



A series
Of Legal
Reports

78

الهيئة المستقلة لحقوق الإنسان "ديوان المظالم"
The Independent Commission for Human Rights

INCEST

Murder of the Soul

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Table of Contents

Introduction.....	5
Chapter I: Relevant International Human Rights Documents	9
1. <i>World Declaration on the Elimination of Violence against Women</i>	9
2. <i>Resolution (1) of the Beijing World Conference on Women.....</i>	11
3. <i>Actions of the Committee on the Elimination of All Forms of Discrimination against Women</i>	12
4. <i>Universal Declaration of Human Rights</i>	13
Chapter II: Functions and Objectives of Laws and Legislation.....	15
1. <i>The Concept of Law</i>	15
2. <i>The Functions of Law</i>	17
3. <i>Functions of Penal Codes</i>	17
Chapter III: Patriarchal Society and Violence against Women	19
1. <i>Palestinian Society and the Patriarchal System</i>	20
2. <i>Violence against Women in Patriarchal Societies</i>	22
Chapter IV: Incest in Domestic Law	25
1. <i>The Concept of Incest under Various Laws.....</i>	26
2. <i>Component Elements of the Crime of Incest.....</i>	31

Chapter V: Incest and Problems with Rights	37
<i>1. Laws pertaining to incest and patriarchal authority</i>	<i>37</i>
<i>2. Escaping Punishment.....</i>	<i>41</i>
Chapter VI: Conclusions and Recommendations	45
<i>1. Conclusions</i>	<i>45</i>
<i>2. Recommendations</i>	<i>48</i>

Introduction

Banning sexual activities between individuals of close “blood relationship” establishes human society, in other words, it is the human society”.

Levi Strauss

Incest is a form of violence that takes place within the family, while domestic violence is defined as any act by a member of a family against another member of the same family that result in, or is likely to result in, physical, sexual or psychological harm or any other form of pain and abuse. Penal laws in general distinguish between incest and other sexual crimes such as rape, adultery and indecent assault, depending on the elements of the crime and according to which the level of the punishment is determined. It considers incest as a crime that prejudices the family, defining it as having sexual intercourse with a female of blood, legal or actual relationship, whether that relationship is legitimate or illegitimate, upon her consent. It conditions the occurrence of incest on three combined elements: the physical element exemplified by the occurrence of intercourse; the mental or psychological element exemplified by free will; and the blood relationship element.

Incest is one of the maximum forms of sexual violence practiced within the family, constitutes a flagrant infringement of women’s rights to security of person, and is in contravention of human ethics and values. It is also a blatant exploitation of the offender’s social and legal status in addition to the blood relationship between the victim and the offender. It also constitutes a general exploitation of family relationships as well as the control of females’ lives by men who are presumed to be taking care of them.

Current law specific to the crime of incest considers men and women equal accomplices, and this is due to an assumption of free will which women are understood to assume at the age of reason. When a young woman is at that stage of life, she is understood to be able to exercise free will and assumed to accept such a relationship willingly. Therefore, the law considers the woman who is subjected to sexual abuse without coercion by one of her relatives or those in charge of taking care of her to be an accomplice on equal footing with the man, and so the same level of punishment would be imposed on both of them.

The law ignores the status of women due to a society organized by patriarchal values where the elderly control the young, males control females, and the father or eldest



brother controls the mother and the rest of the family's members, thus creating a situation characterized by the marginalization, persecution and control of women.

This study addresses the problem of the law's view of women's status with regard to incest and the consideration of incest as a crime consisting of sexual activity with women of close "blood relationship". It also addresses the law's embodiment of patriarchal authority limiting the right to file a complaint of incest with a male relative of the woman of up to the fourth degree of blood ties, and granting the man the personal right to drop or forego the lawsuit. In addition, it addresses the problem of the law's classification of incest as a misdemeanor crime.

To shed more light on the problem, a number of questions need to be asked:

- To what extent can the provisions of the penal code that is in force ensure security and safety to women within the structure of the family? In particular, to what extent does the relevant legislation take into consideration the social reality and cultural fabric of the Arab society in general and the Palestinian society in particular, where patriarchal domination is embodied across the different levels within these societies?
- What kind of penalty is applied to such crimes?
- How effective and how much of a deterrent is this penalty?
- What is the position within Arab legislation for such a crime and what is their legal classification of the penalty issued against perpetrators of such a crime based on these laws?
- To what extent these penalties harmonize with human rights conventions?
- What future development mechanisms are suggested to meet the objectives and functions of the law in this regard and to what extent they meet human rights standards?

Incest has long been taboo due to beliefs generated by the common human social culture that is based on the family as the smallest social unit and also created the concepts of paternity, maternity and fraternity that influence human thought from an early age. Any breach of such social culture would contradict the long-accepted precepts of society and possibly lead to dysfunction. Incest was criminalized on the grounds that it harms the status of the family and its basic function. It especially has been given attention by divine creeds and man-made laws. The family is considered to be among the first basic elements of society, reflecting cohesion and conserving values and ethics. Hence, it is crucial to direct attention to incest as a crime that causes harm to the family and its values and ethics. Human beings should enjoy the right to security of person at home among his or her relatives. The woman who sleeps at her father's home should be assured that she needs no protection at that home because it is expected to be the source of her protection.

The importance of studying the crime of incest under the laws currently in force arises from the fact that it is a crime prejudicing the right of women to physical safety and the entity of the family as an institution based on synergy and protection, including its exploitation of authority granted to it through law and creed. It also arises from the comparison it draws between the role the penal code plays in the performance of the function of legislation in general and the objectives expected from the penal code in particular. This study is also important as it sheds light on the extent of the Palestinian Authority's compliance with international human rights standards.

This study is also concerned with the role of the Independent Commission for Human Rights (ICHR) in promoting human rights in the national legislation and policies that concurrently match the attempts of the governmental organizations and civil society organizations to set forth a national penal code matching with the aspirations of the Palestinian society towards a sovereign state. These laws of course need to comply with human rights conventions, and must safeguard the rights of women in light of a patriarchal society.

Another aim of this study to make available sufficient knowledge about the crime of incest in terms of its elements and connection with the social sphere around it, and with a view to illustrate the capacity of the law to meet the purposes it is enacted to realize. It also aims to make available knowledge about the legislative mechanisms available for putting an end to this crime and the potential for the future development of these mechanisms to make a breakthrough in minimizing patriarchal hegemony over the family, and empowering women to enjoy the right of equality before the law. This includes the right to have control over their bodies and to preserve the values and ethics of the family as a coherent unit constituting the nucleus of society.

This study is based on a qualitative research approach, using two methods to realize its objective and answer the questions raised. These methods include analysis of the content of the relevant laws and in-depth interviews with a number of psychiatrists and social counselors to understand the impact of incest and its consequences on the woman, the household and society at large. Divided into six chapters, the first chapter discusses international human rights conventions and agreements on prohibition of sexual abuse in the family, and the second chapter discusses the functions and objectives of the laws and legislation. The third chapter looks into patriarchal society and violence against women, and the fourth chapter discusses incest. The legal problems related to incest are raised in the fifth chapter, and the final chapter reaches some conclusions and forwards recommendations.



Chapter I

Relevant International Human Rights Documents

Introduction

International human rights conventions aim to guarantee the right of women to physical safety and prohibition of sexual assaults against them. Sexual assaults, according to these conventions, are a form of sexual violence practiced against women due to the imbalance and inequality between men and women. International conventions and agreements have not allocated special provisions addressing sexual violence against women whether occurring in public or in private life. They address such violence as part of general violence practiced against women.

This chapter discusses the international conventions and agreements addressing sexual violence against women within the family, including the World Declaration on the Elimination of Violence against Women (1993), Resolution (1) of the Beijing World Conference on Women (1995), the Action Agenda of the Committee on Elimination of Discrimination against Women (CEDAW), and the Universal Declaration of Human Rights as issued by the General Assembly of the United Nations in 1948.

1. World Declaration on the Elimination of Violence against Women (1993)

The World Declaration on the Elimination of Violence against Women issued by the General Assembly of the United Nations in 1993 emphasized that violence against women constitutes a violation of human rights and fundamental freedoms, and nullifies their enjoyment of those rights and freedoms. The General Assembly of the United Nations expressed its “concern about the long-standing failure to protect and promote those rights and freedoms in the case of violence against women”.

This declaration recognizes violence against women as a manifestation of the historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women. It further recognizes that violence against women is one of the crucial social mechanisms where women are more forced into subordinate positions compared with men.

The declaration also stressed that women are entitled to the equal enjoyment and protection



of all human rights and fundamental freedoms including, inter alia:

- (a) The right to life;
- (b) The right to equality;
- (c) The right to liberty and security of person;
- (d) The right to equal protection under the law;
- (e) The right to be free from all forms of discrimination;
- (f) The right to the highest standard attainable of physical and mental health

The document also urged states to take the appropriate measures for the protection of women against violence, including sexual assault within the family. It encouraged the development of penal, civil and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to such violence, and that women who are subjected to violence should be provided with access to the mechanisms of justice. These mechanisms are to be provided for by national legislation, offering just and effective remedies for the harm that they have suffered. States should also inform women of their rights in seeking redress through such mechanisms.

It also urged states to consider the possibility of developing national plans of action to promote the protection of women against any form of violence or to include provisions for that purpose in plans already existing taking into account, as appropriate, such cooperation as can be provided by non-governmental organizations, particularly those concerned with the issue of violence against women. States were also advised to develop, in a comprehensive way, preventive approaches and all those measures of legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of enforcement practices or other interventions.

The declaration has not ignored the economic condition of abused women and that of their children, pressing states to ensure, to the maximum extent feasible in light of their available resources and, where needed, within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have assistance, such as rehabilitation, assistance in child care, treatment, counseling, and health and social services, facilities and programs. States are to take all other appropriate measures to promote their safety and physical and psychological rehabilitation.

Government budgets also gained mention in the declaration, with a request to ensure states put aside adequate resources for activities related to the elimination of violence against women. This included taking measures to make certain that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women.

Due to the fact that most of violent practices occurring within the family go unreported and that state indicators or those issued by organizations working in the field of domestic

violence are not able to reveal the depth of the problem, the declaration made sure to call on states to promote research, collect data and compile statistics, especially concerning domestic violence and relating to the prevalence of different forms of violence against women. It encouraged research on the causes, nature, seriousness and consequences of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women. Whatever statistics were to be compiled and findings arrived at were also to be made available to the public.

With the source of violence against women understood to be based on the prevalence of social and cultural concepts forwarding the superiority of men to women, the declaration was sure to include the call for states to adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women. This would be part of a larger effort to attempt to eliminate prejudices, customary practices and all other practices which would be based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women.

2. Resolution (1) of the Beijing World Conference on Women (September, 1995)

The World Conference on Women was held in Beijing from 4 - 15 September 1995 on the fiftieth anniversary of the founding of the United Nations, with the intention to advance equality, development and peace for all women everywhere in the world. The aim of the platform for action was to achieve the full and effective implementation of the Nairobi Forward-looking Strategies for the Advancement of Women. These strategies were meant to promote the advancement of women, and eliminate obstacles to women's active participation in all spheres of private and public life through a full and equal share in economic, social, political and cultural decision making. The platform also aimed to prevent all forms of violence against women throughout the different stages of their lives. It attached special attention to girl child in this context and urged states to implement the human rights of women and of the girl child as an inalienable, integral and indivisible part of all human rights and fundamental freedoms.

Incest was discussed in the Fourth World Conference on Women in Beijing in the context of molestation and sexual attraction within the family or outside the frame of the family. Furthermore, it stressed that states should adopt the appropriate measures that would prevent violence against women throughout the different stages of their lives, including violence within the family under any excuse, custom or religious consideration. It also urged states to fulfill their obligations to eliminate violence against women under the declaration on elimination of violence against women. States were asked to include into their national laws criminal and civil penalties or administrative penalties to punish those who caused harm to women and girls subjected to any form of violence in the family, workplace, local community or in the wider society. There were provision to provide redress for women against any damage and adopt and/or implement the laws set forth for eliminating and preventing violence against women and pursuing its perpetrators. States were urged to evaluate and analyze these laws on an ongoing basis to guarantee their effectiveness, adopt appropriate measures to ensure protection for women, enable them to have access to justice, redress, treatment and rehabilitate those who practiced violence against them.

The Beijing Platform for Action called for implementation on the elimination of all



forms of violence against women, taking into account the general recommendations adopted by the committee on eliminating discrimination against women, empowering women subjected to violence and for them to have access to the mechanisms of justice, and informing women of their rights when seeking redress through these mechanisms. The drafting and implementation of action plans on all levels was also covered, as well as creating and promoting institutional mechanisms enabling women to report on the patterns of violence they are subjected to and file complaints thereof in a safe and secure environment. It also called for ensuring access to women with disabilities to information and services related to combating violence against women.

3. Actions of the Committee on the Elimination of All Forms of Discrimination against Women

CEDAW did not directly address the issue of violence against women, but defined the term of discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

The committee’s monitoring of CEDAW’s implementation contributed to recognizing violence against women as a matter of human rights (20: c). It also recommended states to act to ensure protection for women against any form of violence occurring in the family, at workplace or any other area of social life. The committee adopted in 1989 Recommendation No. (12), which recommends states to act to ensure protection for women against any form of violence in the family, at workplace or in the wider community, and to include into their periodic reports information about the legislation drafted to protect women against violence of any kind they might be subjected to in their everyday life. The reports were also to reflect any information on measures taken to eliminate violence as well as information on support services provided for women as victims of violence.

It also adopted Recommendation No. (19) in 1992, emphasizing the terms of the previous recommendation considering violence against women as a form of gender based discrimination and a crucial cause of violence. Furthermore, it considered family violence as one of the most insidious forms of violence against women that is present in all societies. Within family relationships, women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, all of which are perpetuated by customary attitudes and lack of economic independence, both of which force many women to stay in violent relationships. In addition, it specified women’s rights in general, including:

- *The right to life;*
- *The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment;*
- *The right to equal protection according to humanitarian norms in time of international or internal armed conflict;*

- *The right to liberty and security of person;*
- *The right to equal protection under the law;*
- *The right to equality in the family;*
- *The right to the highest standard attainable of physical and mental health.*

4. Universal Declaration of Human Rights (UDHR), 1948:

Through the UDHR, the General Assembly of the United Nations aimed to promote and enhance respect for rights and freedoms and for appropriate measures for that purpose to be taken at the national and international levels among the peoples of the member states. The General Assembly, in accordance with its Resolution No. 52\86 (December 12, 1997) and especially in its Annex, emphasized the “Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice”.

The General Assembly also stressed to states the importance of and need for reviewing, evaluating, and thoroughly studying the laws, codes and procedures of criminal justice. Emphasis was especially made in regard to states’ criminal laws’ capacity to guarantee effectiveness in eliminating violence against women and removing provisions that allow for or condone violence against women, but enable women subjected to violence to testify in criminal proceedings through adequate measures that facilitate such testimony by protecting their privacy. There was also concern to ensure that rules and principles of defense do not discriminate against women, and are able to bring perpetrators of violence against women to justice without allowing them to escape criminal liability by invoking an ‘honor’ or ‘provocation’ defense, and do not exempt perpetrators of violence against women from criminal liability on the grounds that the crimes were committed unintentionally or under the influence of alcohol or drugs. It also urged them to review, evaluate and update criminal justice laws and procedures pertaining to courts’ proceedings to ensure that they:

- *Hold offenders accountable for their acts relating to violence against women;*
- *Put an end to violent behavior;*
- *Take into account the impact on victims and their family members of sentences imposed on perpetrators;*
- *Provide sanctions that are identical to those imposed on crimes of other kinds of violence;*
- *Ensure the right of a victim of violence to be notified of the offender’s release from detention or imprisonment;*
- *Take into account, in the sentencing process, the severity of the physical and psychological harm and the impact of victimization, including through victim impact statements;*
- *Make available to the courts a full range of sentencing dispositions to protect the victim, other affected persons and society from further violence, and to rehabilitate the perpetrator, as appropriate.*



The General Assembly also urged states to make available to women who have been subjected to violence relevant information on rights, remedies and victim support services and on how to obtain them, in addition to information about their role and opportunities for participating in criminal proceedings and the scheduling, progress and ultimate disposition of the proceedings. This also included being provided with access to knowledge about any orders against the offender, and to encourage and assist women subjected to violence in lodging and following through on formal complaints. Attention was also given to ensuring that women who have been subjected to violence get through formal and informal procedures, and that fair and just solutions against the harm inflicted on them are handed out. This latter point includes informing them that they are entitled to seek reparation or compensation against the harm inflicted on them from the perpetrators or from the state. States are also to develop and make available any mechanisms and judicial proceedings that are sensitive to the needs of women who have been subjected to violence.

Chapter II

Functions and Objectives of Laws and Legislation

Introduction

The theory of Social Contract was originally authored by French intellectuals, most important of whom was Jean Jacques Rousseau, who viewed that social commitment and submission to the authority cannot be achieved by force. He believed that rule by force denies the overall idea of rights, and that social commitment cannot and should not be compared to a father's authority over his sons¹. Rousseau was concerned with the rule of the people in society, believing that people are the source of all power, and so they delegate part of these powers to a group of persons who represent and reflect the interests of the people in the different aspects of life. Modern democratic states adopted the principles of Rousseau with respect to human rights, human dignity and individuals' rights to have control over their lives and less control of the family over the individual².

The wish to protect individuals' rights and interests requires each individual to give up part of his or her freedom in return for all individuals having the right to enjoy a just and equal life. Following on that, the social contract was elaborated through laws regulating the relationship of individuals with one another and their relationship with the ruling authorities to ensure rules that are clear and binding to all sectors of the society on the basis of mutual respect and the principles of social justice and equality.

With the above in mind, this chapter aims to highlight the function for which people resorted to drafting laws in general and penal laws in particular with a view to understanding the extent to which these functions are available in the legal context regulating the crime of incest.

1. The Concept of Law

The term *law* means “a rule or rules entailing continuity, stability and order”³. This meaning applies to the systems which govern natural phenomena such as the rule of

1 Karam, 1957. *History of Modern Philosophy*, (Dar al-Maaref, Egypt), p.11.

2 Abrash, 1998. *History of Political Thought from the Rule of Gods till the End of the Renaissance Era* (Babil House for printing and publishing; 2nd edition), p.35.

3 al-Sadeh, *Origins of Law*, 1998. (Dar al-Nahda for printing, Publishing and distribution) p. 11.



gravity, the boiling point rule, and even the rule of supply and demand⁴. It is defined in the Lisan al-Arab dictionary as a meter for gauging every thing⁵. while law is defined as “a set of general abstract rules regulating the conduct of persons in the society in a binding manner in favor of the system’s individual relationships and conduct which it should be in line with⁶. However, *legislation*, which may appear synonymous to law, means “whatever rules issued by the legislative authority to regulate a certain matter, taking into account that legislation has degrees of power according to the importance of the matters it discusses; the constitution is the main legislation, followed by civil and trade law, and then there is secondary legislation, which consists of administrative decisions or bylaws issued by different executive agencies⁷.

This study focuses on the concept of penal code, as the literature we have just reviewed agrees with jurisprudence on the definition of the penal code as “a body of rules and statutes that criminalize a set of actions or conducts that are harmful to the public and individuals and classify them as crimes against the individual and society, and that establish punishment to be imposed for the commission of such acts⁸.” The jurist Najim defined the penal code as “a set of laws or codes set by the state in which it lists crimes and punishments and precautionary measures that may be given for them”⁹.

Penal codes have different names¹⁰, but they have the same purpose of criminalization and punishment on the basis of the legislation, which states that neither is there a crime without punishment nor a punishment without crime¹¹. Penal codes include the rules that identify criminalized acts (crimes), the persons who commit such crimes and so become criminally liable, penalties and measures determined by the law for such acts¹².

A set of general rules are also included, and these are rules that govern crimes and penalties within a joint framework, such as identifying the physical elements of each crime, the principles of criminal liability, reasons of justification, prohibition of punishment and liability, principles of the tempo-spacial validity of law, the start of a legal defense, different forms of crime, penal rules and precautionary measures. In addition, the penal code includes all the penal legislation which is part of and complementary to it because they relate to variable interests in a manner that necessitates their independence in a special section. This is in spite it being subjected to the general principles stated in the penal code, unless it stipulates otherwise¹³.

4 Al-Saraf & Hazbun, 1994. *Entry to Law*, (Dar al-Thakafa Library /House of Culture for publishing and distribution), pp. 8-9.

5 Ibin Manthur. 1956. Volume 13, Beirut.349.

6 Alfadil, 1998. History of law-Dar al-Thakafa for publishing and distribution.p.11

7 Markas, 1998. *Entry Into Legal Sciences* (1957); Al-Fadil, *History of Law*, p. 12.

8 Bihnam, 2008. General Theory of Criminal Law.al-Maaref Library. Egypt. P. 38 &Halabi, 1997, explanation of the penal code..general section, P 11.

9 Najim, 2006. *Penal Law* , general section, General Theory of Crime- (Dar al-Thakafa Library), p.12.

10 Penal code is known by different names, such as criminal law, penal law or criminal ruler. .

11 Sarur, 1992. Al-Wsit in penal code. General section, p.8.

12 Najim, Penal Code- general section, general theory of crime, Dar althakafa Library, p. 9.

13 “ Najim, 2006. *Penal Law* - general section, general theory of crime- (Dar al-Thakafa Library; p. 13.

2. The Functions of Law

Law is an indispensable social need for the preservation of the entirety of society; it consists of general and binding rules which were based on preserving and maintaining stability and order¹⁴. Law as legislation generally aims to achieve three integral purposes:

1. *Supporting peace in society: law preserves the stability of society through security to and assurance of the individual and groups about their property, lives, and freedoms, rendering society to be more powerful, cohesive and respectful of individuals liberties and freedoms¹⁵.*
2. *Reconciliation between conflicting interests in society: law reconciles between the interests of individuals in society when individual interests conflict with the interests of the others, and causes disputes within society. The law consists of fixed rules that ensure solutions or responses would be based on justice and according to objective standards. Such rules reconcile conflicting interests between the public interest of society and the private interests of individuals, and do this by achieving a fair balance among these interests.*

Achievement of justice: the force of law and society's respect for it depends on the extent of justice it achieves. As Aristotle commented: "(justice) makes us respect laws and equality", and legal scholar Jenny said "the legal rules necessarily aim to achieve justice as law makes no sense without justice"¹⁶. Greek philosophers established justice on the basis of equality and proportion between the performance of one party and what it gets in return from the other. Due to the idea of justice, the rules of law are general and abstract and address equality as the core of justice.

3. Functions of Penal Codes

Penal codes consider the reasons for crimes, and study it as a social phenomenon, paying attention to the conditions under which it happens. This provides very important information for law enforcement officials. The aim of penology is to study the punishment of crime and prison management, and so it is complementary to the penal code, which in turn aims to combat the phenomenon of crime. The importance of any penal code goes beyond the deterrence of criminals and the prevention of crime. In addition to the humanitarian role it fills, a penal code has a preventive, disciplinary and remedial role. In regard to the latter, it should attach particular attention to the personality of the offender and categorize penalties with a view to imposing the appropriate punishment that should also be able to help rehabilitate the offender.

In the context of our research and study of the penal code per se, we found out that it aims to achieve three objectives:

1. *Safeguarding values and social interests.* Penal codes aims to protect values as well as social and individual interests. Society consists of a group of individuals who

14 14. Qasim. 1998. Entry into Law..Legal rule-CAIRO..Adar al-Jameya (University House). P 6-8.

15 al-Far, 1994. *Entry to Legal Science Study* (House of Science and Culture for Publishing and distribution), pp. 10-12.

16 Qasim, 1998. Entry into Law..Legal rule-CAIRO..Adar al-Jameya (University House). P 6-8.



each has his or her own interests and needs. These interests and needs could agree or disagree or even collide with the interests of the society, and lead to disputes and conflicts within it. Hence, the penal code assumes protection of human rights including the right to life, security of individuals, and protection of property. It determines the appropriate penalty according to the severity of the crime, and punishes the offender for such violations, taking account of the social conscience, and social-political and economic changes. Often the penal code faces difficulty regarding adaptability to modern society, and compatibility with the basic values of society, including religious and ethical values¹⁷.

2. *Satisfaction with justice.* Punishing each person for a crime committed makes people feel satisfied with justice. Such satisfaction can be achieved by ensuring each offender is punished for the crime committed and not able to escape justice. In order to satisfy society's concerns about justice within the judiciary, all individuals must be equal before the law and their basic human rights respected. In light of this, justice addresses individual responsibility, with punishment imposed on the offender as well as those who have an indirect, inherent or secondary contribution to the crime.
3. *Security and legal stability.* The law aims to achieve security, stability and assurance for individuals within society by listing criminal acts and the punishments assigned to them such as capital punishment, imprisonment and fines. the law as there is no crime without a provision and no penalties could be imposed except for those that are provided for by law. This reflects the legal stability which ensures security for people and offenders themselves as they are subjected only to penalties that are provided for by the law.

¹⁷ Sarur, 1992. Al-Wsit in penal code, p. 8.

Chapter III

Patriarchal Society and Violence against Women

Introduction

It is difficult to discuss social contract theory without considering the regional, cultural and tribal contexts within a society due to their impact on the process of drafting law and rules regulating different aspects of life. Palestine has historically been subjected to the control of several dominant powers (Ottoman Empire, British Mandate, Egyptian Administration, Jordan's unofficial annexation, Israeli Occupation) which, to different degrees, exercised their legal systems as tools of control and hegemony over the Palestinian people. In some cases, these powers applied their legislation to control the Palestinians, distort their culture and tribal norms for their own benefit. Control and command by these powers has ended, but a large part of their legal legacy remains, and this includes family laws and penal laws. For example, some aspects of Jordanian Penal Law from 1960 is still in force in the West Bank, and some of Mandate Penal Law from 1937 is still in force in the Gaza Strip.

Many of these laws embody and promote the patriarchal system, and they do so mainly by giving precedence to the interests of men rather than women, and grant the family the authority in disciplining and punishing those who object to it. Furthermore, it embodies the role of the ruling administrations and protects their interests by imposing penalties contravening human rights, promoting certain cultural practices to penalize opponents of the system and promote the domination of the strong over the weak. This has the effect of dismantling society and turning it into individuals disputing over conflicting interests.

This chapter sheds light on the nature of Palestinian society as a patriarchal society where the free will of those in marginalized categories, such as women and children, is lost. It also highlights the role of the patriarchal system in making available the mechanisms of violence against women, and also reveals the misleading allegations that men and women are equal with regard to freedom of choice and will.



1. Palestinian Society and the Patriarchal System

Arab societies in general and Palestinian society in particular are characterized by a patriarchal structure which forms a social and psychological system predominating the family, tribe, society and authority in the Arab world.

The relationships within this system are characterized by a hierarchical order that is based on tyranny and irrational submission, and these contradict the values of a modern civil society and human rights. Patriarchal society evolved and continued due to a set of historical, social and cultural conditions throughout historical stages and interconnected socio-economic configurations where each stage connects with a transitional stage preceding it until it reaches the modern patriarchal system¹⁸.

Al-Heideri and al-Sharabi believe that the patriarchal system dominates social, cultural, economic and political relationships that are based on tribal, sectarian and local loyalties. Traditional social and customary standards that marginalize and undermine women are well entrenched because this system is generally evolved from a desert environment and the tribal loyalties that come with it, influencing the structure of culture, society and overall behavior¹⁹.

The family in the patriarchal system is considered to be the primary and indivisible social constituent of the tribe structure. It promotes patriarchal control over the family, men's control over women and boys' control over girls, so that the discourse, orders and decisions of the father remain dominant²⁰. The relationship between the master and the subjects in the family, tribe, sect, society and state is "hierarchical" and a form of patriarchal control which determines control and submission in the family and the society. Sharabi considers this type of relationship to be unfair and unequal, lacking balance between the parties and any concept of partnership, whether between master and his subjects, father and sons, or father and daughters. It is based on the concept of safeguarding the right of the family at the expense of the rights of the individuals within it, giving males an advantage with optimal consideration at the expense of the fragile members who have no power in a patriarchal context²¹.

In light of patriarchal systems, social conflicts and psychological trends which favor or promote the role of males and undermine females in general, this can be understood as a form of primogeniture, whereby the eldest son is entitled to become an authority figure over his sister, even if she is older and more educated. This authoritarian relationship flourishes from homes to schools, factories and institutions and more, no matter if it takes place at the administrative, security or military arenas. It is reflected in the legislation, laws and policies which derive from the hierarchical structure of authority and administration

18 al-Heideri, 2010 . "Patriarchal Society and Its Impact on the Family, Society and Authority", electronic magazine *Elaph* (London; date of entry, 1-10-2012). www.elaph.com/web/opinion/2010/10/607072.html.

19 Sharabi, 2000. *The Patriarchal System and the Problem of Arab Society Backwardness* (Nilson House), p.153; see also al-Heideri.

20 "Sharabi & al-Heideri, 2010 . "Patriarchal Society and Its Impact on the Family, Society and Authority", electronic magazine *Elaph* (London; 1-10-2012).

21 "Sharabi, 1991. *Introduction to the Study of Arab Society* , pp. 25-45.

within the Arab world.

Al-Heideri highlights three forms of persecution practiced against women²² :

1. *Qualitative persecution*: based on supremacy and dominance of men over women to achieve their private and public interests. This leads to the suppression of women's individual personalities, undermines their social role and represses their behavior, prohibiting integration and synergy between the sexes.
2. *Patriarchal persecution-masculine*: this kind of persecution manifests itself through men's domination over women in the family, society and authority. This domination is expressed through male control over females, and father's control over mother and children in an irrational manner that necessitates their submission and blind obedience; a boy would control a girl, even if she is older and more intelligent than him.
3. *Legal persecution*: derived from patriarchal persecution, which reflects itself in man- made laws and customs which in turn persecute women's social, economic and political rights, impeding their development and progress towards equality with men.

Al-Heideri also believes that persecution of women is not due to biological, religious or psychological factors; contrary to that, it is due to class, and social and masculine values stem from men's interest in controlling women and subjecting them to their will. This is the core of gender inequality and eternal conflict between both men and women²³. Despite the developments many Arab societies have experienced, there still is a dominant patriarchal system. The changes that have taken place within the patriarchal structure of the Arab family system are generally superficial in content, and so the core was not affected. What might have been affected was the shape and social cultural role of the family. These changes have not influenced the internal relationship of the family. In fact, violence against the marginalized categories of society for the benefit of the powerful in terms of economic, social and political conflict continues²⁴.

Modern developments the Arab World witnessed were first and foremost beneficial for men, giving them new opportunities and allowing them to exclusively enjoy freedoms and exercise their domination within the different economic, social, cultural, political and legal levels. However, women have not received the opportunity for sufficient education and employment to actualize themselves and change the balance of power in a more equitable way, and so the gap between spouses and members of the family increased, leading to tense relationships governed by power, control and exploitation, which in turn

22 al-Heideri, 2010. "Patriarchal Society and Its Impact on the Family, Society and Authority", electronic magazine *Elaph* (London; 1-10-2012).

23 al-Heideri, 2010. "Patriarchal Society and Its Impact on the Family, Society and Authority", electronic magazine *Elaph* (London; 1-10-2012) and Salim and al-Bazri and others, 1999. Arab Woman between Reality and Liberty Aspiration.

24 . al-Heideri, 2010. "Patriarchal Society and Its Impact on the Family, Society and Authority", electronic magazine *Elaph* (London; 1-10-2012).



was supported by religion, culture and law.

2. Violence against Women in Patriarchal Societies

The percentage of women involved in education and employment increased, but the level of violence practiced against them has not. Research into the reasons for this phenomenon shows that increasing the number of women earning education degrees and jobs aims merely to improve their economic conditions, and increases their opportunity to get married and participate in supporting their family members, including the husband. Since childhood, they are prepared to play this role and encouraged to demonstrate their femininity while deprived of having control over their bodies; they suffer psychological repression in regard to the authority of first, the father and then that of the husband's family²⁵. Such a phenomenon prevails due to strict laws, religious instruction, and social suppression. The man, whether father, brother, husband or son, controls a woman's freedom, movement and body to keep the honor of the family and from being seen as a tool of sex, enjoyment and reproduction. Women suffer degrading treatment due to the superiority given to males. The attempt to subdue women to accept such a reality results in adverse impacts on their psychological structure and their future, as well as the future of their offspring, especially among the poorest social categories, where women are less legally and socially protected and more influenced by the dominant culture²⁶.

Such an environment turns women from being an active partner in the process of development with full human rights to a marginalized citizen lacking self-confidence and suffering overwhelming defeat from the patriarchal system. Furthermore, they are turned into victims of the different forms of physical, sexual, psychological and economic violence practiced against them. Domestic violence weakens the natural role of the family as a unit of support and protection for its individuals, and penetrates the first social system where the marginalized individuals due to age, sex or disability become targeted and lose the feeling of support and security. Al-Rajabi views the patriarchal system in her study "Violence Against Children" as full control of men over women, where the discourse, order and decision of the man remains dominant, and the social, economic and cultural backwardness prevents development and progress within society. This also keeps it fossilized and rigid, understating the value of the role of women and overstating that of men²⁷.

International conventions on violence against women reflect the nature of the connection between the social systems of some societies and violence. Recommendation No. (19), adopted by CEDAW (1992), emphasized that violence against women is a form of gender-based discrimination. It also emphasized in Article 16:23 that such discrimination is a major cause of violence in all its kinds and domestic violence is the most malicious

25 Abdulwahab, 1994. *Domestic Violence: Crime and Violence against Women* (Dar al-Mada for Publishing, Damascus, Beirut), p. 26

26 Abdulwahab, 1994. *Domestic Violence: Crime and Violence against Women* (Damascus/Beirut; Dar al-Mada Publishing)

27 Al-Rajabi 2010, "Violence Against Children" ;, published on the following electronic web site.25\6\2012. www.ammanjordan.org/aman_studies/winview.php.

form of violence against women in all societies.

The Universal Declaration on Eliminating Violence Against Women, issued by the General Assembly in 1993, emphasized that violence against women is a manifestation of a historically unequal relationship between men and women that led to men's control over women and impaired their development. It also emphasized that violence against women is one of the cruel social mechanisms that force women into a subordinate position to men. Despite frequent requests of the United Nations Specialist Committees through statements, recommendations and international conventions that all states should adopt measures and policies to eliminate violence against women, legal systems remain a reflection of their social systems, which act influentially to maintain patriarchal control of the different aspects of life by organizing them according to the patriarchal hierarchy.



Chapter IV

Incest in Domestic Law

Introduction

The Universal Declaration on the Elimination of Violence against Women was issued by the United Nations General Assembly on 20 December, 1993. It defined violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”. Domestic violence is defined as “as a pattern of violence within the family committed by one of its members with actual authority over the affected woman²⁸. It is also possible to define domestic violence as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women or to an individual of the family including threats of such acts, coercion or arbitrary deprivation of liberty”.

The study of legislative policy of domestic violence shows that the Palestinian law has not allocated a special section for domestic violence, but included it as a separate criminal act within the penal code. The legal provisions criminalizing acts that are prejudicial to women are included into two different sections, one for the crimes that affect the family and the second for the crimes of misconduct (criminal sexual assault, encouragement of dissipation and debauchery). Whereas family crimes, including crimes relating to marriage (adultery, incest, abandoning and kidnapping children, illegitimate children) are listed in the first section, crimes of rape, criminal sexual assault, elopement, temptation, caressing in breach of public decorum, prostitution, encouragement of debauchery, violation of ethics and morals and abortion are listed in the second section.

The law, furthermore, considers domestic violence as a misdemeanor punishable by an imprisonment term ranging from two months to three years, while considering the crimes of misconduct as felonies and misdemeanors, punishable by imprisonment terms ranging from two months to ~~three years~~. With regard crimes of misconduct, it states that blood relationships should be considered as an aggravating circumstance in the crimes of rape,

28 Al-Mo’aqat, 2006. (Temporary), *Sexual Abuse in the Family; Between Reality and Law* (Women’s Studies Center,), p. 23; documented in Masis & Dwekat and other. 2009. *Domestic Violence against Palestinian Women*.



engaging in intercourse with a girl under the age of 15 years, indecent assault by violence or threat, indecent assault without violence, and the crime of a guardian committing intercourse with a girl under aged 18 who is under his guardianship.

This section shall discuss the crime of incest within national legislation to highlight the legislative gaps of the laws in force within Palestine with a view to develop a legislative frame in compliance with the principles of human rights and human dignity of women.

1. The Concept of Incest under Various Laws

The meaning of incest according to Lisan al-Arab dictionary is debauchery, and adultery committed without contract²⁹. Incest is defined as a banned sexual relationship between two persons of blood relationship resulting in indecency, according to religious and cultural standards, depending on the degree and type of kinship. Such a crime dismisses the roles of paternity, maternity, fraternity and other forms of kinship on the maternal and paternal sides³⁰. This crime lies within criminal and social taboos with adverse consequences on the victim. The consequences could stop the victim's psychological, emotional and sexual growth. It is seen as an old pan-cultural plight, even older than the prohibitions which have been put on it. Incest was banned under the universal institutional law³¹.

Most human societies regulated the provisions and legislations which organize permanent and temporary sexual relationships. They prohibit and punish marriage of a father to his daughter, brother to his sister, or a son to his mother. Marriage of a person beyond these degrees of blood relationship was also regulated by laws and legislations banning some and allowing others. For example, they prohibit a stepfather from marrying his stepdaughter, even though they have no blood relationship³².

The danger of incest lies with the fact that the offender is expected to be a guardian or protector of the victim and a source of comfort and assurance for her. For this reason, it is considered a criminal act punishable by most international laws. Jurisprudence defines incest as adultery among people of close blood relationship or fornication of people of blood relationship. Regardless of what names or terms it has, they denote full sexual intercourse between a man and a woman of blood relationship, an actual or legal relationship where the man committing sexual intercourse with the woman is her

29 Lisan alArab;electronic copy on the following web site. <http://www.alwaraq.net/index3.htm?u=http://www.alwaraq.net/Core/Body.jsp?option=2>

30 Al-Saed, 1993. *Crimes against General Ethics and Family*, comparative analytical study p. 266.

31 . Mary Shaharstan: man between biological development and cultural adaptation. Article published on the page of the researchers: date of entry 2-2-2012. ([albahethon.com\print_details.php](http://albahethon.com/print_details.php)).

32 A survey was made in France for the first time on the number of people subjected to this violation (Disclosing a plight of public health). There is also a parliamentary report suggesting amendment of the penal code. It is a precedent as there is no survey discussing incest in France. The Victims Association justifies its action by claiming that it intends to break the taboo by publishing such findings about the victims of this sexual arbitrariness. The findings show that 3% of the French were victims of incest. The investigative survey was conducted on a national category of 931 people upon the request of Association of Incest Victims International (AIVI). Two million people were subjected to this violation according to the survey. The chairwoman of AIVI believes that one person out of ten has been subjected to this violation. The medical doctor at the Sexual Violation Minor Victims Center in Trousseau Hospital said "we want to prove that incest doesn't only happen in the outlying French farms; it is a public health plight occurring in the different sectors; it isn't limited to a special milieu or to deprived families'. Documented in Shaharstan, 2012.

guardian³³.

Criminal law and legislation have not criminalized incest. The criminal and civil laws of France do not include the concept of incest. It was nullified after the revolution of 1789 and replaced with recognition of aggravating circumstance that contributes to increasing punishment if a minor is sexually assaulted or raped by a man of blood relationship or trust (natural, legal, adopted relative or any other person with authority over the victim³⁴.

French law emphasizes that the element of blood relationship is one of the aggravating factors of the crime. It differentiates between the corruptions of minors versus the rape of people of blood relationship. It considered such an act illegal in accordance with French penal code if committed by an adult against a minor under the age of (15) years or by a person who is not necessarily adult but does have authority over a minor under the age of 18 years.

With regard to sex crimes in the context of distinguishing between corruption of minors and illegal relationships with minors, the law emphasizes that the corruption of minors is a misdemeanor that does not necessarily have to include a sexual relationship or any physical contact; for example, it would include showing sexually explicit films or pornographic scenes³⁵. French law also defines sexual assault as a sexual relationship which is committed by violence, coercion, threat or deception, and identified the aggravating conditions of the punishment for the crime of rape in the event that the rapist has some authority over the victim of rape or has a blood relationship to her³⁶.

Swiss law has criminalized the act of incest, using the concept of adultery involving persons of blood relationship. It defines adultery involving persons of blood relationship as “a sexual act between ancestors and descendents, brothers and sisters or between siblings of half blood.” It considers such kinds of sexual acts punishable by imprisonment, taking into account that it takes place between adults³⁷.

Algerian criminal legislation does not identify the concept of incest, but depends on identifying the elements of it as a criminal act and the penalty determined for it. Legislation criminalized the concept of incest in terms of its meaning as stated above. For example, Article (337) of the Algerian Amended Penal Code of 1966 considers incest as an indecent sexual relationship between persons of blood relationship, which would occur between:

1. Ancestors and descendents.

33 Al-Saed, 1993. *Crimes against General Ethics and Family*.

34 Mary Shaharstan. Man between biological development and cultural adaptation. Published on the web site of researchers. Albahethon.com/print_details.php.

35 “Two Million Victims of incest in France”. “Al-Arab AL-Qataria” e-magazine, 2-1-2009. Date of entry 5\10\2012. Ww.alarab.com.qa/details.php.

36 36. Mary Luis, Member of the French Parliament submitted a report in 2009 to the MoJ about the importance of addressing the issue of incest in the French legislations and setting mechanisms of handling the victims of incest. The report is based on a study conducted between October 2008 and June, 2009 with a view to combat the last French taboo. She asked for criminalizing incest by law as a crime different from rape or exploitation of minors.

37 Al-Hamadah. 2006-2007. Causes of incest crime...Master degree thesis from Damascus University: <http://law-zag.com/vb/showthread.php?9367>. Date of entry 4\7\2012.



2. Brothers and sisters of the same spouses or siblings of half blood.
3. Uncle or aunt with niece or nephew of his sister or brother or any of their descendants.
4. Father or mother with daughter in law or son in law or the widow of his son or widower of her daughter or any of their descendants.
5. Father-in-law or stepfather or stepmother or any of their descendants.
6. Sister in law and brother-in-law.

Algerian law includes three types of penalties:

1. Penalty of a criminal act punishable by 10-20 years in prison (crime of incest between ancestors and descendants and between brothers and sisters).
2. Penalty of a misdemeanor punishable by 5-10 years in prison; a misdemeanor as incest between:
 - Uncle or aunt and niece or nephew or any descendants.
 - Father or mother with daughter in law or son in law or the widow of his son or widower of her daughter.
 - Stepson or stepfather or stepmother or any of the descendants of the other spouse.
3. Penalty of a misdemeanor punishable by 2-5 years in prison (misdemeanor of incest involving brother-in-law or sister in law.

Under all conditions, the punishment imposed on an adult convicted of incest with a minor, under 18 years old, should be more than any punishment imposed on the minor. Such an act should be considered a criminal act even if one of the parties involved is still underage because Article (337) does not refer to a certain age, which is in contrast to crimes of indecent assault and crimes of misconduct, where the law distinguishes between the minor victim and adult victim.

While the Syrian Penal Code, issued in Legislative Decree No. 148 on 22 June, 1949, has not identified the concept of incest, Article 476 thereof recalled the component elements of incest and emphasized that “incest happens between ancestors and descendants, brothers and sisters or between siblings of half blood or relatives by marriage of their similar degree of relationship or persons with actual or legal authority over the victim”. It considers such act a misdemeanor punishable by (1-3) years in prison and by not less than (2) years if committed by a person with actual or legal authority, in addition to stripping him of the right to that authority.

The law also outlines the proceedings of pursuing this crime under Article (477), which gives the right of pursuit in two cases:

1. Upon complaint filed by a relative of up to the fourth degree of blood tie to one of the parties to the crime.
2. Public prosecution can commence legal action without receiving a complaint in the event that such a crime is disclosed to a group of people where it becomes necessary for the Public Prosecution to exercise its right to defend and maintain

the society by commencing action without receiving any complaint.

Temporary Law No. (12) of 2010, which is enforced in Jordan, defined incest in articles (285, 286) as “crime of adultery between ancestors and descendants whether they are legitimate or not, brothers and sisters, siblings of half blood or relatives by marriage of their same degree of relationship or persons with actual or legal authority over the victim”. The law distinguishes between perpetrators of incest on the basis of the degree of relationship they have with the person subject to their control. Incest is considered a criminal felony punishable by not less than (7) years of hard labor when committed by persons of blood relationship and (5) years when by persons of trust. It also is considered to have commenced of a criminal action in this regard upon the filing of a complaint by a relative with up to a fourth degree of blood tie to the offender.

Jordanian Penal Code No. (16) of 1960, which is still in force in the West Bank, includes incest under Article (285) in the second section on family crimes under the title of “Penalties of Incest”. It considers incest as “adultery between ancestors and descendants whether they are legitimate or not, brothers and sisters, siblings of half blood or relatives by marriage of similar degree or between two offender, either one in the trust of the other”.

Law No. (74) of 1936, which remains in force in Gaza Strip, is different from the above mentioned laws. It includes incest under Chapter (XVII), covering crimes of misconduct. Article No. (155) of this law states that “whoever commits illegitimate sexual intercourse with unmarried girl of his descendants or his wife’s descendants or in his trust, aged over (16-21) years, or abetted by another person to commit illegitimate intercourse with her, he shall be deemed perpetrator of a felony punishable by (5) years in prison”.

The difference between the content of the two aforesaid articles which currently remain in effect is clearly noticeable. Article (155) of Law No. (74) of 1936, which is in effect in the Gaza Strip, considers incest as illegitimate sexual intercourse committed by a man with an unmarried girl of his descendants or his wife’s descendants or under his trust. It also stipulated that the girl should be aged over (16) years and less than (21) years while Article (285) hasn’t identified this act and merely stated the component elements of it.

The Palestinian Draft Penal Code of 2011, which was drafted by a national commission under the auspices of the Ministry of Justice, followed the approach of the law affected in the West Bank. It considers incest as a relationship between two parties on equal footing, but distinguishes itself from what is currently in effect by emphasizing that the act of incest is a felony, and distinguishes between the offenders with respect to punishment, which depends on the type of relationship or relatedness there is between them. Article No. (442) of the draft law states that “the incest act which occurs between ancestors and descendants whether they are legitimate or illegitimate, brothers and sisters, siblings of half blood or between relatives by marriage shall be punishable by an imprisonment term of not less than (5) years, while if it is committed by two parties with an actual or legal relationship, it shall be punishable by an imprisonment term of not less than (7) years”.

The study of the aforesaid legal provisions regulating incest shows the following:

1. With regard to criminalization of the act of incest, it is criminalized in the majority



of states, save France. The laws of Switzerland, Algeria, Jordan, Syria and those which are in effect in Palestine all criminalize the act of incest. Furthermore, the laws of Switzerland, Syria, Jordan, and that which is in effect in the West Bank emphasize that both parties to the crime of incest are criminals and shall be equally punished because they have the will and consent to commit that crime. However, in Mandate Law, which is in effect in the Gaza Strip, the act of incest is considered to be a crime committed by an offender against a victim.

2. With regard to identification of the concept of incest, the laws of Switzerland and Jordan consider incest as adultery between persons of blood relationships. Those laws of Jordan which are in effect in the West Bank, as well as those in Syria, have no identification of the concept of incest, but instead recall component elements of it, whereas Algerian law considers incest to be a sexual relationship between persons of blood relationship. The Mandate Law which is in effect in the Gaza Strip considers incest as illegitimate sexual intercourse committed by a man with an unmarried girl of his descendants or his wife's descendants or under his trust.
3. With regard to the act of incest which necessitates criminalization, Swiss law emphasizes that in order for it to be considered as such, incest consists of an act committed between adult ancestors and descendants or brothers and sisters or siblings of half blood. Algerian law considers incest as an illegitimate sexual relationship between father or mother with daughter in law or son in law, or the widow of a son or widower of a daughter, and between stepfather or stepmother with step daughter or step son or any of the descendants of the other spouse. Both Syrian law, West Bank Jordanian law, and Gaza's Mandate Law added to the act of incest between persons of blood relationship the illegitimate sexual act by persons with legal or actual authority (trust), as such a relationship results in control and domination similar to the control and domination which derive from the blood relationship.
4. With regard to the penalty of the crime of incest, the law of Switzerland considers incest a felony crime punishable by imprisonment. However, the law of Algeria listed three types of penalties, depending on the degree of blood relationship between the perpetrators and their age:
 - Criminal penalty for a criminal act, punishable by 10-20 years in prison. This type of penalty applies to incest between ancestors and descendants and between brothers and sisters.
 - Criminal penalty for a misdemeanor act, punishable by 5-10 years in prison. It applies to a misdemeanor of incest between a person and his niece or nephew or any of his descendants, or between mother in law or father-in-law and son in law or daughter in law or a widow of the son or widower of the daughter or any of their descendants or stepson, stepdaughter or stepfather and stepmother or any of the descendants of either spouse.
 - Misdemeanor penalty for a misdemeanor crime, punishable by 2-5 years in prison. It applies to a misdemeanor of incest between two parties when

either one of them is a brother-in-law or sister-in-law. The law of Algeria takes into account of the will of the minor. If the act of incest is committed by an adult person against a minor female aged under 18 years, the penalty imposed on the adult person would be more severe than that imposed on the minor. Such an act of incest is considered a crime even if one of its parties is under criminal age.

Syrian law considers the act of incest as a misdemeanor crime punishable by 1-3 years in prison in the event that it is committed by relatives of blood relationship, and by a term of not less than (2) years in prison in the event that it is committed by persons of trust. In addition, it cancels the right of the perpetrator to guardianship or custody.

Jordanian law as practiced in Jordan considers the act of incest as a crime punishable by not less than seven years of hard labor if committed by persons of blood relationship, and by not less than five years of hard labor if committed by people of trust. It also allowed for the commencement of a criminal action upon the filing of a complaint by a relative of up to the fourth degree of blood tie to one of the perpetrators.

Jordanian law in effect in the West Bank considers the crime of incest as a misdemeanor crime punishable by 2-3 years in prison. It also provides that the complaint should be filed by a relative of up to the fourth degree of blood tie or a relative by marriage. Gaza's Mandate Law considers the act of incest as a felony crime punishable by five years in prison.

2. *Component Elements of the Crime of Incest*

Within law, incest can be understood as having a physical component and a mental component as well, the latter including the important considerations of will and consent. Both have equal significance when considering a case or changing legislation.

1. Physical Element

Jurisprudence defines incest as committing adultery with a woman of blood relationship. Adultery means "occurrence of full consensual sexual intercourse between a male and a female; otherwise, it is considered rape. Intercourse is considered to take place when the penis disappears fully into the vagina. The physical element of such a crime depends on the incidence of this activity. Unless penetration occurs, the crime of adultery will not be proven. This means that the sexual act will not be considered adultery unless it is consummated. Otherwise, it will be classed as a crime of misconduct or intent to commit adultery; taking account of the fact that showing intention of committing adultery is not punishable, being considered a misdemeanor act³⁸". Based on this, the crime of incest is a crime of adultery between persons of blood relationship. This means there is no difference between the crime of adultery and the crime of incest in terms of their criminal nature. The physical element of the crime of incest is the occurrence of natural sexual intercourse, which means disappearance of the penis into the vagina. Unless it occurs in this way, the act, according to al-Saed's view of the physical element of the crime of adultery, it would be classified as a crime of another type³⁹.

38 Al-Saed, 1993. *Crimes against General Ethics and Family*, p. 267.

39 Al-Saed, 1993. *Crimes against General Ethics and Morals and Family*, p. 267.



The limitations of this definition of the physical element of the crime of incest as the occurrence of full sexual intercourse between persons of blood relationship is a legislative failure of the extant laws as well as the legal and legislative mentality which produced this definition. It lacks consideration of other sexual activities which may be practiced by the involved persons, resulting in the same adverse impact on the basis of which this physical element was identified as an element of incest criminalization.

Blood Relationship

Blood relationship and the role it plays in human, social and legal relations is the core of all study and research concerned with the history and foundations of society. With the civil legislator interested in regulating the elements, type, rights, obligations and impacts of blood relationship, the criminal legislator plays a sensitive role in protecting blood relationships in regard to criminalization and punishment, thus contributing to settling serious problems which threaten its safety and stability. Relationships are usually based on the person at the center of a certain family, a member strongly connected with the rest of its members by blood relation or marriage relation. He could also be connected with members of other families by marriage. Some scholars defined blood relationship as a relationship established between a group of persons on the basis of blood unity or a marriage contract between two persons⁴⁰. So blood relationships can result from the descent of a group of persons from the same ancestry, in which case it is called “blood relationship” or it may result from a marriage between two persons, where the relatives of the spouses become relatives to one another, in which case it is called a “marriage relationship”⁴¹.

Marriage relationships are considered to be a special relation connecting spouses physically and spiritually. It is the basis of the family and often stronger than blood relationships, but it is different from affinity, although affinity does arise from it⁴².

Affinity is a legal personal relationship arising between the relatives of the spouses without exceeding the boundaries set by the law. So the father and the mother of the spouse become relatives by affinity to the other spouse. The same rule applies to all the relatives of the spouses and to the son or daughter of either spouse from a previous marriage and to the descendents of both of them. The brother or sister of either spouse is also considered to be a relative by affinity.

When the legislator becomes involved in a case of criminalization regarding the protection of a blood relationship or marriage relationship, then as part of being in a system regulating civil and personal affairs within the law, he considers the nature of the act and not the capacity of the offender. This means that he considers the acts that cause harm to the blood relationship system or the obligations of the individuals, so he directly and expressly intervenes to criminalize these acts and impose punishment on their perpetrators as a threat to them to not commit them lest they face punishment.

40 Rukab 2012, “Protection of Blood Relationships under the Iraqi Penal Code”, *Thi-Kar Magazine*, Edition 4, Volume 5,.

41 Rukab 2012 , “Protection of Blood Relationships under the Iraqi Penal Code”, *Thi-Kar Magazine*, Edition 4, Volume 5.

42 Rukab 2012, “Protection of Blood Relationships under the Iraqi Penal Code”, *Thi-Kar Magazine*, Edition 4, Volume 5.

Blood relationships under criminal legislation are sometimes considered to be a component element of some crimes, such as the crime of neglecting children or neglecting to support them⁴³. It is sometimes also considered to be an aggravating circumstance to increase the penalty of a criminal act, such as the crime of the intentional killing of a descendant, in which case the offender could face the death penalty⁴⁴. On the other hand, it could be considered as a mitigating circumstance to reduce the penalty for a criminal act, such as a crime where a mother kills her newborn child to avoid shame⁴⁵.

Blood relationships are considered to be a basic element of the crime of incest because the crime cannot take place without it, as far as it is stated in the aforesaid laws. If blood relationships are omitted, the criminal act would then be classed as a crime of adultery instead.

The aim of criminalizing legislation goes beyond considering blood relationship as a component element of incest. It is to protect the provisions of the taboos arising out from the blood tie which means the protection of the legislative taboo that bans legal or illegal sexual relationship between persons of blood relationship. The expression of persons of blood relationship is absolute without any restriction which means that this protection includes all women ascendants of the man such as the mother and grandmother and his women descendants such as the daughter, granddaughter, sister, niece, nephew and the descendants of his grandfather and grandmother such as aunts on maternal side or aunts on paternal side or the aunt (on maternal or paternal side) of his ascendants. The taboo also applies to women relatives by affinity whether this taboo is permanent (married stepdaughter, wife of his ascendant, or wife of his descendant) or contemporary (sister of his wife or his sister in law)⁴⁶.

The act of incest wasn't limited to aforesaid relatives as we noticed, as the law of Syria, the law of Jordan and the law effected in the Palestinian controlled territory added to that category the persons of trust (guardian, custodian) and persons with actual authority they exercise over those under their control and their orders and instructions are binding to them. This category is added to the previous one due to the authority and control it does have over others and the trust and obedience relationship which arises between both parties. This relationship allows the persons with authority to influence the life of their subjects such as the relationship of a school principal with students and the relationship of correction and rehabilitation centers' officers with inmates.

The question asked by (al-Thahabi) in his discussion was about the classification of the crime of sexual act between an employer and his woman servant; is it incest or adultery? He believes that it is adultery in accordance with the aforesaid text about the actual authority exercised by a person as the employer has domineering authority over the servant working at his home but not actual authority⁴⁷.

2. Mental Element (criminal intent)

43 Articles (185-186) from the penal code in effect in the Gaza Strip.

44 Article No. (328) from the penal code in effect in the West Bank.

45 Article (331) of the penal code in effect in the West Bank.

46 Personal Affairs Law No. 61, 1976.

47 al-Thahabi, 1997, "Sexual Crimes", (1997) edition. 2. pp. 29-33, documented in *Amal and Isra*, Masis & Dwekat and others, 2009, "Report on Family Violence on Palestinian Women".



The mental element in this kind of crime is exemplified in the intent of the offender, which concerns whether he has the will to commit such an act or not. The mental element is not different from the criminal intent within the crime of adultery. The state of mind and will of the man and the woman involved in the relationship stated in Article (285) put them in a situation where they both seem equally agreed to commit the act, and so the punishment stated in Article (76) of the Penal Code, relates to complicity, would be imposed. It states that “if several persons together commit a felony or a misdemeanor of multiple acts and each one of them committed one act or more of that crime intentionally, they shall all be considered accomplices and each one of them shall be punished according to the law, even if he committed that crime independently”.

This entails that the offender should be aware of the element of relationship stated in Article (285) and be willing to commit the crime. If the man does not know of the relationship stated in the aforesaid article, the act of incest shall be nullified because fault and ignorance dismiss a criminal act. If the defendant does not know that the woman he committed intercourse with falls within one of the categories stated in the aforesaid articles (mistake of law), he would be able to use that in the defense process to nullify the criminal intent, something which the court must prove according to the English justice system.

If a defendant believed his stepdaughter to be the daughter of one of two adulterers, then criminal intent⁴⁸ would be nullified.

What is meant by “consent of the victim to the crime” is consent before the occurrence of the act, and not after it. The legal definition of the consent of the victim to the crime of incest entails approval, not coercion. This is what distinguishes the crime of incest from rape; it occurs upon the consent of both parties, but rape occurs without consent of the victim.

Legal elements of victim consent

- a. Will: this is the core element of the victim’s consent; contrary to that, the civil law defines consent as the agreement between two wills or more to establish obligatory relationships between contractors.

The penal code views consent of the victim as permission willingly given by the victim and an expression of his or her will, reflecting acceptance of the act and the expected consequences of that act. Expression of this will is sufficient to validate the consequences of consent, even if the victim is not aware of them, and provided that this will is expressed freely while in a coherent state of mind. A mad person or a person under the influence of alcohol or drugs cannot be considered to have will and so cannot have consent. The will of the victim ensures consent even if it is not openly announced. _

Consent is a system, the core of which is the will to accept the act, and if it appears that will is not present or not perceived in a positive and clear way, the main element of consent would be nullified or consent as whole would be nullified. In order for the will of the victim to take effect, it must be announced, in a free and

48 al-Saed 1993, Crimes against ethics and family, comparative analytical study p.266. documented for Carmichael 1940, IK.B.630, 1940 (2 ALLE.R.165).

coherent state of mind⁴⁹.

- b. How the will is expressed constitutes consent of the victim; the expression of the will can be expressed or implied, either in writing or orally. It is considered expressed if it is asserted in writing, orally or by gesture; it is implied if it derives from actions and facts from which consent could be inferred. It can sometimes be assumed and can take other forms and conditions⁵⁰.

Legal Eligibility of Consent

Conditions are stated in the penal code for taking a victim's consent into legal consideration:

1. Consent should be given by a person in a coherent state of mind. On one hand, the penal code looks into the eligibility of the offender to be held responsible for his act; on the other hand, it looks into the eligibility of the victim to verify if the ability of that victim to give consent should be taken into consideration by the law. This eligibility cannot be considered available unless the victim has a clear state of mind and is free from the influence of alcohol or drugs⁵¹.

The issue of defining the age of reason and its connection with the element of consent of the victim raises several problems because it is not fully or inclusively stated in penal codes. Law provisions do not identify the age of reason necessary for giving consent except for certain conditions. In addition, jurisprudence has no consensus about the age of reason of the victim and interpretation hasn't discussed or examined whether the victim's consent was legal of a special type or a system by its own. It could be interpreted in this context as a system with special rules when it comes to the authority of the age of reason; in particular, the behavior of the minor are specified by the power of the custodian, and which are in principle subjected to civil and personal affairs rules. Furthermore, when the penal code identifies the age of reason, it identifies it differently from one crime to another. This indicates that each crime has special conditions including the age of the victim and its ability to distinguish between right and wrong. The judge considering the case has the right to issue a justifiable decision with respect to that. For example, the age of reason with regard to rape is (15) years of age in the Syrian penal code under Article (491) thereof.⁵²

The Jordanian penal code in effect in Jordan does not expressly state in Article No, (285) that a woman should be at a certain age in order to be considered an accomplice in the crime of incest. However, due to providing that the element of consent – in order to classify an act of sexual intercourse as a crime of incest - should be available, and due to considering the crime of incest as adultery with a women of blood ties according to jurisprudence, consent is nullified in cases of persons who lack the ability to distinguish between right and wrong.

It could be extrapolated that Jordan's own penal code emphasizes that the age of a woman is an intrinsic and obligatory condition, from Articles (285, 12) of the

49 Al-Saed, Crimes against ethics.

50 Al-Saed, Crimes against ethics- p. 264.

51 Conditions of eligibility or "eligibility of contracting" her research is within the frame of the civil law.

52 The judge sometimes refers to the civil law provisions upon need.



Amended Penal Code, which abrogated the first paragraph of Article (295) of the original law. It was replaced with a new paragraph. The text of the more recent paragraph does not take account of the will of the female who is (15-18) years old if she agrees to sexual intercourse with her guardian or custodian. It imposes a penalty of not less than (10) years of hard labor on the perpetrator in such a case. If the law takes her will into account, the case would be classified as incest, so it is clear that Article No. (285) of the penal code is allocated for a female whose will and acceptance of sexual intercourse are taken into consideration, and this applies to a girl aged over (18) years and free from any mental or physical illness preventing full or partial consideration of her will. These two conditions should be available in the girl referred to under Article (285) of the penal code⁵³.

With regard to legislative reality in Palestine, Jordanian Penal Code No. (16) of 1960, which is in effect in the West Bank, followed suit with the Jordanian penal code which is in effect in Jordan. It distinguished between committing sexual intercourse with a female aged (15-18) years by a person of trust (her guardian or custodian) and the act of incest. With regard to the first criminal act, Article (295) of the penal code provided that such act would be substantiated if the female involved in sexual intercourse with one of her ascendants –legal or illegal-or with her stepfather or the husband of her grandmother on the paternal side or with a person of trust (guardian, custodian) is aged (15-18) years. This is stated in the seventh section covering crimes of misconduct and the first section regarding sexual crimes. It considered the man in such a case to be the “offender” and the girl the “victim” because of her immature will, which in turn would be due to being under age. As a result, the act is considered a criminal act punishable by temporary hard labor.

With regard to the act of incest, which is stated under the second section which covers family crimes, the penal code has not identified a certain age for the female involved in sexual intercourse committed by one of the categories recalled in Article No. (185). It considers the man and the woman accomplices to that act, and so imposes a misdemeanor penalty of (2-3) years in prison on both parties equally, on the grounds that the woman has a free and appropriate will due to being (18) years of age.

The Mandate Penal Code which is in effect in the Gaza Strip is different from the aforesaid laws with respect to criminalization of the act of incest. It does not consider the parties to the act of incest equal. It considers in such cases the man to be the “offender” and the female “victim” and does not consider the free will of a female aged (16-21) years to be in contradiction with the above mentioned age of reason; this is originally arrogated from French law.

The Mandate Penal Code links the ability to distinguish between right and wrong, and free will as the basis of consent, with the marital status of the female determining the act of incest: the female should not be married at the time of the act. It seems that British law considers a married woman mature, with free will, and able to distinguish in regard to sexual issues; connected to this is that a legitimate sexual relationship nullifies the idea that her will to consent is immature.

53 Al-Saed, Crimes against ethics and family, p. 264.

Chapter V

Incest and Problems with Rights

Introduction

The law disregarded, with respect to the crime of incest, the relationship of submission and control which weakens the free will of women in a social context which is based on a patriarchal structure. It is a structure that aims to criminalize the weak party, and grants men the right to have control over women through laws that criminalize acts outside the frame of this control. This justifies the connection between the concept of honor and a woman's body, the right of men to defend this concept and the provision that in some family sexual crimes, including incest, only a relative of the victim of up to the fourth degree of blood tie can file a complaint. This chapter will discuss such rights problems of incest within the laws that are in effect in Palestinian. These rights problems are exemplified in both the physical and mental elements of the crime of incest.

1. Laws pertaining to incest and patriarchal authority

Incest is adultery with the additional element of a blood tie or the relationship stated in Article No. (285) of the penal code which includes the provision of blood tie.

Considering incest as adultery with the additional element of blood tie raises an important problem because the law does not distinguish between the provisions of incest and fornication of women of blood relationship, considering both acts as one crime. Furthermore, the provisions pertaining to incest have avoided considering incest as a crime committed by two parties (offender, victim). Consent is defined as "the act of willingly and verbally agreeing to engage in an act against the public interest which is safeguarded by law. It is provided that this should be conducted in full knowledge of what is consented to"⁵⁴. The influence of the consent of the victim on criminal responsibility is connected with the extent of the authority of the victim over her or his affected right. So the more authority the victim has by law over the affected right, the more influence the consent shall have⁵⁵.

54 Najib, 1988. *Explanation of Penal Procedure Law* (Cairo: Dar al-Nahda al-Arabia, p. 353.

55 al-Jada', 1983. "Victim's consent and its legal influence: a comparative study", (Cairo University, p.154.



Laws distinguish between physical coercion and mental coercion. For example, rape is considered to be a sexual act of coercion between an offender and a victim. While physical coercion is physical force the offender deliberately uses against the victim to strip her of her physical will⁵⁶, mental coercion is “the factor that paralyzes the movement of the will and its inability to examine through fear an imminent danger or harm that cannot be reversed or escaped from but by perpetrating the crime⁵⁷”.

Rashid adds:

“will is existent in such cases on the physical level where the offender can refrain from committing what the law prohibits or do what he is ordered to do by the law, and so refrain from committing the crime though it is certain that he will incur tremendous damage to himself or to the other. In such a situation, he will have no other choice in the end except for that choice which is to escape the imminent danger by committing the crime⁵⁸”.

With regard to the conditions which are taken into consideration for constituting the element of mental coercion, Sarur says in his book *Al-Waseet in the Penal Code* that the term of “self” means “a set of rights which are connected with the self, and they include the right to life, the right to security of person and the right to freedom, honor and consideration⁵⁹.” With regard to the study of the forms and manifestations of will, researchers distinguish between it and silence and submission, believing that the expression of the will requires a demonstrative sign indicating it expressly and implicitly; silence does not imply consent if it is compared to some conditions where it is taken as a sign of consent or if the offer is beneficial to the person offering, but refusal is probable. However, assuming consent from silence depends on the judge who analyses the facts and conditions of each case separately⁶⁰.

Jurisprudence distinguishes between consent and submission where it is possible to say that consent includes submission, but submission does not necessarily imply consent. Crimes of misconduct committed against juveniles, persons under the trust of others or persons, who cannot resist due to physical or mental disability or due to the severity of coercion used against them, can be considered examples of such cases. The law ensures their protection so the submission of a servant to the sexual desire of her employer does not imply her consent⁶¹.

Al-Saed, in his book “Explanation of Penal Code – Crimes of Misconduct and Family, comparative analytical study”, focused on judicial precedents in the UK that distinguish between consent, obedience and submission. He stated that “the English judiciary distinguishes between obedience, submission or surrender and permission of a woman to her relative to commit with her the crime of incest. They have one meaning, but the term which implies that she is accomplice to the crime is permission”. He also depended in his

56 Rashid 1957, *Criminal law brief*, (Arab Book House;), edition 1. p. 440.

57 Sarur 1979, *Al-Waseet in Penal Code*, (Cairo; United Company Publishers), p. 338.

58 Rashid, 1957. *Criminal law brief*, (Arab Book House;), 443.

59 Sarur 1979, *Al-Waseet in Penal Code*, (Cairo; United Company Publishers)

60 Al-Saed, *Crimes against ethics*, p. 265,

61 Al-Saed, *Crimes against ethics*, p. 265.

analysis on the case of “Dimes” where the defendant was exonerated from the charge of rape because of the agreement of the accused woman.

The victim is not necessarily always an accomplice to the crime of incest because there is a difference between obedience (submission or surrender) and permission. Even if her agreement is sufficient to drop the charge of rape, this should not be considered permission from her to commit the crime of incest. It was also decided that that submission alone does not imply agreement to the commission of the crime of rape, so it was decided that there is a difference between agreement and submission. Based on that, it is concluded that an agreement includes submission or obedience or surrender, but this does not mean under any condition that obedience or submission implies agreement or consent⁶².

The law takes physical and mental coercion in crimes into consideration, so if the element of coercion –as above mentioned- is proved to be a constituent of the sexual relationship between a man and a woman, then it is a crime of rape⁶³. While it considers blood ties to be an aggravating circumstance that makes the penalty harsher, it rules out patriarchal control and authority as an indicator of the absence of women’s free will in incest crimes. The woman who is subordinate to men cannot expressly refuse the act of incest. Furthermore, the law overlooks inequality between men and women, and imbalance of justice in favor of men. This is due to a patriarchal society, where the age of girls or women cannot be considered as a factor influencing the degree of control men have over any female’s life.

The connection between the law and patriarchal authority with respect to the crime of incest is exemplified in giving the right of filing a complaint to male relatives of up to fourth degree of blood tie on such grounds that the crime causes harm to the family. And so, the family has the right, according to the law, to file and drop the complaint in order to preserve its interests, ignoring the influence and consequence of incest on the woman herself and thus being considered more as an accomplice than a victim. Such a representation appears, for example, in Case No (1147\2008). This case, which was considered by Ramallah Conciliation Court in mid June, 2008, was withdrawn by the complainant relinquishing his personal right in 2011.

In Case No. 1147\2008, Commission of Incest, (H.A) filed a complaint with the Public Prosecution against (Y.S) and (R.S), accusing them of sexual assault against his sister. The accused were her relatives by affinity, (R.S) being her father-in-law and (Y.S) her brother-in-law (brother of her husband). The complaint states that they attempted to exploit the fact that her husband was in prison and assaulted her sexually while living in their house as a servant. The complainant was surprised that the Public Prosecution considered his sister as a third party to the complaint, and he dropped the case during trial proceedings as a result.

An account of the case:

(H.A) who is (32) years old, was subjected to sexual assaults by her brother-in-law and father-in-law following the detention of her husband for two years. She suffered these assaults for four years. Her father-in-law claimed that he experienced sexual intercourse with her upon her full consent saying “she forced and coerced me to do that”. She became

62 Al-Saed, Crimes against ethics, p. 266.

63 . Abdelmutalib. Honor Crimes. National Center for Legal Releases. P. 25.



pregnant and gave birth to a baby boy during the proceedings of her case, placed in Mihwar Center for the Protection and Empowerment of Women and Families in order to guarantee her own security and the security of her child.

The Public Prosecution considered that her failure to defending herself against the sexual assaults by her father-in-law and brother-in-law and filing a complaint against them was an indication of her consent. It also considered their knowledge of affinity with her an indication of the elements of the crime of incest according to Article (285) of the Jordanian Penal Code No. 16 of 1960. Thus, the court refused to consider the woman representative's argument that her failure to file a complaint and remaining silent was due to her weakness and fear from scandal, even though she was living under difficult conditions in an isolated and backward environment and was being exploited due to the absence of her husband. At the time, she was caring for six children and working as a servant for the family of her husband, who was languishing in an Israeli prison.

This case can be considered as example of how the judicial system handles the crime of incest. The Public Prosecution and the court considered her silence as consent and acceptance of the act of incest, and refused to take into consideration the fact that she was living under the defendants' control with her free will stolen. The lawsuit was finally dropped, the accused were released and free to go, and the woman continued to remain at Mihwar Center to protect her life and the life of her child from the threats to her life from her family.

Clarifying the reason why men assault women and women keep silent as per the above mentioned case, Bahri & Ktishat take the view in their research on domestic violence that the socialization of males and females in the different societies give them certain behaviors with regard to violence. It teaches them that they are stronger than females and have the right to lead and control the family, express their opinion, take decisions, solve problems and be glorified and appreciated as the masters of the family. They also learn that they are responsible for monitoring and disciplining the behavior of the woman and punishing her when need be. It also has the effect of developing a feeling in girls that they are soft and weak. Furthermore, it conditions or trains them to accept submission and restrict their lives to satisfy their man and not to express themselves⁶⁴.

Maha Sabagh⁶⁵ states that 'most sexual assaults taking place in the family are committed by the father-in-law against his daughter-in-law, exploiting his control over her and over his son (husband) and his social and sometimes 'economic' status- as the center of the family, so no one dares to accuse him'. Murad Amre⁶⁶ reveals the nature of the families where females are subjected to acts of incest, saying that the mothers in these families are always too weak to ensure protection for her daughters. Sabagh confirms this, saying 'in most of the cases she handled, the mother was aware of sexual assaults committed by the father against his daughter, but their role was passive; they connived at such acts being afraid of the husband's threats or of getting divorced, and so facing the consequences of that on the social level'. Amre and Sabagh both believe that the main cause of incest

64 Bahri&Ktishat, 2011. *Domestic Violence* (Amman; Dar al-Safa' for publishing and distribution.), p. 55.

65 Social councilor and psychiatrist, Childhood Programs Organization, 37 years experience. Interviewed in her house in Ramallah, November 28, 2012;

66 Interview with Psychiatrist Murad Omar, Director of Clinical Unit at Psycho-Social Counselling Centre in Ramallah, 11-27-2012.

is ‘the patriarchal mentality and exploitation of the man’s status in the family, where he acts as the owner of the women and the girls; the person who has the authority (father, eldest son, father-in-law) exploits that authority to impose sexual practices on the persons subjected to him’.

Amre confirms that there is a relationship between the act of incest and the sexual history of the perpetrator. His research into the history of incest cases reveals that the person who commits the act of incest must have been subjected to a previous sexual assault during his childhood and descended from a dysfunctional family. Sabagh believes that there are some factors that contribute to committing incest, such as overcrowding accompanied by poverty or drugs, disintegrated families, women’s emotional needs, threat of divorcing, killing or dismissing the mother in the event that the girl rejects her father’s request’.

Based on their academic and professional experience, Amre and Sabagh reject the view of consent-based acceptance, even if the female involved is more than (15) or (18) years old. This is because of the power of the patriarchal system and the exploitation of its concepts and configurations with regard to incest. Sabagh explains the words and terms that are used by men in convincing their daughters and daughters-in-law to accept their advances to commit incest are powerful; for example, “I have the right to commit sexual intercourse with you rather than the stranger”. Amre defines incest as an ‘imbalanced and unjust sexual relationship’.

The physical element of the act of incest raises important questions among psychological and social counselors. Amre believes that the danger of limiting the physical element of incest to the occurrence of the sexual intercourse without considering any other sexual activity such as foreplay, flirting, sexual stimulation behavior as incest. Accordingly, Sabagh stresses the danger of such acts has impacts which are similar to the psycho-social impacts of incest on the girl, the family and society at large. Amre emphasizes that whatever sexual act targeting a female by a person of trust should be considered a fault that disturbs the social system of the family and its structure, deviating the protective roles of her father, brother or uncle and influencing her psychological structure as a human being and that of her family. They also change the nature of blood tie as a factor of mercy, protection and security of the girl, and so the disturbance of the ethical and cultural standards. He also asserts that incest is ‘the desire for incest and expressing it in whatever way’.

2. Escaping Punishment

It is worth reviewing here the concept of a limitation period, as it plays an important role in incest cases. Limitation period is understood as the ‘expiry of the time period prescribed by law if within which the state does not commence a legal proceeding with regard to a crime in terms of searching for its perpetrator or implementation of the sentence issued against him, it shall lose the right to pursue investigating that crime in the first case or pursuing the perpetrator who is sentenced due to committing that crime in the second case’⁶⁷. What was lost in the first part was the right of the state to commence legal action, and what was lost in the second part was the state’s right to implement the criminal penalty imposed on the perpetrator. The criminal proceeding arising from that crime is terminated in both situations.

67 Sarur v, *Al-Waseet in Explaining Penal Procedure Code*, (Dar al-Nahda al-Arabia; Edition 7), p. 145.



The termination of a legal action has a prescribed time period which applies to a crime with respect to which no final unappeasable sentence has been issued. The period of limitation of a legal action concerning a crime extends to the day following the incidence of that crime, or when the last proceeding with regard to that crime has taken place if indeed a legal proceeding is in place. A legal action terminates after ten years from the date of the incidence of the crime when the crime concerned is felony, and after three years from the date of the incidence of the crime when the crime concerned is a misdemeanor. With regard to summary offenses, legal action terminates after one year from the date of the incidence of the offence unless the law provides otherwise⁶⁸.

The philosophy of the law of limitation is related to memories fading, as after a certain period of time of the occurrence of a crime with no legal action taken, people would tend to increasingly let it go. Public opinion would fade, no longer demanding punishment for its perpetrator after the passage of time⁶⁹.

Law in these cases is balanced between two contradicting concepts that are based on the right of punishment. The first is the concept of justice and the second is the public interest. There is no advantage for giving precedence to one over the other with the claim that absolute justice does not terminate over time, and this is because public interest can and does terminate over time: some crimes can be forgotten with the passage of time. Stopping an investigation into a crime in order to avoid arousing feelings of resentment or vengeance would be in the interest of the society, especially once the crime is forgotten. For this reason, the law considers the need for a statute of limitations in most crimes, regardless of their nature⁷⁰.

The termination of legal action in misdemeanors relies on the limitation of the time period which applies to a crime, and with respect to which no final criminal unappealable sentence attributing a certain person and imposing punishment on that person for it was issued. This would be regardless of the measures taken with respect to it, even if a preliminary sentence was issued in absentia against that person without notifying him to seize the chance to appeal the sentence issued against him.

With the expiry of the limitation period, whether from the day following the crime or the day following the last measure taken thereof, the right of the state to take any legal action such as pursuing the perpetrator shall be lost. Amre and Sabagh emphasize that girls are sometimes subjected to the act of incest since an early age in their lives and continue to suffer that until they are capable of addressing sexual assaults through support from a member of the family, the husband or by committing suicide, escaping from home, or by the abuser's decision to assault another victim. The statute of limitations with respect to the act of incest neglects the right of girls, especially with the requirement to promptly file complaints, as this allows the perpetrators to escape punishment. The expiry of the limitation period with regard to the act of incest shifts the crime committed against a young girl from a crime of rape to a crime of incest, the latter of which she can become accused and viewed as an accomplice. If sexual assault against a girl has continued for a long period, such as from an early age until she reaches the age of reason or an age when she is capable of disclosing this to a relative to file a lawsuit thereof, this contradicts with

68 . Article No. 12 from the Penal Procedure Code No. (3) of 2001.

69 Sarur, 1996. *Al-Waseet in Explaining Penal Procedure Code*, (Dar al-Nahda al-Arabia).

70 Aqeede, 2001. *Explanation of the Code of Civil Procedure*, (Dar al-Nahda al-Arabia;), pp. 2013-2014.

the interest of the girl being considered accomplice to the crime, resulting in continued silence and submission.

The second factor which enables the perpetrator of the act of incest to escape punishment is the fact that the rules pertaining to the act of incest are void of provisions to pursue anyone who is an accomplice, abettor or accessory in the crime of incest. The law does impose punishment on such people for the crime of adultery, even when in reality the crime committed was the crime of incest, or adultery of people with blood ties⁷¹.

Complicity is participation of more than one person committing the same crime, and it is substantiated once it combines actus reus and mens rea. Actus reus means “criminal physical element” while mens rea means “the intent of the accomplices in the crime” which means that each one of them has knowledge of the criminal act and embarks on a course of conduct to bring about a result which in fact occurs⁷². Jordan’s Penal Code No. 16 of 1960, in effect in the West Bank, distinguishes between the accomplice and accessory, naming the participant as the principal to a crime, an accomplice having a major role in commission of a crime, and the accessory having a minor role in the commission of the crime. There is also the abettor, who encourages another person to commit the crime by giving him money or a gift, or by influencing him through threat, machination, money or malfeasance, and this is a separate category. The failure of the law provisions pertaining to the pursuit of the accomplice, abettor or accessory in the crime of incest is a legal flaw, identifying with the patriarchal system’s way of addressing the crime of incest instead of considering complicity in a crime of incest as in a crime of adultery.

71 Article (284) of the penal code in force in the West Bank

72 Abdelmalik 1939, *Criminal Encyclopedia*, part one. Subscription. Beirut: Dar al-Elim for All”, p. 685.



Chapter VI

Conclusions and Recommendations

1. Conclusions

- International conventions of human rights emphasize that sexual assault is a form of gender-based violence against women due to imbalance and inequality between men and women.
- The World Declaration on the Elimination of Violence against Women urged states to adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of the conduct of men and women, and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women.
- The Beijing Platform for Action urged states to, on an ongoing basis, evaluate and analyze their national laws to guarantee their effectiveness and adopt the appropriate measures to ensure protection for women against violence. States were also to enable women to have access to fair and effective justice, including redress and compensation against harm, remedy for the victims, rehabilitation of its perpetrators and implementation of CEDAW.
- Laws evolved due to the influence of social contract theory and with a view to organizing the relationship between individuals and the ruling authorities on one side and between individuals on the other, to ensure clear and binding rules for all sectors of society on the basis of mutual respect, justice and equality.
- Laws aim to achieve three integral purposes, which are the support of community peace, reconciliation between conflicting interests and achievement of justice. In addition, penal codes aim to achieve three objectives, and these are the protection of values and social interests, satisfactory achievement of justice, and the achievement of security and legal stability.
- Palestinian society is, like other Arab societies, characterized by a patriarchal structure. Patriarchy means the full domination of males, where the discourse, orders and decisions of the father remain dominant and the social, economic and cultural backwardness of the society continue to impede its development and keep it fossilized, rigidly understating the role of women and overstating that of the man. This social reality has been reflected in legislative reality throughout the different



political epochs, where the social system was used as a tool of domination and control of Palestinian society. The law is considered to be the expression of the social, political and economic power reflecting the interest of the males who have access to draft and enact legislation.

- Incest disturbs the natural role of the family as a unit of support and protection for its individuals. It confuses the foundation of the social system by targeting the less fortunate of its individuals due to age, sex or disability. Furthermore, it makes them lose any feeling of security and support.
- The effective penal codes in Palestine have not allocated a special section for family crimes or those that affect any of its individuals as part of a united independent unit. The legal provisions criminalizing the acts that harm women were included in two different chapters: the first chapter addressed family crimes and the second addressed the crimes of misconduct (indecent assault, encouragement of debauchery and disregard of public ethics).
- Incest is defined as a full sexual relationship between two persons of blood ties which is prohibited according to cultural and religious standards, resulting in a feeling of indecency depending on the degree and type of blood tie leading to the disturbance the sense of paternity, maternity, parenthood, brotherhood, uncles on the paternal side and uncles on the maternal side. Jurisprudence defines incest as “adultery between women of blood relationship or fornication of women of blood relationship”. All these names or titles refer to one act, which is a full sexual relationship between a man and a woman of blood ties or a legal or actual relationship whereby the woman is in the trust of the man subjecting her to the act of incest.
- The definition of the physical element of the act of incest is limited to the consummation of sexual intercourse between a man and a woman of blood ties, and this reflects a legal failure and poor legal reasoning.
- Blood relationship is a basic element of the crime of incest. It is impossible for such a crime to happen without this relationship. If the blood relationship does not exist in such cases, the criminal act would be classed as adultery. The law added to the persons of blood relationship the persons who have legal or actual authority over others.
- The mental element in the crime of incest means mens rea (having the knowledge and will to commit crime), which is not different from that of adultery. The knowledge and willingness of the man and the woman involved in the crime described in Article (285) implies their equal consent to commit the crime.
- Most legislation has criminalized the act of incest, except for French law. The other laws compared in this study (Switzerland, Algeria, Jordan, Syria and the law effected in the West Bank) have criminalized the act of incest and consider the two parties to the crime as accomplices and accused of the act, whereas the Mandate Law effected in the Gaza Strip considered the act of incest as a sexual assault committed by a man against an unmarried girl (16-21) years of age.
- The law in effect in the West Bank handles the act of incest differently from that in the Gaza Strip. The latter considers the act of incest as a sexual assault against an

unmarried girl at (16-21) years of age and classifies it as a felony between two parties (offender and victim).

- Current legal provisions regarding incest are not in compliance with international agreements and conventions in general, and international agreements and conventions on violence against women in particular. They embody discrimination and inequality between men and women, considering women victims to be accomplices to the crime of incest. These legal provisions also contradict the functions of the law, which aims to promote and support community peace, reconciliation between conflicting interests and the achievement of justice. Furthermore, they contradict the objectives for which these laws were enacted, such as protection of values and social interests, the achievement of justice, and the achievement of legal security and stability.
- The legal provisions regarding incest represent the nature of patriarchal society, which embodies men's domination over women and their attempt to discipline within social and codified frames and stereotypes aimed at maintaining the patriarchal order.
- It is not reasonable to consider the free will of women on equal footing with that of men in light of patriarchal societies, where women suffer discrimination and marginalization on different levels including custody, marriage, divorce, polygamy, inheritance, lack of control over their bodies and lives, connection of honor with their bodies only and imposition of punishment on who of them breaches the cultural system (honor killing).
- It is not possible to ignore the fact that most of the sexual assaults committed against women by their guardians start at their early age and extend for a long time, changing the criminal classification of the act from an act of rape to an act of incest, whereby the right of the victim to punish the offender and hold him accountable is lost.
- The law denies women the right to file a complaint of incest, and grants this right to her relatives of up to the fourth degree of blood ties in contradiction with the principles of human rights and the functions of the law, and so further allows male domination over women's lives.
- The crime of incest is classed as a misdemeanor crime, which cannot be pursued after a limitation period of three years. The victim, therefore, loses the right to file a complaint through one of her relatives after finding the ability to disclose the sexual assault committed against her by the person whose trust she has been in.
- The law grants the complainant the right to abandon his personal right in the lawsuit on such grounds that it is a family sexual crime committed by consent.
- The laws regarding incest are void of a provision of criminal pursuit of the abettor of and accessory to the crime of incest, particularly when compared to the crime of adultery and even though the physical element of both crimes is the same.
- Incest is destructive to social life, creating an individual who cannot participate in public society activities. Furthermore, it prevents reproduction of new families and paralyzes the individual's ability to build a family and causes adverse psychological effects to a girl, such as trauma, depression, obsessive-compulsive disorder, self-denial and suicide.



2. Recommendations

- a. The legislative authority should reconsider the crimes related to sexual assaults in the family in compliance with the basic principles of human rights to achieve the functions for which laws are generally enacted, and in particular establish penal laws to guarantee equality between men and women, achieve justice, and encourage deterrence in order to bring such assaults to a halt.
- b. Legal provisions regarding incest should be amended as follows:
 - an amendment to the physical element of the act of incest to consider any act or conduct implying sexual activity in the family an act of incest.
 - an amendment of the mental element of the act of incest, nullifying the consent and free will of women with regard to the act of incest in consideration of patriarchal domination over the life of women.
 - the need to consider the crime of incest as a crime committed by two parties of unfair and unequal relationship, where one party is the “offender” and the second party is the woman as the “victim”.
 - the need to consider the crime of incest as a felony and make the punishment against perpetrators harsher.
 - the need to grant women the right to file complaints about sexual assaults, especially incest, and at all stages of life.
 - the need to sufficiently punish the principal, abettor, accessory and accomplice to the crime of incest.
 - the need to repeal the right to drop a lawsuit by forgoing the personal right of the complainant.
- c. The institutions of the PNA should consider creating a national action plan to promote the protection of women against all forms of violence. It should also list provisions in these plans activities and programs for this purpose and fully draft a preventive platform with all legal, political, administrative and cultural measures that promote the protection of women against all forms of violence and guarantee that women shall not be re-victimized due to laws, practices and other forms of intervention which do not take gender into consideration.
- d. Adopt all appropriate measures, especially in the area of education, to modify the patterns of social and cultural conduct of men and women, and to eliminate prejudice, customary practices and all other practices that are based on the inferiority or superiority of either sex as well as stereotypes about the roles of men and women.
- e. Creation and promotion of institutional mechanisms enabling women and girls to notify the relevant authorities about acts of violence committed against them, to file complaints thereof in a secure and covert atmosphere free from the fear of facing punishment or vengeance, and to ensure access for women with disabilities to the information and services related to violence against women.