between the Arab and American legal systems"[51] is that across many MENA-region penal codes, the umbrella of male guardianship over his family applies to the killing of female family members, whereas the U.S. legal system, by and large, applies to wives or romantic partners.

It is critical to note that sensationalist accounts of honor killings—in addition to breezing over the aforementioned British, French, and Egyptian legal impositions—falsely assume them to be much more inherent to Kuwaiti or "Arab" culture than they are in reality.

Here it should be emphasized that the practice is rare in Kuwait; furthermore, when Abolish 153 began their lobbying efforts, they polled over one thousand Kuwaiti citizens and found that 86 percent of respondents were not even aware the law existed (either by name or provision). Roughly two-thirds of respondents were in favor of abolishing Article 153. It is critical to note that sensationalist accounts[52] of honor killings—in addition to breezing over the aforementioned British, French, and Egyptian legal impositions—falsely assume them to be much more inherent to Kuwaiti or "Arab" culture than they are in reality.

Legal, Institutional, and Societal Change

While still waiting for the law to be processed, Abolish 153 accomplished their goal of passing legislation to eradicate Article 153. Can their grassroots tactics and lobbying—especially of young and women MPs—work elsewhere?

As mentioned above, Maryland is among the handful of U.S. jurisdictions[53] that has never considered enacting a modern criminal code. The state, which operates on a version of Common Law, remains the only one to have removed adultery from the means of provocation that can be used to reduce murder charges to manslaughter.

In accomplishing such change across other jurisdictions, legal scholar Susan D. Rozelle argues for a widespread revisitation of the logic behind adultery as adequate provocation:

> *The infidelity paradigm rests on a fundamentally flawed and inadequately examined premise: …that to a certain extent we simply cannot expect people to control themselves when faced with the sight of a faithless spouse. This is not true. We should, and in fact do, have more control over our passions than the defense and the prevailing scholarship assume… the existence of laws at all presumes that people can control their actions. If people cannot, then the laws themselves would be pointless.*[54]

There is evidence that women representatives are more likely to introduce and vote in favor of legislation directly related

to women's rights.[55] More women in public office is therefore an aim of advocacy groups[56] on the issue of gender-based violence—women's congressional representation in the United States hovers at 19.5 percent in the House and 22 percent in the Senate;[57] in Kuwait's parliament, the numbers compare[58] at 3.1 percent in the lower house and 0 in the upper.

The need for gender parity in women's representation speaks to broader social progress that should be made alongside any legal changes. Sociologist and feminist activist Dicle Kogacioglu argues that honor crimes and gender-based violence are perpetuated by a myriad of institutions beyond national-level government and its laws—including political parties, markets, media, feminist and human rights organizations, and supranational institutions.[59] The rhetoric and actions employed by these institutions could go far to change violent practices against women on the ground.

The power of institutions can be seen in their perpetuation not just of the practice of femicide, but also the otherization of certain cultures, the homogenization of women's experiences as individuals, and the consequential denial of women's agency, notes anthropologist Lila Abu-Lughod. Discussing the enterprise of "saving Muslim women," she asserts, "The honor crime poses perhaps more starkly than any other contemporary category the dilemmas of feminist scholarship and rights activism in a transnational world… Can one acknowledge the seriousness of violence against women without contributing to this stigmatization of particular communities?"

Such stigmatizing language is often employed by supranational and transnational organizations that work on women's human rights. While Amnesty International points to honor crimes as a form of the global epidemic of gender-based violence, their featured page on honor killings leads with "The Horror of Honor Killings, Even In US"—a case of an immigrant family from Iraq in which the father killed the daughter.[60] UN Women, on the other hand, no longer employs the "honor crime" language on its website, instead noting that of all women victims of homicide in 2012, half were killed by intimate partners or family members.[61] The Office of the UN High Commissioner on Human Rights has recently advocated for a shift in viewing intimate partner violence and "honor killings" alike as a form of arbitrary execution—therefore violating the right to life.[62] Indeed, both Kuwait and the United States have ratified the International Covenant on Civil and Political Rights (ICCPR), which backs all human beings' inherent right to life.[63]

In seeking out legal, institutional, and societal change to hold the perpetrators of femicide accountable for their actions, advocates should remain vigilant in their understanding of the different historical contexts within which they are operating. However, they also can and should recognize similarities in legally codified forms of gender-based violence to draw upon tactics employed in different parts of the world—regardless of whether the crimes are dubbed as relating to "honor" or "passion." Doing so serves to reject otherized, racist, and xenophobic appropriations of gender-based violence and to more honestly confront the nightmarish reality of widespread legal protection for men who kill women.

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Molly Bangs, Contributor

Molly Bangs is a contributor at The Century Foundation, whose writing focuses on women's and human rights as well as social and environmental justice.