

**WANTED**



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**Equality and Justice in the Muslim Family**

**Edited by  
Zainah Anwar**



**musawah**

**an initiative of Sisters in Islam**

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This book would not have been possible without the vision, passion and commitment of the international planning committee for Musawah. At our first meeting in Istanbul in March 2007, we identified the importance of making Musawah a knowledge-building movement. We felt that the Global Meeting to launch a movement that will bring together women's groups from Muslim countries and communities to demand equality and justice in the family must be accompanied by theoretical resources to provide women's rights activists with a basic grounding in why change is possible within Islam.

I am grateful to our scholars who have not only been selfless in sharing their scholarship and analysis with the activists, but who have also been tireless in answering questions and providing clarifications in our search for solutions. To Ziba Mir-Hosseini, Muhammad Khalid Masud, Amina Wadud, and Amira Sonbol, thank you for taking us through this journey of enlightenment. To Khaled Abou El Fadl, thank you for allowing us to edit your lengthy paper and to share your important ideas on Islam and human rights with Musawah participants. Thank you as well to Cassandra Balchin and Kamala Chandrakirana, whose international activism and knowledge of global trends provide a broad overview of contemporary family law reform and the socio-economic realities of women's lives today and offer us compelling evidence on why change is both possible and necessary within Muslim contexts.

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from more than thirty countries who provided feedback on the Framework for Action, which went through numerous drafts throughout 2008.

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Zainah Anwar  
Project Director, Musawah  
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# Introduction: Why Equality and Justice Now

Zainah Anwar

Equality and justice are values intrinsic to Islam. So why do Muslim family laws and practices treat women as inferior to men?

The papers in this resource book for Musawah, the Global Movement for Equality and Justice in the Muslim Family, seek to understand the genesis of Muslim family law, how it was constructed within the classical *fiqh* tradition, and how the wealth of resources within *fiqh* and Qur'anic verses on justice, compassion and equality can support reform towards more egalitarian family relationships. Importantly, the papers demonstrate that current discriminatory Muslim family laws are not divine, but constructed by humans within particular socio-political contexts. The authors argue that equality and justice are both possible and necessary from within the Islamic tradition, within international human rights and constitutional frameworks, and given the lived realities of women and men in the Muslim world today.

The aim of this book is not to provide a template or a uniform model for family law that will be applicable to all Muslims and in all contexts, but to open horizons for thinking constructively about change and reform and to claim back the diversity and dynamism that were once so integral to the Islamic legal tradition.

Very often Muslim women who demand justice and want to change discriminatory laws and practices are told 'This is God's law' and therefore not open to negotiation and change. To question, challenge or demand reform will supposedly go against *Shari'ah*, weaken our faith in God and lead us astray from the straight path.

In a world where women's rights are considered part of human rights, where modern constitutions of Muslim countries recognise equality

and non-discrimination, where women's daily realities make them the providers and protectors of their families, the continuing discrimination found in family laws in much of the Muslim world is increasingly untenable and indefensible.

For decades now, women activists and rights groups in Muslim societies have been pushing for law reform to recognise equality between men and women and to protect positive provisions where these exist. Many have focused on family laws because inequality and discrimination against women, which often begin in the 'private' space of the family, have affected their engagement and their rights in the public sphere.

But law reform and the protection of existing rights have been uphill battles for activists in most Muslim countries and communities. Opposition to these efforts comes from very powerful forces, in the name of religion and state-sanctioned patriarchy. The success in 2004, however, of the women's movement in Morocco in pushing for comprehensive reform of their Personal Status Code, the *Moudawana*, within a framework of equality between men and women, provided new impetus for activists in other countries to rethink and re-strategise their campaigns and demands regarding family laws.

## **Why Musawah**

The idea for Musawah ('Equality' in Arabic) was first proposed at a Sisters in Islam International Consultation on 'Trends in Family Law Reform in Muslim Countries' in March 2006 in Kuala Lumpur, Malaysia. The meeting brought together Muslim activists and scholars from South-East Asia, Turkey and Morocco (two Muslim-majority countries with recent successful family law reform campaigns), Iran, Pakistan, the United Kingdom, and the United States, to share knowledge and strategies. The participants at that meeting felt a compelling need to build an international

network of women's groups in the Muslim world that have for decades been working on family law to share strategies, scholarship and best practices. This sharing would develop the international discourse, public voice and momentum to propel forward efforts to protect existing rights and promote reform at the national and regional levels.

Many groups have not made the hoped-for progress in their reform efforts because they have worked in isolation—at both national and transnational levels—and because of opposition from conservative groups within society and a lack of support from their governments. In other contexts, especially in the Gulf states and some African countries, family law reform efforts are relatively new. And in yet other countries, rising identity politics and Islamisation policies threaten to roll back past achievements in family law reform.

While women's rights groups like Sisters in Islam have engaged with the religion for over 20 years, many other feminists in the Muslim world have been reluctant to do so, preferring to advance women's rights within the human rights framework. Over the past ten years or so, there has been increasing demand from women activists to also look at addressing issues relating to Muslim women's rights from within a religious framework, but using a rights-based perspective. This need and demand come from activists who believe in the paradigm of justice and equality but need additional effective tools for dealing with resistance, opposition and demonising by Islamist groups and those in traditional positions of religious authority.

In countries such as Algeria, Morocco, Tunisia, Indonesia and Malaysia, women's groups and supportive men have begun to explore a broader, more holistic framework that argues for reform from multiple perspectives—religious, international human rights, constitutional and fundamental rights guarantees, and women's lived realities—to put forward positive, progressive practices and examples of reform. This holistic framework uses Islamic arguments, but is grounded in the

realities of modern-day life in democratic constitutional states and a world linked by international law.

Musawah is designed to bring together scholars and activists who wish to work within a holistic framework to ensure that Muslim women are treated as human beings of equal worth and dignity in the law, in the family and the community. Since so much of the injustice against Muslim women and the resistance to law reform are justified in the name of Islam, we feel that it is important that Musawah's key focus as a knowledge-building movement be on acquiring knowledge and understanding why equality and change are possible and necessary within Islam.

It is for this reason that the international planning committee of Musawah spent almost two years building a foundation for the initiative by commissioning theoretical papers to provide the basic grounding to understand why change is possible, developing a Framework for Action and principles to guide Musawah's work, consulting scholars, activists and practitioners from over thirty Muslim countries, and organising a Global Meeting to bring people together to demand equality and justice.

## **Justifying Equality and Justice**

In this book, the groundbreaking work of scholars such as Ziba Mir-Hosseini, Amina Wadud, Muhammad Khalid Masud and Khaled Abou El Fadl reveals the possibility of finding justice and equality for women within Islam. Mir-Hosseini's research on the construction of gender in Islamic legal theory enables us to understand the legal logic of classical juristic texts that discriminate against women. The conception of marriage in the early centuries of Islam, which produced rules that led to the control and subjugation of women, can no longer be the basis for regulating marriage and divorce in the twenty-first century. Mir-Hosseini argues in her paper that Muslim family laws are not divine, but are 'man-made'



juristic constructs, shaped by the social, cultural and political conditions within which Islam's sacred texts were understood and turned into law. She asserts that the classical *fiqh* definition of marriage between the providing, protecting husband and the submissive wife has become irrelevant to the contemporary experiences and ethical values of Muslims, and that a 'paradigm shift' in Islamic law and politics is well underway.

Masud's paper focuses on the significance of *ikhtilaf*, or diversity of opinion among the jurists, and how this doctrine serves as a rich source for understanding the development of the Islamic legal tradition and an important juristic tool for reinterpreting Muslim family laws. He emphasises the need to understand that *fiqh* is not divine law, but is humanly constructed to deal with the changing times and circumstances. When new times and circumstances emerge, new juristic rules and understandings must also develop.

Amina Wadud's paper points to the several references in the Qur'an where women and men are acknowledged as equal and examines how these can provide a source for the concept of equality as an essential component of Muslim family laws and relationships. She proposes a *tawhidic* paradigm of reform. As long as Allah is supreme and is unique, there can be no other relationship between any two persons except one of horizontal reciprocity. She asserts that patriarchy, which places one person as superior to the other, is a form of *shirk* (polytheism or association of partners with God) because it violates *tawhid*, where the presence of Allah is always the highest focal point.

Khaled Abou El Fadl's paper discusses the major points of tension between the Islamic tradition and the human rights system of belief and explores the possibilities for achieving a normative reconciliation between the two moral traditions. The paper focuses on the doctrinal potentialities or concepts constructed by the interpretive activities of Muslim scholars that could legitimise, promote, or subvert the emergence of a human rights practice in Muslim cultures. He believes that even if Islam has not

known a human rights tradition similar to that developed in the West, it is possible, with the requisite amount of intellectual determination, analytical rigour, and social commitment, to demand and eventually construct such a tradition.

This set of four theoretical papers on Qur'an and the Islamic legal tradition provide us with key understandings on the possibility and potential for deriving concepts of equality and justice from within the Islamic framework. This will enable activists to move forward in arguing for reform and protection of existing rights while also being able to respond to the accusation that their demands are somehow 'against Islam'.

The next set of papers were commissioned to look at the realities on the ground. Amira Sonbol's paper on the genesis of family law shows how today's Muslim personal status codes are in fact a construct of the modern state, influenced by medieval *fiqh* rules, local custom and tradition, and European colonial laws regarding gender relations. By tracing the origins of modern personal status codes and the influences on their construction in some illustrative countries, Sonbol debunks the myth that Muslim family laws are divine and therefore immutable and unchangeable.

Cassandra Balchin's paper provides an overview of the immense diversity in legal systems and laws relating to the family in Muslim countries and communities. She highlights the variety of strategies activists have used to demand reform and promote equality and justice in family laws and, in some contexts, to defend gains made in the face of a backlash because of rising identity politics. Both Balchin and Sonbol's papers further illustrate how reform and protection of rights is possible within Muslim contexts.

Kamala Chandrakirana uses available data to show how global forces of the twenty-first century have affected, shaped, and even changed the many faces of the Muslim family. She warns that given the new realities of Muslim women's and men's lives today, a stubbornly

unchanged vision of Islam that regards women as inferior to men, and therefore undeserving of a life of equal worth and dignity, could eventually lead to the religion losing its relevance in the future. And yet, she believes a new vision of Islam that affirms women's humanity and articulates itself in the form of gender-sensitive laws adopted by states is both necessary and possible. The time to make this a reality throughout the Muslim world is now.

These seven contributions are preceded by the Musawah Framework for Action, the conceptual framework and principles that guide the work of Musawah and can be used in various countries to help frame claims for just and equal family laws. The Framework for Action builds on the seven papers, using a holistic approach that brings together Islamic teachings, universal human rights principles, fundamental rights and constitutional guarantees, and the lived realities of women and men today.

## **Why Now?**

Musawah has a long pedigree. At the time of Revelation, Islam's message was revolutionary in spirit and gave women rights not available in most cultures of the era. It is time to reassert this revolutionary spirit and show how Islam can stand on the side of the women's movement and other rights movements. Today, the right to freedom from non-discrimination on the grounds of gender is regarded in international human rights law as non-derogable. This means that, like torture and slavery, gender discrimination is increasingly accepted as something for which there can be no excuse. Gender discrimination cannot be justified by a lack of resources, by a declaration of a state of emergency, by arguing that the perpetrators are non-state actors, and certainly not by culture and religion.

Many women, including those from Muslim contexts, have played a key role in making it clear that women's rights are human rights. At the same time, women in Muslim societies have also played a major role in insisting on a nuanced approach to universal human rights. While sisterhood is indeed global, it is now acknowledged that this is experienced differently in various contexts. Musawah is thus part of a global trend whereby women who work through religious frameworks have promoted and developed alternative interpretations of their faith in ways that challenge patriarchal domination of religion, and highlight women's rights as human rights. This has occurred in other faith contexts, through the work of organisations such as Catholics for a Free Choice, the International Women's Partnership for Peace and Justice working in Buddhist contexts, and *Lilith Magazine* developed by Jewish women, as well as in Muslim contexts through the work of Women Living Under Muslim Laws, Women's Learning Partnership, Women's Islamic Initiative in Spirituality and Equality, and of course Sisters in Islam, which initiated Musawah.

In many ways, Musawah offers a contrast to the image and experiences of Muslims in this current 'War on Terror' context. Whereas Muslims are stereotyped as intolerant and backward, and Muslim women as oppressed and victimised, Musawah reveals how we are forward-looking, embracing change and determined to highlight diversity in interpretations and to challenge any human claims to know the One Truth. It also offers a challenge to authoritarian forces within our own societies that seek to use the United Nations platform to roll back gains made in human rights language, and to use national social and political platforms to roll back gains women and men have made in building just and tolerant societies.

This is a trend that women and men are challenging not just in Muslim societies, but everywhere that religion has a public face. Their aim is to build societies where religion forms not the sole element but,

instead, one aspect of a holistic framework that influences public policy. The right to define what these religious beliefs are and what role they should play in public law and policy must be open to public debate and pass the test of public reason.

It is our hope that Musawah as a global movement will lead to that day when those in the Muslim world will realise that women's demands for equality and justice are neither alien nor a threat to Islam, but are rooted in the Islamic tradition. Equality and justice are non-negotiable—and these values must be at the core of what it means to be Muslim today.



# Musawah Framework for Action

*This Framework for Action is a working document that provides a conceptual framework for Musawah, a global movement for equality and justice in the Muslim family. Musawah declares that equality in the family is necessary because many aspects of our current Muslim family laws and practices are unjust and do not respond to the lives and experiences of Muslim families and individuals. Musawah declares that equality in the family is possible through a holistic approach that brings together Islamic teachings, universal human rights principles, fundamental rights and constitutional guarantees, and the lived realities of women and men today. Musawah builds on decades of tireless effort by women's groups and activists in Muslim countries and communities to campaign for reform of Muslim family laws that discriminate against women and to resist regressive amendments demanded by conservative groups within society.*

*The Framework has been developed by a group of Muslim activists and scholars who have come together to initiate Musawah. The core group, coordinated by Sisters in Islam (Malaysia), comprises a twelve-member planning committee of Muslim activists and academics from eleven countries. The Framework was conceptualised and written through a series of meetings and discussions with Islamic scholars, academics, activists and legal practitioners from approximately thirty countries.*



***We hold the principles of Islam to be a source of justice, equality, fairness and dignity for all human beings. We declare that equality and justice are necessary and possible in family laws and practices in Muslim countries and communities.***

### **Recognising that:**

- The teachings of the Qur'an, the objectives of the *Shari'ah*, universal human rights standards, fundamental rights and constitutional guarantees, and the realities of our lives in the twenty-first century, all demand that relations between Muslim women and men in both the private and public spheres be governed by principles and practices that uphold equality, fairness and justice;
- All Muslims have an equal right and duty to read the religious texts, engage in understanding God's message, and act for justice, equality and the betterment of humankind within their families, communities and countries;
- Many laws and practices in Muslim countries are unjust, and the lives of all family members, especially women, are impaired by these injustices on a daily basis;
- Human affairs constantly change and evolve, as do the laws and social practices that shape relations within the Muslim family;
- Islam embodies equality, justice, love, compassion and mutual respect between all human beings, and these values provide us with a path towards change;
- The reform of laws and practices for the benefit of society and the public interest (*maslahah*) has always been part of the Muslim legal tradition; and



- International human rights standards require dignity, substantive equality and non-discrimination for all human beings;

***We, as Muslims and as citizens of modern nations, declare that equality and justice in the family are both necessary and possible. The time for realising these values in our laws and practices is now.***

## **I. Equality and Justice in the Family are Necessary**

Most family laws and practices in today's Muslim countries and communities are based on theories and concepts that were developed by classical jurists (*fuqaha*) in vastly different historical, social and economic contexts. In interpreting the Qur'an and the *Sunnah*, classical jurists were guided by the social and political realities of their age and a set of assumptions about law, society and gender that reflected the state of knowledge, normative values and patriarchal institutions of their time. The idea of gender equality had no place in, and little relevance to, their conceptions of justice. It was not part of their social experience. The concept of marriage itself was one of domination by the husband and submission by the wife. Men were deemed to be protectors of women and the sole providers for the household, such that their wives were not obliged to do housework or even suckle their babies. Women, in turn, were required to obey their husbands completely.

By the early twentieth century, the idea that equality is intrinsic to conceptions of justice began to take root. The world inhabited by the authors of classical jurisprudential texts (*fiqh*) had begun to disappear. But the unequal construction of gender rights formulated in their texts lingered—reproduced, in a modified way, in colonial and post-colonial family laws that merged classical juristic concepts with colonial influences and negative aspects of local customs. Most of the

current Muslim family laws were created through this process, and are therefore based on assumptions and concepts that have become irrelevant to the needs, experiences and values of Muslims today. The administration of these hybrid statutes shifted from classical scholars, who became increasingly out of touch with changing political and social realities, to executive and legislative bodies that had neither the legitimacy nor the inclination to challenge premodern interpretations of the *Shari'ah*. Even in Muslim communities where classical juristic concepts have not been codified into law, the centuries-old *fiqh* rules and colonial and local norms have, in many cases, been invoked to sustain inequality between women and men within the family and wider society.

Injustices resulting from this disconnect between outdated laws and customs and present-day realities are numerous and can be found in many Muslim countries and communities. Such injustices and discrimination were also common in secular laws throughout the world until changes were made in the twentieth century to bring these laws progressively in line with new universal norms of equality. Because family laws and practices are interconnected with all other aspects of society, injustices within the family affect women in many other areas, including dignity, personal security, mobility, property, citizenship, nationality, labour rights, criminal laws and political participation.

In our time and contexts, there cannot be justice without equality. Many aspects of our family laws, as defined by classical jurists and as reproduced in modern legal codes, are neither tenable in contemporary circumstances nor defensible on Islamic grounds. Not only do they fail to fulfil the *Shari'ah* requirement of justice, but they are now being used to deny women dignified choices in life. These elements lie at the root of marital disharmony and the breakdown of the family.

## II. Equality and Justice in the Family are Possible

Qur'anic teachings encompass the principles of justice (*'adl*), equality (*musawah*), equity (*insaf*), human dignity (*karamah*), love and compassion (*mawaddah wa rahmah*). These principles reflect universal norms and are consistent with contemporary human rights standards. These key Qur'anic values can guide further development of family laws and practices in line with the contemporary notion of justice, which includes equality between the sexes and before the law.

Several basic concepts in Islamic legal theory lay the foundation for the claim that family laws and practices can be changed to reflect equality and justice and the lived realities of Muslims today:

- There is a distinction between *Shari'ah*, the revealed way, and *fiqh*, the science of Islamic jurisprudence. In Islamic theology, *Shari'ah* (lit. the way, the path to a water source) is the sum total of religious values and principles as revealed to the Prophet Muhammad to direct human life. *Fiqh* (lit. understanding) is the process by which humans attempt to derive concrete legal rules from the two primary sources of Islamic thought and practice: the Qur'an and the *Sunnah* of the Prophet. As a concept, *Shari'ah* cannot be reduced to a set of laws—it is closer to ethics than law. It embodies ethical values and principles that guide humans in the direction of justice and correct conduct. What many commonly assert to be *Shari'ah* laws are, in fact, often the result of *fiqh*, juristic activity, hence human, fallible and changeable.
- There are two main categories of legal rulings: *'ibadat* (devotional / spiritual acts) and *mu'amalat* (transactional / contractual acts). Rulings in the *'ibadat* category regulate relations between God and the believer, and therefore offer limited scope for change. Rulings

in the *mu'amalat* category, however, regulate relations between humans, and therefore remain open to change. Since human affairs constantly evolve, there is always a need for new rulings that use new interpretations of the religious texts to bring outdated laws in line with the changing realities of time and place (*zaman wa makan*). This is the rationale for *ijtihad* (lit. endeavour, self-exertion), which is the jurist's method for finding solutions to new issues in light of the guidance of revelation. Rulings concerning the family and gender relations belong to the realm of *mu'amalat*, which means that Muslim jurists have always considered them as social and contractual matters that are open to rational consideration and change.

- Laws or amendments introduced in the name of *Shari'ah* and Islam should also reflect the values of equality, justice, love, compassion and mutual respect among all human beings. These are values and principles on which Muslims agree and which Muslim jurists hold to be among the indisputable objectives of the *Shari'ah*. In the words of Ibn Qayyim al-Jawziyyah, the 7th (AH)/14th (CE) century jurist, 'The fundamentals of the *Shari'ah* are rooted in wisdom and promotion of the welfare of human beings in this life and the Hereafter. *Shari'ah* embraces Justice, Kindness, the Common Good and Wisdom. Any rule that departs from justice to injustice, from kindness to harshness, from the common good to harm, or from rationality to absurdity cannot be part of *Shari'ah*, even if it is arrived at through individual interpretation.'
- Diversity of opinion (*ikhtilaf*) is a basic concept that has always been a part of *fiqh*, even after the formal establishment of schools of law. There is not now, nor has there ever been, a single, unitary 'Islamic law'. The very existence of multiple schools of law, let

alone the dozens of Muslim family laws in different countries today, attests to the fact that no one person, group or country can claim there is a unified, monolithic, divine Islamic law over which they have ownership. Within the context of the modern state, we must recognise and engage with this diversity of opinions to determine how best to serve the public interest (*maslahah*) and meet the demands of equality and justice.

Thus, contemporary family laws, whether codified or uncodified, are not divine, but are based on centuries-old, human-made *fiqh* interpretations that were enacted into law by colonial powers and national governments. Since these interpretations and laws are human-made and concern relations between humans, they can change within the framework of Islamic principles and in accordance with the changing realities of time and place. Recent positive reforms in Muslim family laws and evolutions in practices provide support for this possibility of change.

The principles and ideals within the Qur'an lay out a path toward equality and justice in family laws and practices, as they did in ending the institution of slavery. As the injustices of slavery became increasingly recognised and the conditions emerged for its abolishment, laws and practices related to slavery were reconsidered and the classical *fiqh* rulings became obsolete. Similarly, our family laws—as well as practices that have not been codified into law—must evolve to reflect the Islamic values of equality and justice, reinforce universal human rights standards and address the lived realities of families in the twenty-first century. Likewise, laws or amendments introduced in the name of Islam in the future should also reflect the values of equality, justice, love, compassion and mutual respect among all human beings.

### III. Principles on Equality and Justice in the Family

***Principle 1: The universal and Islamic values of equality, non-discrimination, justice and dignity are the basis of all human relations.***

Islam mandates justice (*'adl*), equality (*musawah*), human dignity (*karamah*), and love and compassion (*mawaddah wa rahmah*) in relations among humans and in the family. These principles are also recognised as universal values and enshrined as rights in many national constitutions and international instruments.

In the Qur'an, men and women are equal in creation and in the afterlife. *Surah an-Nisa'* 4:1 states that men and women are created from a single soul (*nafs wahidah*). One person does not come before the other, one is not superior to the other, and one is not the derivative of the other. A woman is not created for the purpose of a man. Rather, they are both created for the mutual benefit of each other.

The Qur'an teaches 'love and tenderness' (*Ar-Rum* 30:21) between women and men; that men and women are like each other's garments (*Al-Baqarah* 2:187); that 'be it man or woman: each of you is an issue of the other' (*Al-Imran* 3:195); and that 'both men and women—they are close unto one another, they [all] enjoy the doing of what is right and forbid the doing of what is wrong' (*At-Tawbah* 9:71). The four Qur'anic verses that apparently speak of men's authority over women in the family and inequality between them in society (*Al-Baqarah* 2:222, 228 and *An-Nisa* 4:2, 34) must be understood in light of the broader Islamic principles and the objectives of the *Shar'iah*, and not in isolation.

Understandings of justice and injustice change over time. Within the context of the Qur'anic worldview of justice and equality, there are many verses that can provide a model for relations within the family and

between all human beings that is in line with contemporary notions of justice. To have justice in our time and to remain true to the spirit of Islam and its teachings, equality must be embodied in our laws and practices. Inequality in family relations and human relations must be replaced by mutual respect, affection and partnership.

***Principle 2: Full and equal citizenship, including full participation in all aspects of society, is the right of every individual.***

Islam teaches that all human beings are born equal in worth and dignity, which is echoed in universal human rights principles. The Qur'an promotes absolute equality of 'all men and women' in key aspects of their lives, promising 'for [all of] them has God readied forgiveness of sins and a mighty reward' (*Al-Ahzab* 33:35).

As human beings of equal worth and dignity before God, and as citizens of modern states, all individuals are entitled to exercise equal rights to political participation and leadership, equal access to economic resources, equality before the law, and equal autonomy in the economic, social, cultural and political spheres. The Qur'an notes that all human beings, men and women, are agents (*khalifah*) of God, charged with realising God's will on earth. In countries where Islam is a source of law and policy, as well as communities in which Islam influences customs and traditions, it is the right and duty of all Muslims—and all people—to openly contribute to laws, policies and practices in order to achieve justice and equality within their families, communities and societies.

***Principle 3: Equality between men and women requires equality in the family.***

Islam calls for equality, justice, compassion and dignity between all people. Family laws and practices must therefore fulfil this call by

promoting these principles and responding to the lived realities of Muslim women and men today.

Women and men alike are entitled to equality and justice within the family, as well as respect and recognition for their contributions. The acknowledgement of joint responsibilities within the family must be accompanied by equal rights, equal decision-making practices, equal access to justice, equal property ownership, and equal division of assets upon divorce or death. Islamic principles, universal human rights standards, constitutional and legal guarantees, and the lived realities of women and men today together provide a path for our communities to ensure equality and justice in family laws and practices. In the twenty-first century, the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)—which stands for justice and equality for women in the family and society—are more in line with the *Shari'ah* than family law provisions in many Muslim countries and communities.

***Realisation of these principles entails laws and practices that ensure:***

- The family as a place of security, harmony, support and personal growth for all its members;
- Marriage as a partnership of equals, with mutual respect, affection, communication and decision-making authority between the partners;
- The equal right to choose a spouse or choose not to marry, and to enter into marriage only with free and full consent; and the equal right to dissolve the marriage, as well as equal rights upon its dissolution;



- Equal rights and responsibilities with respect to property, including acquisition, ownership, enjoyment, management, administration, disposition and inheritance, bearing in mind the need to ensure the financial security of all members of the family; and
- Equal rights and responsibilities of parents in matters relating to their children.



We, as women and men who embrace the Islamic and universal values of equality and justice, call for a renewal of these values within the Muslim family. We urge our governments and political leaders, international institutions, religious leaders, and our sisters and brothers to come together to ensure that our family laws and practices uphold these values.

***Equality, justice, fairness and dignity are necessary and possible in Muslim families in the twenty-first century. The time for integrating these values into our laws and realising them in our daily lives is now.***



# Towards Gender Equality: Muslim Family Laws and the *Shari'ah*

Ziba Mir-Hosseini

*Who is to say if the key that unlocks the cage  
might not be hidden inside the cage?*<sup>1</sup>

This paper examines the conceptions of gender in Islamic legal thought and the challenge that they present to the construction of an egalitarian Muslim family law. I ask two prime questions: If justice and equality are intrinsic values in Islam, why are women treated as second-class citizens in Islamic jurisprudential texts? If equality has become inherent to conceptions of justice in modern times, as many Muslims now recognise, how can it be reflected in Muslim family laws?

After a note on my approach and conceptual framework, I proceed to examine rules and opinions regulating marriage and its termination as formulated by classical Muslim jurists (*fuqaha*).<sup>2</sup> I choose this focus for two reasons. First, it is through these rules that the control and subjugation of women have been legitimated and institutionalised throughout the history of the Muslim world. Secondly, it is through these rules that gender inequality is sustained in the contemporary world. In the course of the twentieth century, while Muslim states put aside Islamic legal theory in all other areas of law, they retained its provisions on marriage and divorce, selectively reformed, codified and grafted them onto a modern legal system. By highlighting the theological, philosophical and jurisprudential assumptions that informed the classical jurists' construction of marriage, I aim to explore the genesis of gender inequality in Islamic legal tradition. In the final part I consider the challenge this tradition presents to those seeking to advance an

egalitarian construction of gender rights within an Islamic framework, and I outline relevant developments during the twentieth century. I conclude with some suggestions towards the construction of an egalitarian Muslim family law.

There are three elements to the argument. First, I show that there is neither a unitary nor a coherent concept of gender rights in Islamic legal thought, but rather a variety of conflicting concepts, each resting on different theological, juristic, social and sexual assumptions and theories. This, in part, reflects a tension in Islam's sacred texts between ethical egalitarianism as an essential part of its message and the patriarchal context in which this message was unfolded and implemented.<sup>3</sup> This tension has enabled both proponents and opponents of gender equality to claim textual legitimacy for their respective positions and gender ideologies.<sup>4</sup> Secondly, I argue that Muslim family laws are the products of sociocultural assumptions and juristic reasoning about the nature of relations between men and women. In other words, they are 'man-made' juristic constructs, shaped by the social, cultural and political conditions within which Islam's sacred texts are understood and turned into law. The idea of gender equality, which became inherent to conceptions of justice only in the twentieth century, has presented Islamic legal thought with a challenge it has yet to meet. Finally, I argue that many elements in these laws are neither defensible on Islamic grounds nor tenable under contemporary conditions; not only are they contrary to the egalitarian spirit of Islam, they are invoked to deny Muslim women justice and dignified choices in life.

## **I. Approach and Conceptual Framework**

I approach Islamic legal tradition as a trained legal anthropologist, but also as a believing Muslim woman who needs to make sense of her

faith and her religious tradition.<sup>5</sup> I am a committed participant in debates over the issue of gender equality in law, and I place my analysis within the tradition of Islamic legal thought by invoking two distinctions in that tradition. These distinctions have been distorted and obscured in modern times, when modern nation states have created uniform legal systems and selectively reformed and codified elements of Islamic family law, and when a new political Islam has emerged that uses *Shari'ah* as an ideology.

The first distinction is between *Shari'ah* and *fiqh*—a distinction that underlies the emergence of the various schools of Islamic law, and, within them, a multiplicity of positions and opinions.<sup>6</sup> *Shari'ah*, which literally means ‘the path or the road leading to the water’, in Muslim belief is the totality of God’s will as revealed to the Prophet Muhammad. As Fazlur Rahman notes, ‘in its religious usage, from the earliest period, it has meant “the highway of good life”, i.e. religious values, expressed functionally and in concrete terms, to direct man’s life’.<sup>7</sup> *Fiqh*, which literally means ‘understanding’, denotes the process of human endeavour to discern and extract legal rules from the sacred sources of Islam: that is, the Qur’an and the *Sunnah* (the practice of the Prophet, as contained in *Hadith*, Traditions). In other words, while the *Shari'ah* in Muslim belief is sacred, eternal and universal, *fiqh*, consisting of the vast literature produced by Muslim jurists, is—like any other system of jurisprudence—human, mundane, temporal and local.

It is essential to stress this distinction and its epistemological and political ramifications. *Fiqh* is often mistakenly equated with *Shari'ah*, not only in popular Muslim discourses but also by specialists and politicians, and often with ideological intent: that is, what Islamists and others commonly assert to be a ‘*Shari'ah* mandate’ (hence divine and infallible), is in fact the result of *fiqh*, juristic speculation and extrapolation (hence human and fallible). *Fiqh* texts, which are patriarchal in both spirit and form, are frequently invoked as a means to silence and

frustrate Muslims' search for this-worldly justice—to which legal justice and equality in law are intrinsic.

In line with emerging feminist voices in Islam, I contend that patriarchal interpretations of the *Shari'ah* can and must be challenged at the level of *fiqh*, which is nothing more than the human understanding of the divine will—what we are able to understand of the *Shari'ah* in this world at the legal level. In short, it is the distinction between *Shari'ah* and *fiqh* that enables me—as a believing Muslim—to argue for gender justice within the framework of my faith. Throughout this paper, then, the *Shari'ah* is understood as a transcendental ideal that embodies the spirit and the trajectory of Islam's revealed texts, a path that guides us in the direction of justice; while *fiqh* includes not only the legal rulings (*ahkam*) and positive laws (enacted or legislated) that Muslim jurists claim to be rooted in the sacred texts, but also the vast corpus of jurisprudential and exegetic texts produced by the scholars.

The concept of justice is deeply rooted in Islam's teaching, and is integral to the basic outlook and philosophy of the *Shari'ah*. This is where the juristic consensus ends. What justice requires and permits, its scope and its manifestation in laws, and its roots in Islam's sacred texts, have been the subject of contentious debates.<sup>8</sup> In brief, there are two schools of theological thought. The prevailing *Ashari* school holds that our notion of justice is contingent on revealed texts and is not subject to extra-religious rationality. The *Mutazili* school, on the other hand, argues that our notion of justice is innate and has a rational basis, and exists independently of revealed texts. I adhere to the second position, as developed by contemporary neo-rationalist Muslim thinkers, notably Abdolkarim Soroush and Nasr Hamid Abu Zayd.<sup>9</sup> In this perspective, our notion of justice, like our understanding of revealed texts, is contingent on the knowledge around us, and is shaped by extra-religious forces. In Soroush's words, 'Justice as a value cannot be religious, it is religion that has to be just';<sup>10</sup> any religious text

or law that defies our notion of justice should be reinterpreted in the light of an ethical critique of their religious roots.

[B]oth linguistic strategy and conceptual analysis make it abundantly clear that while justice is not a verb or an action, it is often used as an adjective. The field of ethics tells you when and in what contexts actions are just, that is, justified. [F]or the most we can achieve is an interpretation of justice—a definition of what counts as justice. Such interpretations are of course conventional and provisional, and they differ from each other.<sup>11</sup>

My second distinction, which I take from *fiqh*, is that between the two main categories of legal rulings (*ahkam*): between *'ibadat* (devotional/spiritual acts) and *mu'amalat* (transactional/contractual acts).<sup>12</sup> Rulings in the first category, *'ibadat*, regulate relations between God and the believer, where jurists contend there is limited scope for rationalisation, explanation and change, since they pertain to the spiritual realm and divine mysteries. This is not the case with *mu'amalat*, which regulate relations among humans and remain open to rational considerations and social forces, and to which most rulings concerning women and gender relations belong. Since human affairs are in constant change and evolution, there is always a need for new rulings, based on new interpretations of the sacred texts, in line with the changing realities of time and place. This is the very rationale for *ijtihad* ('self-exertion', 'endeavour'), which is the jurist's method of finding solutions to new issues in the light of the guidance of revelation.

I must stress that I am not attempting to emulate Muslim jurists (*fuqaha*), who extract legal rules from the sacred sources by following juristic methodology (*usul al-fiqh*). Nor is my approach the same as that of the majority of Muslim feminists who go back to the sacred texts in order to 'unread patriarchy'.<sup>13</sup> I am not concerned—nor qualified—to do

*ijtihad* nor to offer (yet another) new reading of the sacred texts; this is contested terrain, where both those who argue for gender equality, and those who reject it, can and do provide textual support for their arguments, though commonly taking it out of context in both cases. Rather, I seek to engage with juristic constructs and theories, to unveil the theological and rational arguments and legal theories that underlie them; above all, to understand the conception of justice and the notion of gender that permeate family law in Islamic legal tradition, which I contend is a social construction, like other laws in the realm of *mu'amalat*, and is shaped in interaction with political, economic, social and cultural forces and with those who have the power to represent and define interpretations of Islam's sacred texts.

## **II. The Sanctification of Patriarchy in Islamic Legal Tradition**

The conception of gender rights in Islamic legal thought is nowhere more evident than in the rules that classical jurists devised for the formation and termination of marriage. In these matters, the various *fiqh* schools all share the same inner logic and patriarchal conception. If they differ, it is in the manner and extent to which they have translated this conception into legal rules.<sup>14</sup> They defined marriage as a contract of exchange, with fixed terms and uniform legal effect, whose main purpose is to make sexual relations between a man and woman licit. The contract is called *aqd al-nikah* ('contract of coitus') and has three essential elements: the offer (*ijab*) by the woman or her guardian (*wali*), the acceptance (*qabul*) by the man, and the payment of dower (*mahr*), a sum of money or any valuable that the husband pays or undertakes to pay to the bride before or after consummation.



In discussing marriage and its legal structure, classical jurists often used the analogy of the contract of sale, and they had no qualms in drawing parallels between the two. For instance, this is how Muhaqqiq al-Hilli, the renowned thirteenth-century *Shari'ah* jurist, opens his discussion of marriage:

[I]t has been said that [marriage] is a contract whose object is that of dominion over the vagina (*buz'*), without the right of its possession. It has also been said that it is a verbal contract that first establishes the right to sexual intercourse, that is to say: it is not like buying a female slave when the man acquires the right of intercourse as a consequence of the possession of the slave.<sup>15</sup>

Sidi Khalil, the prominent fourteenth-century Maliki jurist, was equally explicit:

When a woman marries, she sells a part of her person. In the market one buys merchandise, in marriage the husband buys the genital *arvum mulieris*.<sup>16</sup>

Likewise, Al-Ghazali, the twelfth-century philosopher and jurist, drew parallels between the status of wives and female slaves, to whose sexual services husbands/owners were entitled. In his monumental work *Revival of Religious Sciences*, he devoted a book to defining the proper code of conduct in marriage (*Adab al-Nikah*, Etiquette of Marriage), which makes explicit the assumptions in the *fiqh* rulings on marriage.<sup>17</sup> Significantly, he ends the discussion with a section on 'Rights of the Husband', and he relies on *Hadith* (the sayings of the Prophet) literature to enjoin women to obey their husbands and remain at home.<sup>18</sup> He begins:

It is enough to say that marriage is a kind of slavery, for a wife is a slave to her husband. She owes her husband absolute obedience in whatever he may demand of her, where she herself is concerned, as long as no sin is involved. We find many traditions emphasizing the husband's rights over his wife. The Prophet (Allah bless him and give him peace) said: A woman who dies, leaving her husband content with her, will enter Paradise.<sup>19</sup>

I am not suggesting that classical jurists conceptualised marriage either as a sale or as slavery.<sup>20</sup> Certainly there were significant differences and disagreements about this among the schools, and debates within each, with legal and practical implications for women.<sup>21</sup> Even statements such as those quoted above distinguish between the right of access to the woman's sexual and reproductive faculties (which her husband acquires) and the right over her person (which he does not). Rather, my point is that the notion and the legal logic of 'ownership' (*tamlík*) underlie their conception of marriage, in which a woman's sexuality, if not her person, becomes a commodity, an object of exchange. It is this legal logic that defines the rights and duties of each spouse in marriage.

Aware of possible misunderstandings, classical jurists were careful to stress that marriage and divorce resembles a sale contract and manumission only in form, not in spirit, and they drew a clear line between free and slave women in terms of rights and social status. The marriage contract is among the few contracts in *fiqh* that crosses the boundary between its two main divisions: *'ibadat* and *mu'amalat*. The jurists spoke of marriage as a religious duty, lauded its religious merit and enumerated the ethical injunctions that the contract entailed for the spouses. But these ethical injunctions were eclipsed by those elements in the contract that made female sexuality the object of exchange in marriage, sanctioned men's control over women and

gave them a free hand in ending the contract. What classical jurists defined as the prime ‘purposes of marriage’ separated the legal from the moral in marriage; their consensus held these purposes to be: the gratification of sexual needs, procreation, and the preservation of morality.<sup>22</sup> Whatever served or followed from these purposes became compulsory duties incumbent on each spouse, which the jurists discussed under *ahkam al-zawaj* (laws of matrimony). The rest, though still morally incumbent, remained legally unenforceable and were left to the conscience of individuals.

With a marriage contract a woman comes under her husband’s *isma*—which can be translated as authority, protection and control. For each party, the contract entails a set of defined rights and obligations, some with moral sanction and others with legal force. Those with legal force revolve around the twin themes of sexual access and compensation, embodied in the two concepts *tamkin* (obedience; also *ta’a*) and *nafaqa* (maintenance).<sup>23</sup> *Tamkin*, defined in terms of sexual submission, is a man’s right and thus a woman’s duty; whereas *nafaqa*, defined as shelter, food and clothing, became a woman’s right and a man’s duty. A woman is entitled to *nafaqa* only after consummation of the marriage, and she loses her claim if she is in a state of *nushuz* (disobedience). The contract does not create joint ownership of resources: the husband is the sole owner of the matrimonial resources, and the wife remains the possessor of her dower and whatever she brings to or earns during the marriage. She has no legal duty to do housework and is entitled to demand wages if she does. The procreation of children is the only area the spouses share, but even here a wife is not legally required to suckle her child, and can demand compensation if she does.

Among the default rights of the husband is his power to control his wife’s movements and her excess piety. She needs his permission to leave the house, to take up employment, or to engage in fasting or forms of worship other than what is obligatory (for example the

fast of Ramadan). Such acts may infringe on the husband's right of 'unhampered sexual access'.<sup>24</sup>

A man can enter up to four marriages at a time,<sup>25</sup> and can terminate each contract at will: he needs neither grounds for termination nor the consent nor the presence of his wife. Legally speaking, *talaq*, repudiation of the wife, is a unilateral act (*iqa*), which acquires legal effect by the husband's declaration. Likewise, a woman cannot be released without her husband's consent, although she can secure her release through offering him inducements, by means of *khul'*, often referred to as 'divorce by mutual consent'. As defined by classical jurists, *khul'* is a separation claimed by the wife as a result of her extreme 'reluctance' (*karahiya*) towards her husband, and the essential element is the payment of compensation (*iwad*) to the husband in return for her release. This can be the return of the dower, or any other form of compensation. Unlike *talaq*, *khul'* is not a unilateral but a bilateral act, as it cannot take legal effect without the consent of the husband. If the wife fails to secure his consent, then her only recourse is the intervention of the court and the judge's power either to compel the husband to pronounce *talaq* or to pronounce it on his behalf. In defining *talaq* as the exclusive right of the husband, the classical jurists used the analogy of manumission—a right that exclusively rested with the master of a slave. In Ghazali's words, 'the man is the owner and he has, as it were, enslaved the woman through the dowry and ... she has no discernment in her affairs'.<sup>26</sup>

### **i. Questioning the Patriarchal Premises**

These are, in a nutshell, the classical *fiqh* rulings on marriage and divorce. Islamists and Muslim traditionalists claim that they are divinely ordained, that they embody the *Shari'ah* conception of family and gender rights, and thereby invoke them to legitimate patriarchy on religious grounds. Such claims, however, should be challenged on their own terms, so

that patriarchal readings of Islam's sacred texts can be separated from the ideals and objectives of the *Shari'ah*. Among important questions to ask are: how far does this conception of gender reflect the principle of justice that is inherent in the *Shari'ah*? Why and how did classical *fiqh* deprive women of free will and make them subject to male authority when it comes to marriage? What are the ethical and rational bases for this conception of marriage? These questions become even more crucial if we accept—as I do—the sincerity of the classical jurists' claim that their rulings are derived from the sacred sources of Islam and that they reflect the justice that is an indisputable part of the *Shari'ah*.<sup>27</sup>

Feminist scholarship in Islam gives us two sets of related answers. The first set is ideological and political, and has to do with the strong patriarchal ethos that informed the classical jurists' readings of the sacred texts and the exclusion of women from production of religious knowledge, and their consequent inability to have their voices heard and their interests reflected in law. The second set of answers is more epistemological,<sup>28</sup> and concerns the ways in which social norms, existing norms, marriage practices and gender ideologies were sanctified, and then turned into fixed entities in *fiqh*. That is, rather than considering them as social, thus temporal institutions and phenomena, the classical jurists treated them as 'divinely ordained', thus immutable. Let me elaborate.

The model of marriage and gender roles constructed in *fiqh* is grounded in the patriarchal ideology of pre-Islamic Arabia, which continued into the Islamic era, though in a modified form. There is an extensive debate in the literature on this, which I will not enter.<sup>29</sup> But there are two points of consensus among the students of Islam and gender. The first is that the revelatory texts and the Prophet altered only some of the existing patriarchal practices of the time (such as burying infant girls alive and coercing women into unwanted marriages) and left others intact (such as polygamy and men's right to unilateral divorce).

The Qur'an and the *Hadith* set in motion a reform of family laws in the direction of justice that was halted after the Prophet's death. What the Prophet did was to rectify injustice and to introduce justice, as these were understood in his day. Secondly, the further we move from the time of revelation, the more women are marginalised and lose their political clout: their voices are silenced and their presence in public space is curtailed.

Many verses in the Qur'an condemn women's subjugation, affirm the principle of equality between genders and aim to reform existing practices in that direction.<sup>30</sup> Yet this subjugation is reproduced in *fiqh*—though in a mitigated form. The classical *fiqh* model of marriage is based on one type of marriage agreement prevalent in pre-Islamic Arabia, known as 'marriage of dominion'; it closely resembled a sale, by which a woman became the property of her husband.<sup>31</sup> The jurists redefined and reformed certain aspects of the 'marriage of dominion' to accommodate the Qur'anic call to reform and to enhance women's status and to protect them in a patriarchal institution. Women became parties to, not subjects of, the contract, and recipients of the dower or marriage gift. Likewise, by modifying the regulations on polygamy and divorce, the jurists curtailed men's scope of dominion over women in the contract, without altering the essence of the contract or freeing women from the authority of men—whether fathers or husbands.<sup>32</sup>

In producing these rulings, the jurists based their theological arguments on a number of philosophical, metaphysical, social and legal assumptions. Salient assumptions that underlie *fiqh* rulings on marriage and gender rights are: 'women are created of and for men', 'God made men superior to women', 'women are defective in reason and faith'. While they are not substantiated in the Qur'an—as recent scholarship has shown<sup>33</sup>—they became the main theological assumptions for classical jurists seeking to discern legal rules from the sacred texts. The moral and social rationale for women's subjugation is found in the theory of

difference in male and female sexuality, which goes as follows: God gave women greater sexual desire than men, but this is mitigated by two innate factors, men's *ghaira* (sexual honour and jealousy) and women's *haya* (modesty and shyness). What jurists concluded from this theory is that women's sexuality, if left uncontrolled by men, runs havoc, and is a real threat to social order. Feminist scholarship on Islam gives vivid accounts of the working of this theory in medieval legal and erotic texts, and its impact on women's lives in contemporary Muslim societies.<sup>34</sup> Women's *haya* and men's *ghairah*, seen as innate qualities defining femininity and masculinity, in this way became tools for controlling women and the rationale for their exclusion from public life.<sup>35</sup> The sale contract, as already discussed, provided the juristic basis for women's subjugation in marriage, and the legal construction of women's bodies as *awrah* (pudenda) and of their sexuality as a source of *fitnah* (chaos) removed them from public space, and thus from political life in Muslim societies.

By the time the *fiqh* schools emerged, women's critical faculties were so far denigrated as to make their concerns irrelevant to law-making processes.<sup>36</sup> Women were among transmitters of prophetic *Hadith*, yet, as Sachedina reminds us:

It is remarkable that even when women transmitters of hadith were admitted in the *'ilm al-rijal* ('Science dealing with the scrutiny of the reports'), and ... even when their narratives were recognized as valid documentation for deducing various rulings, they were not participants in the intellectual process that produced the prejudicial rulings encroaching upon the personal status of women. More importantly, the revelatory text, regardless of its being extracted from the Qur'an or the Sunna, was casuistically extrapolated in order to disprove a woman's intellectual and emotional capacities to formulate independent decisions that would have been sensitive and more accurate in estimating her radically different life experience.<sup>37</sup>

I do not suggest that there was a conspiracy among classical jurists to undermine women, or that they deliberately sought to ignore the voice of revelation. Rather I argue that, in their understanding of the sacred texts, these jurists were guided by their outlook, and in discerning the terms of the *Shari'ah*, they were constrained by a set of gender assumptions and legal theories that reflected the social and political realities of their age. These assumptions and theories, which reflected the state of knowledge and the normative values and patriarchal institutions of their time, came to be treated by subsequent generations as though they were immutable, and as part of the *Shari'ah*. This is what Sachedina calls the crisis of epistemology in traditional evaluation of Islamic legal heritage.

The Muslim jurists, by exercise of their rational faculty to its utmost degree, recorded their reactions to the experiences of the community: *they created, rather than discovered*, God's law. What they created was a literary expression of their aspirations, their consensual interests, and their achievements; what they provided for Islamic society was an ideal, a symbol, a conscience, and a principle of order and identity.<sup>38</sup>

In this way, essentially time-bound phenomena—patriarchal notions of marriage and gender rights—were turned into juridical principles of permanent validity. This was achieved, first by assimilating social norms into *Shari'ah* ideals, secondly by classifying rulings pertaining to family and gender relations under the category of *mu'amalat* (social/private contracts, where the rulings are subject to rationalisation and change) yet treating them as though they belonged to the category of *'ibadat* (acts of worship where the rulings are immutable and not open to rational discussion).

In short, *fiqh* rulings on the family are literal expressions of the classical jurists' consensual understanding of Islam's revealed texts and



their notions of justice and gender relations, shaped in interaction with the values and norms, the social and economic and political realities of the world in which they lived.<sup>39</sup> In this world patriarchy and slavery were part of the fabric of society, seen as the natural order of things, the way to regulate social relations. The concepts of gender equality and human rights—as we mean them today—had no place and little relevance to the classical jurists' conceptions of justice. They were, in Arkoun's terms, 'unthinkable' for premodern Muslim jurists, and thus remained 'unthought' in Islamic legal thought.<sup>40</sup>

It is crucial to remember that, even if ideas of human rights and gender equality belong to the modern world, and were naturally absent in premodern legal theories and systems, nonetheless, until the nineteenth century, the Islamic legal tradition granted women better rights than its Western counterparts. For instance, Muslim women have always been able to retain their legal and economic autonomy in marriage, while in England it was not until 1882, with the passage of the Married Women's Property Act, that women acquired the right to retain ownership of property after marriage.<sup>41</sup>

### **III. The Challenge We Face: Muslim Women's Quest for Equality**

For Muslims, however, the encounter with modernity coincided with their painful and humiliating encounter with Western colonial powers, in which both women and family law became symbols of cultural authenticity and carriers of religious tradition, the battleground between the forces of traditionalism and modernity in the Muslim world—a situation that has continued ever since.<sup>42</sup> All twentieth-century debates and struggles in Muslim family law were inevitably entangled with the legacy of colonialism, in which Muslim women's quest for equality became a hostage to the

politics of modernity. In the new century, this has given way to the so-called 'War on Terror', which most Muslims, rightly or wrongly, perceive as a 'War of Civilisations' directed against them. The result has been, on the one hand, to make them insecure and thus more likely to cling to their religious tradition, but on the other, to delegitimise the internal voices of change and discredit modern discourses such as those of feminism and human rights.

How are we to deal with a patriarchal legal heritage so entangled with politics? How can we argue for gender equality within a legal tradition that claims to be 'sacred', yet whose notions of justice and gender rights go against the very grain of our project? How can we challenge the false sanctity of that legal tradition without support from its power base? Should we advocate radical measures, replace this legal heritage with a different code of law? Or should we continue the patchwork and piecemeal reforms that started a century ago? Or, as some Muslim feminist scholars have suggested, should we simply acknowledge that current *fiqh*-based marriage laws are so compromised that they are beyond repair—an acknowledgement that can free 'progressive Muslims' to 'pursue a new marriage law' based on Qur'anic verses that foreground equality between men and women and cooperation and harmony between spouses?<sup>43</sup>

There are no easy, clear-cut, answers to these questions, which have been subject of theological and political debates among Muslims for over a century. The ideas of equal rights for women and equality in the family, to use a *fiqh* idiom, are among 'newly created issues' (*masa'il mustahdatha*), that is to say, they were not issues that concerned pre-modern jurists, as they were not part of their social experience or relevant to people's conceptions of justice. They continue to present Islamic legal thought with a challenge that it has yet to meet; meanwhile, twentieth-century developments have transformed the interaction between religion, law and family for Muslims. It is against the background of these

transformations that I now turn to explore the arguments and strategies for reform of Muslim family laws.

The first part of the twentieth century saw the expansion of secular education, the retreat of religion from politics and the secularisation of law and legal systems with the rise of modern nation states. In many such Muslim states, classical *fiqh* provisions on the family were selectively reformed, codified and grafted onto unified legal systems inspired by Western models. With the exceptions of Turkey, which abandoned *fiqh* in all spheres of law and replaced it with Western-inspired codes, and Saudi Arabia, which preserved classical *fiqh* as a fundamental law and attempted to apply it in all spheres of law, the large majority of Muslim states retained *fiqh* only with respect to personal status law (family and inheritance).<sup>44</sup> The extent and impetus for reform varied from one country to another, but on the whole one can say that reforms were introduced through procedural rules (i.e. registration of marriages and divorces), which left the substance of the classical law more or less unchanged.

These developments transformed the interaction between Islamic legal theory and social practice, and had two consequences that are of great importance for women, though often overlooked in Muslim family law debates. First, the partial reform and codification of the *fiqh* provisions led to the creation of a hybrid family law that was neither classical *fiqh* nor Western. As codes and statute books took the place of classical *fiqh* manuals, family law was no longer solely a matter for Muslim scholars (*ulema*) operating within particular *fiqh* schools, but became the concern of the legislative assembly of a particular nation state, which had neither the legitimacy nor the inclination to challenge premodern interpretations of the *Shari'ah*. Deprived of the power to define and administer family law, *fiqh* and its practitioners were no longer accountable to the community; they were confined to the ivory tower of seminaries; they lost touch with changing political realities

and were unable to meet the epistemological challenges of modernity, including the idea of gender equality. These developments in practice worked against women, limited their bargaining with religious law and their access to legal justice, and gave *fiqh* rulings a new lease of life: they could now be applied through the machinery of the modern nation-states. Recent studies of medieval and Ottoman court archive materials and judgements show that in those times not only did judges generally take a liberal and protective attitude towards women, but also women could choose between legal schools and judges.<sup>45</sup>

The second consequence was that putting aside *fiqh* as the source of other areas of law reinforced the religious tone of provisions that related to gender rights, turning them into the last bastion of Islam. Thus *fiqh* became a closed book, removed from public debate and critical examination. There emerged a new gender discourse and a genre of literature that can be termed Neo-Traditionalist, accessible to the general public and not necessarily authored by jurists or legal in reasoning and arguments. Published by religious houses and largely written by men—at least until very recently—this literature aims to illuminate the ‘status of women’ in Islam, and to clarify Islamic laws of marriage and divorce.<sup>46</sup> The authors reread the sacred texts in search of new solutions—or more precisely, Islamic alternatives—to accommodate women’s contemporary aspirations for equality, and at the same time to define ‘women’s rights in Islam’. Despite their variety and diverse cultural origins, what these rereadings have in common is an oppositional stance and a defensive or apologetic tone: oppositional, because their concern is to resist the advance of what they see as alien ‘Western’ values and lifestyles; apologetic, because they attempt to explain and justify the gender biases which they inadvertently reveal, by going back to classical *fiqh* texts. They see gender equality as an imported Western concept that must be rejected. Instead, they put forward the notions of ‘complementarity’

and 'balance' in gender rights and duties. These notions, premised on a theory of the 'naturalness' of *Shari'ah* law, are formulated as follows: though men and women are created equal and are equal in the eyes of God, the roles assigned to men and women in creation are different, and classical *fiqh* rules reflect this difference. Differences in rights and duties, these authors maintain, do not mean *inequality* or *injustice*; if correctly understood, they are the very essence of justice, as they are in line with human nature.<sup>47</sup>

In the second part of the twentieth century, with the rise of political Islam, the Neo-Traditionalist texts and their gender discourse became closely identified with Islamist political movements, whose rallying cry was 'Return to *Shari'ah*'. Political Islam had its biggest triumph in 1979 with the popular revolution in Iran that brought Islamic clerics to power. The same year saw the dismantling of reforms introduced earlier in the century by modernist governments in Iran and Egypt, and the introduction of Hudud Ordinances in Pakistan. Yet, this was also the year when the United Nations adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The Islamists' attempts to translate a *fiqh* notion of gender rights into policy provoked criticism and spurred women to increased activism. Their defence of premodern patriarchal interpretations of the *Shari'ah* as 'God's Law', as the authentic 'Islamic' way of life, brought the classical *fiqh* books out of the closet and exposed them to critical scrutiny and public debate. A growing number of women came to question whether there was an inherent or logical link between Islamic ideals and patriarchy. This opened a space, an arena, for an internal critique of patriarchal readings of the *Shari'ah* that was unprecedented in Muslim history. A new phase in the politics of gender in Islam began. One crucial element of this phase has been that it places women themselves—rather than the abstract notion of 'woman in Islam'—at the heart of the battle between forces of traditionalism and modernism.<sup>48</sup>

By the early 1990s, there were clear signs of the emergence of a new consciousness, a new way of thinking, a gender discourse that is 'feminist' in its aspiration and demands, yet 'Islamic' in its language and sources of legitimacy. Some versions of this new discourse came to be labelled 'Islamic feminism'—a conjunction that is unsettling to many Islamists and some secular feminists. This discourse is sheltered by a new trend of reformist religious thought that is consolidating a conception of Islam and modernity as compatible, not opposed. Reformist thinkers do not reject an idea simply because it is Western, nor do they see Islam as providing a blueprint, as having an in-built programme of action for the social, economic, and political problems of the Muslim world. Following and building on the work of earlier reformers such as Mohammad Abduh, Muhammad Iqbal and Fazlur Rahman, they contend that the human understanding of Islam is flexible, that Islam's tenets can be interpreted to encourage both pluralism and democracy, and that Islam allows change in the face of time, space and experience.<sup>49</sup> Not only do they pose a serious challenge to legalistic and absolutist conceptions of Islam, they are carving a space within which Muslim women can achieve gender equality in law.

Instead of searching for an Islamic genealogy for modern concepts like gender equality, human rights and democracy (the concern of earlier reformers), the new thinkers place the emphasis on how religion is understood and how religious knowledge is produced. Revisiting the old theological debates, they aim to revive the rationalist approach that was eclipsed when legalism took over as the dominant mode and gave precedence to the form of the law over substance and spirit. In this respect, the works of the new wave of Muslim thinkers such as Mohammad Arkoun, Khaled Abou El Fadl, Nasr Abu Zayd, Mohammad Mojtahed Shabestari and Abdolkarim Soroush are of immense importance and relevance.<sup>50</sup> The questions they are now asking, and the assumptions that inform their readings of the sacred

texts, are radically different from those of classical jurists. They are re-examining critically the older interpretations and epistemologies and exposing the contradictions inherent in the earlier discourses on family and gender rights.

#### **IV. Where We Stand: Observations and Suggestions**

Before considering further the implications of twentieth-century developments for Muslim women's quest for equality, let me return to my opening questions, which I would now rephrase as: Why and how did Muslim family law come to be as patriarchal as it is? Can there be an equal construction of gender rights within the framework of Islamic legal thought? In other words, can Islamic and human rights frameworks coexist? If so, how and by what means and processes?

I have pursued the first question in the context of the classical *fiqh* discourse on gender. The gist of my argument was that the genesis of gender inequality in Islamic legal tradition lies in the inner contradictions between the ideals of the *Shari'ah* and the patriarchal structures in which these ideals unfolded and were translated into legal norms. While *Shari'ah* ideals call for freedom, justice and equality, their realisation was impeded in the formative years of Islamic law by Muslim social norms and structures.<sup>51</sup> Instead, these social norms were assimilated into *fiqh* rulings through a set of theological, legal and social theories and assumptions that reflected the state of knowledge of the time, or were part of the cultural fabric of society. In this way, Islamic legal thought became the prisoner of its own theories and assumptions, which in time came to overshadow the ethical and egalitarian voice of Islam and its call for justice and reform, thus negating the spirit of the *Shari'ah*.

I raised the second question—the possibility of achieving gender equality within an Islamic framework—through a discussion of

the twentieth-century developments that transformed the interaction between Islamic legal theory and practice. The gist of my argument was that these developments—the partial reforms and codification of *fiqh* notions of gender during the first half of the century and their abandonment in the second half after the rise of political Islam—have made it abundantly clear that there can be no justice for women as long as patriarchy is not separated from Islam's sacred texts and the *Shari'ah*. In the course of the century, the idea of gender equality became inherent to global conceptions of justice and acquired a clear legal mandate through international human rights instruments, notably the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Since it came into force in 1981, CEDAW has been ratified by all Muslim states except Iran, Qatar, Somalia and Sudan, though, in most cases, ratification has been subject to 'Islamic reservations'—a notion that speaks of unresolved tensions between CEDAW and Islamic legal theory.

Let me conclude with three observations that suggest that a rapprochement between the two is in the making, and that the catalyst for this has been the rise of political Islam and its slogan of 'Return to the *Shari'ah*'. Among the paradoxical and unintended consequences of the rise of political Islam was the demystification of the sanctity that veiled the patriarchal interpretations of the *Shari'ah*, so that women gained both the cause to demand equality and the language to argue for it from within the tradition.

First, as the twentieth century came to a close, for many Muslims the patriarchal dogmas and constructs that informed the pre-modern notions of marriage in Islamic legal theory lost their theological validity and their power to convince. In their place, the discourses of feminism and human rights have combined to bring a new consciousness and a new point of reference for Muslim women and reformist thinkers. The growing body of texts under the rubric of 'women in Islam' (much



of it now on the Internet) is a clear sign of recognition of this new consciousness. As I have argued elsewhere, this literature must be seen as constituting its own subject matter, as opening a space in Islamic legal tradition within which women are treated as ‘social beings’, ‘rights-holders’ and citizens—concepts that were alien to classical *fiqh*, which treated women as ‘sexual beings’ and discussed their rights only in the contexts of marriage and divorce.<sup>52</sup> Ranging from sound scholarship to outright polemics, this literature displays different positions and different gender perspectives, from endorsements of the classical *fiqh* rules to advocacy of gender equality on all fronts. Irrespective of their position and gender perspective, all contributors to the literature agree that ‘Islam honours women’s rights’, and that justice and fairness are integral to the *Shari’ah*; they disagree on what these rights are, on what constitutes justice for women, and how to realise it within an Islamic framework.

The intensity of the debate, and the diametrically opposed positions taken by some authors, are indications of a paradigm shift in thinking about gender rights, Islamic legal theory and politics. Significantly, even those who see classical *fiqh* rulings on marriage and gender roles as immutable, as part of the *Shari’ah*, use titles such as ‘Women’s Rights in Islam’ and ‘Gender Equity in Islam’, and are silent on the juristic theories and theological assumptions that underlie them, which I have outlined above.<sup>53</sup> For instance, they omit the explicit parallels that classical jurists made between the legal structures of sale and the marriage contract, and statements such as those of Ghazali, which speak of marriage as a type of enslavement for women. Such notions and statements are so repugnant to modern sensibilities and ethics, so alien from the experience of marriage among contemporary Muslims, that no one can afford to acknowledge them. This, in my view, is clear proof that the classical *fiqh* definition of marriage has already become irrelevant to the contemporary experiences and ethical values of Muslims, and that a ‘paradigm shift’ in Islamic law and politics is well

underway. We become aware of the old paradigm only when the shift has already taken place, when the old rationale and logic, previously undisputed, lose their power to convince and cannot be defended on ethical grounds.<sup>54</sup>

My second point and observation is that legal systems and jurisprudential theories must be understood in the cultural, political and social contexts in which they operate. The old *fiqh* paradigm, with its strong patriarchal ethos, as well as the new feminist readings of the *Shari'ah*, should be understood in this complex double image, as both expressing and moulding social norms and practice. We must not forget that legal theory or jurisprudence is often reactive, in that it reacts to social practices, to political, economic and ideological forces and people's experiences and expectations. In other words, law most often follows or reflects practice; that is to say, when social reality changes, then social practice will effect a change in the law. Islamic legal theory is no exception—as attested by the way both legal systems and women's lives and social experiences have been transformed in the course of the twentieth century. The new feminist voices in Islam herald the coming of an egalitarian legal paradigm that is still in the making. The 2004 Moroccan family code, establishing equality in marriage and divorce between spouses, is evidence of the new trend in family law reform.

On the basis of these observations, I suggest that arguments and strategies for Muslim family law reform need to be concurrently placed within Islamic and human rights frameworks. The distinction between *Shari'ah* and *fiqh*, and the demand for legal justice, provide us with the conceptual tools to make the link between the two frameworks, and to defuse the opposition to gender equality voiced by defenders of traditional *fiqh* conceptions of marriage and by Islamists invoking cultural relativist arguments disguised in Islamic terminology. It is important to remember that it is not our task to define what justice

is, but to cry out when women face and experience injustice and discrimination because of their gender. Like *Shari'ah*, justice is a direction, a path towards which we can only strive; and we can claim, with the full certainty of our faith and awareness of our Islamic heritage, that some elements of Muslim family laws as formulated by classical jurists and reproduced in modern legal codes have become empty legal shells and are no longer in line with the justice of the *Shari'ah*. As Hashim Kamali reminds us,

A perusal of the Qur'anic evidence on justice leaves one with no doubt that justice is integral to the basic outlook and philosophy of Islam, within or beyond the *Shari'a* itself. It is therefore not incorrect to say that the *Shari'a* itself can be measured by its effectiveness to administer justice. This is the understanding, in fact, that the renowned Hanbali Jurist Ibn Qayyim al-Jawziyya, has conveyed in his widely quoted statement that **'Islam will stand always for justice and any path that is taken toward justice is bound to be in harmony with the Shari'a and can never be against it.'**<sup>55</sup>

Understandings of justice and injustice change over time. 'In setting out the social rulings that relate to justice and injustice, the Prophet took the people of his own age from that day's injustice to that day's justice, from that day's ignorance to that day's knowledge; not from the day's injustice to ahistorical justice, not from the day's ignorance to ahistorical knowledge'.<sup>56</sup> The Qur'an and the Prophet's *Sunnah* guide us to a path to follow, the *Shari'ah*, and a trajectory towards justice. In the twenty-first century, the provisions of CEDAW—which stands for justice and equality for women in the family and in society—are more in line with the *Shari'ah* than are the provisions of family laws in many contemporary Muslim countries. What complicates the situation, of course, is the political context in which both international human rights and *Shari'ah*

have been used as pawns and ideological projects. But first, we need to get away from the polarised thinking and the global rhetoric that are silencing the voices of reason in both camps.

## Notes

- 1 Sharma and Young, *Feminism and World Religions*, p. ix.
- 2 By classical, I mean dating from the formative period, before modern times.
- 3 Ahmed, 'Early Islam and the Position of Women', p. 58.
- 4 It is important to note that, as feminist scholarship on religion teaches us, such a tension is present in other scriptural religions. See Gross, *Buddhism after Patriarchy*, for this tension in Buddhism; Ruether, *Sexism and God-Talk*, and Schussler Fiorenza, *Bread Not Stone*, for Christianity; Heschel, *On Being a Jewish Feminist*, and Plaskow, *The Coming of Lilith*, for Judaism.
- 5 A clear statement of position is important, as the literature on Islam and women is replete with polemic in the guise of scholarship. Mir-Hosseini, *Islam and Gender*, pp. 3-6.
- 6 Among current scholars of Islamic law, Kamali, *Freedom, Equality and Justice in Islam*, p. 216, and Abou El Fadl, *Speaking in God's Name*, pp. 32-5, use this distinction; An-Na'im, 'Islamic Foundation for Women's Human Rights', pp. 33-4, does not.
- 7 Rahman, *Islam*, p. 100.
- 8 For a discussion of conceptions of justice in Islamic texts, see Khadduri, *The Islamic Conception of Justice*, and Lampe, *Justice and Human Rights in Islamic Law*; for a discussion of the absence of theological debates in the work of contemporary jurists, see Abou El Fadl, 'The Place of Ethical Obligations in Islamic Law'; for discussion of links between justice and *Shari'ah*, see Kamali, *Justice in Islam*.
- 9 See Soroush, 'Islamic Revival and Reform' and <http://drsoroush.com/English>; Nasr Hamid Abu Zayd, 'The Qur'anic Concept of Justice' and *Reformation of Islamic Thought*.
- 10 Soroush, 'Islamic Revival', pp. 131-3.
- 11 Soroush, 'The Beauty of Justice', pp. 8-9.

- 12 For useful and concise introductions to Islamic legal theory, see Hallaq, *A History of Islamic Legal Theories*, and Kamali, *An Introduction to Shari'ah*.
- 13 The growing literature of feminist scholarship in Islam, too large to list here, has so far focused on Qur'an and *Hadith*; Kecia Ali, in 'Progressive Muslims and Islamic Jurisprudence' and *Sexual Ethics and Islam*, engages with *fiqh*, as to some extent does Al-Hibri in 'Islam, Law and Custom', 'Muslim Women's Rights in the Global Village' and 'An Islamic Perspective on Domestic Violence'. For a useful collection, see Webb, *Windows of Faith*; other important works are: Barazangi, *Women's Identity and the Qur'an*; Barlas, *Believing Women in Islam*; Hassan, 'Equal Before Allah?' and 'Feminist Theology'; Mernissi, *Women and Islam*; and Wadud, *Qur'an and Woman*, 'Qur'an, Gender and Interpretive Possibilities' and *Inside the Gender Jihad*.
- 14 Space does not allow me to elaborate on these differences, which in practice have important implications for women. The discussion here is intended merely to outline the salient features of the marriage contract and to give references to sources available in English; for differences between the *fiqh* schools, see Maghniyyah, *Marriage According to Five Schools of Islamic Law*, and Ibn Rushd, *The Distinguished Jurist's Primer*, pp. 1-150. For introductions to and translations of classical texts on marriage, see Farah, *Marriage and Sexuality in Islam*, and Spectorosky, *Chapters on Marriage and Divorce*; and for critical analysis of the marriage contract, see Ali, 'Progressive Muslims' and *Sexual Ethics*; Mir-Hosseini, *Marriage on Trial*, 'The Construction of Gender in Islamic Legal Thought and Strategies for Reform' and 'Islam and Gender Justice'.
- 15 Hilli, *Sharayi' al-Islam*, p. 428.
- 16 Ruxton, *Maliki Law*, p. 106. Jorjani, another Maliki jurist, defines marriage in the following terms: 'a contract through which the husband acquires exclusive rights over the sexual organs of woman'

- (quoted by Pesle in *Le Mariage chez les Malekites de l'Afrique du Nord*, p. 20).
- 17 For an excellent introduction to and translation of this book, see Farah, *Marriage*.
- 18 For critical discussion of these *Hadith*, see Abou El Fadl, *God's Name*, pp. 232-47.
- 19 Al-Ghazali, *The Proper Conduct of Marriage in Islam*, p. 89. For another rendering of this passage, see Farah, *Marriage*, p. 120.
- 20 For similarities in the juristic conceptions of slavery and marriage, see Marmon, 'Domestic Slavery in the Mamluk Empire', and Willis, 'Introduction'.
- 21 For these disagreements, see Ali, 'Progressive Muslims', pp. 70-82; for their impact on rulings related to *mahr* and the ways in which classical jurists discussed them, see Ibn Rushd, *Jurist's Primer*, pp. 31-3.
- 22 For a discussion, see 'Abd Al 'Ati, *The Family Structure in Islam*, pp. 54-9; the last purpose, preservation of morality, takes the prime place in the writings of radical Islamists such as Maududi in *The Laws of Marriage and Divorce in Islam* and *Purdah and the Status of Women in Islam*.
- 23 For translations of these rulings in the modern legal codes of Iran and Morocco, and their application in practice, see Mir-Hosseini, *Marriage on Trial*.
- 24 For a useful discussion, see 'Abd Al 'Ati, *Family Structure*, pp. 146-82.
- 25 In *Shi'ah* law a man may contract as many temporary marriages (*mut'a*) as he desires or can afford. For this form of marriage, see Haeri, *Law of Desire*.
- 26 Quoted by Marmon, 'Domestic Slavery', p. 19. In classical *fiqh* texts, the Book of Divorce (*kitab al-talaq*) is often followed by the Book of Manumission (*kitab al-itaq*); in the words of Al-'Ayni, a fifteenth-century commentator: 'The reason for the analogy between the two

- books lies in the fact that divorce is the release of the individual from the subjugation of ownership of the sexual organ (*takhlis al-shakhs min dhull milk al-mut'a*) and manumission is the release of the individual from the subjugation ownership of the physical person (*takhlis al-shakhs min dhull milk al-raqaba*)' (quoted by Marmon, 'Domestic Slavery', p. 18; q.v. for discussion).
- 27 Whether these rulings corresponded to actual practices of marriage and gender relations is, of course, another area of inquiry, which recent scholarship in Islam has started to uncover; see, for instance, Sonbol, *Women, Family and Divorce Laws in Islamic History*; Tucker, *In the House of Law*; and Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society*.
- 28 By epistemology, I refer to theories of knowledge. Epistemology is a branch of philosophy that investigates the nature and scope of knowledge: how we know what we know.
- 29 Some argue that the advent of Islam weakened the patriarchal structures of Arabian society, others that it reinforced them. The latter also maintain that, before the advent of Islam, society was undergoing a transition from matrilineal to patrilineal descent, that Islam facilitated this by giving patriarchy the seal of approval, and that the Qur'anic injunctions on marriage, divorce, inheritance, and whatever relates to women both reflect and affirm such a transition. For concise accounts of the debate, see Smith, 'Women, Religion and Social Change in Early Islam', and Spellberg, 'Political Action and Public Example'.
- 30 Of the more than six thousand verses in the Qur'an, only a few treat men and women differently; four of these (2:222, 228 and 4:3, 34) are frequently cited as justifications for unequal gender rights in marriage. For a discussion, see Husein Muhammad et al., *Dawrah Fiqh Concerning Women*.
- 31 Esposito, *Women in Muslim Family Law*, pp. 14-15.



- 32 For differences among classical schools on matrimonial guardianship or *wilaya*, see Maghniyyah, *Five Schools of Islamic Law*, pp. 47-53.
- 33 See Barlas, *Believing Women*; Hassan, 'Equal Before Allah?' and 'Feminist Theology'; Mernissi, *Women and Islam*; and Wadud, *Qur'an and Woman*, 'Qur'an, Gender and Interpretive Possibilities' and *Inside the Gender Jihad*, pp. 186-216.
- 34 See Mernissi, *Beyond the Veil*, and Mir-Hosseini, 'Sexuality, Rights and Islam'.
- 35 This rationale is found in many contemporary texts on women in Islam; an explicit example is Maududi, *Purdah*; for an analysis see Mir-Hosseini, 'Sexuality' and 'Gender Justice'.
- 36 As Abou-Bakr in 'Teaching the Words of the Prophet' shows, women remained active in transmitting religious knowledge, but their activities were limited to the informal arena of homes and mosques and their status as jurists was not officially recognised.
- 37 Sachedina, 'Woman, Half-the-Man?', p. 149.
- 38 Sachedina, 'The Ideal and Real in Islamic Law', p. 29; emphasis added.
- 39 Whether these rulings corresponded to actual practices of marriage and gender relations is, of course, another area of inquiry, which recent scholarship in Islam has started to uncover; see, for instance, Rapoport, *Medieval Islamic Society*; Sonbol, *Divorce Laws in Islamic History*; Tucker, *House of Law*.
- 40 For a discussion of these concepts in Arkoun's work, see Gunther, 'Mohammad Arkoun'.
- 41 See Wright, 'Legal Rights and Women's Autonomy'; her discussion of the assumptions that informed English family law in the eighteenth century reveals striking parallels with those of classical *fiqh*.
- 42 From an extensive literature, see especially Ahmed, *Women and Gender in Islam*.
- 43 Ali, 'Progressive Muslims', p. 183.

- 44 For a discussion of the terms of the marriage contract and its adoption in the legal codes of two Arab countries, see El-Alami, *The Marriage Contract in Islamic Law in the Shari'ah and Personal Status Laws of Egypt and Morocco*; for codification and reforms, see Welchman, *Women and Muslim Family Laws in Arab States*.
- 45 See, for instance, Sonbol, *Divorce Laws in Islamic History* and 'Women in Shariah Courts'; Rapoport, *Medieval Islamic Society*; Tucker, House of Law.
- 46 For a discussion of such writings in the Arab world, see Haddad, *Islam and Gender*; Stowasser, 'Women's Issues in Modern Islamic Thought'; for Iran, see Mir-Hosseini, *Islam and Gender*; for sample of texts in English, see Doi, *Women in the Shari'a*; Khan, *Woman Between Islam and Western Society*; Maududi, *Marriage and Divorce in Islam and Purdah*; Mutahhari, *The Rights of Women in Islam*.
- 47 For a discussion, see Mir-Hosseini, 'Gender Justice'.
- 48 I elaborate this in Mir-Hosseini, 'The Construction of Gender' and 'Gender Justice'.
- 49 For the textual genealogy of this thinking, see Kurzman, *Liberal Islam*.
- 50 For Arkoun, see Gunther, 'Mohammad Arkoun'; for Abou El Fadl, see Abou El Fadl, *God's Name*; for Abu Zayd, see Kermani, 'From Revelation to Interpretation'; for Soroush, see Soroush, 'Islamic Revival' and the articles available on his website (<http://www.dr.soroush.com/English.htm>), and for his ideas on gender, see Mir-Hosseini, *Islam and Gender*, chapter 7; for Shabestari, see Vahdat, 'Post-Revolutionary Modernity in Iran' and articles and interviews at Qantara.de ([http://qantara.de/webcom/show\\_article.php/\\_c-575/i.html](http://qantara.de/webcom/show_article.php/_c-575/i.html)).
- 51 Masud, *Muslim Jurists' Quest for the Normative Basis of Shari'a*.
- 52 Mir-Hosseini, *Islam and Gender*.

53 For example, Badawi, *Gender Equity in Islam*, and Mutahhari, *Women in Islam*.

54 By paradigm shift, I mean fundamental change in approach and underlying assumptions. The term was introduced by Thomas Kuhn in his 1962 book, *The Structure of Scientific Revolutions*, to describe change in basic assumptions within the ruling theory of science.

55 Kamali, *Justice in Islam*, pp. 3-4; emphasis added.

56 Soroush, 'Islam, Revelation and Prophethood'.

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# ***Ikhtilaf al-Fuqaha*: Diversity in *Fiqh* as a Social Construction**

*Muhammad Khalid Masud*

*Ikhtilaf*, which means disagreement, difference of opinion and diversity of views, especially among the experts of Islamic law, is widely recognised in Islamic tradition as a natural phenomenon. In its meaning of 'diversity', *ikhtilaf* is also a recurring theme in the Qur'an, with references to the diverse phenomena of nature and diversity as a sign of God and proof of God's existence and creation.<sup>1</sup> According to a saying of the Prophet Muhammad, diversity among the Muslim people is a blessing (*ikhtilafu ummati rahma*).<sup>2</sup> The Islamic tradition takes pride in sciences developed for studying the differences in the recitation and interpretation of the Qur'an and the differences in the transmissions of the *Hadith*, reports about Prophet Muhammad's statements, and the *Sunnah*, his practices. Since the beginning of the development of *fiqh*, *ikhtilaf* among the jurists not only existed, but was also respected.

In Islamic jurisprudence, *ikhtilaf al-fuqaha* (disagreement among the jurists) is one of the most frequently discussed subjects, yet current studies of Islamic law generally ignore its implications for the development of *fiqh* and its relevance for law reform in the modern context. It is neither possible nor advisable to analyse the doctrine of *ikhtilaf al-fuqaha* in detail in this short space. Therefore, this paper aims to underscore the significance of *ikhtilaf al-fuqaha* as a rich source for understanding the development of the Islamic legal tradition and as an important juristic tool to reinterpret Muslim family laws in today's globalised world in which difference is increasingly valued.

## I. *Ikhtilaf* as a Basic Feature of Islamic Law

Historians narrate that when the Abbasid Caliph Mansur (re. 754–775) began unifying the caliphate, his secretary Ibn Muqaffa' (d. 759) advised the Caliph that the law and order situation was particularly problematic due to the lack of uniformity in judicial practice. *Qadis* at this time were issuing divergent and conflicting judgements, which caused legal chaos.<sup>3</sup> The Caliph came to know that Imam Malik was compiling or had compiled *al-Muwatta*, a compendium of the *Sunnah* of the Prophet as known and practised in Medina. On his pilgrimage to Mecca, he visited Imam Malik in Medina. Caliph Mansur proposed to Imam Malik that *al-Muwatta* be adopted as the law of the caliphate but Imam Malik disagreed with the Caliph's wishes and persuaded him against it. In view of the significance of the dialogue between the Caliph and the jurist, I would like to quote the full story as reported in one of the earliest historical accounts.

Ibn Sa'd (d. 845) reports on the authority of Muhammad b. Umar al-Waqidi (d. 822), that Imam Malik narrated the story as follows:

When Abu Ja'far [Caliph Mansur] performed Hajj, he called me. I went to see him and we talked. He asked questions and I replied. Then he said, 'I have resolved to have several copies made of these books that you have composed. I will send one copy each to every Muslim city. I shall order the people to abide by its contents exclusively. I will make them set aside everything else than this new knowledge, because I find true knowledge in the tradition of Medina.' I said, 'O Commander of the faithful! Do not do that. Because the people have received various reports, heard several statements, and transmitted these accounts. Each community is acting upon the information they have received. They are practicing and dealing with others in their mutual differences accordingly. Dissuading the people

from what they are practicing would put them to hardship. Leave the people alone with their practices. Let the people in each city choose for them what they prefer.' Mansur said, 'Upon my life! Had you complied with my wishes I would have ordered so.'<sup>4</sup>

Malik's advice marks the significance of *ikhtilaf* among the jurists that ensured a jurist's right to differ with others. Imam Malik recognised the fact that disagreements among the jurists were informed, among other causes, by the diversity in reports about the Prophetic *Sunnah* and its transmission, which led to differences in local legal practices. He recommended respecting existing legal practices. This remark, however, must be considered together with Imam Malik's apparently contradictory view expressed in his correspondence with his Egyptian pupil, Layth b. Sa'd (d. 791).

In this correspondence, Malik criticised his pupil for not adhering to the consensus in Medina. Apparently, Layth had changed his views in the course of his travel from Medina to Egypt. In his letter, Layth disagreed with Malik's arguments that the practice in Medina was the authentic *Sunnah* of the Prophet. Layth contended that not all the Companions of the Prophet agreed with the practice in Medina. The Companions even disagreed among themselves on a number of issues. It is unlikely that they did not know the Qur'an and the *Sunnah*, as the first three Caliphs had very keenly transmitted this knowledge. Yet the Companions who went on to different places evolved different practices in matters where there was no direct guidance from the Qur'an. Layth referred to several practices in which the Companions of the Prophet in Syria and elsewhere differed with the practice in Medina.

It is important to analyse this correspondence. Imam Malik, both in reference to Medina and other places, cited local consensus as the basis of authenticity. Layth, on the other hand, legitimised disagreement as a right to differ; 'the Companions of the Prophet and their Successors

disagreed in their individual opinions (*yajtahidun bi ra'yi him*).<sup>5</sup> While Malik invoked practice (*'amal*) and consensus (*ijma'*), Layth referred to reasoning (*ijtihad*) and individual opinion (*ra'y*) as juristic tools.

Imam Shafi'i (d. 820), the founder of the Shafi'i school, also discussed differences mostly in terms of geographical locations, particularly with reference to Iraq, Medina and Syria. In his extensive work *al-Umm*, he discussed his disagreement with the jurists in these places. Shafi'i proposed that consensus of the scholars and the *Sunnah* of the Prophet be the criteria for judging the authenticity of *ikhtilaf*, rather than the local consensus that Malik insisted upon. In his treatise, *al-Risala*, written on the request of Caliph Mahdi, Shafi'i pleaded that the disagreement among the jurists be regulated on the basis of the *Sunnah* and *ijma'*. Unlike Ibn Muqaffa', who proposed that the Caliph regulate the disagreement, Shafi'i regarded the community of scholars as more qualified to undertake this task. Shafi'i called for regulating the *ikhtilaf*, yet he also valued it as an important juristic phenomenon, a fact that is observable throughout the history of Islamic law.

In his *History of Islamic Legislation*,<sup>6</sup> Shaykh Muhammad al-Khudri (d. 1927) described how *ikhtilaf* has been one of the prominent characteristics of *fiqh* throughout its history, existing since the days of the Companions of the Prophet Muhammad, namely during the period 11–40 AH / 633–660 CE. There are a number of examples in which the Companions differed with each other on various religious matters. Most of these were cases in which there was no clear guidance from the Qur'an and the *Sunnah*, but there were also differences in interpreting Qur'anic injunctions. As soon as the Muslim Empire began to expand, the Companions began to travel to different areas of the caliphate. Al-Khudri mentioned seven great centres where *fiqh* began to develop as diverse local legal traditions around these Companions. He divided the development of *fiqh* from the seventh to the twentieth centuries into six periods, explaining how *ikhtilaf* prevailed in each period.



After explaining the disagreement among the Companions and their successors during the second and third periods (from mid-seventh to early eighth centuries), Al-Khudri referred to the diversity among the emerging schools of law during the fourth period (between early eighth and mid-tenth centuries), during which the doctrine of *taqlid* was used in an attempt to unify this disagreement. He particularly mentioned debates among the jurists in Iraq, Syria, and Hijaz. During the fifth period (mid-tenth to mid-thirteenth centuries), this disagreement took the form of scholarly debates and controversies; it sometimes turned into sectarian violence. According to al-Khudri, the sixth period (from the thirteenth century onward) saw a continuation of *taqlid*, with no significant development.

In the post-*taqlid* period of Islamic legal thought and practice, definitions of *ijma'* (consensus) and *ijtihad* (legal interpretation) were closely linked with the notions of *taqlid*, *ijma'* and particularly *ikhtilaf*. *Ijtihad* developed a contrastive meaning against *taqlid*, and was, therefore, defined as fresh legislation and hence not allowed in matters already settled by consensus in the schools. The scope of *ijtihad* was demarcated with reference to *ikhtilaf* and *ijma'*. Since *ijma'* had not been institutionalised, consensus in practical terms came to mean the absence of *ikhtilaf*. A jurist could justify the need for reinterpretation only by pointing to differences among the jurists. In recent debates also, traditional jurists have often justified reinterpretation, especially in matters relating to family laws, on the grounds of this diversity of opinions.

Although the differences among the jurists produced diverse and often conflicting opinions, and despite the fact that jurists frequently stressed the need for unifying laws, difference of opinion has been continuously respected in principle. The following list of selected books on this subject sufficiently illustrates the continuity of *ikhtilaf* from the early periods of Islamic legal thought until today.

## II. *Ikhtilaf* Literature (798–1987)

The earliest treatises on the subject of *ikhtilaf* were written by Abu Yusuf (d. 798) and Muhammad Hasan Shaybani (d. 803), both disciples of Abu Hanifa (d. 767), the founder of the Hanafi school. These treatises explained their differences with the Syrian Awza'i (d. 777) school, Ibn Abi Layla (d. 765), the Umavi Qadi of Kufa and with the Maliki jurists in Medina. Similarly, al-Shafi'i (d. 820) wrote chapters on *ikhtilaf* in *Kitab al-Umm* and his theory on the subject in his *al-Risala*.

The earliest known book dedicated to *ikhtilaf* was written by Muhammad b. Nasr al-Marwazi (d. 905). Among the popular texts on the subject are the text by Muhammad b. Jarir al-Tabari (d. 922) entitled *Ikhtilaf al-Fuqaha*; the book by Abu Ja'far Ahmad b. Muhammad al-Tahawi (d. 933) with the same title; Ibn 'Abd al-Barr's (d. 1077) *Kitab al-Insaf fi ma bayn al-Ulama min al-Ikhtilaf*; the text by Abu Muhammad Abdullah b. al-Sayyid al-Batlimusi (d. 1127) entitled *Al-Insaf fi al-tanbih ala asbab al-ikhtilaf*; and that by Ibn Rushd (d. 1198) with the title *Bidayat al-mujtahid*. Among the later works, Shah Waliullah's (d. 1762) *Al-Insaf fi bayan sabab al-ikhtilaf* has been widely used. More recently, Abdul Rahman Al Juzayri's *al-Fiqh 'ala al-madhahib al-arba'a* (1970), Mustafa Sa'id al-Khann's *Athar al-Ikhtilaf fi'l qawa'id al-usuliyya fi Ikhtilaf al-fuqaha* (1972) and Taha Jabir al-Alwani's *Adab al-Ikhtilaf fi'l Islam* (1987) illustrate the continuous interest of Muslim jurists in the subject.

*Ikhtilaf* literature begins by recognising diversity as a natural phenomenon grounded in the teachings of the Qur'an. These works emphasise diversity as a divine blessing because humans differ in their levels of understanding and social settings. The early *ikhtilaf* books are mostly collections of differing opinions by the jurists. Later, the compilers developed theories to explain these differences. One finds at least two approaches to these explanations. One approach seeks to explain the

basis (*sabab*) of the difference with reference to diverse local usages in language, customs and different levels of knowledge of the *Hadith*. The other approach tries to identify the different methods adopted by the jurists or by the schools in their legal reasoning. Ibn Rushd's *Bidayat al-mujtahid* offers a comparative study of *ikhtilaf* among the various schools of law. *Al-Fiqh 'ala al-madhahib al-arba'a* by Al Juzayri and *Al-Fiqh 'ala al-madhahib al-khamsa* by Jawad Mughniya have further contributed to this subject by compiling this disagreement in the Sunni and Ja'fari schools of *fiqh* in the form of compendia of Islamic laws.

Besides this special type of literature, one finds records of disagreement among the jurists on almost every point in almost every *fiqh* book. This regard for diversity is observed to the extent that even those texts that were written abiding by the principle of adherence (*taqlid*) to one of the law schools and even such collections of the schools' doctrine as *Fatawa Alamgiri*,<sup>7</sup> which was sponsored by the Mughal emperor Awrangzeb Alamgir (1617–1708) to regulate judicial practice in seventeenth-century India, do not fail to describe in detail the diversity of opinion and disagreement among the jurists on most legal doctrines.

In the above list, Shah Waliullah's work is particularly important to the advancement of the study of *ikhtilaf*.<sup>8</sup> Shah Waliullah revisited the issue of *ikhtilaf* as a doctrine that was developed in the later period within the framework of *madhhab* and *taqlid*. According to him, the first generation of Muslims disagreed with each other for several reasons. One reason was that not every one of them had access to a complete knowledge of the Prophetic *Hadith*. Their abilities to remember and preserve the texts of the *Hadiths* also varied. They also disagreed in assigning legal value to each report of the *Sunnah*; their criteria of preserving the texts varied. Some gave priority to particular reports, others did not. Also, sometimes they rationalised and applied rules differently. Consequently, they exercised their own reasoning in relation to given issues.

Comparing the grounds for disagreement among the Companions with those of the later jurists, Shah Waliullah concluded that disagreement in the later periods was counterproductive. It moved further away from the formative period when disagreement was a product of *ijtihad*. The practice of *ikhtilaf* declined in the post-*taqlid* period because it was confined within the school doctrines, which were projected as statements by the founders. Adherence to schools (*taqlid*) had an adverse impact and the practice of *ikhtilaf* led to conflicts and clashes among the followers of the different schools.

Waliullah identified the following factors as responsible for this decline. During this period, debates among the schools became very common. Jurists inflated differences in order to defend and prove the superiority of their schools. This produced a new science called *'ilm al-khilaf*, which the debaters mastered. The jurists paid less attention to the true bases and sources of the legal doctrines given by the founders of schools. They came to accept the explanations for the disagreement among the scholars given by the earlier jurists as facts of history. They disregarded the distinction between *ra'y* (reasoned opinion) and literal interpretation of the texts and began to indulge in unnecessary casuistry.

### III. Theories of *Ikhtilaf*

The jurists developed various theories of *ikhtilaf* to deal with the disagreements, with at least two objectives: to justify *ikhtilaf* and to reconcile it. I explain some of these theories to illustrate and show their significance and relevance to present-day legal reasoning.

#### i. Interpretative Disagreements

In a chapter especially dedicated to *ikhtilaf* in his *al-Risala*,<sup>9</sup> Imam Shafi'i

theorised *ikhtilaf*, explaining that it was caused by different understanding of the texts of the Qur'an and the *Hadith*. He developed a typology of disagreement; one that is forbidden and the other that is not. Forbidden disagreement pertains to the opinion that contradicts a clear text of the Qur'an or the *Sunnah*. There is, however, a possibility that where the text is not explicit and clear it may be interpreted in more than one way. Differences based on such interpretation are not forbidden, according to Shafi'i, but it is also not absolutely free from prohibition. Shafi'i explains permissible *ikhtilaf* with several examples.

This brief paper does not allow space to go into a detailed analysis of these examples. Therefore, I will only stress here that he explains this disagreement only in terms of usage of language. For instance, the Qur'an prescribes that a divorced woman wait for three *quru'* periods after the divorce before entering into another marriage contract ('Divorced women shall wait concerning themselves for three monthly periods', *Al-Baqarah* 2:228). The jurists are divided on translating the term *quru'* and calculating this period. According to Shafi'i, some Companions understood it to refer to the 'menstrual' period while others took it to mean the 'purity' period. 'Aisha, the wife of the Prophet, defined it as the period of purity. Shafi'i follows 'Aisha and further cites a saying of the Prophet in his support. Maliki and Shi'i jurists also take the same position. The Hanafis and the Hanbalis define *quru'* to mean menstruation and take the onset of menses as the starting point because it is easy to begin counting from that clear sign. I shall argue subsequently that this disagreement may also be explained as diversity in social norms.

We find further details in the *ikhtilaf* literature about how the jurists disagreed in their understanding of the Qur'an and the *Sunnah*. The Qur'an (*Al-Imran* 3:7) declares that some of its verses are clear (*muhkam*) and others are ambiguous (*mutashabih*). The disagreement concerns how to identify and distinguish the clear from the ambiguous

verses. There is also *ikhtilaf* or difference on how to understand the Qur'anic text. Do we take the Qur'an literally? What does the literal interpretation mean? In understanding words, phrases and concepts, do we look to pre-Islamic Arab poetry or to dictionaries written after the Qur'an was revealed? Do we read each verse individually or examine them in the Qur'an as a whole? Should we try to understand them with reference to the stories of their revelation and historicise them? To what extent do we historicise the context or the occasion when the words were revealed by connecting them to the story? These are all different methods that have been used in the Islamic tradition.

There are also differences of opinions regarding the understanding of *Hadith* texts. In fact, the word *mukhtalaf* (disagreed, disputed) appeared as a technical term first in *Hadith* studies as early as the tenth century.<sup>10</sup> This disagreement related to usage, meaning and mutual contradiction. *Hadith* scholars distinguished between two types of disagreement: one was called *mukhtalaf*, where differences could be explained; the other was *mukhtalif*, where it was difficult to reconcile contradictions and both meanings had to be allowed and explained.<sup>11</sup> The jurists also distinguish between *Hadith* and *Sunnah*; the former as words and text, the latter as action and practice. Do the sayings of the Prophet and his actions have the same legal implications? If there is a conflict between the reported saying and the Prophet's practice, which one will prevail?

More significant was the disagreement about the criteria for an authentic *Hadith*. The *Hadith* scholars devised complex methods to verify the reports of *Hadith* on the basis of reliability of the reporters, chain of narrators linked to the Prophet Muhammad and on the quality of texts. The reports of *Hadith* were categorised on that basis. These studies culminated in collections of sound *Hadith*. These collections shared some agreed reports but disagreed either in text or chain of narrators; they also differed in the number and classification of

*Hadith* in their collections. It was due to this difference that several other collections were made even after the six collections, which were generally regarded as reliable. Recently, Nasir al-Din Albani published a new collection of *Hadith* in which he differs with the six collections not only in the texts of *Hadith*, but also in questioning the criteria of the earlier collectors.

It is also significant that the jurists and the *Hadith* scholars differed not only in their criteria of what constitutes reliable *Hadith* but also with each other. A crucial debate between the jurists and the *Hadith* scholars had been about the reports in which the chain of narration stops with a Companion; such reports are classified as *mursal*. Most *Hadith* scholars do not regard these *Hadith* reports as reliable. This debate was closely linked with the question of sources of *fiqh*. The *Hadith* scholars insisted that *Hadith* reports were a primary source next to the Qur'an, often overriding the Qur'anic verse because their fundamental function was to explain the meaning of the verse. Among the jurists, Imams Shafi'i and Ibn Hanbal took that position. Other jurists held that if a *Hadith* report was contradictory or contrary to the explicit meaning of the verse, it was not acceptable. Imam Malik regarded the practice and consensus in Medina as the most reliable. The jurists, especially Hanafis, preferred a *Hadith* narrated by a jurist because a narrator who was not familiar with the nuances of jurisprudence may not properly understand the implication of the text.

## ii. Theories of Abrogation (*Naskh*)

Sometimes the jurists' references to the Qur'anic verses produced conflicting views. In such situations where the conflict could not be resolved, the jurists invoked the doctrine of abrogation (*naskh*). They argued that the Qur'anic verses cannot contradict each other and therefore one of the conflicting verses must have been abrogated.

The jurists further differ in defining the basis for determining abrogation. One method is chronology of the verses; the verses revealed later abrogate the earlier ones. As is well known, the Qur'an was revealed in parts over twenty-three years, with some parts revealed in Mecca and some in Medina. The collection of the Qur'an is not arranged chronologically; it is difficult to establish the chronology of each verse. There are indications of which chapters (*Surah*) were revealed in Mecca and which in Medina, though most chapters include verses revealed in Mecca as well as in Medina. Some scholars have unsuccessfully tried to rearrange the Qur'an.

Sometimes, the term abrogation refers to change in the circumstances (*sabab* or *sha'n nuzul*) in which the verses were revealed. The verse is regarded as inapplicable and thus abrogated if the circumstances changed. Sometimes, the term abrogation is used simply to mean clarification; namely, if one verse qualifies, provides more details or restricts the application of another verse, the latter is regarded as being abrogated by the former. The doctrine primarily concerns the Qur'anic verses but it was also extended to the *Hadith*.

### **iii. Theories of Sources**

In the formative period, jurists used several other sources in addition to the Qur'an and the *Sunnah*. Imam Shafi'i suggested reducing disagreement by restricting the sources to the following four: the Qur'an, Prophetic *Sunnah*, analogies derived from these texts (*qiyas*) and consensus (*ijma'*). He defined *ikhtilaf* and *ijma'* as parallel opposites: consensus is the absence of disagreement. Imam Shafi'i's four sources theory was popularised by his school, but other schools continued to stress other sources as well. Shihab al-Din al-Qarafi (d. 1285) enumerated nineteen sources used by the jurists.<sup>12</sup> In the *Sunnah*, he included the sayings of the Companions. To *ijma'*, he added the consensus of the people of Medina



and Kufa, and that of the four caliphs and the family of the Prophet. His list of sources included the local customs and the following principles of interpretation as sources: *al-maslaha al-mursala* (public interest which is neither affirmed nor forbidden specifically in the primary sources); *istishab* (presumption of continuity of the past conditions in a ruling); *al-bara'a al-asliyya* (the principle that things are originally permissible until forbidden); *al-istiqrā'* (inductive logic); *sadd al-dhara'i'* (adopting preventive means); *istidlal* (extending the application of a ruling by human reason); *istihsan* (juristic preference); *al-akhdh bi'l akhaff* (choosing the minimum); and *al-'isma* (infallibility of judgement). Other jurists have also added to the list the laws revealed before Islam. Al-Shatibi and some other jurists in the fourteenth century also introduced the notion of *maqasid al-Shari'ah* (objectives of *Shari'ah*), which has become very popular among modern Muslim jurists.

I need not go into details. It is sufficient to say that the jurists differ on the validity of the above sources; some would call them supplementary to the primary four sources. The point is that the number and validity of these sources have been continuously debated by the jurists.

#### **iv. Theories of *Taqlid* and *Madhhab***

I have already mentioned the doctrines of *taqlid* and *madhhab*. These doctrines also emerged as a method of regulating *ikhtilaf*, but in fact schools of law further institutionalised *ikhtilaf*, and disagreement among jurists continued within the schools to the extent that methods had to be developed to regulate it.

The Hanafis developed the method of hierarchy (*qism, tabaqat*) of authorities, including jurists and their texts. For instance, in case of conflict among Abu Hanifa, Abu Yusuf and Shaybani, Qadi Khan (d. 907) advised a mufti to adopt the opinion to which Abu Hanifa and

one of his disciples agreed; if there was a conflict between Abu Hanifa and his disciples and the matter related to a change caused by time and space, the mufti should follow the disciples.<sup>13</sup> In Hanafi schools, a list of authoritative books was classified as clear authorities (*zawahir*) compared to solitary (*nawadir*) views within the school. Another method was preference (*tarjih al-rajiḥ*), for which detailed conditions were prescribed and only the qualified jurists were allowed to exercise this right. That method applied to the *ikhtilaf* within the school.

Manuals of fatwa written as guidelines for the muftis, experts whom laymen consulted on legal matters, raised an interesting question relating to *ikhtilaf*. What should a layman do when he finds expert opinions (fatwa) by the jurists divided and conflicting? The manuals advise that the layman is free to choose one of the opinions. These manuals regard disagreement as a positive process of legal development. Such a choice might, nevertheless, lead to dispute and conflict. For instance, if one mufti said that the divorce in question was valid and the other said it was not, the choice of one of these opinions would result in conflict between a husband and his wife. Abu Bakr al-Jassas (d. 980), a Hanafi *qadi* advised that in such a case the husband and wife should go to a *qadi*.<sup>14</sup> Jassas did not discourage disagreement among the jurists; he only gave this advice in the case of disputes among lay persons.

#### **v. Theory of *Mura'at Al-Khilaf***

Malikis also tried to regulate *ikhtilaf* without reducing its significance. In the fourteenth century, Maliki jurists in Andalus developed the doctrine of *mura'at al-khilaf* (recognition of the disagreement among the jurists),<sup>15</sup> which called for taking due consideration of disagreement among the jurists. Initially, this doctrine required avoiding conflict with the preceding, even divergent opinions, but in practice it came to mean liberty to choose any of the differing or conflicting opinions.

## **IV. The Relevance of *Ikhtilaf* to Family Law Debates Today**

The above brief historical overview of *ikhtilaf* and related theories suggest two very important facts about the nature of *fiqh*. First, *fiqh* offers choice among several alternate opinions; second, it is a social construction of the *Shari'ah*. As these points are extremely relevant to present-day debates on Muslim family laws, I will explain them here.

### **i. *Fiqh* as Alternate Opinion**

In order to understand the nature of *fiqh*, we must note that we know very little about the law as it was practised in the premodern period. The history of Islamic law is still to be written; what we have instead is a history of jurists and their schools. We have records of some legislation by the first four caliphs, but we know very little about the laws introduced by the later caliphs, kings and sultans. The doctrine of *ikhtilaf al-fuqaha* can be very helpful in writing this history. We commonly presume that *fiqh* was the source of law in premodern Muslim societies. This assumption identifies *Shari'ah* and law with *fiqh* and thus tends to ignore a very significant contribution that *fiqh* made as an alternate legal system that the jurists built to counter the royal laws. It offers a new perspective on the development of law in Islam, which is particularly relevant to the reform of Muslim family laws today.

In my view, the jurists' insistence on diversity suggests that *fiqh* developed as an alternate set of laws parallel to the then-existing legal system. It was a critique of the contemporary system. This aspect has been overlooked because we do not have sufficient knowledge about how the law operated in practice. Nothing can be said with certainty, and therefore the following points are made to suggest the need for rewriting the history of Islamic law.

It is generally believed that *fiqh* was the law of the caliphate in courts and markets, but the absence of codes and documents on the one hand and continuous diversity in *fiqh* on the other hand questions that view. Records of *qadi* judgements are available only after the sixteenth century. We know from the *Adab al-Qadi* literature that records of the *qadi* judgements were kept meticulously, but since *fiqh* did not recognise them as precedents or as a source of law, they were rarely made part of the *fiqh* texts. Some recent studies show similarity between *fiqh* and these judgements, but it is difficult to conclude that *fiqh* was the only source of law for the *qadis*. The literature on disagreement between *qadis* and jurists suggests that the *qadis* were free to interpret the Qur'an.

The institution of *qadi* was a combination of the *hakam* (arbiter) and the mufti (expert in *fiqh*). In the beginning, the institutions of mufti and *qadi* overlapped each other. During the Umayyad caliphate when the office of *qadi* was defined as a deputy of the caliph and governor, the religious authority of *qadis* became debatable among the jurists. Muftis began functioning as private experts in law. Fatwa became an institution alternate to the *qadi* court during the formative period of Islamic law. We know comparatively more about fatwas than about *qadi* judgements. *Qadis* were appointed and controlled by caliphs. Some of the *qadis* were not qualified jurists and were, therefore, advised to consult muftis. *Fiqh*, though not enforced as caliphate law, served as one of the sources of law for the *qadis*. *Qadis* asked muftis for fatwas on complex issues. While the jurisdiction of *qadis* was limited, fatwas had a larger scope.

From the *Adab al-Mufti* manuals, we also learn why it was possible for the institution of fatwa to develop independent of caliphate law. Apparently, it was because *qadi* judgements addressed specific cases, which were considered ephemeral. These cases could not be generalised to become legal norms. Further, compared to *qadis*, jurists had a comparatively more independent role in the production of legal texts, legal education and fatwas.

*Ikhtilaf* literature also reveals that most of the jurist doctrines were not derived directly from the Qur'an and the *Hadith*; they were often derived from the opinions and practices of the Companions and their Successors. The *ikhtilaf* literature also refers to the opinion of the Companions (*qawl al-sahabi*) as an accepted source of law. This is particularly true about family laws. Recent studies of divorce laws in Islamic law illustrate how *fiqh* relies more on opinions of the Companions and their Successors than on the Qur'an and the *Sunnah* of the Prophet.<sup>16</sup>

A significant example is the disagreement among the jurists on the requirement of a marriage guardian (*wali*) for a marriage contract to be considered valid. Imams Malik and Shafi'i rule that a marriage contract is not valid without the consent of a marriage guardian. Abu Hanifa, his disciple Zufar, Sha'bi and Zuhri do not consider it a requirement provided the couple is socially compatible. Da'ud al-Zahiri requires a guardian when it is the bride's first marriage and Ibn Qasim regards the presence of a guardian as commendable, but not obligatory. Ibn Rushd analyses this disagreement, pointing out that it came about because there was no clear verse or *Hadith* on the subject. The Qur'anic verses presented by the jurists to justify their views are at best implicit in these meanings. The two *Hadiths* reported by Ibn Abbas and 'Aisha also do not support the jurists' view explicitly. Technically, questions have been raised about both *Hadiths* as to whether they are sayings of the Prophet or the opinions of Ibn Abbas and 'Aisha.<sup>17</sup>

The development of *fiqh* and its diversity suggest that legal interpretation is a continuous process that allows legal norms to remain relevant to social norms. The disagreement among the jurists, particularly on matters relating to family laws, suggests the importance of going behind the text to find universal legal principles that can accommodate social changes.

## **ii. *Fiqh* as a Social Construction of *Shari'ah***

From the above overview, it must be noted that the diversity in jurists' opinions and the rise of different schools was geographical in origin; the difference was caused essentially by local practices and customs. This suggests that *fiqh* was a social construction of *Shari'ah*. In the beginning, the term *fiqh* was used in its literal meaning, namely the understanding of *Shari'ah*. This understanding was informed by social thought categories, either in the sense that the *Shari'ah* was revealed in a particular social context or that institutions were built to make *Shari'ah* socially acceptable. In a theoretical sense, social construction meant harmonising social and legal norms.

As mentioned above, classical *fiqh* scholars sought to explain diversity and difference of opinion as due to varying language usages or different interpretative methods. What is important and missing in these explanations is the social context of these differences. Languages and interpretative differences are closely associated with social norms and institutions, indicating the different social contexts of the speakers. The understanding of certain words even in the same language may differ in different areas where people speak that language simply because language is a social phenomenon. Jurists speak about two types of customs: usage of language (*'urf qawli*) and social practice (*'urf fi'li / amali*). Both are called *'urf*, meaning socially constructed practices. This distinction between words and actions is used particularly in reference to diversity in family laws. For instance, cases of dower (*mahr*) disputes about the amount and mode of payment, or whether specific words connote the meaning of dower, are settled on the basis of the practice in a community. However, the *ikhtilaf* literature usually explains this disagreement as different meanings of a word understood by the jurists.

The social construction of laws is evident from the disagreement among jurists with regard to the matter of apportionment of inheritance for sisters and uterine relatives, namely relations on the maternal side. The Qur'an says that if a man was survived by only one sister, she would inherit half of his estate as inheritance (*An-Nisa* 4:176). According to some jurists, she will also inherit the other half as residue if there was no agnate relative. Shafi'i disagreed with this view: 'Have you not given her the entire estate as a sole survivor, while God prescribed for her only half of it whether she survived alone or with others?'<sup>18</sup> Other jurists cited the Qur'anic verse about uterine relatives (*Al-Anfal* 8:75), but Shafi'i disagreed and dismissed the argument, saying that that verse related to a period soon after the Hijra when inheritance was distributed on the basis of faith relations. The distribution of inheritance was no longer regulated on faith relations after clear verses about succession were revealed. Shafi'i maintained, 'The husband receives a larger share than most uterine relatives. So if you permit people to inherit according to uterine relationship, the daughter would be on an equal footing with the brother, and all the uterine heirs would be entitled to inherit and would have a greater claim than the husband, who enjoys no uterine relationship.'<sup>19</sup> Shafi'i argued that this disagreement arose due to differing interpretations of the two Qur'anic verses. Shafi'i historicised the verses and argued that the verse that related to uterine relatives was no longer applicable. As to the residue, it went to the tribe if there were no agnate relatives.

I suggest that this disagreement may also be explained in terms of different perspectives held by the jurists on patriarchal and matriarchal social structures. Shafi'i seems to be favouring patriarchy and arguing that the opposing opinion would compromise this principle. If we look at the pre-Islamic practice, women and uterine relatives were not given any shares in inheritance. The Qur'an introduced women's shares and

explicitly allowed one half of the estate to be given as share to a daughter and to a sister, if the latter was the only survivor. The Qur'an does not say anything about the residue in this case. In the pre-Islamic practice, only the agnate relatives inherited the estate if the deceased died childless. Shafi'i's position appears to maintain the pre-Islamic patriarchal practice; he replaced tribe with Muslim community.

Another instance of the social construction of *fiqh* relates to Imam Shafi'i's example regarding the disagreement relating to the meaning of *quru'* that was mentioned previously. Shafi'i, Maliki and Shi'i jurists define *quru'* as a period of purity. To Hanafi and Hanbali jurists, it refers to the time of menstruation. Shafi'i explained the disagreement as different meanings of the term. His justification for his view, however, suggests practical difficulties in accepting other views. Shafi'i refers to three possible ways of calculating the waiting period: by lunar month, period of purity or onset of the menses. He explains that calculating by the lunar calendar cannot be considered normative as months vary between 29 and 30 days. He suggests that it is more accurate to count from the period of purity. The Hanafi and Hanbali jurists take the onset of menses as the starting point for calculating because it is a clear sign and therefore it is easy to begin counting from thereon.

In the pre-Islamic Arab society, the waiting period after divorce was apparently counted in terms of lunar months. The Qur'an also mentions three months in case of doubt (*At-Talaq* 65:4). In these explanations, again local practice is ignored. Ibrahim Fawzi<sup>20</sup> studied the pre-Islamic practices and the Qur'anic reforms in family laws and placed jurists' debates in this comparative context. He concluded that in the pre-Islamic Arab practice, the waiting period referred to the period of purity. A husband would divorce his wife in the period of purity and the waiting period ended with the beginning of the next menstruation, as it indicated that she was not pregnant. Islam affirmed the practice of repudiation during the period of purity but extended the duration of



waiting from one to three periods of purity in order to give the couple more time to reconsider the matter of repudiation. Shafi'i's position is again a continuity of Arab customs. This perspective, which is relevant to family laws, is often missing in the *ikhtilaf* literature.

The family is a social institution that regulates relationships between humans. When the Qur'an speaks about the family or about relationships between men and women, it certainly takes the social setting, customs and institutions into account. As Shah Waliullah explains, the material source of Islamic law, especially about family relations, is the pre-Islamic social customs. The Qur'an and the *Sunnah* examined pre-Islamic Arabian practices and customs, reformed those which were unjust, and adopted those which were fair-minded.<sup>21</sup> Shah Waliullah advises that to understand *Shari'ah*, one must examine its material source as well as the method used to implement reform. Referring to the reforms in family law, Shah Waliullah explained that Islam adopted the following pre-Islamic Arab practices and amended those which harmed the rights of women, especially with reference to divorce, dower and inheritance: engagement before marriage, marriage guardian, marriage ceremony, wedding feast, dower, prohibited relations, fosterage, marital rights, divorce and its various types, the waiting period and succession.

When the Prophet introduced reforms to the patriarchal practices, some of his Companions found them difficult to accept.<sup>22</sup> For instance, the verses relating to women's shares in inheritance were viewed as strange by some of the Companions as they said women did not take part in wars and did not bring in any booty, so how could they be allotted shares in property.<sup>23</sup> Examples like this reveal the social context of these reforms and indicate how the patriarchal society reacted to these changes. We cannot appreciate the reforms introduced in the Qur'an and the *Sunnah* without relating them to the social context when they were introduced. The jurists also interpreted the *Shari'ah* with reference to

their social contexts. Today, when the social context has again changed, we need to reinterpret the *Shari'ah* in these new social contexts.

Often, diversity (and the concomitant disagreement) is taken as a negative development; some historians of Islamic law (e.g. Joseph Schacht) describe it as a conflict between theory and practice. I have tried to present it as a dynamic principle in the development of *fiqh*.

In summary, the key points so far are:

1. Diversity in *fiqh* reflects the process of the social construction of the *Shari'ah*.
2. Diversity justifies the continuous need for *ijtihad*, harmonising legal and social norms.
3. Diversity legitimises the quest for new methods of interpretation.
4. Diversity recognises multiculturalism and legal pluralism.

## **V. The Way Forward: *Ikhtilaf* and the Reform of Family Laws**

In the struggle for equality and justice in the Muslim family, the diversity and differences in juristic opinion provide many avenues for the reform of family laws and practices.

First, it is important to understand *fiqh* texts and judgements of the classical times within a social context. It is very clear in reading *fiqh* texts that social contexts were set aside in the jurists' interpretation. So it is necessary to go to commentaries and glossaries of that period to raise the issue of social context. In this way, judgements from that time can help us understand the application of law within a social context. In modern legal studies, we are increasingly studying and teaching case

law to understand law. The same should be applied to *fiqh*—it should be studied and understood in a context.

Those who argue for gender inequality and use the Qur'an and Islam as a source of their legitimacy today also set aside social context. When we try to highlight the social context, we are referred to an ideal context that never existed. We need to understand the issues addressed in Qur'anic revelation and the *Sunnah* not as theology, but as social problems that existed at that time and to which the Qur'an and the Prophet were responding.

Second, we need to know about the development and promotion of schools of law during different historic periods to better understand what led to one school being promoted to the exclusion of others in different regions. We have so internalised the concepts of jurisprudence and socially constructed laws that we often think they are Islamic and divine in origin. For instance, considering Muslim family laws to be personal laws is actually a colonial construct. The colonial state divided laws into customary and common laws to introduce European legal systems and to restrict the application of local laws to marriage, divorce and inheritance. Colonial powers defined these topics in terms of religion and custom in order to exclude them from the general principles of equality and justice. It is ironic that Muslims internalised the idea of personal laws in such a sacrosanct way that no principles of equality and justice could be applied to them. No doubt Muslim family laws are based on principles of justice, but the notion of justice is defined within the framework of social hierarchy as rights and responsibilities are defined in terms of status of a person in society. The concept of a Muslim Personal Status Law needs to be unpacked because it served a particular objective that is leading to inequality and injustice today.

One must remember that choices with regard to the schools of law were made throughout Islamic history based on social context. For instance, official *madhahib* were introduced during the Ottoman

period, but the other Muslim societies did not adopt the idea of an official *madhhab*. The judicial system was pluralist in Egypt during the Mamluk period; there were four or five different *qadis* from different schools, and all of these schools were officially recognised. In the Ottoman period, however, only the Hanafi system was recognised. During the colonial period, the new concept of a codified personal law was introduced. This concept did not exist in the earlier periods. Personal law meant that *Shari'ah* was dissected and only certain parts of the *fiqh* or *Shari'ah* were considered religious and personal. The British then experimented on the Hanafi law in India, developing the 'Anglo-Mohammedan law' that they exported to other British-controlled areas that had different schools of law and customary practices, such as Sudan, Egypt and Malaysia. These influences must be better understood.

A method that reconciles different doctrines from different schools of law, called *talfiq* or *takhayyur*, was introduced in the mid-twentieth century. For instance, in India and Pakistan, the Hanafi law limited judicial divorce to one or two points. In 1939, after extensive discussions and debates, the traditional scholars in India initiated the process of adopting Maliki *fiqh*. When actual cases that demonstrated injustice towards women under the Hanafi doctrine were brought to the attention of these traditional scholars, they took the initiative and suggested reforms. This shows that reforms could take place as new problems emerge.

Third, it is important to understand that the jurists were functioning in their own era based on what they thought was just and were reading and interpreting the Qur'an from their own social perspectives. For instance, in interpreting *An-Nisa* 4:34, all of them tried to qualify what kind of beating should take place. This shows that they were already embarrassed that the idea of beating a wife was in the Qur'an. We should regard their discussions as social efforts which were temporal and also social. From that same line of reasoning, we

must now look at how that justice could be achieved or is possible in the modern era.

Fourth, we need to acknowledge that change has taken place and change is possible. We often think that whatever is in the *fiqh* is in the Qur'an or the *Sunnah* and thus immutable, necessarily dictating how things must be. Yet, to use a classic example, it has been less than 100 years since slavery was abolished, and no one, not even the traditionalists, will propose bringing back slavery or forms of marriage based on slavery. In other areas of law, changes in the modern period have also been accepted and internalised. These are examples that can be used to show why change is possible in family laws.

*Fiqh* is not divine law that Muslims have a duty to implement. *Fiqh* is juristic law, humanly constructed to deal with times and circumstances. It can change when new times and circumstances emerge. The *madhahib* that developed in history and are still developing did so as a result of social change. They gained authority and currency because of their utility. So we do not need to actually invent new schools, but we should adopt the same method that the jurists in their period were using—pushing for the acceptance of whatever is socially practical and useful.

Finally, in advocating for reform, it is important that women's groups go beyond anecdotes and begin to support their demands for change with data and statistics of the nature and extent of the problems. Given data about the problems, even the most patriarchal and fundamentalist people would have to agree with the analysis of the situation, and justice could then be used as a principle and guide for developing the appropriate solution.

## Notes

- 1 Al-Qur'an: 2:164; 3:190; 10:6; 23:80; 30:22; 45:5.
- 2 This *Hadith* is cited in al-Nawawi's commentary of *Sahih Muslim*, a book on *waqf*. *Sahih Muslim*, p. 91. Authenticity of this *Hadith* was questioned by several scholars. Al-Khattabi, in his commentary on *Sahih Muslim* mentions that Jahiz and Musili had rejected this *Hadith*, saying that if disagreement was a blessing then agreement would be punishable. Al-Khattabi, however, explains that disagreement here particularly refers to legal matters, not to disagreement in matters of belief.
- 3 See Schacht, *An Introduction to Islamic Law*, p. 55.
- 4 Ibn Sa'd, *Al-Tabaqat al-Kubra, al-qism al-mutammim*, p. 440.
- 5 Al-Khudri, *Tarikh al-Tashri' al-Islami*, pp. 191-7.
- 6 Ibid.
- 7 See Masud, 'Fatawa Alamgiri: Mughal Patronage of Islamic Law'.
- 8 Waliullah al-Dihlawi, *Al-insaf fi bayan sabab al-ikhtilaf*.
- 9 Khadduri, *Al-Shafi'i's Risala*, pp. 333-52.
- 10 Ibn Qutayba, *Ta'wil mukhtalif al-Hadith*.
- 11 See Thanawi, *Kashshaf Istilahat al-funun*, pp. 441-2.
- 12 Al-Qarafi, *Al-Dhakhira*, p. 141.
- 13 Qadi Khan, *Fatawa Qadi Khan*, p. 3.
- 14 Al-Jassas, *Al-Fusul fi'l-usul*, p. 351.
- 15 For a discussion of al-Shatibi's views on *mura'at al-khilaf*, see Masud, *Shatibi's Philosophy of Islamic Law*, pp. 240-6.
- 16 Lucas, 'Alternative Methodologies'.
- 17 Ibn Rushd, *Bidayat al-Mujtahid*, pp. 8-11.
- 18 Shafi'i, quoted in Khadduri, *Al-Shafi'i's Risala*, p. 345.
- 19 Ibid., p. 346.
- 20 Fawzi, *Ahkam al-Usra fi al-jahiliyya wa'l Islam*.

21 Waliullah, *Hujjatullah al-baligha*, p. 124.

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# Islam Beyond Patriarchy Through Gender Inclusive Qur'anic Analysis

*Amina Wadud*

To consider Islam beyond patriarchy I direct our attention to the Qur'an and the Prophet Muhammad as the two primary sources of Islamic thought and practice. I start with a few appropriate quotations, followed by some commentary on how these might assist us in our goal of ensuring equality and justice in Muslim family laws and practices.

The Qur'an and the *Sunnah* are considered the primary sources for understanding *Shari'ah* and for the development of Islamic jurisprudence (*fiqh*). Muslim scholars, who were human agents, developed *fiqh* as a comprehensive field of study in order to help Muslim societies become more just and equitable. We should likewise continue to engage in the process of establishing just and equitable societies given our new experiences and current realities (*al-waaqiyyah*). This includes new ideas about justice and about the valuable roles played by women as individuals, as members of the family, and as public servants in Muslim civil societies today. What is uppermost is the belief that Islam is a fair and just way of life (*din*).

As a system of civil construction, *fiqh* also has complex secondary sources like *qiyas* and *ijma'*. While it is also important to illuminate the significance of these, I will focus less on the formation of positive law and more on the ethical nuances of legal reasoning, especially regarding reform. There is an intimate and crucial relationship between ethics, this process of reform and the sacred texts (*al-nusus*). My comments are focused on ethical theory in relationship to praxis and on ideas about the relationship between each person and Allah as well as

relationships within Muslim communities. I take as given that the Qur'an is the word of Allah revealed to Prophet Muhammad.

## I. Equality in Creation, the Hereafter and the Life In Between

There are three significant stages of human development as revealed in the Qur'an: Creation, the Hereafter (*al-akhirah*) and all of life in between. In considering reforms, what concerns us most is how life is lived in between (*'aalam al-shahadah*). However, it is important to set a framework based upon the other two realms, or *'aalam al-ghayb*, because the Qur'an emphasises the relationship between these two realms (*'aalamatayn*). What human beings are expected to do here in the *dunya* (this world) is related to what we believe about the nature of Allah, His creation, and the ultimate outcome of our actions in the *al-akhirah* (the afterlife), as well as to what we consider to be human nature.

### i. Creation

Oh humankind have *taqwa* before your Lord Who created you (all) from a single soul and created from it, its mate, and spread from the two countless men and women. (*An-Nisa* 4:1)

Starting with *nafsin wahidah* (the 'one soul') and *zawjaha* ('its mate'), we eventually move to all of humanity: *rijaalan kathiran wa nisaa'* ('countless men and women'). This means that plurality is part of the Qur'anic scheme, or of the divine design. The significance of the idea of plurality is more relevant at this time in human history than at any other time, because the world is clearly interconnected through its technology and sciences. The significance of one human life clearly affects other

human lives. Therefore, we must think and act in ways that indicate our awareness of the interrelationship between all human life and creation as a whole. The choices made about, for example, nuclear weapons, oil reserves, the way we understand and maintain family, or the way we understand what it means to be a human being and to achieve human excellence—all have an effect on others whether male or female, Muslim or non-Muslim. The foundation for the idea of pluralism is already a part of the Qur'anic worldview. The ways that we participate in and transform Muslim societies, laws and cultures through the Qur'an in the face of a more complex global reality are already foretold in the text:

Oh human kind, We created you from male and female and made you into nations and tribes so that you might know one another. Verily the most noble of you in the sight of Allah is the one with the most *taqwa*. (*Al-Hujurat* 49:13)

How does a world so interconnected manage to maintain excellence in character rather than be abased to the lowest of the low (*At-Tin* 95:4-5)? *Taqwa* is the key Qur'anic term for moral integrity as described in *Al-Hujurat* 49:13. This verse first takes note of both male and female, explicitly, as part of the creative design. That is how Allah created us: *min kulli shay'in khlaqnaa zawjayn* ('all created things are in pairs'); *al-dhakar wa al-'untha* ('the male and the female') (*Adh-Dhariyat* 51:49; *An-Najm* 53:45; *Al-Qiyamah* 75:39). This cosmology of creation in pairs has an important corollary in every aspect of human interaction and in social communities. Therefore a balance must be struck within each level of society from the most private sphere (in the family) to the public arena of governance and public policy. Therefore both the male and the female must be considered responsible for the formulation of laws and policies and be equal beneficiaries of the justice inherent in those laws and policies. Finally, the notion of plurality is again repeated in this

verse with the words ‘nations and tribes’, which are intended ‘to know one another’. The form of the verb used here, *ta’arafu*, is a reciprocal form that leads to *mu’awadhah*, or reciprocity between self and others, a term I will return to at length below. The ultimate criterion for making judgements between human beings is on the basis of *taqwa*, or a certain kind of moral integrity in mature human agents.

As mature and responsible human agents, we are able to choose between what is good and just and what is evil and oppressive (*zulm*). This is part of human free will. We can exercise this free will any way we want. However, although we are completely free to exercise this will any way we want, the judgement for how we choose to act on this free will lies completely outside of us—it lies with Allah. Allah is the ultimate judge. Allah sees and knows all things, whether in the public arena or in the private sphere, such as in the home. Therefore these two spheres of human interaction are not intended to require two separate ways of behaving. **The level of just and fair behaviour in the public space is neither greater nor less important than the level of just and fair behaviour in the home.** Both spaces demand of us moral excellence or *taqwa*.

It is self-evident that the development of fair and just laws requires a harmonious balance between public and private spaces, between women and men, as well as between responsibility and benefits. An example of imbalance or injustice common today is that Muslim women experience a dichotomy in their role with regard to the law. They are considered morally responsible subjects of the law without being considered equally as creators of the law. *Taqwa* is considered in the Qur’an as the ultimate criteria for the judgement of all human worth, but women are often socially conditioned to demonstrate *taqwa* by being subservient and silent, while men are encouraged to demonstrate *taqwa* through social activism, intellectual contributions and formation of the laws. One of the simplest ways to reform the law in accordance with the ethics of the Qur’an may be to encourage active and equal public

participation by both women and men, especially in legal and policy reform, so they are equally able to express their *taqwa*.

I make one more point here about the Qur'an and human creation. When the Qur'an says, *Inni Jaa'ilun fi-l-'ard khalifah* ('Indeed, I will create on the earth an agent or trustee') (*Al-Baqarah* 2:30), we know that humankind is meant to live out its destiny here on earth, *fi-l-'ard* (*Sad* 38:26). The way in which we fulfil our destiny is through *khilafah*, or moral agency. Human beings are created to be moral agents. There is no distinction made between male and female in terms of this divine mandate. Thus each and every one of us is held accountable for what we do in our lives. Most importantly, as *khalifah* (moral agents) we are trustees of Allah, entrusted to fulfil Allah's will on earth. The choice to do good deeds and to uphold justice is part of our *khilafah*. It is best carried out by *taqwa* or the awareness that although we are free to choose how we behave, we will be inclined to choose to follow Allah's will since that is the best choice. It is the choice that helps humankind to fulfil its destiny as *khalifah*. To show our *taqwa* and fulfil our agency we must do justice here on earth. Justice on earth means to establish human relationships of equality.

## ii. The Hereafter

I refer to only two verses about the Hereafter, because the Qur'an consistently cites both man and woman as morally responsible—promising reward or punishment for both based upon their faith, actions and intentions, whether they act alone, in the family, in the community, or in the wider world. For example,

Whoever does a good deed, whether male or female, and is a believer,  
all such shall enter the Garden... (*Ghafir* 40:40)

And remain conscious of [the coming of] a day when no human soul shall in the least avail another soul, nor shall intercession be accepted of them, nor ransom taken from them [for or from another] and none shall be helped. (*Al-Baqarah* 2:48)

These Qur'anic verses clearly emphasise moral responsibility and the certainty of reward or punishment for both man and woman. No human soul (*nafs*) will be able to gain any benefit from or lose any virtues because of another human soul. Judgement is on the basis of the individual's faith and actions on earth that follow from that faith, with regard to each other and to all humanity at large.

## **II. Challenging Patriarchy with Reciprocity**

Patriarchy is older than the history of Islam and the life of the Prophet Muhammad. Like other religions, Islam addressed the existing patriarchal norms, taking them for granted. However, the Qur'an introduced what is best understood as a trajectory to move the believer, as a person and a member of a just social order, beyond patriarchy. We can therefore ask whether this trajectory was followed. After the revelation was given to the Prophet Muhammad, to what extent did Muslim thinkers and members of Muslim societies move beyond this patriarchy in historical and intellectual terms, as well as in community and cultural practices? Did Muslims succeed in fulfilling gender justice to the extent required by the trajectory set forth in the Qur'an?

Today we face a dual mandate. From within, we must address the persistent sub-standard status of women under Muslim laws and in Muslim cultures, countries and communities. At the same time, we must also challenge notions from outside Muslim cultures that Islam is not competent to participate fully in global pluralism and universalism and to



meet the demands for democracy and human rights. We are more than competent, and we are addressing these issues from within an Islamic framework. In this way, we can overcome patriarchy and move towards more egalitarian notions and practices in Muslim civil society, whether in Muslim majority nation states or as Muslim minorities in the diaspora of North America and Europe.

In his book, *The Web of Life: A New Scientific Understanding of Life Systems*, Fritjof Capra describes a paradigm shift that began almost 100 years ago that has been important to overcoming deep-rooted, patriarchal ideas about the inequality of women. 'This paradigm shift consists of a number of entrenched ideas and values, among them ... the belief that a society in which the female is everywhere subsumed under the male is one that follows a basic law of nature.'<sup>1</sup> In response to the old patriarchal paradigm, a new notion has emerged in which domination is replaced by partnership. Such a partnership was missing in the patriarchy of the past, whether practised by Muslims or non-Muslims alike.

Patriarchy is two pronged. It has both the idea and the practice of gross hegemony in the private and public spheres. Patriarchy is not just about men, it is about persistently privileging one way of doing things, one way of being and one way of knowing. That way of knowing stems from notions about how the public space operates, based almost entirely on the way men have acted in that space, and the common perception that public space has greater significance than private space. However, according to the considerations discussed above, the requirements of *taqwa*, or moral excellence, are the same in both the public and private spheres. There is no double standard that excludes women from equal participation in the public sphere or requires participation in the public sphere only in the way that men have participated. Likewise, men are not excluded from equal participation in the private space, but are awarded equal worth for those contributions. The answer to patriarchy is neither that women should rule over men nor that women must do what men

have been doing; instead, we move from domination to partnership. Therefore, the answer to patriarchy is best understood with the term *mu'awadhah*, or reciprocity.

Reciprocity is a fundamental moral value found in various religions, cultures and philosophies and is exemplified by the 'Golden Rule of Reciprocity'.<sup>2</sup> It is a universal ethical principle that articulates a right to just treatment and a responsibility to be just to others. The teachings of Islam provide many sources and examples on the ethic of reciprocity, or *mu'awadhah*.<sup>3</sup>

*Mu'awadhah* comes from the root form *waw*, *'ain*, *dhad*. *Iwaadhah* is a legal term denoting reciprocal responsibilities or substitution (the origins of this term, according to the Hans Wehr Modern Arabic Dictionary). The term *mu'awadhah* has been used in Muslim contexts to refer to Islamic financial transactions.

In this paper, I define *mu'awadhah* to mean a relationship of reciprocity between individuals. It consists of two components: 1. mutual knowing of one another (what the Qur'an refers to in *Al-Hujurat* 49:13 as *ta'arafu*; and 2. mutual support of each other as individuals, in the family and in the community at large. Community is not restricted solely to local communities, but is taken to encompass the whole of the Muslim *ummah* as well as the entire earth, *al-'ard*. We are responsible for the effects of all our actions upon Muslim and non-Muslim alike. This notion of pluralism is one that asserts moral responsibility on our all actions towards humankind. This falls under the *Shari'ah* term *mu'amalat*, social actions or actions reflecting social justice. At the deeper level of personal self-introspection (*muhasabah*), this also means taking into account the effects of one's actions on others. This is because patriarchy is a kind of *shirk* (ultimate violation of divine unity), stemming from the Satanic notion of *istikbar* (thinking of oneself as better than another), as illustrated in the following Qur'anic story on the creation of humans.

*Surah Al-A'raf* narrates that *Iblis* (Satan) refused to bow down with the angels before the first human soul (Adam). He said, *Ana Khayran minhu. Khalqatani min naar wa khalaqatahu min Tin* ('I am better than him, You created me from (smokeless) fire and You created him from an atom of dirt') (*Al-A'raf* 7:12). This attitude is regarded as *istikbar*—considering oneself as better than another, rather than obeying the will of Allah and acknowledging the necessary interconnection between all humans. *Istikbar* leads to all practices and systems of oppression, including the historical worldview of patriarchy. The practices of *istikbar* stem from the idea that no matter what men do, it is better than whatever women do. The continuation of this patriarchal logic is that men always do better than women in certain things and women always do better than men in certain other things, but these are always separate or 'complementary' and not interrelated. The idea that men are superior reduces women to a subordinate status.

Many people—both women and men—have often been acculturated into accepting this false notion of male superiority and thereby disregarding equality rather than seeing it as essential to their creation, to the *akhirah* and hence to all of life in between. As such, there is a long history of Muslim practices that are based on a double standard. One standard of behaviour is applied to men, and another standard, which views women as having a subordinate status, is applied to women.

To grow beyond these attitudes and structures of inequality we have to move towards reforms that acknowledge the equal significance of women's creation, women's ways of thinking and being, and their equal responsibility in judgement. We can do this by establishing a system of social justice that practices *mu'awadhah*, relations of reciprocity and equality between women and men. This system would acknowledge both women and men as competent contributors in both the private and the public spheres of activities. Such a system would encourage women

and men to excel in whatever they do and would not restrict them to one sphere over another. This would encourage people to believe and do good deeds in all spheres rather than placing undue constraints on themselves based on gender roles. In this way, the multiple competencies of the persons who perform these good deeds can be emphasised over and above the gender of those who perform them. The basis of this reciprocity is central in Islam under the rubric of *tawhid*.

### **III. Beyond Patriarchy and Towards Gender Reforms**

The way to move beyond patriarchy is twofold: *taqwa* at the level of the individual and *tawhid* at the level of social praxis and the legal codes of jurisprudence (*fiqh*). Again, the inspiration for such a movement can be taken from the Qur'anic ethos, which was also a central tenet in the statements of the Prophet Muhammad. The texts (*al-nusus*), especially the references where women and men are acknowledged as equal, provide a source for the concept of equality as an essential component of Muslim family laws and relationships. These are the foundations on which the necessity and possibility of reforming existing family laws can be built, taking into account the Islamic perspective, human rights principles and the lived realities of women.

Indeed, men who surrender to Allah and women who surrender, and men who believe and women who believe, and men who obey and women who obey, and men who speak the truth, and women who speak the truth, and men who persevere in patience and women who persevere in patience, and men who are humble and women who are humble, and men who give in alms and women who give in alms, and men who observe the fast and women who observe the fast, and men who guard their modesty and women who guard

their modesty and men who remember Allah much and women who remember Allah much, Allah has prepared for them a forgiveness and a great reward. (*Al-Ahzab* 33:35)

This verse sets the obvious framework in the Qur'an for equal and reciprocal moral relationships and responsibilities of women and men. The life between Creation and the Hereafter entails mutual duties and responsibilities, as well as *mu'awadhah* (reciprocity) in the thoughts and practices of both women and men. As a historical text, the Qur'an was revealed in the context of seventh-century Arabian patriarchy and anarchy. In its effort to reform society, the Qur'an addressed social, political, economic and moral imbalances, offering a model of greater reciprocity and explicit statements regarding reforms to the realities of women's lives. Had this important Qur'anic trajectory been fully maintained over the last fourteen centuries, the situation of Muslim women in most contexts globally would be far improved from what it is today. The foundational idea of gender equality, then, is derived from the Qur'anic worldview. Therefore, all discussions of equal human rights for women have their confirmation in this Qur'anic worldview.

*Qala rasulu-Lah (saw) Inna li-rabbi ka 'alayka haqqan wa li-ahlika 'alaka haqqan wa li-nafsika alaka haqqan, fi'ti kulla dhi haqqan haqqahu.* (The Prophet Muhammad (*saw*) said, 'Indeed, your Lord has certain rights over you, and your family has certain rights over you and your own soul has certain rights over you, so give to each according to the rights that are due.')

(*Sahih Bukhari* 3.189)

This *Hadith* is significant as it recommends that the way to fulfil the rights that Allah (*rabbika*) has over us, as human beings, is to fulfil the other two rights. The first relates to our relationship with others. The word *ahl* can either refer in a limited way to our immediate families or, in

more universal terms, could mean the family of humankind. This means that we should work in concert with others besides our own selves. The second concerns the rights that we should fulfil for our own souls.

This *Hadith* reminds us of the necessity of balancing how we fulfil the rights of others in the family or community, how we fulfil the rights due to our own souls, and how we fulfil that which is due to our Lord. This challenges the common notion that a Muslim woman's only role in her family is self-sacrifice and serving the needs of others, no matter how great the sacrifice. In patriarchy, women's labours of love and caretaking in the family tend to be exploited, as though such labours flow from some biological predisposition of being female, rather than as reflections of an intense kind of agency. For some women, this tendency can make the private sphere a kind of prison from which they may not escape lest they fall under the judgement of being less than truly or ideally female. For others, it becomes a double bind, because they must fulfil the role of primary caretaker in the home while also competing in the public sphere for wages. Moreover, that public sphere is generally defined along the lines of what men do, and those men often rely on women to take care of their families at home. The *Hadith* quoted above demands a balance for both women and men to serve themselves, serve each other and their families and communities, and serve their Lord.

Finally, in terms more specific to our intimate family relationships between women and men, the Qur'an says:

Among His signs is that He created for you from your own selves, partners, that you might dwell with them in tranquility and has made affection (*muwaddatan*) and mercy between (these partners). Indeed in that is a sign for those who reflect. (*Ar-Rum* 30:21)

The relationship between the married couple as described here is extremely gentle. *Muwaddatan* as affection also means mutual love

and intimacy. This is not a relationship of competition, violence, strife or hierarchy. It is impossible to have reciprocal terms in the family unless these start with the fundamental relationship between the married couple.

**In place of domination, we have partnership. In place of competition, we have cooperation.** These are all aspects of *mu'awadhah* and here the Qur'an explains it in even more intimate terms with the words *muwaddatan bayna al-rajul wa-l-mar'ah* ('mutual love between the man and the woman').

The traditional model of the family enshrined in Islamic legal thought is one based on a relationship of domination such that a man is only and always viewed as *qawamun*: responsible, and, in some interpretations, superior. As a result, the woman can only and must always be subject to, inferior to and therefore dependent upon, the man. Although this resembled the practices at the time of revelation, it is a patriarchal model irreconcilable with women's agency and integrity in the present circumstances. Women have made and will continue to make valuable contributions in all areas, private and public, and these realities must be reflected in the reform of laws and policies to acknowledge women's valuable contributions and full human agency. The only model which exemplifies this integrity is one based upon mutual love and respect and which is implemented in terms of full equality.

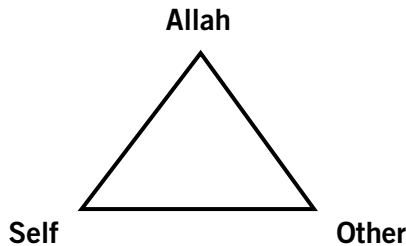
#### **IV. The *Tawhidic* Paradigm of Reform**

What makes a difference in today's consideration of Muslim personal status laws or family laws is the relationship between women as actors and agents both in matters of interpretation (*tafsir*) as well as in matters of jurisprudence (*fiqh*). In this paper I describe the legitimacy of women as actors and agents on the basis of Qur'anic analysis. In particular, the goal has been to shed some light on how women and men must form an

active partnership in both the legal or policy realms and in the family, in the name of Islam and justice.

The main inspiration for looking at this role of cooperation comes from the notion of *tawhid* as implemented at the level of social praxis and in human relationships. At its most fundamental level *tawhid* refers to the oneness of Allah. Allah is one and unique. The word *tawhid* comes from the second form of the verb, *wahhada*, and is a dynamic term, emphasising the divine power to bring all things into unity or harmony. This harmony I have already spoken of as *mu'awadhah*, or mutual reciprocity, cooperation and interdependence. Its relationship to *tawhid* is the final point I wish to consider.

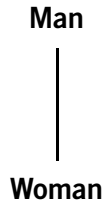
A fundamental idea in Islam is that Allah is the greatest. *Allahu akbar*. Added to this, the Qur'an makes it clear that whenever two persons are together, Allah makes the third, or when three are together, Allah makes the fourth and so on (*Al-Mujadalah* 58:7). Taking into consideration that Allah is always present, the relationship of *mu'awadhah* can be described as horizontal reciprocity that looks like the following diagram:



As long as Allah is the greatest and is unique, according to *tawhid*, then there can be no other relationship between any two persons except the one of horizontal reciprocity. The horizontal plane is mutually cooperative because the role of the one can be exchanged with the role of the other with no loss of integrity.



In the patriarchal framework, man is superior to woman, which can be seen as a relationship on a vertical plane:



This is how patriarchy is a kind of *shirk*. It places men and women in a relationship that is not capable of reciprocity because one person is always ‘superior’ to the other. Under *tawhid*, this is not possible, because the presence of Allah must remain as the highest focal point. Since a new axis is formulated wherever and whenever Allah is present, **and Allah is always present**, then no one can hold the upper level without violating *tawhid*.

## V. Conclusion

At the practical level what is at stake is bringing the experiences of Muslim women to the discourse. We empower women’s voices, women’s experiences and women’s ways of knowing as equally important contributions to the lived realities of Islam. Women’s experiences become central for formulating all policies and practices related to them. In Islam, both women’s and men’s agencies are central—women cannot be relegated to a subordinate status. Women are competent to be major contributors to the laws that govern the personal, professional and spiritual lives of all citizens, in the contexts of the modern Muslim nation state and within the complex realm of today’s global pluralism and the mandates for democracy and human rights.

Muslim nation states and the global arena are seeing rapid changes, interconnections and cross discourses about human rights, women's human rights, Islamic human rights and pluralism. It is important that Muslim women and men take leading roles in assessing what these will mean in the context of our cultures, our countries, and our *din, al-Islam*. It is also important that we see these new links with the traditional sources in such a way as to transform and augment what is foundational on the basis of enduring principles and values. Otherwise, we fall prey to the blind following (*taqlid*) of traditions. We also need to make careful examination of the impact of our actions in preserving what is good and prohibiting what is evil (*'amr bi-l ma'ruf wa nahyi 'an al-munkar*). Here, *ma'ruf* is the key term for 'universal', referring to that which is self-evident and good. In respect to family laws, new policies are needed that take into account women's real experiences and potentialities as part of the full human agency to fulfil the will of Allah in light of *tawhid* and in order to bring about greater cooperation between individual members of the community.

## Notes

- 1 Capra, *The Web of Life*, p. 6.
- 2 K ng, 'The Globalization of Ethics'. Confucius was the first to formulate the Golden Rule of Reciprocity: 'Never impose on others what you would not choose for yourself.' Through the spread of Chinese culture, the concept of ren and the Golden Rule spread throughout the vast Chinese-influenced area that reaches from Central Asia to Taiwan and from Korea to Singapore.

This Golden Rule, however, also appears in the Indian tradition. In Jainism, it is stated as: 'A man should wander about treating all creatures as he himself would be treated.' In Buddhism: 'A state that is not pleasant or delightful to me must also be so to him; and a state that is not pleasing or delightful to me, how could I inflict that upon another?' In Hinduism: 'One should not behave towards others in a way which is disagreeable to oneself. This is the essence of morality.'

This 'Golden Rule' can also, of course, be found in the Abrahamic religions. Rabbi Hillel (60 B.C.) said: 'What is hurtful to yourself do not do to your fellow man.' Jesus worded it positively: 'So in everything, do to others what you would have them do to you.' Islam, too, has a similar concept: 'None of you believes until he wishes for his brother what he wishes for himself.'

For more on the existence of the 'Golden Rule of Reciprocity' in 21 religions, see <http://www.religioustolerance.org/reciproc.htm>.

- 3 'None of you [truly] believes until he wishes for his brother what he wishes for himself' (from Al-Nawawi's Forty Hadiths). 'Woe to those who ... when they are to receive their due from [other people], demand that it be given in full, but when they have to measure or weigh whatever they owe to others, give less than what is due.' *Al-Mutaffifin* 83:1-3.

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# The Human Rights Commitment in Modern Islam\*

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Of all the moral challenges confronting Islam in the modern age, the problem of human rights is the most formidable. This is not because Islam, as compared to other religious traditions, is more prone to causing or inducing behaviour that disregards or violates the rights of human beings. In fact, the Islamic tradition has generated concepts and institutions that could be utilised in a systematic effort to develop social and moral commitments to human rights. But the cause of the formidable challenge to the Islamic tradition pertains to the particular historical dynamics that Muslims have had to confront in the modern age. Political realities—such as colonialism, the persistence of highly invasive and domineering despotic governments, the widespread perception, and reality, of Western hypocrisy in the human rights field, and the emergence and spread of supremacist movements of moral exceptionalism in modern Islam—have contributed to modes of interpretation and practice that are not consistent with a commitment to human rights.<sup>1</sup>

These political developments, among others, have led to an aggravated process of moral disengagement, and even callousness, toward human suffering, even when such suffering is inflicted in God's name. Put simply, in the contemporary era there has been a systematic undermining and devaluing of the humanistic tradition in Islam, and a process of what could be described as a vulgarisation of Islamic normative doctrines and systems of belief. Therefore, exploring the relationship of Islam to the concept of human rights implicates the crucial issue of

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Islam's self-definition: What will Islam stand for and represent in the contemporary age? What are the symbolic associations that Muslims and non-Muslims will draw when it comes to thinking about the Islamic tradition? A corollary issue will be the relationship between modern Islam and its own humanistic tradition: To what extent will modern Islam associate with and develop the historical experience of Islamic humanism?<sup>2</sup>

In recent times, and well before the tragedy of 9/11, Muslim societies have been plagued by many events that have struck the world as offensive and even shocking. Morally offensive events—such as the publication of *The Satanic Verses* and the consequent death sentence issued against Salman Rushdie; the stoning and imprisoning of rape victims in Pakistan and Nigeria; the public flogging, stoning, and decapitation of criminal offenders in Sudan, Iran, and Saudi Arabia; the degradation of women by the Taliban; the destruction of the Buddha statues in Afghanistan; the sexual violation of domestic workers in Saudi Arabia; the excommunication of writers in Egypt; the killing of civilians in suicide attacks; the shooting in 1987 of over four hundred pilgrims in Mecca by Saudi police; the taking of hostages in Iran and Lebanon; the burning to death in 2002 of at least fourteen schoolgirls in Mecca because they were not allowed to escape their burning school while not properly veiled; and the demeaning treatment that women receive in Saudi Arabia, including the ban against women driving cars, as well as many other events—seem to constitute a long Muslim saga of ugliness in the modern world.

My purpose in this chapter is not necessarily to explain the socio-political reasons for the pervasiveness of acts of ugliness in the modern Islamic context. In addition—although, admittedly, I discuss the Islamic tradition as an insider—I do not aim, so to speak, to vindicate or defend Islam by proving that Islamic beliefs and convictions are consistent with human rights. For reasons explained below, I think that adopting such an

approach would be intellectually dishonest and ultimately not convincing or effective. Rather, the purpose of this article is to discuss the major points of tension between the Islamic tradition and the human rights system of belief and to explore the possibilities for achieving a normative reconciliation between the two moral traditions.

I will identify some of the main obstacles that hamper a serious Islamic engagement with the field, and analyse potentialities within Islamic doctrine for realising a vision of human rights. In essence, this article will focus on potentialities—i.e. the doctrinal aspects in Muslim thought that could legitimise, promote, or subvert the emergence of a human rights practice in Muslim cultures. In principle, doctrinal potentialities exist in a dormant state until they are co-opted and directed by systematic thought, supported by cumulative social practices, toward constructing a culture that honours and promotes human rights. This article will focus on the doctrinal potentialities or concepts constructed by the interpretive activities of Muslim scholars (primarily jurists), but not on the actual socio-political practices in Islamic history.

One of the powerful attributes of doctrine—especially theological and religious doctrine—is that it does not necessarily have to remain locked within a particular socio-political-historical practice. Religious doctrine can be distilled from the aggregations and accumulations of past historical practices, and reconstructed and reinvented in order to achieve entirely new social and political ends. I do admit that I suffer from a certain amount of optimism about the possibilities of reinterpreting religious doctrine in order to invent new socio-political traditions, without necessarily having to sacrifice either the appearance or substance of authenticity. Put differently, I do believe that even if Islam has not known a human rights tradition similar to that developed in the West, it is possible, with the requisite amount of intellectual determination, analytical rigour, and social commitment, to demand and eventually construct such a tradition.<sup>3</sup> This is to say that the past influences—but

does not completely determine—the future, and if one did not at all believe in the transferability of ideas, and in the possibility of cultural transplants, there would be little point to speaking about a possible relationship between Islam and human rights.

## **I. Colonialism, Apologetics, and the Muslim Human Rights Discourse**

The construct of human rights has achieved notable symbolic significance in the modern world. Politically, whether in fact a nation regularly violates the rights of its citizens or not, most nations go through the pretence of claiming to honour some version of human rights. In the past half-century, human rights has become a significant part of international relations, as there has been a globalisation of human rights concerns and discourses. At least since the widespread adoption of what has been referred to as the International Bill of Rights, the idea of human rights has become established as a powerful symbolic construct often used to shame or embarrass governments into exhibiting a higher degree of restraint in dealing with their citizens.

Importantly, in the case of the Muslim world, the human rights movement has, so to speak, won indigenous converts, and as a result, it is not unusual to observe the language of human rights being used as a medium for expressing dissent, and making demands on local governments. This is the case particularly for women's rights activists in the Muslim world who frequently cite international standards and obligations as a means of exerting pressure upon their domestic governments.<sup>4</sup> But aside from localised support and co-optation of the language and paradigms of international human rights by some activists in the process of articulating social and political demands, there has been quite a different dynamic taking place in Muslim countries.



Despite the active involvement of countries such as Egypt, Lebanon, and Tunisia in drafting the aspirational language of several international human rights documents, there remained a considerable tension between traditional Islamic law and the normative demands of human rights. This was particularly so in matters relating to personal status laws, equal rights for women, freedom of religion, and harsh Islamic criminal penalties for offences such as theft, adultery, and apostasy.<sup>5</sup> However, the primary intellectual and theological response to the challenge of international human rights followed a pattern that had become well ingrained since the onslaught of colonialism and the taunting criticisms of Orientalists against the Islamic tradition and systems of belief.

Colonialism, and its accompanying institution of Orientalism, had not only played a pivotal role in undermining the traditional institutions of Muslim learning and jurisprudence, but it had also posed a serious challenge to traditional Muslim epistemologies of knowledge and the sense of moral values.<sup>6</sup> Although international human rights law was enshrined in various treaties during a period in which most Muslim countries had gained political independence, the experiences of colonialism and post-colonialism influenced the Muslim intellectual response in several important respects. Muslims did not first encounter Western conceptions of human rights in the form of the Universal Declaration of Human Rights (UDHR) of 1948, or in the form of negotiated international conventions. Rather, they encountered such conceptions as part of the 'White Man's Burden' or the 'civilising mission' of the colonial era, and as a part of the European natural law tradition, which was frequently exploited to justify imperialistic policies in the Muslim world.<sup>7</sup>

This experience has had a significant impact on the understanding of human rights in the Muslim social imagination, and on the construction of Islamic discourses on the subject. The most important, among Muslim

intellectuals, was the perception that the human rights field is thoroughly political, and that it is plagued by widespread Western hypocrisy. The aggravated politicisation of the issue of human rights meant that, quite frequently, the field became a battleground for competing cultural orientations within Muslim societies. In the writings of some dogmatists such as Sayyid Qutb, Abu A'la al-Mawdudi, and Jalal Kishk, the human rights discourse was portrayed as a part of the Western cultural invasion of Muslim lands, and as a tool for instilling Muslims with a sense of cultural inferiority. Although in the late nineteenth and early twentieth centuries there were several systematic efforts to come to terms with the Western natural law tradition in general<sup>8</sup> and human rights more specifically, increasingly the Muslim intellectual response could be summed up within two predominate orientations, the first apologetic and the second defiant or exceptionalist.

The apologetic orientation consisted of an effort by a large number of Islamists to defend and salvage the Islamic system of belief and tradition from the onslaught of Westernisation and modernity by simultaneously emphasising both the compatibility and the supremacy of Islam. Apologists responded to the intellectual challenges of modernity and to universalist Western paradigms by adopting pietistic fictions about the presumed perfection of Islam, and eschewed any critical evaluation of Islamic doctrines. A common heuristic device of apologetics was to argue that any meritorious or worthwhile modern institutions were first invented and realised by Muslims. Therefore, according to the apologists, Islam liberated women, created a democracy, endorsed pluralism, and protected human rights, long before these institutions ever existed in the West.<sup>9</sup>

Muslim apologists generated a large body of texts that claimed Islam's inherent compatibility with international human rights, or even claimed that Islam constituted a fuller and more coherent expression of human rights. These texts followed the same basic pattern and

methodology; they produced a list of rights purportedly guaranteed by Islam, and the rights listed coincided, or were correlated, most typically with the major human rights articulated in the UDHR. Most often, in order to demonstrate the point, these texts would selectively cite a Qur'anic verse, or some anecdotal report attributed to the Prophet, for each of the purported rights.

Nonetheless, these rights were not asserted out of critical engagement with Islamic texts, or the historical experience that generated these texts, or even out of a genuine ideological commitment or a rigorous understanding of the implications of the rights asserted. Rather, they were asserted primarily as a means of resisting the deconstructive effects of Westernisation, affirming self-worth, and attaining a measure of emotional empowerment. The apologetic orientation raised the issue of Islamic authenticity in relation to international human rights, but did not seriously engage it. By simply assuming that Islam presented a genuine and authentic expression of international human rights, the apologetic orientation made those international rights redundant.

This led to an artificial sense of confidence, and an intellectual lethargy that neither took the Islamic tradition nor the human rights tradition very seriously. One of the serious consequences of this orientation was that, to date, a serious analytical Islamic discourse on human rights has not emerged. By pietistically affirming the place of human rights in Islam instead of investigating it, the apologetic movement simply avoided confronting the points of tension between the two convictional systems.<sup>10</sup>

One notices a near-complete absence of any systematic philosophical and theological treatment of the issue of human rights in Islam. As discussed later, in contrast to speculative theological works of classical Islam, and the often complex rights conceptions of premodern Islam, contemporary Islamist approaches remained superficial. For instance, during the heyday of socialist ideologies in the Third World,

a large number of Islamists insisted that the essential character of the Islamic approach to rights is collectivism and not individualistic. But in the 1980s, with the increasing influence of the United States on the world scene, a large number of Islamists claimed that Islam emphasised individualistic conceptions of rights and guaranteed the right to private property.

## **II. Puritanism, Anti-Westernism, and Exceptionalism in Muslim Discourses**

In the 1970s, much of the Muslim world witnessed an Islamic resurgence, which took the form of a powerful puritan movement demanding a return to an authentic Islamic identity through the reimplementation of *Shari'ah* law. The return to an authentic Islamic identity as well as the call for the reassertion of *Shari'ah* law were recurrent themes during the colonial era. Both the Wahhabi<sup>11</sup> and the Salafi<sup>12</sup> theological movements—the main proponents of puritan Islam—had emerged during the colonial era and remained active throughout the twentieth century. But for a variety of reasons, including aggressive proselytising and the generous financial support of Saudi Arabia, these two movements became practically indistinguishable from each other, and they also became a dominant theological force in contemporary Islam.

Puritanism resisted the indeterminacy of the modern age by escaping to a strict literalism in which the text became the sole source of legitimacy. It sought to return to the presumed golden age of Islam, when the Prophet created a perfect, just polity in Medina. According to the puritans, it was imperative to return to a presumed pristine, simple, and straightforward Islam, which was believed to be entirely reclaimable by a literal implementation of the commands and precedents of the Prophet and by a strict adherence to correct ritual practice. The puritan

orientation also considered any form of moral thought that was not entirely dependent on the text to be a form of self-idolatry, and treated humanistic fields of knowledge, especially philosophy, as 'the sciences of the devil'. It also rejected any attempt to interpret the divine law from a historical or contextual perspective and, in fact, treated the vast majority of Islamic history as a corruption or aberration of the true and authentic Islam. The dialectical and indeterminate hermeneutics of the classical jurisprudential tradition were considered corruptions of the purity of the faith and law, and the puritan movement became very intolerant of the long-established Islamic practice of considering a variety of schools of thought to be equally orthodox. It attempted to narrow considerably the range of issues upon which Muslims may legitimately disagree.

In many respects, the puritan movement reproduced the mental sets adopted by the apologetic movement. It eschewed any analytical or historical approaches to the understanding of the Islamic message and claimed that all the challenges posed by modernity are eminently resolvable by a return to the original sources of the Qur'an and the *Sunnah*. Unlike the apologetic orientation, however, the puritans insisted on an Islamic particularity and uniqueness and rejected all universalisms, except the universals of Islam. The puritans reacted to the eagerness of the apologists to articulate Islam in a way that caters to the latest ideological fashion by opting out of the process. In the puritan paradigm, Islam is perfect, but such perfection meant that ultimately Islam does not need to reconcile itself or prove itself compatible with any other system of thought. According to this paradigm, Islam is a self-contained and self-sufficient system of beliefs and laws that ought to shape the world in its image, rather than accommodate human experience in any way.

This attitude, in good part, emerged from what is known as the *hakimiyya* debates in Islamic history (dominion or sovereignty). According to the puritans, in Islam dominion properly belongs to God alone, who is the sole legislator and lawmaker. Therefore, any normative

position that is derived from human reason or sociohistorical experience is fundamentally illegitimate. The only permissible normative positions are those derived from the comprehension of the divine commands, as found in divinely inspired texts. Not surprisingly, the puritan orientation considered all moral approaches that defer to intuition, reason, contractual obligations, or social and political consensus to be inherently whimsical and illegitimate. All moral norms and laws ought to be derived from a sole source: the intent or will of the Divine.

As to the issue of universal human rights, it is not entirely accurate to describe the puritan orientation as exceptionalist because the puritans did not seek a relativist or cultural exception to the universalism of human rights. Rather, the puritan claim was that whatever rights human beings are entitled to enjoy, they are entirely within the purview of *Shari'ah* law. It is important to realise that the puritans did not deny, in principle, that human beings have rights; they contended that rights could not exist unless granted by God. Therefore, one finds that in puritan literature there is no effort to justify international rights on Islamic terms but simply an effort to set out the divine law, on the assumption that such a law, by definition, provides human beings with a just and moral order.

Nevertheless, despite the practice of waving the banner of Islamic authenticity and legitimacy, the puritan orientation was far more anti-Western than it was pro-Islamic. The puritans' primary concern was not to explore or investigate the parameters of Islamic values or the historical experience of the Islamic civilisation but to oppose the West. As such, Islam was simply the symbolic universe in which they functioned and not the normative imperative that created their value system. Although the puritans pretended that the *Shari'ah* comprised a set of objectively determinable divine commands, the fact is that the divine law was the by-product of a thoroughly human and fallible interpretive process. Whatever qualified as a part of the *Shari'ah* law, even if inspired by exhortations found in religious texts, was the product of human efforts and

determinations that reflected subjective sociohistorical circumstances. As such, the determinations of the puritans were as subjective and contextual as any of the earlier juristic interpretations in Islam.

However, the most noticeable aspect regarding the puritan determinations was their reactive nature. The puritan orientation was as alienated and superficially anchored in the Islamic tradition as the apologetic orientation. Puritanism understood and constructed Islam only through the prism of seeking to be culturally independent from the West. As such, its primary operative mode was to react to Western supremacy in the modern world by, effectively, constructing Islam into the antithesis of the West, or at least the antithesis of an essentialised view of the West. This reactive stance was significant because it shaped much of the puritan discourse on the idea of universal human rights. Since international human rights was seen as distinctly Western in origin, they were opposed on these grounds alone and, in fact, Islamic scholars who espoused some form of doctrinal reconciliation were thought of as suffering from Westoxification and, consequently, treated as betrayers of the Islamic tradition.

### **III. The Human Rights Commitment and Ambiguity in Islam**

Between the two dominant responses of apologetics and puritanism, Islamic discourse on the subject of human rights has remained vastly underdeveloped.<sup>13</sup> Consequently, there has been much ambiguity surrounding what may be called the human rights commitment in modern Islam. In essence, a human rights commitment emerges from a convictional paradigm: human rights is a moral and normative belief about the basic worth and standard of existence that ought to be guaranteed for any human being.<sup>14</sup> Whether this belief is founded on

a vision of human dignity, rational capacity, or freedom from harm and suffering, in its essence it expresses a commitment to the well-being of the human being. Even collectivist or communitarian visions of rights are often forced to justify their commitments by claiming to provide for the well-being of most of the members of the imagined community or collectivity.

Importantly, visions of human rights do not necessarily seek to exclude subjective or contextual perceptions of rights or entitlements. Such visions are not necessarily premised on the idea that there is a fixed set of human rights that is immutable and unevolving from the dawn of history until today. However, human rights visions do tend to objectify and generalise the subjective experiences of human beings. By evaluating the sociohistorical experience of human beings—the demands made for protection and the resistance offered to these demands—and by evaluating the impact of practices that cause suffering, degradation, or deny people the ability to develop, it becomes possible to articulate objectified visions of a universal set of rights that ought to be enjoyed by all human beings.<sup>15</sup>

At the legalistic level, arguably the so-called Bill of International Human Rights has already recognised what ought to be objective standards for human conduct, and such standards are binding on all nations of the world, even as to states that have not become signatories to the two human rights covenants. But whether the legal argument is valid or not, the universal human rights schemes have the unmistakable characteristic of an ideology that, very much like a religious faith, believes that human beings ought to be treated in a certain way because, quite simply, as a matter of conviction it is what is right and good. Once a claim of right is objectified, unless it goes through a process of deconstruction and de-objectification, as a matter of commitment and belief, it becomes binding to all. It also becomes a measure by which to judge the behaviour of violators.<sup>16</sup>



One of the major aspects that human rights schemes share with religious systems is the objectification of subjective experience. The tension between religion and human rights, as systems of convictional reference, is not in the subjective experience. Genuine regard for human rights may be subjectively experienced in a fashion that is entirely consistent with one's religious convictions.<sup>17</sup> Put differently, a religious person's unique set of experiences may resolve all possible tensions between his/her own personal religious convictions and human rights. At the subjective level, individuals may feel that they have not experienced any irreconcilable conflicts between their commitment to human rights and their religious convictions.

Rather, the tension between the convictional systems of religion and human rights exist in the objectified standards and realities that each system claims.<sup>18</sup> Put rather bluntly, which of the two generalised and objectified systems warrants deference and which constitutes the ultimate frame of reference? Unless one argues, as was claimed in the classical natural law tradition, that God willed that human beings have a particular set of rights, the tension between the two systems becomes inevitable.<sup>19</sup> If the generalised and objectified set of human rights asserted by people just happens to be exactly the same as the divinely ordained set of rights, then, in effect, the tension is resolved, or such a tension never really existed in the first place. The tension is most pronounced, however, when the objectified religious experience is inconsistent with the objectified claims to human rights. This is especially the case when, as is the situation today, such claims arise from a fundamentally secular paradigm.<sup>20</sup>

The ambiguity one finds in modern Muslim discourses regarding a commitment to human rights is due to the failure to confront the two objectified experiences of Islam and human rights. The apologetic discourse avoided the issue by assuming that the two experiences must be one and the same, and that God has granted human beings the

same set of rights found in the international human rights discourse. But such a claim was not made out of a process of reobjectifying or reconstructing Islam so as to engineer such a consistency. In light of the colonial experience and the perception of the vast hypocrisy in human rights practices, many Muslims did not take the human rights discourses seriously enough to effectuate such an engineering of the objectified experience of Islam.

The puritan orientation, on the other hand, opted out of the process altogether and, asserting the supremacy of Islam as a convictional system, rejected as a matter of principle the process of re-engineering or reobjectifying Islam in order to resolve such a tension. This is what accounts for the puritan orientation's defiant stance toward contemporary international human rights claims and its assumption that Islamic imperatives must necessarily be very different from the imperatives set by human rights commitments. The irony, however, is that by taking such a stance, the puritan orientation ended up negating the integrity of the Islamic experience and, in the name of being different, voided what could be genuinely Islamic and, at the same time, consistent with the international human rights tradition.

Acknowledging the primacy of the apologetic and the puritan approaches in modern Islam does not mean that the problematic relationship between the two convictional systems of Islam and human rights is fundamentally irresolvable. In fact, such an acknowledgement is a necessary precondition for developing a critical mass of analytically rigorous Islamic treatments of the issue. There have been some serious efforts, especially in Iran, to deal with the tension between the two systems, but to date such efforts have not reached a critical mass where they may constitute a serious intellectual movement.<sup>21</sup>

Methodologically, many of these efforts have tried to locate a primary Islamic value, such as tolerance, dignity, or self-determination, and utilise this value as a proverbial door by which the human rights

tradition may be integrated into Islam. Other efforts, however, have relied on a sort of original-intent argument, namely, that God's original intent was consistent with a scheme of greater rights for human beings but that the sociohistorical experience was unable to achieve a fulfilment of such an intent.<sup>22</sup> My point here is not to critique these methodological approaches, and I do not necessarily even disagree with them. I do think, however, that Islamic discourses need to go further than either identifying core values or constructing arguments about a historically frustrated divine will.

It is not an exaggeration to say that what is needed is a serious rethinking of the inherited categories of Islamic theology. Nonetheless, in my view, what is needed is not a human-centred theology, but a rethinking of the meaning and implications of divinity, and a reimagining of the nature of the relationship between God and creation. It is certainly true that in Qur'anic discourses God is beyond benefit or harm, and therefore all divine commands are designed to benefit human beings alone and not God. One of the basic precepts of *Shari'ah* is that all laws are supposed to accrue to the benefit of human beings, who are ultimately charged with fulfilling the divine covenant.<sup>23</sup> But in and of itself, this avowed goal of Islamic law is not sufficient to justify a commitment to human rights. Rather, the challenge is to reimagine the nature of the divine covenant, which defines the obligations and entitlements of human beings, in order to centralise the imperative of human rights, and to do so from an internally coherent perspective in Islam.

From an internal perspective, the question is: Is the subjective belief of human beings about their entitlements and rights relevant to identifying or defining those entitlements and rights? May human beings make demands upon each other, and God, for rights and, upon making such demands, become entitled to such rights? As Islamic theology stands right now, the answer would clearly be that, in the eyes of God, the demands of human beings are irrelevant to their entitlements. God is not

influenced one way or the other by human demands, and it is heretical to think otherwise. This response given by traditional Islamic theology does not necessarily preclude a recognition of human rights, but I do believe that such a response creates the potential for foreclosing the possibility of giving due regard to the evolving field of universal human rights.

As I noted earlier, I am dealing with potentialities and not absolute determinations. Therefore, as argued below, giving a different response to these questions could contribute to, or could create, a potential for resolving what I described as the problematic tension between human rights schemes and Islam. I will argue that in order to create an adequate potential for the realisation of a human rights commitment in Islam, it is important to visualise God as beauty and goodness, and that engaging in a collective enterprise of beauty and goodness, with humanity at large, is part of realising the divine in human life.

#### **IV. God's Sovereignty and the Sovereignty of Human Well-Being**

The well-known Muslim historian and sociologist Ibn Khaldun (d. 784/1382) separated all political systems into three broad types. The first he described as a natural system, which approximates a primitive state of nature. This is a lawless system in which the most powerful dominates and tyrannises the rest. The second system, which Ibn Khaldun described as dynastic, is tyrannical as well but is based on laws issued by a king or prince. However, due to their origin, these laws are baseless and capricious, and so people obey them out of necessity or compulsion, but the laws themselves are illegitimate and tyrannical. The third system, and the most superior, is the caliphate, which is based on *Shari'ah* law. *Shari'ah* law fulfils the criteria of justice and legitimacy, and binds the governed and governor alike. Because the government

is bound by a higher law that it may not alter or change, and because the government may not act whimsically or outside the pale of law, the caliphate system is, according to Ibn Khaldun, superior to any other.

Ibn Khaldun's categorisation is not unusual in premodern Islamic literature. The notion that the quintessential characteristic of a legitimate Islamic government is that it is a government subject to and limited by *Shari'ah* law is repeated often by premodern jurists. Muslim jurists insisted that a just caliph must apply and himself be bound by *Shari'ah* law. In fact, some such as the jurist Abu al-Faraj al-Baghdadi Ibn al-Jawzi (d. 597/1200) asserted that a caliph who tries to alter God's laws for politically expedient reasons is implicitly accusing the *Shari'ah* of imperfection.

In the imaginary constructs of Muslim jurists, *Shari'ah* was seen as the bulwark against whimsical government, and as the precondition for a just society. Although this point is often ignored in modern discourses, *Shari'ah* was, at least at the symbolic level, presented as a constraint on the power of the government. The very notion that informed the concept of *Shari'ah* law was that *Shari'ah* is not the law of the state but the law that limits the state. The premodern jurists insisted that the state or the ruler cannot make or formulate *Shari'ah* law. Particularly after the third/ninth century, it had become fairly well established that it was the jurists (*ulama*) who were the legitimate spokespersons for the divine law—an idea that was expressed in the oft-repeated phrase that the *ulama* are the inheritors of the *Shari'ah*.

The state could pass and adopt rules and regulations, as might be necessary in order to serve the public interest, but only as long as such rules and regulations did not violate *Shari'ah* law. Any rules or regulations enacted by the state did not constitute a part of *Shari'ah* law, but were treated as merely administrative in nature. Administrative laws, or what might be called executive laws, were, unlike *Shari'ah* law, considered temporal and mundane; they were a legitimate means for achieving

specific contextual ends, but such laws had no claim to divinity and had no precedential value beyond their specific context and time.

The notion of a government constrained by laws, and the denial to the executive power of unfettered discretion in dealing with the ruled, does tend to support conditions that are conducive for the protection of human rights. Arguably, *Shari'ah* law, as articulated by jurists, could support a conception of rights that, in most situations, are immune from government interference or manipulation. The fact that the interpretations of jurists are endowed with a certain measure of sanctity—as long as such interpretations tend to respect the honour and dignity of human beings—could empower these juristic interpretations against the vagaries and indiscretions of political powers and contribute to the protection of human dignities.

In fact, in Islamic historical practice, Muslim jurists did form a class that exercised considerable moral power against the government and helped to play a mediating role between the rulers and the ruled. Historically, Muslim jurists often represented the ruler to the ruled, and the ruled to the ruler, and acted to stem and balance against political absolutism. They did so by negotiating power, and yielding their moral authority in favour of the ruler or the ruled, depending on the sociohistorical context and the competing normative demands confronting them. Throughout Islamic history, the *ulama* performed a wide range of economic, political, and administrative functions, but most importantly, they acted as negotiative mediators between the ruling class and the laity. As Afaf Marsot states: '[The *ulama*] were the purveyors of Islam, the guardians of its tradition, the depository of ancestral wisdom, and the moral tutors of the population.'<sup>24</sup> Importantly, until the modern age Muslim jurists, as a class of legal technocrats, never assumed power directly and did not demand that they be allowed to assume direct political power.<sup>25</sup> Therefore, theocratic rule, until the contemporary age, was virtually unknown in Islam.<sup>26</sup>

The problem, however, is that *Shari'ah* is a general term for a multitude of legal methodologies and a remarkably diverse set of interpretive determinations.<sup>27</sup> In fact, the negotiative role played by Muslim jurists points to the subjective element in *Shari'ah* interpretations. Despite the dogmatic assumptions of many Muslim activists, *Shari'ah* law constitutes the sum total of the subjective engagements of legal specialists with texts that purport to represent the divine will. The extent to which *Shari'ah* law will provide for certain rights—to be retained by individuals or even communities, which are held as immunities against possible transgressions by others—largely depends on the subjective determinations of Muslim jurists.

I am not arguing that Islamic texts do not provide for objectivities whatsoever, or that they do not constrain, and even limit, the interpretive activities of jurists. My argument is that the idea of limited government in Islam is as effective as the constraints and limitations that the subjective interpreter is willing to place upon such a government. In other words, the reliance on *Shari'ah*, or on Islamic texts, is not in and of itself a sufficient guarantee of human rights. What is needed is a normative commitment by the subjective interpreters of the law in favour of such rights.

It is quite possible for a government to implement faithfully the technical rules of *Shari'ah*, but otherwise violate the rights of human beings. A government could implement *Shari'ah's* criminal penalties, prohibit usury, dictate rules of modesty, and so on, and yet remain a government of unrestrained powers against its citizens. This is because unless the conception of government is founded around core moral values about the normative purpose of *Shari'ah* and unless there is a process that limits the ability of the government to violate those core moral values, the idea of a government bound by *Shari'ah* remains vague.

Much of the debate on the subjective moral commitments that underlie the implementation of *Shari'ah* harks back, however, to the issue of God's legislative sovereignty. This is known in Islamic

discourses as the *hakimiyya* debate. Arguably, it is meaningless to speak of normative moral commitments to human rights in the context of Islamic law. Put simply, since only God is sovereign and since God is the sole legislator, God is also the giver and taker of rights. Therefore, it is often argued, human beings only have such rights as God has chosen to give to them, and they are also denied the rights that God has denied them, and one may not add or subtract anything to this basic and fundamental principle. As a result, it is often maintained that the sole focus ought to be on compliance with the technical rules of Islamic law, without paying particular attention to whether the implementation of such laws grant or deny rights to human beings. Interestingly, a very similar issue was debated in the context of a famous political controversy in early Islam. It will be helpful to review briefly this historical debate.

The issue of God's dominion or sovereignty (*hakimiyyat Allah*) was raised by a group known as the Haruriyya (later known as the Khawarij) when they rebelled against the fourth Rightly Guided Caliph, 'Ali ibn Abi Talib (d. 40/661). Initially, the Haruriyya were firm supporters of 'Ali, but they rebelled against him when he agreed to arbitration in his political dispute with a competing political faction led by a man named Mu'awiya. Being a puritan and pietistic group of zealots, the Khawarij believed that God's law clearly supported 'Ali and, therefore, an arbitration or any negotiated settlement was inherently unlawful. It in effect challenged the rule of God and thus God's sovereignty or dominion, and therefore, by definition, was illegitimate.

In the view of the Khawarij, by accepting the principle of arbitration and by accepting the notion that legality could be negotiated, 'Ali himself had lost his claim to legitimacy because he had transferred God's dominion to human beings. Not surprisingly, the Khawarij declared 'Ali a traitor to God, rebelled against him, and eventually succeeded in assassinating him.



Typically, the story of the Khawarij is recounted as an example of early religious fanaticism in Islamic history, and I have no doubt that this view is substantially correct. However, one ought not to overlook the fact that the Khawarij's rallying cry of 'dominion belongs to God' or 'the Qur'an is the judge' (*al-hukm li-Allah* or *al-hukm li al-Qur'an*) was a call for the symbolism of legality and the supremacy of law.<sup>28</sup> This search for legality quickly descended into an unequivocal radicalised call for clear lines of demarcation between what is lawful and unlawful. The anecdotal reports about the debates between 'Ali and the Khawarij regarding this matter reflect an unmistakable tension about the meaning of legality and the implications of the rule of law.

In one such report, members of the Khawarij accused 'Ali of accepting the judgement and dominion (*hakimiyya*) of human beings instead of abiding by the dominion of God's law. Upon hearing of this accusation, 'Ali called upon the people to gather and brought a large copy of the Qur'an. 'Ali touched the Qur'an, commanding it to speak to the people and to inform them about God's law. The people gathered around 'Ali and one of them exclaimed, 'What are you doing! The Qur'an cannot speak, for it is not a human being.' Upon hearing this, 'Ali exclaimed that this is exactly the point he was trying to make! The Qur'an, 'Ali stated, is but ink and paper, and it is human beings who give effect to it according to their limited personal judgements.<sup>29</sup>

Arguably, anecdotal stories such as this do not relate only to the role of human agency in interpreting the divine word, but they also symbolise a search for the fundamental moral values in society. For a believer, God is thought of as all-powerful and as the ultimate owner of heaven and earth, but what are the implications of this claim for human agency in understanding and implementing the law? As I argue below, arguments claiming that God is the sole legislator and the only source of law engage in a fatal fiction that is not defensible from the point of view of Islamic theology. Such arguments pretend that human agents

could possibly have perfect and unfettered access to the mind of God and could possibly become the mere executors of the divine will, without inserting their own human subjectivities in the process. Furthermore, and more importantly, claims about God's sovereignty assume that there is a divine legislative will that seeks to regulate all human interactions. This is always stated as an assumption, instead of a proposition that needs to be argued and proven.

It is possible that God does not seek to regulate all human affairs, a point to which I will return. It is also possible that God leaves it to human beings to regulate their own affairs as long as they observe certain minimal standards of moral conduct, and that such standards include the preservation and promotion of human dignity and honour because, after all, according to the Qur'an, humans are the vicegerents of God and the inheritors of the earth and are the most valued invention among God's creation. In the Qur'anic discourse, God commanded creation to honour human beings because of the miracle of the human intellect, which is the microcosm of the abilities of the divine itself. Arguably, the fact that God honoured the miracle of the human intellect and also honoured the human being as a symbol of divinity is sufficient, in and of itself, to justify a moral commitment to whatever might be needed to protect and preserve the integrity and dignity of that symbol of divinity.

At this point, it will be useful to deal more systematically with the very concept and epistemology of *Shari'ah*, and the possibility of moral commitments within such an epistemology. This is important because of the centrality of *Shari'ah* to the whole conception of government in Islam, and because the epistemological basis of *Shari'ah* itself is poorly understood by contemporary Muslims, let alone by non-Muslims. As noted earlier, the primacy of the apologetic and puritan trends in contemporary Islam has made *Shari'ah* discourses more like an arena for political slogans than a serious intellectual discipline. But the issue of God's sovereignty and

the possibility of moral commitments within a *Shari'ah* paradigm needs to be analysed through a more informed understanding of the epistemology of *Shari'ah*. Only then can one hope to get beyond the prevalent contemporary dogma in the process of justifying a human rights commitment in Islamic jurisprudence.

As discussed earlier, the difficulty with the concept of *Shari'ah* is that it is potentially a construct of limitless reach and power, and any institution that can attach itself to that construct becomes similarly empowered. *Shari'ah* is God's Way, and it is represented by a set of normative principles, methodologies for the production of legal injunctions, and a set of positive legal rules. *Shari'ah* encompasses a variety of schools of thought and approaches, all of which are equally valid and equally orthodox. Nevertheless, *Shari'ah* as a whole, with all its schools and variant points of view, is considered the Way of God. It is true that the *Shari'ah* is capable of imposing limits on government and of generating individual rights, both of which would be considered limits and rights dictated by the divine will. Yet, whatever limits are imposed or whatever rights are granted may be withdrawn in the same way they are created—through the agency of human interpretation.

In other words, the *Shari'ah*, for the most part, is not explicitly dictated by God. Rather, it relies on the interpretive act of the human agent for its production and execution. This creates a double-edged conceptual framework: on the one hand, *Shari'ah* could be the source of unwavering and stolid limitations on government and an uncompromising grant of rights; but on the other hand, whatever is granted by God can also be taken away by God. In both cases, one cannot escape the fact that it is human agents who determine the existence, or non-existence, of the limits on government and the grant of individual rights. This is a formidable power that could be yielded, in one way or another, by the human agent who attaches himself or herself to the *Shari'ah*. The discourse of *Shari'ah* enables human beings to speak in God's name,

and effectively empowers human agency with the voice of God. This is a formidable power that is easily abused.

However, I wish to focus on one aspect of Islamic theology that might contribute to the development of a meaningful discourse on human rights in the Islamic context. As noted above, Muslims developed several legal schools of thought, all of which are equally orthodox. But paradoxically, *Shari'ah* is the core value that society must serve. The paradox here is exemplified in the fact that there is a pronounced tension between the obligation to live by God's law and the fact that this law is manifested only through subjective interpretive determinations. Even if there is a unified realisation that a particular positive command does express the divine law, there is still a vast array of possible subjective executions and applications. This dilemma was resolved somewhat in Islamic discourses by distinguishing between *Shari'ah* and *fiqh*. *Shari'ah*, it was argued, is the divine ideal, standing as if suspended in mid-air, unaffected and uncorrupted by the vagaries of life. The *fiqh* is the human attempt to understand and apply the ideal. Therefore, *Shari'ah* is immutable, immaculate, and flawless; *fiqh* is not.

As part of the doctrinal foundations for this discourse, Muslim jurists focused on the tradition attributed to the Prophet stating: 'Every *mujtahid* [jurist who strives to find the correct answer] is correct', or 'Every *mujtahid* will be [justly] rewarded'.<sup>30</sup> This implied that there could be more than a single correct answer to the same question. For Muslim jurists, this raised the issue of the purpose or the motivation behind the search for the divine will. What is the divine purpose behind setting out indicators to the divine law and then requiring that human beings engage in a search? If the Divine wants human beings to reach the correct understanding, then how could every interpreter or jurist be correct?

The juristic discourse focused on whether or not the *Shari'ah* had a determinable result or demand in all cases; and if there is such a determinable result or demand, are Muslims obligated to find it? Put

differently, is there a correct legal response to all legal problems, and are Muslims charged with the legal obligation of finding that response? The overwhelming majority of Muslim jurists agreed that good faith diligence in searching for the divine will is sufficient to protect a researcher from liability before God. As long as the researcher exercises due diligence in the search, he or she will not be held liable nor incur a sin, regardless of the result.

Beyond this, the jurists were divided into two main camps. The first school, known as the *mukhatti'ah*, argued that ultimately there is a correct answer to every legal problem. However, only God knows what the correct response is, and the truth will not be revealed until the Final Day. Human beings, for the most part, cannot conclusively know whether they have found that correct response. In this sense, every *mujtahid* is correct in trying to find the answer; however, one seeker might reach the truth while the others might be mistaken. On the Final Day, God will inform all seekers who was right and who was wrong. Correctness here means that the *mujtahid* is to be commended for putting in the effort, but it does not mean that all responses are equally valid.

The second school, known as the *musawwibah*, included prominent jurists such as Imam al-Haramayn al-Juwayni (d. 478/1085), Jalal al-Din al-Suyuti (d. 911/1505), al-Ghazali (d. 505/1111), and Fakhr al-Din al-Razi (d. 606/1210), and it is reported that the Mu'tazilah were followers of this school as well. The *musawwibah* argued that there is no specific and correct answer (*hukm mu'ayyan*) that God wants human beings to discover, in part because if there were a correct answer, God would have made the evidence indicating a divine rule conclusive and clear. God cannot charge human beings with the duty to find the correct answer when there is no objective means of discovering the correctness of a textual or legal problem. If there were an objective truth to everything, God would have made such a truth ascertainable in this life. Legal truth, or correctness, in most circumstances, depends on belief and evidence,

and the validity of a legal rule or act is often contingent on the rules of recognition that provide for its existence.

Human beings are not charged with the obligation of finding some abstract or inaccessible legally correct result. Rather, they are charged with the duty to investigate a problem diligently and then follow the results of their own *ijtihad*. Al-Juwayni explains this point by asserting:

The most a *mujtahid* would claim is a preponderance of belief (*ghalabat al-zann*) and the balancing of the evidence. However, certainty was never claimed by any of them [the early jurists]... If we were charged with finding [the truth] we would not have been forgiven for failing to find it.<sup>31</sup>

God's command to human beings is to search diligently, and God's law is suspended until a human being forms a preponderance of belief about the law. At the point that a preponderance of belief is formed, God's law becomes in accordance with the preponderance of belief formed by that particular individual. In summary, if a person honestly and sincerely believes that such and such is the law of God, then, for that person 'that' is in fact God's law. The position of the *musawwibah*, in particular, raises difficult questions about the application of the *Shari'ah* in society.<sup>32</sup> This position implies that God's law is to search for God's law, otherwise the legal charge (*taklif*) is entirely dependent on the subjectivity and sincerity of belief. The *mukhatti'ah* teach that whatever law is applied is potentially God's law, but not necessarily so. In my view, this raises the question: Is it possible for any state-enforced law to be God's law? Under the first (*mukhatti'ah*) school of thought, whatever law the state applies, that law is only potentially the law of God, but we will not find out until the Final Day. Under the second (*musawwibah*) school of thought, any law applied by the state is not the law of God unless the

person to whom the law applies believes the law to be God's will and command. The first school suspends knowledge until we are done living, and the second school hinges knowledge on the validity of the process and ultimate sincerity of belief.

Building upon this intellectual heritage, I would suggest that *Shari'ah* ought to stand in an Islamic polity as a symbolic construct for the divine perfection that is unreachable by human effort. It is the epitome of justice, goodness, and beauty as conceived and retained by God. Its perfection is preserved, so to speak, in the mind of God, but anything that is channelled through human agency is necessarily marred by human imperfection. Put differently, *Shari'ah* as conceived by God is flawless, but as understood by human beings it is imperfect and contingent. Jurists ought to continue exploring the ideal of *Shari'ah* and expounding their imperfect attempts at understanding God's perfection. As long as the argument constructed is normative, it is an unfulfilled potential for reaching the divine will. Significantly, any law applied is necessarily a potential unrealised. *Shari'ah* is not simply a bunch of *ahkam* (a set of positive rules) but also a set of principles, methodology, and a discursive process that searches for the divine ideals. As such, it is a work in progress that is never complete.

To put it more concretely, a juristic argument about what God commands is only potentially God's law, either because on the Final Day we will discover its correctness (the first school) or because its correctness is contingent on the sincerity of belief of the person who decides to follow it (the second school). If a legal opinion is adopted and enforced by the state, it cannot be said to be God's law. By passing through the determinative and enforcement processes of the state, the legal opinion is no longer simply a potential; it has become an actual law, applied and enforced. But what has been applied and enforced is not God's law—it is the state's law. Effectively, a religious state law is a contradiction in terms. Either the law belongs to the state or it belongs to God, and as long as

the law relies on the subjective agency of the state for its articulation and enforcement, any law enforced by the state is necessarily not God's law. Otherwise, we must be willing to admit that the failure of the law of the state is, in fact, the failure of God's law and, ultimately, God himself. In Islamic theology, this possibility cannot be entertained.<sup>33</sup>

Institutionally, it is consistent with the Islamic experience that the *ulama* can and do play the role of the interpreters of the divine word, the custodians of the moral conscience of the community, and the curators reminding and pointing the nation towards the Ideal that is God. But the law of the state, regardless of its origins or basis, belongs to the state. It bears emphasis that under this conception, there are no religious laws that can or may be enforced by the state. The state may enforce the prevailing subjective commitments of the community (the second school), or it may enforce what the majority believes to be closer to the divine ideal (the first school). But in either case, what is being enforced is not God's law.

This means that all laws articulated and applied in a state are thoroughly human, and should be treated as such. This also means that any codification of *Shari'ah* law produces a set of rules that are human, and not divine. These laws are a part of *Shari'ah* law only to the extent that any set of human legal opinions can be said to be a part of *Shari'ah*. A code, even if inspired by *Shari'ah*, is not *Shari'ah*; a code is simply a set of positive commandments that were informed by an ideal, but do not represent the ideal. As to the fundamental rights that often act as the foundation of a just society, a Muslim society would have to explore the basic values that are at the very core of the divine ideal.

It is important to note that the paradigm proposed above does not exclude the possibility of objectified and even universalistic moral standards. It simply shifts the responsibility for moral commitments, and the outcome of such commitments, to human beings. Morality could originate with God or could be learned by reflecting upon the state of



nature that God has created, but the attempts to fulfil such a morality and give it actual effect are human. In fact, the paradigm proposed here would require certain moral commitments from human beings that ought to be adopted as part of their discharge of their agency on God's behalf.

Neither the first nor the second view of *Shari'ah* epistemology is possible unless people are guaranteed the right to rational development. Furthermore, the right to rational development means that people ought to be entitled to minimum standards of well-being, in both the physical and intellectual senses. It is impossible to pursue rational development if one is not fed, housed, educated, and, above all, safe from physical harm or persecution. In addition, people cannot pursue a reflective life unless they are guaranteed freedom of conscience, expression, and assembly with like-minded people. Premodern Muslim jurists approached the same type of concerns expressed here by arguing that human needs should be divided into necessities, needs, and luxuries, and that the necessities should be conceptualised in terms of the five core values of protecting religion, life, intellect, honour, and property. I have more to say about the juristic divisions and five core values, but my point is that even these juristic divisions, for example, are fundamentally human, and thus fallible attempts at fulfilling a divine ideal or moral commitment. As such, they can be rethought, deconstructed, and redeveloped if need be. I think that once Muslims are able to assert that morality is divine, but law and legal divisions and rules are mundane, this will represent a major advancement in the attempt to justify a paradigm of human rights in Islam.

More concretely, reflecting upon divinity, I, as a Muslim, might be able to assert that justice and mercy are objective and universal moral values. I might even try to convince others that justice and mercy are part of the divine charge to humanity—God wants humans to be merciful and just. This represents a moral commitment that I am inviting other human beings to adopt as well. But, under the paradigm proposed here, while

I can claim that moral rules emanate or originate from God—a claim which people are free to accept or dispute—I cannot claim that any set of laws that attempt to implement or give effect to this moral commitment is divine as well. Under the first and second views discussed above, this would simply be a conceptual impossibility. Giving effect to this paradigm, I will argue below that justice is a core divine and moral value and further attempt to justify a human rights commitment in Islam.

## **V. Justice as a Core Value and Human Rights**

One of the basic issues commonly dealt with in Islamic political thought was the purpose of government (or the caliphate). The statement of al-Juwayni is fairly representative of the argument of premodern jurists. He states:

The *imama* (government) is a total governorship and general leadership that relates to the special and common in the affairs of religion and this earthly life. It includes guarding the land and protecting the subjects, and the spread of the message [of Islam] by the word and sword. It includes correcting deviation, redressing injustice, aiding the wronged against the wrongdoer, and taking the right from the obstinate and giving it to those who are entitled to it.<sup>34</sup>

The essential idea conveyed here is that government is a functional necessity in order to resolve conflict, protect religion, and uphold justice. In some formulations, justice is the core value that justifies the existence of government. Ibn al-Qayyim, for example, makes this point explicit when he asserts the following:

God sent His message and His Books to lead people with justice.... Therefore, if a just leadership is established, through any means, then therein is the Way of God.... In fact, the purpose of God's Way is the establishment of righteousness and justice ... so any road that establishes what is right and just is the road [Muslims] should follow.<sup>35</sup>

In the Qur'anic discourse, justice is asserted as an obligation owed to God and also owed by human beings to one another. In addition, the imperative of justice is tied to the obligations of enjoining the good and forbidding the evil and the necessity of bearing witness on God's behalf.

Although the Qur'an does not define the constituent elements of justice and in fact seems to treat it as intuitively recognisable, it emphasises the ability to achieve justice as a unique human charge and necessity.<sup>36</sup> In essence, the Qur'an requires a commitment to a moral imperative that is vague, but recognisable through intuition, reason, or human experience.<sup>37</sup> Importantly, a large number of Muslim jurists argued that God created human beings weak and in need of cooperating with others in order to limit their ability to commit injustice. Furthermore, God created human beings diverse and different from each other so that they will need each other, and this need will cause them further to augment their natural tendency to assemble and cooperate in order to establish justice.

The relative weakness of human beings and their remarkably diverse abilities and habits will further induce people to draw closer and cooperate with each other. If human beings exploit the divine gift of intellect and the guidance of the law of God, through cooperation, they are bound to reach a greater level of strength and justice. The ruler, the jurists argued, ascends to power through a contract with the people pursuant to which he undertakes to further the cooperation of the people,

with the ultimate goal of achieving a just society or at least maximising the potential for justice.

This juristic discourse is partly based on the Qur'anic statement that God created people different, and made them into nations and tribes so that they will come to know one another. Muslim jurists reasoned that the expression 'come to know one another' (*Al-Hujurat* 49:13) indicates the need for social cooperation and mutual assistance in order to achieve justice. Although the premodern jurists did not emphasise this point, the Qur'an also notes that God made people different, and that they will remain different until the end of human existence. Further, the Qur'an states that the reality of human diversity is part of the divine wisdom, and an intentional purpose of creation (*Hud* 11:118). The Qur'anic celebration and sanctification of human diversity, in addition to the juristic incorporation of the notion of human diversity into a purposeful pursuit of justice, creates various possibilities for a human rights commitment in Islam. This discourse could be appropriated into a normative stance that considers justice to be a core value that a constitutional order is bound to protect.

Furthermore, this discourse could be appropriated into a notion of delegated powers in which the ruler is entrusted to serve the core value of justice in light of systematic principles that promote the right of assembly and cooperation in order to enhance the fulfilment of this core value. In addition, a notion of limits could be developed that would restrain the government from derailing the quest for justice, or from hampering the right of the people to cooperate in this quest. Importantly, if the government fails to discharge the obligations of its covenant, then it loses its legitimate claim to power.

However, there are two considerations that militate against the fulfilment of these possibilities in modern Islam. First, modern Muslims themselves are hardly aware of the Islamic interpretive tradition on justice. Both the apologetic and the puritan orientations, which are

the two predominant trends in modern Islam, have largely ignored the paradigm of human diversity and difference as a necessary means to the fulfilment of the imperative of justice. The second consideration, and the more important one, is that even if modern Muslims reclaim the interpretive traditions of the past on justice, the fact is that, at the conceptual level, the constituent elements of justice were not explored in Islamic doctrine.

There is a tension between the general obligation of implementing the divine law and the demand for justice. Put simply, does the divine law define justice, or does justice define the divine law? If it is the former, then whatever one concludes to be the divine law, therein is justice. If it is the latter, then whatever justice demands is, in fact, the demand of the Divine. For instance, many premodern and modern jurists asserted that the primary purpose of a Muslim polity is to guard and apply the divine law, and the primary charge of a Muslim ruler is to ensure that the people cooperate in giving effect to God's law. In effect, this paradigm makes the organising principle of society the divine law, and the divine law becomes the embodiment of justice.

Under this paradigm, there is no point in investigating the constituent elements of justice. There is no point in investigating whether justice means equality of opportunities or results, or whether it means maximising the potential for personal autonomy, or whether it means, perhaps, the maximisation of individual and collective utility, or the guarding of basic human dignity, or even the simple resolution of conflict and the maintenance of stability, or any other conception that might provide substance to a general conception of justice. There is no point in engaging in this investigation because the divine law pre-empted any such inquiry. The divine law provides particularised positive enactments that exemplify but do not analytically explore the notion of justice. Conceptually, according to this paradigm, organised society is no longer about the right to assembly, about cooperation, or about the right

to explore the means to justice, but simply about the implementation of the divine law. This brings us full circle to the problem noted above, which is that the implementation of the divine law does not necessarily amount to the existence of limited government, or the protection of basic human rights.

It is important to note, however, that considering the primacy of justice in the Qur'anic discourse, coupled with the notions of human vicegerency, and the notion that the divine charge of justice has been delegated to humanity at large, it is plausible to maintain that justice is what ought to control and guide all human interpretive efforts at understanding the law. This requires a serious paradigm shift in Islamic thinking. In my view, justice and whatever is necessary to achieve justice is the divine law and is what represents the supremacy and sovereignty of the Divine.

God describes God's-self as inherently just, and the Qur'an asserts that God has decreed mercy upon Godself (*Al-An'am* 6:12, 54). Furthermore, the very purpose of entrusting the divine message to the Prophet Muhammad is as a gift of mercy to human beings.<sup>38</sup> In the Qur'anic discourse, mercy is not simply forgiveness or the willingness to ignore the faults and sins of people. Mercy is a state in which the individual is able to be just with himself or herself and with others by giving each their due. Fundamentally, mercy is tied to a state of true and genuine perception; that is why, in the Qur'an, mercy is coupled with the need for human beings to be patient and tolerant with each other.<sup>39</sup> Most significantly, diversity and differences among human beings are claimed in the Qur'anic discourse as a merciful divine gift to humankind.

Genuine perception that enables persons to understand and appreciate—and become enriched by—the difference and diversity of humanity is one of the constituent elements for the founding of a just society, and for the achievement of justice. The divine charge to human

beings at large, and Muslims in particular, is, as the Qur'an puts it, 'to know one another', and utilise this genuine knowledge in an effort to pursue justice. Beyond mere tolerance, this requires that Muslims, and human beings in general, engage in a collective enterprise of goodness, in which they pursue the fulfilment of justice through mercy. The challenge is not simply for people to coexist, but to take part in an enterprise of goodness by engaging in a purposeful moral discourse. Although coexistence is a basic necessity for mercy, in order to pursue a state of real knowledge of the other and aspire for a state of justice, it is imperative that human beings cooperate in seeking the good and beautiful. The more the good and beautiful is approached, the closer humanity comes to a state of divinity.

However, implementing legalistic rules, even if such rules are the product of the interpretation of divine texts, is not sufficient for the achievement of genuine perception of the other, of mercy, or ultimately of justice. The paradigm shift of which I speak requires that the principles of mercy and justice become the primary divine charge. In this paradigm, God's sovereignty lies in the fact that God is the source and authority that delegated to human beings the charge to achieve justice on earth by fulfilling the virtues that are approximations of divinity. Far from negating human subjectivities through the mechanical enforcement of rules, such subjectivities are accommodated and even promoted to the extent that they contribute to the fulfilment of justice.

Significantly, according to the juristic discourses, it is not possible to achieve justice unless every possessor of right (*haqq*) is granted his or her right. As discussed below, God has certain rights, humans have rights, and both God and humans share some rights. The challenge of vicegerency is to first recognise that a right exists, then to understand who is the possessor of such a right, and ultimately to allow the possessor of a given right the enjoyment of the warranted right. A society that fails to do so, regardless of the deluge of rules it might apply, is not a merciful

or just society. This puts us in a position to explore the possibility of individual rights in Islam.

## **VI. The Rights of God and the Rights of People**

This is the most challenging topic, and I cannot possibly do it justice in the space of this article. The very notion of individual rights is elusive, in terms of both the sources and the nature of those rights. Furthermore, whether there are inherent and absolute individual rights or simply presumptive individual entitlements that could be outweighed by countervailing considerations is debatable. In addition, while all constitutional democracies afford protections to a particular set of individual interests, such as freedom of speech and assembly, equality before the law, right to property, and due process of law, exactly which rights ought to be protected, and to what extent, is subject to a large measure of variation in theory and practice. In this context, I am using a minimalist and, hopefully, non-controversial notion of individual rights.

By individual rights, I do not mean entitlements but qualified immunities—the idea that particular interests related to the well-being of an individual ought to be protected from infringements, whether perpetuated by the state or other members of the social order, and that such interests should not be sacrificed unless for an overwhelming necessity. This, as noted, is a minimalist description of rights and, in my view, a largely inadequate one. I doubt very much that there is an objective means of quantifying an overwhelming necessity, and thus, some individual interests ought to be unassailable under any circumstances. These unassailable interests are the ones that, if violated, are bound to communicate to the individual in question a sense of worthlessness, and that, if violated, tend to destroy the faculty of a human being to comprehend the necessary elements for a dignified existence. Therefore,



for instance, under this conception, the use of torture, the denial of food or shelter, or the means for sustenance, such as employment would, under any circumstances, be a violation of an individual's rights. For the purposes of this article, however, I will assume the minimalist description of rights.

It is fair to say, however, that the premodern juristic tradition did not articulate a notion of individual rights as privileges, entitlements, or immunities. Nonetheless, the juristic tradition did articulate a conception of protected interests that accrue to the benefit of the individual. However, as demonstrated below, this subject remains replete with considerable ambiguity in Islamic thought. As noted earlier, the purpose of *Shari'ah* in jurisprudential theory is to fulfil the welfare of the people. The interests or the welfare of the people is divided into three categories: the necessities (*daruriyyat*), the needs (*hajiyyat*), and the luxuries (*kamaliyyat* or *tahsiniyyat*). The law and political policies of the government must fulfil these interests in descending order of importance—first, the necessities, then the needs, and then the luxuries. The necessities are further divided into five basic values (*al-daruriyyat al-khamsah*): religion, life, intellect, lineage or honour, and property. But Muslim jurists did not develop the five basic values as conceptual categories and then explore the theoretical implications of each value. Rather, they pursued what can be described as an extreme positivistic approach to these rights.

Muslim jurists examined the existing positive legal injunctions that arguably can be said to serve these values, and concluded that by giving effect to these specific legal injunctions, the five values have been sufficiently fulfilled. So, for example, Muslim jurists contended that the prohibition of murder served the basic value of life, the law of apostasy protected religion, the prohibition of intoxicants protected the intellect, the prohibition of fornication and adultery protected lineage, and the right of compensation protected the right to property. Limiting the protection of the intellect to the prohibition against the consumption

of alcohol or the protection of life to the prohibition of murder is hardly a very thorough protection of either intellect or life. At most, these laws are partial protections to a limited conception of values and, in any case, cannot be asserted as the equivalent of individual rights because they are not asserted as immunities to be retained by the individual against the world. It is reasonable to conclude that these five values were emptied of any theoretical social and political content and were reduced to technical legalistic objectives. This, of course, does not preclude the possibility that the basic five values could act as a foundation for a systematic theory of individual rights.<sup>40</sup>

To argue that the juristic tradition did not develop the idea of fundamental or basic individual rights does not mean that that tradition was oblivious to the notion. In fact, the juristic tradition tended to sympathise with individuals who were unjustly executed for their beliefs or those who died fighting against injustice. Jurists typically described such acts as a death of *musabara*, a description that carried positive or commendable connotations. Muslim jurists produced a formidable discourse condemning the imposition of unjust taxes and the usurpation of private property by the government. Furthermore, the majority of Muslim jurists refused to condemn or criminalise the behaviour of rebels who revolted because of the imposition of oppressive taxes or who resisted a tyrannical government.<sup>41</sup> In addition, the juristic tradition articulated a wealth of positions that exhibit a humanitarian or compassionate orientation. I will mention only some of these positions, leaving the rest to a more extensive study. Muslim jurists developed the idea of presumption of innocence in all criminal and civil proceedings and argued that the accuser always carries the burden of proof (*al-bayyina 'ala man idda'a*).<sup>42</sup> In matters related to heresy, Muslim jurists repeatedly argued that it is better to let a thousand heretics go free than to punish a single sincere Muslim wrongfully. The same principle was applied to criminal cases; the jurists argued that it is always better to release a guilty person than

to run the risk of punishing an innocent person.<sup>43</sup> Moreover, many jurists condemned the practice of detaining or incarcerating heterodox groups that advocate their heterodoxy (such as the Khawarij) and argued that such groups may not be harassed or molested until they carry arms and form a clear intent to rebel against the government.

Muslim jurists also condemned the use of torture, arguing that the Prophet forbade the use of *muthla* (the use of mutilations) in all situations<sup>44</sup> and opposed the use of coerced confessions in all legal and political matters.<sup>45</sup> A large number of jurists articulated a doctrine similar to the American exculpatory doctrine; confessions or evidence obtained under coercion are inadmissible at trial. Interestingly, some jurists asserted that a judge who relies on a coerced confession in a criminal conviction is, in turn, to be held liable for the wrongful conviction. Most argued that the defendant or his family may bring an action for compensation against the judge, individually, and against the caliph and his representatives, generally, because the government is deemed to be vicariously liable for the unlawful behaviour of its judges.

But perhaps the most intriguing discourse in the juristic tradition is that which relates to the rights of God and the rights of people. The rights of God (*huquq Allah*) are rights retained by God, as God's own through an explicit designation to that effect. These rights belong to God in the sense that only God can say how the violation of these rights may be punished and only God has the right to forgive such violations. These rights are, so to speak, subject to the exclusive jurisdiction and dominion of God, and human beings have no choice but to follow the explicit and detailed rules that God set out for the handling of acts that fell in God's jurisdiction. In addition, in the juristic theory, all rights not explicitly retained by God accrue to the benefit of human beings.

In other words, any right (*haqq*) that is not specifically and clearly retained by God becomes a right retained by people. These are called *huquq al-'ibad*, *huquq al-nas*, or *huquq al-adamiyyin*. Importantly, while

violations of God's rights are only forgiven by God through adequate acts of repentance, the rights of people may be forgiven only by the people. The Hanafi jurist al-'Ayini (d. 855/1451) argues that the usurper of property, even if a government official (*al-zalim*), will not be forgiven for his sin, even if he repents a thousand times, unless he returns the stolen property.<sup>46</sup>

Most of such discourse occur in the context of addressing personal monetary and property rights, but they have not been extended to other civil rights, such as the right to due process or the right to listen, to reflect, and to study, which may not be abandoned or violated by the government under any circumstances. This is not because the range of the rights of people was narrow; quite to the contrary, it is because the range of these rights was too broad. It should be recalled that people retain any rights not explicitly reserved by God. Effectively, since the rights retained by God are quite narrow, the rights accruing to the benefit of the people are numerous. Juristic practice has tended to focus on narrow legal claims that may be addressed through the processes of law rather than on broad theoretical categories that were perceived as non-justiciable.

As such, the jurists tended to focus on tangible property rights or rights for compensation instead of on moral claims. So, for instance, if someone burns another person's books, that person may seek compensation for destruction of property, but he could not bring an action for injunctive relief preventing the burning of the books in the first place. Despite this limitation, the juristic tradition did, in fact, develop a notion of individual claims that are immune from governmental or social limitation or alienation.

There is one other important aspect that needs to be explored in this context. Muslim jurists asserted the rather surprising position that if the rights of God and those of people (mixed rights) overlap, the rights of people should, in most cases, prevail. The justification for this was that

humans need their rights, and need to vindicate those rights on earth. God, on the other hand, asserts God's rights only for the benefit of human beings, and in all cases God can vindicate God's rights in the Hereafter if need be. As to the rights of people, Muslim jurists did not imagine a set of unwavering and generalisable rights that are to be held by each individual at all times. Rather, they thought of individual rights as arising from a legal cause brought about by the suffering of a legal wrong. A person does not possess a right until he or she has been wronged and, as a result, obtains a claim for retribution or compensation.

Shifting paradigms, it is necessary to transform the traditional conceptions of rights to a notion of immunities and entitlements. As such, these rights become the property of individual holders, before a specific grievance arises and regardless of whether there is a legal cause of action. The set of rights that are recognised as immutable and invariable are those that are necessary to achieve a just society while promoting the element of mercy. It is quite possible that the relevant individual rights are those five values mentioned above, but this issue needs to be rethought and reanalysed in light of the current diversity and particularity of human existence.

The fact that the rights of people take priority over the rights of God, on this earth, necessarily means that a claimed right of God may not be used to violate the rights of human beings. God is capable of vindicating whichever rights God wishes to vindicate in the Hereafter. On this earth, we concern ourselves only with discovering and establishing the rights that are needed to enable human beings to achieve a just life, while—to the extent possible—honouring the asserted rights of God. In this context, the commitment to human rights does not signify a lack of commitment to God, or a lack of willingness to obey God. Rather, human rights become a necessary part of celebrating human diversity, honouring the vicegerents of God, achieving mercy, and pursuing the ultimate goal of justice.

## VII. Islam and the Promise of Human Rights

I have argued that God's sovereignty is honoured in the pursuit of a just society and that a just society must, in pursuit of mercy, respect human diversity and richness and must recognise the immunities that are due to human beings. I have justified this position on Islamic grounds, and, while acknowledging that this approach is informed by the interpretive traditions of the past, it is not the dominant approach to the subject or even a well-established approach among Muslims in the modern era. Unfortunately, the only well-established approaches to the subject today are the apologetic and puritan approaches. As far as contemporary discourses are concerned, they are replete with unjustified assumptions and intellectual shortcuts that have seriously undermined the ability of Muslims to confront such an important topic as human rights.

In addition, partly affected by Muslim apologists, many Western scholars repeat generalisations about Islamic law that, to say the least, are not based on historical texts generated by Muslim jurists. Among those unfounded generalisations are the claims that Islamic law is concerned primarily with duties, and not rights, and that the Islamic conception of rights is collectivist, and not individualistic.<sup>47</sup> Both claims, although they are often repeated, are somewhat inconsistent, but more importantly, they are not based on anything other than cultural assumptions about the non-Western 'other'. It is as if the various interpreters, having decided on what they believe is the Judeo-Christian or perhaps Western conception of rights, assume that Islam must necessarily be different. The reality, however, is that both claims are largely anachronistic.

Premodern Muslim jurists did not assert a collectivist vision of rights, just as they did not assert an individualistic vision of rights. They did speak of *al-haqq al-'amm* (public rights) and often asserted that public rights ought to be given preference over private entitlements. But as a matter of juristic determination, this amounted to no more than an

assertion that the many should not be made to suffer for the entitlements of the few. For instance, as a legal maxim, this was utilised to justify the notion of public takings or the right to public easements over private property. This principle was also utilised in prohibiting unqualified doctors from practising medicine. But, as noted above, Muslim jurists did not, for instance, justify the killing or the torture of individuals in order to promote the welfare of the state or the public interest. Even with regard to public takings or easements, the vast majority of Muslim jurists maintained that the individuals affected are entitled by the state to compensation equal to the fair market value of the property taken.

Pursuant to a justice perspective, one can argue that a commitment to individual rights, taken as a whole, will accrue to the benefit of the many (the private citizens) over the few (the members of ruling government). I do believe that the common good is greatly enhanced, and not hampered, by the assertion of individual rights, but this point needs to be developed in a more systematic way in a separate study. My point here, however, is that the juristic notion of public rights does not necessarily support what is often described as a collectivist view of rights.

Likewise, the idea of duties (*wajibat*) is as well established in the Islamic tradition as the notion of rights (*huquq*); the Islamic juristic tradition does not show a preference for one over the other. In fact, some premodern jurists have asserted that to every duty there is a reciprocal right, and vice versa.<sup>48</sup> It is true that many jurists claimed that the ruler is owed a duty of obedience, but they also, ideally, expected the ruler to safeguard the well-being and interests of the ruled. The fact that the jurists did not hinge the duty to obey on the obligation to respect the individual rights of citizens does not mean that they were, as a matter of principle, opposed to affording the ruled certain immunities against the state. In some situations, Muslim jurists even asserted that if the state fails to protect the well-being of the ruled, and is unjust toward them, the ruled no longer owe the state either obedience or support.<sup>49</sup>

The widespread rhetoric regarding the primacy of collectivist and duty-based perspectives in Islam points to the reactive nature of much of the discourse on Islamic law in the contemporary age. In the 1950s and 1960s, most Muslim countries, as underdeveloped nations, were heavily influenced by socialist and national development ideologies which tended to emphasise collectivist and duty-oriented conceptions of rights. Therefore, many Muslim commentators claimed that the Islamic tradition necessarily supports the aspirations and hopes of what is called the Third World. But such claims are as negotiative, reconstructive, and inventive of the Islamic tradition as is any particular contemporaneous vision of rights. In my view, however, from a theological perspective, the notion of individual rights is easier to justify in Islam than a collectivist orientation.

God created human beings as individuals, and their liability in the Hereafter is individually determined as well. To commit oneself to safeguarding and protecting the well-being of the individual is to take God's creation seriously. Each individual embodies a virtual universe of divine miracles—in body, soul, and mind. Why should a Muslim commit himself/herself to the rights and well-being of a fellow human being? The answer is because God has already made such a commitment when God invested so much of the God-self in each and every person. This is why the Qur'an asserts that whoever kills a fellow human being unjustly, it is as if he/she has murdered all of humanity; it is as if the killer has murdered the divine sanctity and defiled the very meaning of divinity (*Al-Ma'idah* 5:32).

The Qur'an does not differentiate between the sanctity of a Muslim and that of a non-Muslim. It repeatedly asserts that no human being can limit the divine mercy in any way or even regulate who is entitled to it (*Al-Baqarah* 2:105, *Al-Imran* 3:74, *Al-Fatir* 35:2, *Sad* 38:9, *Az-Zumar* 39:38, *Ghafir* 40:7, *Zukhruf* 43:32).



I take this to mean that non-Muslims, as well as Muslims, could be the recipients and the givers of divine mercy. The measure of moral virtue on this earth is who is able to come closer to divinity through justice, and not who carries the correct religious or irreligious label. The measure in the Hereafter is a different matter, but it is a matter that is in the purview of God's exclusive jurisdiction.

Does it matter what the general world community has come to believe are the minimal standards of conduct that ought to be observed when dealing with human beings? Concretely, does it matter if the world community has come to see the cutting of the hands of the thief, the stoning of an adulterer or adulteress, or the male privilege enjoyed in matters of divorce or inheritance to be violative of the basic standards that should be observed in dealing with human beings? It is relevant if the concept of mercy and human diversity is going to be taken seriously. The real issue is that as Muslims we have been charged with safeguarding the well-being and dignity of human beings, and we have also been charged with achieving justice.

If my argument is sound, dignity and justice need compassion and mercy. Muslims are charged with the obligation to teach mercy; but in the same way that one cannot learn to speak before learning to listen, one cannot teach unless one is also willing to learn. To take the ethic of mercy seriously, we must first learn to care, and this is why it does matter what humanity at large thinks of our interpretations and applications of the divine mandate. If other humans cannot understand our version of mercy, then claiming cultural exceptionalism or relativism, from a theological point of view, avails us nothing. This is especially so if we, as Muslims, are engaging the rest of humanity in a collective enterprise to establish goodness and well-being on this earth. Considering the enormous diversity of human beings, we have no choice but to take each contribution to a vision of goodness

seriously, and to ask which of the proffered visions comes closer to attempting to fulfil the divine charge.

Yet we cannot lose sight of the fact that, as human beings, the charge, and ultimate responsibility, is ours. This means that, acting upon the duties of vicegerency on this earth, we must take the imperative of engaging in a collective enterprise of goodness seriously, and in doing so we must be willing to persuade and be persuaded as to what is necessary for a moral and virtuous existence on this earth. God will most certainly vindicate God's rights in the Hereafter in the fashion that God deems most fitting, but, on this earth, our primary moral responsibility is the vindication of the rights of human beings. Put this way, perhaps it becomes all too obvious that a commitment in favour of human rights is a commitment in favour of God's creation, and ultimately, it is a commitment in favour of God.

## Notes

- 1 See Mayer, 'Rhetorical Strategies and Official Policies on Women's Rights', pp. 104-32.
- 2 On the humanistic tradition in Islam, see Boisard, *Humanism in Islam*; Goodman, *Islamic Humanism*; Kraemer, *Humanism in the Renaissance of Islam*; Makdisi, *The Rise of Humanism in Classical Islam and the Christian West*.
- 3 For the argument that some of what are believed to be ancient traditions are in reality recently crafted constructs, see the introduction and concluding chapter written by Hobsbawm in Hobsbawm and Ranger, *The Invention of Tradition*, pp. 1-14, 263-307.
- 4 For instance, see Black, *Islam and Justice*; Cotran and Yamani, *The Rule of Law in the Middle East and the Islamic World*; Dwyer, *Arab Voices*; Waltz, *Human Rights and Reform*, pp. 14-34, 216-30. On the impact of the international human rights discourse on Egypt, see Boyle, 'Human Rights in Egypt', pp. 87-114. For a more general assessment, but which also focuses on Algeria, see Monshipouri, *Democratization, Liberalization, and Human Rights in the Third World*. A particularly insightful analysis is offered by Dalacoura, *Islam, Liberalism and Human Rights*.
- 5 On the issue of the general tension between Islamic law and human rights law, see Tibi, 'Islamic Law/*Shari'ah* and Human Rights', pp. 75-96. On the response of several Muslim countries to international human rights obligations, see Mayer, *Islam and Human Rights*. Mayer critiques the practice of several Muslim countries of entering reservations to human rights treaties providing that they are bound by human rights law only to the extent that such international obligations are consistent with *Shari'ah* law. See also Mayer, 'Cultural Particularism as a Bar to Women's Rights', pp. 176-88. On the

- treatment of religious minorities in traditional Islamic law, and the tension with international human rights law, see Mohammad Tal'at Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach*, pp. 212-16. See also Kelsay, 'Saudi Arabia, Pakistan, and the Universal Declaration of Human Rights', pp. 33-52. For two very critical perspectives on the status of women under traditional *Shari'ah* law, see Abdel Halim, 'Reconciling the Opposites', pp. 203-13, and Afkhami, 'Gender Apartheid and the Discourse of Relativity of Rights in Muslim Societies', pp. 67-77. See also Cooke and Lawrence, 'Muslim Women Between Human Rights and Islamic Norms', pp. 313-28. On Islamic criminal punishments and human rights, see An-Na'im, 'Toward a Cross-Cultural Approach to Defining International Standards of Human Rights', pp. 19-43. See also Mayer, 'A Critique of An-Na'im's Assessment of Islamic Criminal Justice', pp. 37-60. On freedom of religion in Islam, see Lerner, *Religion, Beliefs, and International Human Rights*, pp. 47-8.
- 6 See Anderson, *Islamic Law in the Modern World*; Anderson, *Law Reform in the Muslim World*; Hallaq, *A History of Islamic Legal Theories*, pp. 207-11. On the adoption of secularised law, and the emergence of Western legal professionals in Egypt, see Ziadeh, *Lawyers, the Rule of Law, and Liberalism in Modern Egypt*, pp. 3-61.
- 7 The classic studies on Orientalism and its effects remain those of Said, *Orientalism* and *Culture and Imperialism*. For a probing survey of Orientalism and its practices, see Turner, *Orientalism, Postmodernism and Globalism*, pp. 3-114. See also Hussain, Olson and Qureshi, *Orientalism, Islam, and Islamists*. For an informative survey of Orientalism and its practices, see Macfie, *Orientalism*. Euben in *Enemy in the Mirror* argues somewhat persuasively that Islamic fundamentalism is a form of critique or protest against rationalist modernism. On the emergence of the feminist discourse and the 'White Woman's Burden', see A. Ali, *The Emergence of Feminism*

*Among Indian Muslim Women 1920-1947*; Ahmed, *Women and Gender in Islam*; Charrad, *States and Women's Rights*; Chaudhuri and Strobel, *Western Women and Imperialism*; Jayawardena, *The White Woman's Other Burden*; S. Ali, *Gender and Human Rights in Islam and International Law*.

- 8 This period has been described by some scholars as the liberal age of modern Islam. See Binder, *Islamic Liberalism*; Brown, *Rethinking Tradition in Modern Islamic Thought*; Hourani, *Arabic Thought in the Liberal Age*; Lee, *Overcoming Tradition and Modernity*. Lee focuses on the reformative thought of four modern influential Islamic thinkers. For excerpts from the works of Muslim liberals, see Kurzman, *Liberal Islam*. See also Isik, *The Religion Reformers in Islam*.
- 9 For a critical, and similarly grim, assessment by a Muslim intellectual of the impact of apologetics upon Muslim culture, see Ramadan, *Islam, the West and the Challenges of Modernity*, pp. 286-90. For an insightful analysis of the role of apologetics in modern Islam, see Smith, *Islam in Modern History*.
- 10 On this subject, see the collection of articles in An-Na'im et al., *Human Rights and Religious Values*.
- 11 The foundations of Wahhabi theology were set into place by the eighteenth-century evangelist Muhammad b. 'Abd al-Wahhab (d. 1206/1792). With a puritanical zeal, 'Abd al-Wahhab sought to rid Islam of all the corruptions that he believed had crept into the religion—corruptions such as mysticism, including the doctrine of intercession and rationalism. The simplicity, decisiveness, and incorruptibility of the religious thought of 'Abd al-Wahhab made it attractive to the desert tribes, especially in the area of Najd. 'Abd al-Wahhab's ideas would not have spread even in Arabia had it not been for the fact that in the late eighteenth century the Al Saud family united itself with the Wahhabi movement and rebelled against Ottoman rule in Arabia. The Wahhabi rebellion was considerable, at one point reaching as far

as Damascus in the north and Oman in the south. Egyptian forces under the leadership of Muhammad Ali in 1818, however, quashed the rebellion after several failed expeditions and Wahhabism seemed to be on its way to extinction. Nevertheless, Wahhabi ideology was resuscitated once again in the early twentieth century under the leadership of Abd al-Aziz b. Al Sa'ud (r. 1319-1373/1902-1953), who adopted the puritanical theology of the Wahhabis and allied himself with the tribes of Najd, thereby establishing the nascent beginnings of what became Saudi Arabia.

12 Salafism is a creed founded in the late nineteenth century by Muslim reformers such as Muhammad 'Abduh (d. 1323/1905), Jamal al-Din al-Afghani (d. 1314/1897), Muhammad Rashid Rida (d. 1354/1935), Muhammad al-Shawkani (d. 1250/1834), and al-Jalal at-San'ani (d. 1225/1810). Salafism appealed to a very basic and fundamental concept in Islam, that Muslims ought to follow the precedent of the Prophet and his rightly guided Companions (*al-salaf al-salih*). The founders of Salafism maintained that on all issues Muslims ought to return to the original textual sources of the Qur'an and the *Sunnah* (precedent) of the Prophet. In doing so, Muslims ought to reinterpret the original sources in light of modern needs and demands without being slavishly bound to the interpretive precedents of earlier Muslim generations. Methodologically, Salafism is nearly identical to Wahhabism except that Wahhabism is far less tolerant of diversity and differences of opinion. By the 1980s, however, Wahhabism co-opted the language, symbolisms, and even the very name of Salafism and, therefore, was able to spread in the Muslim world under the Salafi label.

13 For an overview of the Islamic response to international human rights, see Brems, *Human Rights*, pp. 183-293; Mayer, 'The Dilemmas of Islamic Identity', pp. 94-110.

- 14 See the discussion on this point by Ignatieff, *Human Rights*, pp. 53-94.
- 15 For instance, one can speak of a right to education because of the fact that such a right has been demanded and often denied. On the other hand, one normally does not speak of a right to go to the toilet because that function is normally not demanded and then denied. However, one might start articulating such a right if, for instance, state or non-state actors are torturing a prisoner by denying him or her access to such facilities. I am not necessarily articulating a sociological understanding of human rights. A right could exist as a perennial right or eternity, but it is not recognised or claimed until human experience demonstrates the need to recognise or claim it. On the social recognition and promotion of rights, see Martin, *A System of Rights*, pp. 24-97.
- 16 This is well exemplified by the unfortunate practice of retaliatory 'political' rapes that exist in some countries. Once a woman's right to be free of sexual molestation is recognised, political rapes become indefensible regardless of the applicability of the legal argument. Whether rape is mentioned in an international declaration or treaty, and whether a particular country is a signatory to a particular covenant or not, is treated as irrelevant to assessing the moral wrong of retaliatory rapes. On retaliatory rapes, see Haeri, 'The Politics of Dishonor', pp. 161-74.
- 17 By an exercise of personal volition, an individual may resolve most, if not all, conflicts between religious conviction and human rights claims. For instance, although the divine law may decree that the hands of a thief be severed, I may refuse to sever anyone's hands, or even refuse to prosecute anyone if the punishment is so harsh. Likewise, I may abstain from stoning an adulterer or adulteress to death, or refuse to take part in a proceeding that would result in a

stoning. Of course, the more a system is compulsory and the more it denies individual volition, the more exasperated the tension becomes between the subjective experience and human rights standards.

18 On the dynamics between religion and human rights, see Marty, 'Religious Dimensions of Human Rights', pp. 1-16.

19 See Mitchell, *Law, Morality and Religion in a Secular Society*, pp. 103-18; Tuck, *Natural Rights Theories*, pp. 5-31. On religion and the natural rights tradition, see Gordis, 'Natural Law and Religion', pp. 240-76; Sigmund, *Natural Law in Political Thought*, pp. 36-89; Strauss, *Natural Right and History*, pp. 81-164.

20 See Monshipouri, *Islamism, Secularism, and Human Rights in the Middle East*, pp. 207-35.

21 For the Iranian context, see Mir-Hosseini, *Islam and Gender*; Soroush, *Reason, Freedom and Democracy in Islam*, pp. 61-4, 122-30, 132-3

22 For instance, see An-Na'im, *Toward an Islamic Reformation* and 'Islamic Foundations of Religious Human Rights', pp. 337-59; Esack, *Qur'an, Liberation, and Pluralism*; Kamali, *The Dignity of Man*; Moussalli, *The Islamic Quest for Democracy, Pluralism, and Human Rights*; Sachedina, *The Islamic Roots of Democratic Pluralism*.

23 For elaboration on this, see Abou El Fadl, *Speaking in God's Name*, pp. 32-3.

24 Marsot, 'The Ulama of Cairo in the Eighteenth and Nineteenth Century', p. 149.

25 After the evacuation of the French in Egypt in 1801, 'Umar Makram with the assistance of the jurists overthrew the French agent left behind. Instead of assuming power directly, the jurists offered the government to the Egyptianised Albanian Muhammad 'Ali. See Marsot, 'The Ulama of Cairo', pp. 149-65.

26 Modernity, however, through a complex dynamic, turned the '*ulama*' from 'vociferous spokesmen of the masses' into salaried state



functionaries that play a primarily conservative, legitimist role for the ruling regimes in the Islamic world. See Crecelius, 'Egyptian Ulama and Modernization', pp. 167-209. Crecelius makes this point about the '*ulama*' of Egypt in the modern age. However, see Ajami, 'In the Pharaoh's Shadow', p. 18; Mortimer, *Faith and Power*, pp. 91, 95; Ruthven, *Islam in the World*, p. 179. Of course, there are notable exceptions in contemporary Islamic practice. Many clerics became prominent opponents of the present Muslim regimes, and suffered enormously for their troubles. To my mind, the disintegration of the role of the '*ulama*' and their co-optation by the modern praetorian state, with its hybrid practices of secularism, has made Islamic normative determinations all the less rich. On the idea of the praetorian state, see Perlmutter, *Egypt*.

27 Structurally, *Shari'ah* is comprised of the Qur'an, *Sunnah*, and *fiqh* (juristic interpretive efforts). Substantively, the *Shari'ah* refers to three different matters: (1) general principles of law and morality; (2) methodologies for extracting and formulating the law; and (3) the *ahkam*, which are the specific positive rules of law. In the contemporary Muslim world, there is a tendency to focus on the *ahkam* at the expense of the general principles and methodology. It is entirely possible to be *Shari'ah*-compliant, in the sense of respecting the *ahkam*, but to ignore or violate the principles and methodologies of *Shari'ah*.

28 Of course, I realise that this claim is quite controversial for Muslims and non-Muslims alike. Nevertheless, I believe that this argument is supported by the fact that the rebellion of the Khawarij took place in the context of an overall search for legitimacy and legality after the death of the Prophet. Furthermore, the research of some scholars on the dogma and symbolism of the early rebellions lends support to this argument. See Hisham, *al-Fitnah*.

29 Al-Shawkani, *Nayl al-Awtar Sharh Muntaqa al-Akhbar*, 7:166;

Ibn Hajar al-'Asqalani, *Fath al-Bari bi Sharh Sahih al-Bukhari*, 14:303.

- 30 The Arabic is '*kull mujtahid musib*' and '*li kulli mujtahid nasib*'. See Abu al-Husayn, *Al-Mu'tamad fi Usul al-Fiqh*, 2:370-2; 'Ala' al-Din, *Kashf al-Asrar 'an Usul Fakhr al-Islam al-Bazdawi*, 4:30-55; Al-Ghazali, *al-Mustasfa min 'Ilm al-Usul*, 2:363-7.
- 31 Al-Juwayni, *Kitab al-Ijtihad min Kitab al-Talkhis*, pp. 50-5.
- 32 I deal with these two schools of thought more extensively elsewhere. See Abou El Fadl, *God's Name*, pp. 145-65.
- 33 Contemporary Islamic discourses suffer from a certain amount of hypocrisy in this regard. Often, Muslims confront an existential crisis if the enforced, so-called, Islamic laws result in social suffering and misery. In order to solve this crisis, Muslims will often claim that there has been a failure in the circumstances of implementation. This indulgence in embarrassing apologetics could be avoided if Muslims would abandon the incoherent idea of *Shari'ah* state law.
- 34 Al-Juwayni, *Ghiyath al-Umam fi Iltiyath al-Zulam*, p. 15.
- 35 Shams, *I'lam al-Muwaqqi'in 'an Rabb al-'Alamin*, 4:452.
- 36 On the obligation of justice in the Qur'an, see Izutsu, *The Structure of Ethical Terms in the Qur'an*, pp. 205-61; Rahman, *Major Themes of the Qur'an*, pp. 42-3. On the various Muslim theories of justice, see Khadduri, *The Islamic Conception of Justice*.
- 37 The Qur'an also demands adherence to a large number of moral virtues such as mercy, compassion, truthfulness, equity, generosity, modesty, and humility.
- 38 Qur'an 21:107, which, addressing the Prophet, states: 'We have not sent you except as a mercy to human beings'; see also 16:89. In fact, the Qur'an describes the whole of the Islamic message as based on mercy and compassion. Islam was sent to teach and establish these virtues among human beings. I believe that to Muslims, as opposed to Islam, this creates a normative imperative of teaching mercy (Qur'an

27:77; 29:51; 45:20). But to teach mercy is impossible unless one learns it, and such knowledge cannot be limited to text. It is *ta'aruf* (the knowledge of the other), which is premised on an ethic of care, that opens the door to learning mercy, and in turn, teaching it.

39 The Qur'an explicitly commands human beings to deal with one another with patience and mercy (90:17), and not to transgress their bounds by presuming to know who deserves God's mercy and who does not (43:32). An Islamic moral theory focused on mercy as a virtue will overlap with the ethic of care developed in Western moral theory. See Tronto, *Moral Boundaries*, pp. 101-55.

40 I would argue that the protection of religion should be developed to mean protecting the freedom of religious belief; the protection of life should mean that the taking of life must be for a just cause and the result of a just process; the protection of the intellect should mean the right to free thinking, expression, and belief; the protection of honour should mean the protecting of the dignity of a human being; and the protection of property should mean the right to compensation for the taking of property.

41 See Abou El Fadl, *Rebellion and Violence in Islamic Law*, pp. 234-94.

42 Ahmad, *Sharh al-Qawa'id al-Fiqhiyya*, pp. 369-89; 'Ali Ahmad, *al-Qawa'id al-Fiqhiyya*, pp. 400-1; Jalal al-Din, *al-Ashbah wa al-Naza'ir fi Qawa'id wa Furu' Fiqh al-Shafi'iyya*, p. 53; Mahmasani, *al-Ashbah wa al-Naza'ir fi Qawa'id wa Furu' Fiqh al-Shafi'iyya*, p. 294.

43 Al-Shawkani, *Nayl al-Awtar*, 7:168; Ibn Hajar al-'Asqalani, *Fath al-Bari*, 14:308.

44 Muslim jurists, however, did not consider the severing of hands or feet as punishment for theft and banditry to be mutilation.

45 A considerable number of jurists in Islamic history were persecuted and murdered for holding that a political endorsement (*bay'a*) obtained under duress is invalid. Muslim jurists described the death of these scholars under such circumstances as a death of *musabara*.

- This had become an important discourse because caliphs were in the habit of either bribing or threatening notables and jurists in order to obtain their *bay'a*. See Abou El Fadl, *Islamic Law*, pp. 86-7; Ibn Khaldun, *The Muqaddimah*, p. 165. On the Islamic law of duress and on coerced confessions and political commitments, see Abou El Fadl, 'Law of Duress in Islamic Law and Common Law', pp. 305-50.
- 46 Abu Muhammad, *al-Binaya fi Sharh al-Hidaya*, p. 482.
- 47 For this often-repeated claim, see Howard, *Human Rights and the Search for Community*, pp. 92-104; Rosen, *The Justice of Islam*, pp. 7, 79-80, 156-7; Weiss, *The Spirit of Islamic Law*, pp. 145-85.
- 48 On the relationship between duty and right in Roman law, and the subsequent Western legal tradition, see Finnis, *Natural Law and Natural Rights*, pp. 205-10. The dynamic that Finnis describes is very similar to that which took place in classical Islamic law. On rights and responsibilities, also see Weinreb, 'Natural Law and Rights', pp. 278-305.
- 49 On this subject, see Abou El Fadl, *Islamic Law*, pp. 280-7.

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# **The Genesis of Family Law: How *Shari'ah*, Custom and Colonial Laws Influenced the Development of Personal Status Codes**

*Amira El-Azhary Sonbol*

It is commonly asserted that personal status laws applied in Muslim countries today are based on the Islamic *Shari'ah* and as such should be considered God's laws as provided through the Qur'an and the *Sunnah* of the Prophet. Thus, any effort to change personal status laws is an attack on the very basic principles of Islam.

This line of reasoning provides the strongest opposition to current attempts to change gender relations and laws pertaining to women. Because such assertions represent a patriarchal hegemony that is supported by traditions, conservative clerical classes and state power structures, they present significant obstacles for those challenging the system.

Given the social transformations in the last decades, such as women entering job markets in larger numbers and increasingly bearing the financial burdens of their families and communities, one might expect that there have been corresponding changes to the philosophical approaches to gender and the laws that guide the life of women within families, workplaces, the marketplace, and political systems. Although some changes have occurred, they hardly come close to the transformations in the labour and social fields or the accomplishments of women in the professional and business worlds.

In this paper, I would like to raise serious issues regarding the central impediment facing women in their efforts to change personal status laws: the belief that these laws are God's laws and are therefore immutable and unchangeable. I offer three propositions to challenge these assumptions:

1. There is a critical distinction between *fiqh* and *Shari'ah*. *Shari'ah* is the sum total of religious values and principles as revealed to the Prophet Muhammad to direct human life, and should not be confused with *fiqh*, which is the product of the efforts of the *fuqaha* over the centuries to derive concrete legal rules from the Qur'an and the *Sunnah*. These *fuqaha* did not work in a vacuum but rather through their cultural and social lenses and experiences in an effort to try and find a way to reconcile the customs and conditions of their age and place with rules dictated by the Qur'an.
  
2. Personal status laws are a construct of the modern state. While the rules can be found in the interpretation of medieval *fiqh*, the actual laws by which Muslims live today are a combination (*talfiq*) of *fiqh* rules, traditions (*'urf*), and nineteenth century philosophy toward gender relations. These laws and the approach to gender embedded within them reflect prevailing Victorian values and European laws, traditions, education and legal systems of the nineteenth century, characterised by the spread of European hegemony. Although European women have thrown off this philosophy and laws since that time, this nineteenth century gender philosophy has remained embedded in family laws in Muslim countries that were part of European imperial territories, particularly colonies of England and France. From these colonies, the laws have expanded or been exported to other Muslim countries.
  
3. The personal status laws developed in the modernisation period established a construction of the family with the father as the recognised official head of the family whose powers are legally defined and protected by the powers of the state.



This construct is neither natural nor divinely ordained, but a modern phenomenon. This does not mean that there was no 'family' before the nineteenth century, for such social units have always existed. But what emerged as a new phenomenon is the legally defined nuclear family (*'usra*), controlled and guided by modern legal codes which defined the power of the male and his control over his wife and children. While the Qur'an speaks of *'asha'ir* and *qaba'il* (clans and tribes) and other Islamic sources speak of *al-* or *banu* (people or children of), this is not in reference to the nuclear family formed of a husband/father with legal powers over his wife and children, but rather of larger units in which the father has more powers over his daughter than does her husband, and in which the institution of marriage was looser, with divorce much more accessible to both women and men than in the modern state.

This paper will substantiate these three core propositions by examining the evolution of family laws from the *Shari'ah* courts in the Ottoman Empire through to the 'modernisation' of law and construction of personal status codes during European colonisation. The first section will describe the legal system before the modernisation era, then explore the nineteenth and early twentieth century development of personal status codes in Egypt and the recent drafting and debates over a personal status law in Bahrain. The second section will raise three key structural areas in which the 'premodern' laws and the current personal status codes diverge: the philosophical approach to gender and law, the application of law in courts, and the codification of laws. Finally, the third section will look at the substance of some family laws today and how, through the codification process, they came to differ from the possibilities and flexibility allowed before codification.

## **I. Origins of Selected Muslim Personal Status Laws<sup>1</sup>**

In tracing the origins of Muslim personal status laws, I will provide an overview of the laws and legal system as practised in the Ottoman Empire before European colonisation and, as a case study, the subsequent development of the personal status law in Egypt under European tutelage. I will then demonstrate how other Muslim countries have borrowed their laws from former colonies such as Egypt by examining the development of a personal status law in Bahrain that is currently taking place. This account will support the proposition that these laws are not, in fact, divine, but rather have been constructed based on a European philosophy of law and gender combined with selected *fiqh* rules. What we know as 'Islamic Family Law' today is the product of nation states' efforts to modernise their laws. This process included the formation of committees to select specific provisions from both *fiqh* and colonial codes, codification by state legislative bodies, and enforcement through state executive authority. The reformers were themselves graduates of Western European law schools who were imbued with the laws and philosophy of law they studied in Europe, which they brought home and proceeded to imitate. While the content of the law is said to be derived from the *Shari'ah*, in fact and spirit, the methodology for selection and execution of the law are all based on European models and the prevailing European philosophy of law and gender of those times.

What is said to be *Shari'ah* in law and practice today has very little to do with what was practised in *Shari'ah* courts before the reform of the law. Court records from the Ottoman Empire before state codification of law began in the late nineteenth century show that *Shari'ah* courts played a central role in the life of people and the relations between them. The system was flexible and provided an avenue for the public to achieve justice and litigate disputes rather than to enforce a particular philosophy of social laws and norms formulated by the State. Litigation in court

seemed to be a daily activity for men and women, and there were no separate courts for the sexes. Court records from Ottoman Egypt and Palestine show that women appeared in court routinely to register real estate purchases, sales and rentals, dispute ownership of property, register loans they made to others, deal in goods, contract their own marriages and divorces, ask for alimony, report violence against them, ask for financial support from husbands, and demand child custody and financial support from husbands and ex-husbands. The flexibility of the system allowed women to determine their marriage contracts and the conditions under which they lived.

Precedent was essential in Ottoman courts and basic principles were followed as a sort of common law. Perhaps the most important principle was the sanctity of contracts, which was of longstanding importance in Islamic countries. Another important basic principle, common to most legal systems, is the protection of the weak, particularly children and women.

*Qadis* had discretion in deciding cases. Principles of *istihsan* and *istihbab* (preference) guided the *qadi* in the direction of what was expected and preferable depending on the sociocultural and economic context of the people he served. Every *qadi* belonged to and specialised in one particular *madhhab* (school of law), but the theological collections and interpretations of all four *madhahib* were available to him as reference in deciding cases. More frequently, a *qadi*'s decisions were informed by, and made according to, local '*urf*' (custom). Unlike modern nation states, the premodern State did not establish legal codes determining social relations; rather it passed *qanun*, edicts or executive orders, pertinent to collecting taxes, the amount of the *diyya* (blood-price) and various types of security measures. With these guides and juristic *fiqh* as a framework, the *qadi* reached his decisions. Unlike courts today, *qadis* had neither the right to force a woman to stay with a husband she wanted to divorce, nor did they question her reasons for asking for divorce. The *qadi*'s role

was that of a mediator regarding financial rights and support given the circumstances of the divorce.

Centralisation and homogenisation of legal codes and court procedures took place only in the modern period as nation states were carved out of the former Ottoman Empire. From this period and throughout the last century, depending on the particular Muslim country, the legal system and the laws followed were transformed in shape, philosophy and intent. The modernisation of law included the division of legal codes into national, criminal and commercial codes. It was the State that decided which courts or other venues would be responsible for which codes. Various courts opened and changed according to shifting governmental and social needs.

One of the main reasons for the change in treatment of women in modern *Shari'ah* courts is that when modern states built new separate *Shari'ah* courts, they did not apply precedents from premodern *Shari'ah* courts. Rather, modern states constructed legal codes compiled by committees, handed the new codes to *qadis* educated in newly opened *qadi* schools, and had these *qadis* apply the codes in court. In the process, the logic of the court system, the philosophy behind *Shari'ah* law, and the manoeuvrability and flexibility it provided to the public and *qadis* alike were curtailed. Common practices, at the heart of a system which had been organically linked to the society it served, were replaced by particular laws suitable to nineteenth-century nation state patriarchal hegemony. These laws ultimately worked against the weaker members of society (i.e. women and children) even while making the legal system more streamlined, homogeneous, and efficient. Because premodern *Shari'ah* court records were not used as precedent for modern *Shari'ah* courts, the rights of women, including the right to work and determine their marriage contracts, were lost.

For example, Egypt's personal status law, which has served as a model for other Arab countries, began its existence in the 1920s

and continues to evolve and change until today. The reform of laws and courts in Egypt, however, date back to 1885, when Egypt began to divide its court system into national, mixed, *Shari'ah* and *milla* (sectarian courts for non-Muslim communities) courts. During this period, European-style institutional reforms were adopted and the codification of law became the basic organisational structure for the legal system. National courts oversaw interests of the State at large, and the laws applied in these courts were borrowed from French law and precedents. Mixed courts, where disputes involving foreigners or foreign companies would be litigated under European laws, were established so that foreigners would not lose the benefits of the Ottoman Concessions. *Milla* courts applied religious family laws to their various religious constituencies throughout the Ottoman Empire, and *Shari'ah* courts did the same for the Muslim population. Since the powers of church courts were limited during the Ottoman period when *Shari'ah* courts were open to litigation by both Muslims and non-Muslims, the new religious *milla* courts did not have legal precedents for all the legal issues litigated before them. Therefore they resorted to applying *Shari'ah* law when there was a gap in precedence. For example, the courts applied Muslim inheritance laws to non-Muslims, resulting in inheritances that gave non-Muslim males double the females' shares. Ironically, other Muslim laws like those relating to divorce, which could have given non-Muslims flexibility and a way out of unwanted marriages, were not acceptable to churches even though the same churches accepted Islamic inheritance laws.

Even after states moved to unify the legal systems into a single rather than multiple court system, as happened in Egypt in 1952, the legal codes and the philosophies behind them remained the same. Modern national courts were responsible for the issues of the public sphere, including business and national issues, and laws dealing with family issues were seen as strictly within the religious domain.

While European and particularly French laws provided the model for national and mixed courts, the *Shari'ah* was designated as the source for laws handling marriage, child custody, inheritance and *awqaf*. This is the connection between personal status laws and the *Shari'ah*; the name given to the courts that were to look into disputes involving marriage or child custody was *Shari'ah* courts and the law applied in these courts would be derived from the *Shari'ah*. However, this process of modernising the law did not follow the tradition of premodern *Shari'ah* courts where the *qadi* judges had flexibility and discretion in deciding the case based on the *madhhab*, precedent, custom, and the specific needs of the litigants in the given situation. The resulting codified law, in spirit and application, was therefore different from the *fiqh* principles from which they were extracted and certainly from the wider range of *Shari'ah* possibilities open to judges before the modernisation of law. This was bound to happen, given the fact that the State and the members of the codification committees were made up of graduates of modern law schools in Egypt and in Europe, schools that taught different frameworks of legal conceptualisation and a different approach to state, society and the laws applied in them. Simply put, while premodern courts were more organically linked to society, modern courts were directly connected to the nation state, serving its will.

Egypt's approach to 'personal status law' was one of the first in the Arab region, and has served and continues to serve as a model for other Muslim countries. In Bahrain, for example, a personal status law is currently being drafted and debated. Bahrain claims that the proposed law has been dictated by the *Shari'ah*, but in actuality the process of law making and the culture and substance of the Egyptian law have been replicated in the Bahraini law almost wholesale. The definition of 'personal status' is said to be derived from the *Mawsu'a al-'Arabiyya al-Muyassira*, a widely used encyclopaedic source published in Egypt:

The totality of what differentiates one human being from another in natural or family characteristics according to which the law based legal principles in regards to his social life such as whether the human being is a male or female, if he is married or a widower, a divorcé, a father, or legitimate son, or if he is a full citizen or less due to his age or imbecility or insanity, or if he is fully civilly competent, or is controlled in his competency due to a legal reason.<sup>2</sup>

However, this definition is the exact definition reached by a *qadi* in a 1937 Egyptian court case in which the term 'personal status' was defined as:

By Personal Status is meant the totality of what differentiates one human being from another in natural or family characteristics according to which the law based legal principles in regards to his social life such as if the human being is male or female, if he is married or a widower, a divorcé, a father, or legitimate son, or if he is a full citizen or less due to his age or imbecility or insanity, or if he is fully civilly competent, or is controlled in his competency due to a legal reason.<sup>3</sup>

These similarities should not come as a surprise, due to the interconnection between different Arab countries, the common education received by lawyers, politicians, legists and other professionals in these countries, and the direct borrowing that takes place when laws are codified in countries trying to follow the footsteps of other Arab countries who have reformed their laws to fit with Western legal traditions.

At the same time, the proposed Bahrain Personal Status Law also contains differences due to culture to reflect the importance of tribalism and the extended family structure, which continue to be important to the social fabric. The scope of family in the Personal Status

Law is defined differently, with the inclusion of relations created by marriage, *nasab* and *musahara*. This is absent in the personal status laws of countries like Egypt or Syria, where the nuclear family made up of the father, mother and children is the primary concern of the law.

Bahrain—similar to many Muslim countries—insists that the proposed personal status law is ‘derived from the Islamic *Shari’ah* and does not go outside of it’.<sup>4</sup> But it has deep roots in the Egyptian laws, which were heavily influenced by European colonial philosophy and structures relating to law and gender. At the same time, it differs from other personal status codes in the region that are also said to be derived from the *Shari’ah*. One wonders why the philosophy and the specifics of the laws change so much from one country to the other, if indeed the source is the same?

## **II. Systemic Divergences between *Shari’ah* and Personal Status Laws**

Given this codification process and the influence of the European philosophy of law and legal systems, the newly codified personal status laws took on certain systemic differences from the *Shari’ah* they were purported to stem from and the *Shari’ah* law that was practised in courts before legal reform began in the nineteenth century. Three major divergences are worth highlighting: (1) the philosophical approach to gender and law; (2) the application of law in courts; and (3) the codified structure of the law itself.

### **i. Philosophical Approach to Gender and Law**

As the above quote defining personal status illustrates, the laws developed and applied by the modern state involved a particular philosophical



approach toward human relations which viewed human beings through ‘natural’ characteristics and ‘family’ units. The modern laws formed new grids through which human society was perceived, organised and dealt with legally and otherwise. Defining personal status laws through natural qualifications—meaning male or female, minor or major, sane or insane—and through social needs like the State’s responsibility to upkeep the ‘family’ and its espousal of a moral discourse that sanctified and fortified the family, assured an unequal system that denied freedoms to certain sectors of society (women and children) that were placed in the hands of another sector (adult males).

Thus, gender difference would define the law and biological differences became a liability denying women full legal competence in the same way as an insane person or a minor who needs the protection of a ‘guardian’. Once arguments based on biological differences became normative, the impact of patriarchy became all the more obvious in the interpretation of laws dealing with marital relations. This happened incrementally. In 1885, the first reformed law focused on regulating *marriage*, but by 1920 a comprehensive personal status law was codified whose purpose was to organise the *family*. The move from ‘marriage’ to ‘family’ is significant, with the first looking at individual duties and rights within a marriage between two persons, and the latter focused on and interested in the family as a unit guided by the law. New issues of importance emerged such as the formation of a family unit and definition of marriage as a means for forming a family and begetting ‘legitimate’ children. The father was made the legal head; the wife, losing legal rights after her marriage, became an adjunct of the husband in the eyes of the State.

The introduction of the Code Napoléon in Egypt with regard to issues of property, finance, nationality, trade and crime brought a distinct impact on the legal system and gender relations as a whole. In terms of gender, the Code Napoléon has been described in the following way:

The Code Napoléon ... is especially based on the rights and authority of the husband as chief of the family, and on the respect which has to be paid to him by his wife and children. The husband is considered to be best able to manage the family fortunes, and in that respect and in his capacity as head of the family, the rights given to him sometimes override those of his wife and children.<sup>5</sup>

This legal philosophy was undoubtedly introduced in the modern period along with the explicit provisions of the Code. Nothing exemplifies the adoption of the Code Napoléon legal philosophy into local laws more than citizenship laws, which considered a wife an adjunct of her husband who gains his nationality upon marriage but loses her own (note that this has been subsequently changed in European and Middle East countries), but denied a female citizen the same right to give her nationality to her husband and children. In other words, a woman was denied full legal competency. Other examples abound. For example, all Arab countries require that wives and children be included in the husband's personal identity card. These are all symbols of this legal control based on biological difference.

## **ii. Application of Law in Courts**

Precedents from *Shari'ah* courts dating from the pre-reform period did not constitute a source for the codification of the laws or even, after the completion of codification, for judges to refer to in their judgements. In other words, the thousands of Egyptian court cases contained in the massive *sijill* (court records) that date all the way back to the ninth century were not considered of any value to the *Shari'ah* courts established in the modernisation period. The same can be said for Turkey, Syria, Palestine and other Muslim countries in which the court systems have extensive archival records. In

addition, *qadis* were trained using different instructions, sources and procedures through which they could make judgements. The lack of interest in legal precedent from pre-reform legal practice might have been expected, given the fact that the codified laws applied in the modernised courts had little to do with laws and procedures in courts during the pre-colonial period. There was thus a clear break in the practice of *Shari'ah* laws between the modern codified period and the pre-reform period.

### iii. Codification of Laws

The laws that have been introduced since the nineteenth century were codes selected by committees and applied by judges who were educated in newly opened schools for judges. In Egypt, these *Shari'ah* court judges were instructed in the Hanafi *madhhab*, which had become the state's *madhhab* of choice in the 1870s. (Before that time, Egypt's courts also applied the Shafi'i and Maliki *madhahib* to serve Egypt's population, the majority of which belonged to these two *madhahib*.) But courts did not apply the Hanafi *madhhab* as they had done in the pre-reform era, but rather applied a codified form of this *fiqh*. This meant the new laws had serious differences from the pre-existing laws, especially since they could no longer be applied with the same flexibility and discretion that were used before codification.

Islamic marriage contracts in the era before modernisation normally included details like the name of the wife and the name of the husband, names of their fathers, address and professions. It stated whether the wife was a virgin or not, if the wife or husband were underage or adult and, if underage, who had the right to marry them. It also included information regarding who could represent the wife or husband in transacting the marriage and, if underage, who is the guardian for each. It almost always included the amount of the agreed

dower and how it was being paid and contained certain language regarding mutual respect in relations between the couple. The marriage contract was open to the inclusion of conditions, such as a wife refusing her husband's taking a second wife or the husband's request that the wife not leave the home without his permission. These were negotiated issues and included as part of the contractual agreement to be honoured or else the other would be found in breach of contract. The structure and content of marriage contracts enjoyed continuity until the modernisation period. It should be added that changes in the form and content of marriage contracts appeared over time particularly linked with state formation. For example, marriage contracts dating from the third century Hijra show greater flexibility in the language used and the conditions demanded by women and offered by husbands as part of the contract, while the contracts from the Ottoman period show greater consistency in language and requirements, a sign of early modern state bureaucratic rationalisation with its requirements for standardisation. The important point here is that there is a direct connection between government structures and political conditions and the various laws and regulations that are in practice.

Major changes took place in the substance of the law when the codification of marriage was introduced under modern nation states and a standard contract was included in the newly developed codes. Marriage was defined according to French definitions that considered the father the legal head of the family. Modern, formatted fill-in-the-blank contracts made no room for the type of conditions that women used earlier to define the types of marriages that they wanted to transact.

In Egypt, for example, Article 1 of the 30 June 1885 decree defined the marriage contract in specific terms based on comparative practices in France. The marriage contract was to be designed as a fill-in-the-blank document.<sup>6</sup> It reads something like this:

Year (H) ..... corresponding to (Gregorian calendar) ..... In front of me ..... Mazoun for contracting marriages, of the locality ..... of the town .....

Present are: 1. M[r.] ..... Whose father is M ..... son of ..... and whose mother is Mrs. .... born at ..... whose age is ..... address ..... religion ..... nationality ..... whose profession is ..... 2. M[iss] ..... born at ..... whose father is M ..... and mother ..... born at ..... whose age is ..... address ..... religion ..... nationality ..... profession .....

Both having reached the age of majority and being sound of mind have declared in the presence of the witnesses signatory to this document ..... that they wish to be married in accordance to the Muslim religion. I explained to them that the *Shari'ah* **includes** the following stipulations: 1. The husband has the right ....., to have at the same time two, three or four wives, notwithstanding the opposition of that he is already married to; 2. He can divorce his wife, as he wishes, without even her consent. He could also forbid her from going out of the marital home without his permission. He also has the right to have her ..... in the conjugal home and the enforcement of this is obligated on her, in accordance to the *Shari'ah* .....

The application of such a standard, rigid contract and a fixed personal status code destroyed the flexibility of a system in which *qadis* could refer to a wide number of divergent sources in making judgements, based on precedent, judicial discretion and general interest. It also discounted the validity of legal practices accumulated over the centuries which had constituted a common law. In addition, the standardisation of the marriage contract and the laws governing personal status eliminated the possibility of women determining the content of their marriage contracts and the conditions under which they lived.

### III. Entrenching Biology as Destiny through the Codification Process

In addition to the systemic divergences from the *Shari'ah*, the newly codified laws also differed substantively from the *Shari'ah* that was applied by *Shari'ah* courts in the pre-modernisation era. From a diversity of *Shari'ah* rules available, the lawmakers clearly selected and adopted a set of rules for the marriage contract that granted a man the right of dominion over the woman in a marriage—including a wife's total obedience and incarceration in the home, and a husband's ability to marry as many as he wished and divorce at will. Though the marriage contract was based on the French model, these specific values could have been derived from *fiqh* sources. However, given the diversity within the Islamic juristic thought and practice, *fiqh* sources could have also been used to derive a different set of laws and a different marriage contract, had there been a different outlook or intent. The provisions that were selected and codified would not withstand scrutiny if tested against principles of *istihsan* (preference), *'adl* (justice) or against a philosophy that looked beyond the letter of the law to the intent of the law, i.e. ultimately the protection of the weak.

Simply put, there was little concern or even sense that there are *maqasid* (objectives and principles) behind the *Shari'ah*, nor that the rules of the *Shari'ah* are too wide and complex to be fitted into a codified law. The 1885 Egyptian law, for example, shows that the selection of provisions was patriarchal, with dominant male prerogatives chosen while female prerogatives provided by the *Shari'ah* were denied. In other words, the very act of codification entrenched discriminatory gender relations. While these rules were 'Islamically valid' in the sense that they could be found in *fiqh* rules of *madhahib*—in this case the Hanafi *madhhab*—they could have been struck down according to principles of *maqasid* or *maslahah* (public interest) or legal practices prior to the

codification. The codification process entrenched women's biology and her status within a particular time and context as the normative standard valid for all times.

The following discussion provides an overview of a number of specific areas in which the substance of the codified laws applied after the 'modernisation' period was less favourable for women than what was available in the pre-modernisation era, demonstrating the fact that the new laws were constructed by humans with a particular philosophy and framework and cannot be deemed to be 'God's law' or 'divine'.

### **i. Divorce**

The newly codified marriage contract entrenched the unequal right to divorce and rights upon divorce that were particularly discriminatory towards women. The husband was granted the right to divorce at will; a similar right was not given to the wife. Even though all *fiqh* schools provided several grounds for a wife to divorce her husband, limited grounds for divorce were established that had to be proven in order for the wife to be granted divorce. This list included non-support, which had to be proven beyond doubt, and which was an invalid ground if another relative of the husband was willing to pay such support. Impotence also had to be proven beyond doubt through medical evidence and a one-year wait in which the husband might be cured. If the wife was proven to have known of the husband's impotence at any time before or after the marriage and agreed to stay with him, then she could not be granted a divorce. Wife-beating was not included as grounds for divorce. Rather, it was seen as a class issue by judges determining such cases, with poorer women forced to accept abuse since they were used to such treatment within the family. Not a single condition was placed on the husband's right to unilaterally divorce his wife or to take her back (*ruju'*) within three months of the divorce.

## ii. Obedience (*ta'a*)

The recognition of wives' rights in the law largely revolved around financial support during the marriage and following divorce, which was intimately tied with the concept of obedience (*ta'a*). The husband was financially obligated to provide for the wife, whether in relation to the *mahr* (dower) or *nafaqa* (maintenance). In return, the wife must be obedient to the husband. This equation between financial support (*nafaqa*) and obedience (*ta'a*) became central to marriage and to the marriage law. Obedience was seen in absolute terms rather than as negotiated matter, as had been usual in marriages before the modernisation period, which can be proven through marriage and divorce records from premodern *Shari'ah* courts.

It was in the new application of *ta'a* that the influence of Victorian philosophy and values becomes obvious. Previously, a wife's obedience was expected as part of a conditioned marriage contract. When a husband insisted that the wife obey his wishes not to leave the marital home without his approval, she had the choice of abiding by these wishes or getting out of the marriage. In other words, *ihitbas* (incarcerating oneself) was by choice and not enforced by law unless the wife wanted it. Modern law changed this and took *ta'a* to mean an absolute obedience to the husband. Since divorce was blocked to women unless the husband granted it, and there were no conditions included in marriage contracts and hence no breach of contract when a husband, for example, took another wife, a woman's ability to get out of a marriage became incredibly difficult. Wives resorted to leaving the marital home and returning to their family homes, hiding with a relative or living alone. After the establishment of the institution of *bayt al-ta'a* (lit. 'house of obedience') in 1920, absolute *ta'a* became enforceable by the power of the State, i.e. the police, giving the husband the right to ask a court to send the police to drag his wife back to live with him as long as the home he provided was adequate.



Even though *ta'a* and *bayt al-ta'a* are believed to be Islamic institutions, this right for incarceration in a *bayt al-ta'a* makes no appearance in any laws in Egypt or elsewhere in the Islamic world before the modernisation era, but did exist in law in Britain until the twentieth century under the principle of coverture, which allowed the husband to lock up his wife and to force her to live with him to ensure marital relations. In addition, *ta'a* and *bayt al-ta'a* were applied to non-Muslim women in Egypt. Modern treatment of *ta'a* cases in Egypt were based on law number 25 for 1920 (amended in 1929, 1979 and 1985) for Muslims and on ordinances 140 through 151 of the personal status laws for Orthodox Copts issued by the Majlis al-Milli in 1938 (reconfirmed by the Naqd court in 1973). *Bayt al-ta'a* cases were brought against Coptic wives and enforced by the court using the personal status laws of Copts and quoting Scripture. In one court case dating from 1953 the Majlis al-Milli court of Damanhur rendered the following decision: 'The obedience of a wife to her husband is a duty according to Church law and according to the traditions of the Majlis al-Milli. [This is because obedience] is the corner-stone of the family no matter the severity involved in the interference of the executive authorities to assure execution by forcible compulsion (*alquwa al-jibriya*). Without this the family would be at the mercy of tremendous dangers (*akhtar jasima*).'<sup>17</sup> Clearly, the notion of obedience as central to the family law is not just an 'Islamic' concept found solely in the *Shari'ah*, but had been introduced to and applied in all religious communities in Egypt.

### **iii. Ability to Negotiate and Add Conditions to Marriage Contracts**

Codified laws also removed the right to include conditions in the marriage contract to protect the interest of the wife. Article 12 of the 1885 Egyptian law stated:

Not valid is a marriage which includes a condition or circumstance whose realisation is uncertain. But the marriage which is contracted under illegal conditions is considered legal but the condition is considered as non-existent; such is the marriage in which the husband stipulates that there will be no dower.

If conditions were added to the contract, at the time of divorce the judge would rule that the marriage was valid but the conditions were not, generally because they were against the *Shari'ah* as defined in the newly codified personal status laws.

Previously, the most important conditions that women insisted on including in their marriage contracts were that a husband not take a second wife, and if he did, then either the first wife would have the option of divorcing her husband from the second wife or of being divorced herself.<sup>8</sup> Conditions requiring good treatment and defining what that good treatment entailed were also popular. Wives often asked their new husbands to be responsible for the food and board of their children from other marriages, including minor girls who may have been placed under the custody of the mother even after her remarriage. Women asked that other family members like their mothers live with them and included this in the marriage contract;<sup>9</sup> they asked that they not be moved from their homes if that was their wish and indicated specific and intricate details regarding treatment, free movement, and other issues they considered of importance.<sup>10</sup> Premodern courts regarded these conditions as binding to the contract and honoured the conditions when brought to court by the wife. In other words, the absolute right of a husband to divorce and deny his wife any choice within the marriage was non-existent unless the wife wished it or agreed to it.<sup>11</sup>

The 1885 restriction on conditions closed the most important door women had used to contract marriages to ensure they had a say in the kind of life they expected to lead with their husbands, they had

recourse to renegotiate their marriages if things were not working, and they had access to divorce without having to pay the husband financial compensation when the marriage did not work. From 1885 on, conditions included in marriage contracts were denied by judges in court litigation on the basis that the 'contract is valid but the condition is non-existent'.

Note that some countries like Jordan, which continued to apply tribal laws within its legal system, accepted some of the conditions as legal, including the right of the wife to request that her husband not take another wife.

#### **iv. Dower (*Mahr*)**

Marriage contracts from the pre-1885 period detailed the dower, which was a significant part of the contract, but the dower was not necessarily the central aspect to the contract. Sometimes the contract simply indicated that the amount was the dower 'expected of her equals', sometimes the woman indicated that she had received it without mentioning any amount, sometimes it was written with specific details, including whether it was paid up front or would be paid in instalments over a number of years, and at other times there was no dower mentioned at all. The important thing is that there was much more to the marriage contract than simple information regarding the dower. Financial settlement was important but not the only and often not even the central issue in pre-modern marriages.

In the standardised marriage contract, however, the dower and other financial issues took on central importance in the contract. Perhaps the legists of modern marriage were influenced by discussions of medieval *fuqaha*, who were often also *qadis* and thus interested in the money issues that were a normal concern of court litigation involving financial settlements. It made sense for *fuqaha* to spend time discussing financial issues, which were particularly likely to arise in the merchant

and marketplace culture of the cosmopolitan towns in which medieval *fuqaha* lived. At the same time, *fuqaha* usually drew their attention to cases that did not have immediate answer in law, since this is where they came up with specific fatwas. Lesser attention would have been paid to the general rules, which were common and thus taken for granted. This may be why so many books of *fiqh* handle specific subjects and neglect more general questions of law. Over time, these specific subjects were likely to become the source of the law and its logic, notwithstanding the fact that they were originally exceptional rules.

For example, discussions of the *fuqaha* regarding when they thought it was appropriate or inappropriate for women to leave the home were taken as what Islam has defined for women when in fact they were actually debates and discussions between *fuqaha*. Still, even today these debates remain valid in social discourses, among *fuqaha* and in court. That a wife cannot go to work without her husband's approval, travel without a *mihrim*, go to pilgrimage without a *mihrim* or even leave the home except for a *fiqh*-defined reason like visit a sick mother, continues to be accepted as what Islam rules when in fact there is little in the Qur'an or *Sunnah* to give support to these contentions.

With regard to the dower, although it was an important part of the premodern Islamic marriage contract, it was not the central component that it became after the modernisation period. This shift in emphasis must have resulted from influence outside of the standard procedures and rulings of the premodern *Shari'ah* courts.

## **v. Guardianship and Custody**

The philosophy of male authority over wives and children, as introduced by the French Napoléonic Code, can be seen in modern personal status laws that deny mothers the right of guardianship over their children or their children's property (*wilayat al-nafs wal-mal*). Often, a woman can

only become guardian if she is selected as trustee (*wasiya*) over the property by the father or the grandfather.<sup>12</sup> This is a far cry from pre-modern *Shari'ah* courts in which the mother was very often chosen by the judge as *wasiya* over the life and property of her orphaned children even against the specific wishes of her deceased husband when it was clear to the judge that she would be the better and more trustworthy guardian over her children.<sup>13</sup>

As part of legal reforms and importation of European codes, the age of majority was raised from fifteen to twenty-one. This meant that young men and women and the property that they may have inherited from deceased parents or other family members were left under the control of the patriarchal head of the family until several years later in the individual's life. Given the fact the marriage age for girls was sixteen, guardians had almost complete control over girls' lives—physical and financial—until their marriage to husbands, who were normally chosen by the same guardians. While the new laws following the Hanafi code allowed adult girls to marry without the approval of a guardian, the law also allowed a girl's guardian to sue for her divorce if she married someone he did not approve of. The law clearly strengthened the power of the patriarch and the family, and the modernisation process in fact promoted the nuclear family and control by the father and male relatives.

#### **IV. Conclusion**

Before the era of reform beginning in the late nineteenth century, the *Shari'ah* law administered by local courts represented accumulated social practices of specific localities and communities. One could talk of the courts as indigenous social institutions, organically linked to the communities they served, where the interpretation of *Shari'ah* law was moulded to the local *'urf*, and where the wide array of Islamic *fiqh*

sources represented valid sources of law. This abruptly shifted during the modernisation era, when the influence of European philosophy and legal systems was embedded into new, standardised personal status codes.

In the new reformed order, through the standardisation and codification of laws and legal systems, the State became the direct giver, institutor and executor of universal legal codes. At the same time, the *qadis* who heard cases and issued judgements were now the 'product' of the State, trained by the State to implement its will. In this process, women may have achieved a greater public and state administrative role, but lost manoeuvrability, flexibility, power and even certain substantive advantages in the laws. What makes this situation problematic is the fact that notwithstanding the heavy human and state hand in determining these laws, they are still represented as being *Shari'ah* law and given religious sanctity, thereby making it extremely hard to criticise and change them.

To be able to move ahead and change personal status laws today, we first need to deconstruct the laws themselves to show their origins and to illustrate the process by which various types of laws were fused together to form a legal code that was given the name of 'Personal Status Law' and labelled as *Shari'ah* law. The connection between the two needs to be broken, which can be done through several steps. First, it is essential to show the origins of the laws and the cumulative process through which these laws became established. Second, there must be serious historical analysis into the practice of law and the development of *fiqh* in various places and periods in the Islamic world; a comparative approach, using court records and the writings of *fuqaha* with due regard to the context in which they worked, would be best. Third, new laws should be proposed using the same process as what had been undertaken before the modernisation era, recognising the importance of the *Shari'ah* as a source of law and using the *Shari'ah* process to derive laws that will achieve justice and serve the changing

needs of the community, especially its most vulnerable members, given the current realities of time and place. This will not be easy, but taking such steps would lay a firm grounding for long-term change today and in the future.

## Notes

- 1 This section is derived from earlier, more extensive papers on the topic of the formation of 'Shari'ah law' in the modern state and women in Shari'ah courts in the Ottoman period, including Sonbol, 'Shari'ah and State Formation' and Sonbol, 'Women in Shari'ah Courts'.
- 2 Government of Bahrain, *Qanun al-Ahwal al-Shaksiyya al-Muqtarah*, p. 3.
- 3 *Al-Majm'a al-Rasmiyya l'il-Mahikim al-Ahliyya wa'l-Shar'iyya*, p. 11.
- 4 *Ibid.*, p. 6.
- 5 Butaye and de Leval, *A Digest of the Laws of Belgium and of the French Code Napoléon*, p. 132.
- 6 For more information on the significance of the change in format of marriage contracts, see Sonbol, 'Nineteenth Century Muslim Marriage Contracts'.
- 7 Majlis Milli, Damanhur, 27-11-1953, case 15.
- 8 For greater discussion of marriage contracts and the conditions included in them, see the court cases below and read Sonbol, 'History of Marriage Contracts in Egypt'.
- 9 'In front of our lord (*sayyidna*) the Shaykh Shams al-din ... al-Maliki, reconciliation took place between *al-mu'allim* Abul-Nasr, son of *al-mu'allim* Nasir al-Din ... and his wife Immat al-Haman, daughter of *al-hajj* Ahmad ... a legal reconciliation, knowing its meaning and legal consequences, that the last of what he owes his named wife in the form of previous *nafaqa* and clothing allowance up to this day is the amount of 48 new silver simani *nisfs* and no more. The named husband also agreed that the mother of his named wife, the woman Badr, would live in her named daughter's house and that he would not ask her for support [reimbursement] as long as she lived with her in the port of Alexandria without causing trouble ...' Alexandria, Watha'iq, 958 [1551], 1: 408-1713.



- 10 'The woman Faraj ... returned to the *isma* of her twice divorced husband, Sulayman ... for a dower of 450 silver Sulaymani dinars, 50 *hal* and the rest to be paid over twenty years instalments ... The named husband determined (*qarar*) 40 *nisfas* her winter and summer allowance, and she legally accepted that from him and the husband took an oath (*wa ashhad 'alayhi*) that he would not beat his named wife and would not take another wife and would not travel away from her ... and if he should do any of these or similar actions and this was proven legally and she cancelled (*abra'atahu*) the rest of the *ansaf* and her *sadaq* ... she would be divorced one divorce by which she owned herself ....' In front of Hanafi judge, Alexandria, 957 [1550], 1:34-157.
- 11 The enforceability of conditions by courts and related court cases is discussed in Sonbol (2008).
- 12 *Al-Kitab al-Dhahabi*, p. 234.
- 13 For more information on this issue, including details of court cases, see Sonbol, 'Living and Working Together'.

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# **Family Law in Contemporary Muslim Contexts: Triggers and Strategies for Change**

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Family law has been one of the most politically and socially contested issues in Muslim contexts in the contemporary period. This has had both positive and negative aspects. On the one hand, it has opened up the possibility of discussing matters and power relationships previously regarded as strictly belonging to the private sphere. But on the other hand, women's autonomy has at times been threatened in a sphere that holds the key to the realisation of their rights across all aspects of their lives. While positive change or protection of threatened family law rights in Muslim contexts has almost always been actively instigated by women, increasingly women are also leading a demand for the reconceptualisation of family relationships based on clearly articulated concepts of equality and justice.

This paper explores this demand for positive change in family laws and for the protection of rights, illustrating ways in which equality and justice in the Muslim family have become increasingly possible. After citing examples of the immense diversities in legal systems and laws relating to families in Muslim countries and contexts, the paper outlines a variety of strategies used by activists to promote equality and justice in family laws and responses to situations in which existing rights are threatened. Because of space constraints, this paper cannot discuss the enormous social and economic changes that have taken place within Muslim societies and that underlie the need to reconceptualise family relationships based on principles of equality and justice.

Defining the ‘contemporary period’ in relation to family laws in Muslim contexts is not easy. In some countries (e.g. in South Asia), codification processes—often the main vehicle for changes in law—began during the colonial period and have been expanded in the post-colonial period. In others (e.g. in the Gulf states and parts of francophone West Africa), codification is an issue raised only in the past decade, while in yet others (e.g. Nigeria), existing Muslim family law is part of an uncodified continuity stretching back to when communities first embraced Islam. For the purposes of this paper, I shall concentrate on developments in the past four decades. This is a period when two countervailing forces have become particularly visible: women’s collective activism for their rights as well as absolutist visions of religion that seek control of politics and society (sometimes referred to as religious fundamentalisms).

## **I. Diversities in Legal Systems and Family Law Outcomes for Women**

Law reform processes in Muslim contexts have been every bit as diverse as the legal systems, political systems and social customs informing the interpretation and application of laws, and the interpretations of Muslim jurisprudence that prevail in these societies.

There are diversities in terms of sources of law, ranging from various interpretations of the Qur’an and *Sunnah*, to colonial common law, the Napoleonic Code and Soviet code. Some countries, such as Nigeria, have plural legal systems with parallel customary, *Shari’ah* and general<sup>1</sup> courts, while others, such as Turkey’s system, are unitary. In some countries, such as Cameroon and India, a couple can choose which system (customary, religious or general) they wish to be governed by, whereas in others such as Egypt and Sri Lanka (majority and minority communities respectively), Muslim couples are automatically governed

by Muslim family laws. Malaysia has a federal system in which the various states have jurisdiction in developing and applying family laws, while Algeria is a highly centralised unitary state. In countries such as Britain and Germany where there are Muslim minority communities, a unified civil law is often applied differently by the courts in matters involving Muslims. Court systems are also varied: in Pakistan a single family court system hears cases for all communities, while in Syria multiple courts adjudicate on the matters of different religious communities.

For many issues in women's lives, criminal and family laws are inextricably linked. For example, the requirement of registration of marriage, generally seen as a positive step in reform efforts, can become less beneficial to women when sex outside of a valid marriage is criminalised through *Hudud* laws. In some systems, violation of family law provisions (e.g. on polygamy, child and early marriage, and maintenance) are also criminalised. More broadly, family law is also often linked with constitutional law, which may for example recognise the status of customary and/or religious law, including in family matters, or set up seemingly irresolvable contradictions between gender equality and the right to religious freedom.

The practical outcomes of all these variations for women's lives are equally diverse. Bangladesh, influenced by customs denying women ownership of property, makes no legal provision for post-divorce maintenance, whereas in Tunisia it is provided for—at least in the relevant statute. Sri Lanka and countries in South-East Asia, where the Shafi'i school dominates, require a *wali* (guardian) even for an adult Muslim bride, while there is no such legal requirement in Hanafi-dominated Pakistan and Bangladesh. There is also a great diversity of legal positions on the issue of polygamy, ranging from an outright ban (Tunisia and Turkey, with the sources of law being religious and secular respectively), to completely unregulated (Saudi Arabia and Nigeria) and partially regulated (Egypt, Malaysia and many other Middle Eastern and

Asian countries). This extraordinary diversity explodes the myth of one homogeneous 'Muslim world' propounded by both orientalists and global media, as well as by right-wing forces within Muslim societies.

But there is a commonality: whatever the diverse positions of laws and customs on family law issues, these are frequently justified with reference to religion or the preservation of a religious-national/religious-ethnic identity. The vast majority of women are marginalised from the power structures that determine processes of legislative reform and community identity formation. Thus the needs and concerns of women arising from their daily struggles are rarely, if ever, addressed in local laws and customs. In those Muslim contexts where legislation has been introduced or where customs have been changed in ways that increase women's life options, the goal of the process has often been the strengthening of the religious/ethnic or national community, and not women's empowerment—and particularly empowerment of marginalised women—per se.

Nevertheless, over the past some 100 years, women's demands for a transformation of their family lives—often impacting deeply on the possibilities for their engagement in the public sphere—have also brought about some beneficial tinkering with family law. Occasionally, and with gathering pace since the turn of the twenty-first century, there have been wholesale and positive transformations of the concepts underlying family relationships.

## **II. Feminist Demands for Equality and Justice**

It is important to remember that demands for equality and justice in family law have meant both reform as well as resistance to (regressive) reform; the latter issue will be dealt with in the section on nation-building, state Islamisation and identity politics later in this paper. Moreover, I see



'feminist' as including those men who have challenged the oppression that patriarchy brings to the lives of both women and men, even though it is acknowledged that many men, and indeed women, who are part of this struggle would not identify themselves as 'feminist'.

Demands for equality and justice have arisen largely out of women's lived experiences that legal systems as they currently stand do not meet their needs. Such demands are not new. When Pakistan's Prime Minister decided to take a second wife in the early 1950s, his first wife mobilised the full strength of the country's major women's organisation to demand codification of Muslim family laws and thereby limitations to men's exploitation of women in the family. The 1955 Rashid Commission culminated in the 1961 Muslim Family Laws Ordinance, which provided for the registration of marriage and divorce and regulated polygamy.

Women's demands for reform have gained particular momentum since the 1980s, when feminist researchers and activists began to move beyond simplistic statements that 'the system of patriarchy is oppressive' towards gathering concrete evidence of how structures of oppression actually work. This is one of the strategies that have made moves towards equality and justice in the Muslim family possible, and which are discussed in more detail below. Limitations of space mean I cannot examine here all the social, political and economic factors that have made such moves possible, but it is important to highlight the normalisation of concepts of gender equality and human rights. Thus, while women may have been making demands for equality and justice for centuries, it is only more recently that these have taken a conscious shape as collective action for women's rights, and that society as a whole has become more receptive to the recognition of such rights. Today, even right-wing political parties based on religious identity must at least claim that their positions favour women's rights. States have to sign on to international treaties recognising women's equality, and are also

increasingly under pressure to withdraw reservations to, for example, family related articles of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) that were made in the name of protecting cultural and religious specificity. This is a profoundly important context for the promotion and protection of women's rights within the Muslim family.<sup>2</sup>

Although women's collective organising for their rights has had positive impacts on family law reforms in Muslim contexts, one must be careful not to ascribe all positive changes to women's efforts. For example, in Cote d'Ivoire (38 per cent Muslim), people are increasingly rejecting customary and informal courts in favour of courts applying general civil law (which usually have better outcomes for women) due to urban migration and the breakdown of traditional community structures rather than women's advocacy efforts.

### **III. Strategies Used to Promote Equality and Justice in Family Laws**

This section outlines different strategies used by activists to demand an expansion of women's rights in family laws. Responses to situations where existing rights are threatened are discussed in a later section on regressive law reform processes. For ease of analysis, strategies discussed here are divided into two main groups: first, those related to campaigning and advocacy methods, and later those more related to analytical and conceptual perspectives. This can only be a very broad overview of strategies and cannot possibly reflect the diversity and creativity involved even in just one country's experience of positive change. The examples here have been chosen largely because they clearly illustrate the point that positive reforms in family law in Muslim contexts are indeed possible.

## **i. Documenting Women's Lived Realities and Experiences of Injustice**

Exposing the failings of current legal systems through careful research of women's lived experience of the law has been a vital strategy.

In Iran, for example, the massive loss of male life in the Iran-Iraq war left thousands of widows. Yet Iran's custody laws, based on a male-centred interpretation of Muslim jurisprudence, meant that widows frequently lost custody of their children to the families of their dead husbands. Iranian women's rights activists successfully argued for reform of these unjust provisions by publicising examples of the extreme emotional hardship they caused, and questioning how such provisions matched the 1979 Revolution's slogan of Islam and social justice, and the authorities' glorification of the sacrifice of (male) lives in the war.<sup>3</sup>

In 2001 in Malaysia, Sisters in Islam (SIS) organised a press conference in the hope of embarrassing the government into making legislative changes. Failing to bring about reform through the submission of memoranda, SIS decided to produce public evidence of the injustices suffered by Muslim women in the administration of family law by the country's *Shari'ah* court system. One single mother related how she had to fight for five years to get a simple divorce from a violent husband who had sprayed her with acid. Because she had to constantly flee from her husband, she failed to file a case in time and lost alimony and financial support guaranteed under the local *Shari'ah* provisions. Such concrete evidence of inequity forced the government to promise to speed up the creation of a family court system extending protection to Muslim women.<sup>4</sup> In 2006, Bahraini women took a similar approach in their campaign for codification. A group of women directly affected by the injustices of the current system toured Europe and shared their life stories in order to build pressure for reform.

A comparative research approach appears to have been particularly popular because revealing similarities and diversities in women's lived experiences strengthens analysis of the power structures that underlie these experiences. Examples of such comparative research which has led to practical support for demands for equality and justice in the family include the Women & Law in the Muslim World Programme of the network Women Living Under Muslim Laws, which ran for over a decade starting in 1991 and spanned over twenty countries.<sup>5</sup> Meanwhile, the network Strategic Initiatives for Women in the Horn of Africa (SIHA) is currently planning regional research on women's experiences of different aspects of family laws.

## **ii. Mobilisation through Consensus-building and Broad-based Platforms**

The use of consensus-building and broad-based platforms to consolidate women's advocacy efforts and mobilise public opinion in favour of one specific demand has had considerable success.

For example, in 2001, the Turkish Parliament finally accepted 1030 amendments to Turkey's Civil Code, signalling the victory of a protracted lobbying campaign by the country's women's movement. The amended code finally establishes the equality of men and women in the family by abolishing the clause that defines the man as the head of the family and by providing for a 50/50 division of all matrimonial property. This followed a major public campaign involving women's groups all around the country, overcoming traditional divisions within Turkey's women's movement and strong resistance from nationalists and religious conservatives who insisted on the retention of the separate property regime in force since 1926. Similarly, in Morocco a broad-based coalition of women's groups overcame opposition from the religious right and led to reform of the *Moudawana* (Personal Status Code) in 2004.

Last year, a three-year programme uniting nine civil society organisations towards reform of the personal status law was launched in Egypt.

Mass mobilisation has also been used to support piecemeal change where a reconceptualisation of family relationships (as envisaged in Turkey and Morocco) is strategically not yet possible. For example, in 2003, lawyers and other volunteers in Syria collected 15,000 signatures in favour of women-friendly amendments to child custody provisions—enough to make the Syrian Parliament agree to study the proposal. The law on custody was ultimately changed, but only through a decree from the (Alawite minority) President, which avoided the risk of stirring up organised *Sunni* Muslim protests.<sup>6</sup> This illustrates the experience that in some contexts mass mobilisation can bring a backlash, and thus lobbying with specific lawmakers may be more effective.

### **iii. Lobbying with Lawmakers and Raising the Political Stakes**

Family law reform suffers from a number of specific constraints. These include the fact that frequently those most in need of the reform—usually women—are a group with a lesser voice and poorer access to lawmakers. Nevertheless, direct lobbying around family law reform—without necessarily first mobilising a groundswell of public opinion in favour of the reform—has been successful.

A recent example is the 2000 expansion of divorce options for Egyptian women recognising the concept of *khul'*. Women's groups made a conscious effort to unite around the issue and sought male support within Parliament. They also closely lobbied the Minister of Justice and identified key parliamentarians who could convince others in a sort of snowball effect.

Increasingly, women have also begun to access concepts of citizenship and to use their power as voters to raise the political stakes, such that lawmakers, governments and authorities can no longer risk

ignoring women's demands. The 'One Million' march and signature campaign in favour of wholesale family law reform in Morocco played a major part in ensuring a successful campaign, and a similar 'One Million Signatures' campaign has been launched to support reform in Iran.

But in the political contexts that characterise many of our countries, there are dangers in efforts to lobby a specific group of decision-makers or parliamentarians. One Fiji women's activist lawyer of Indian Muslim origin spent years lobbying for a comprehensive family law reform package—only for the Parliament to be dismissed during political instability precisely the week that the reform package was tabled for debate. Once some form of stability returned, she found she had to begin from scratch with an entirely new set of politicians and parliamentarians, although she ultimately succeeded and Fiji now has possibly the most forward-thinking family law in the world.

#### **iv. Focusing on Procedural Amendments**

Additionally, women's groups have also advocated for procedural reform, acknowledging that the 'law' is far more than a specific family code and that winning guarantees of rights in the text is only half of the battle.

Some of the ways in which existing legal systems fail to address women's needs relate specifically to women, such as the absence of a gender-sensitive judiciary. Others, such as the lack of legal aid, protracted procedural delays, grey areas in jurisdictional matters, and weak legal drafting leaving litigants vulnerable to cultural and social biases, obstruct all disadvantaged groups' access to justice. But they are particularly significant for women in domestic disputes since in many jurisdictions women form the majority of plaintiffs in family law and domestic violence cases, and the failure of legal systems to guarantee and protect their rights leaves them vulnerable in their most immediate sphere of experience—the family.

Moreover, focusing on amendments in procedural law may be more manageable and may bring immediate relief to thousands of potential litigants, particularly when the political context militates against substantial legislative reform. The expansion of Egyptian women's rights to divorce through the introduction of procedures for *khul'* came through a cleverly crafted procedural amendment rather than overtly adding *khul'* to the list of divorces possible for women. The vitriolic nature of the media debate around the proposed provisions indicated that had the direct reform route been taken, the amendment may not have passed.

## **v. Communications and Public Advocacy**

Most successful campaigns for change have a strong communications and public advocacy elements, and family law reform efforts in Muslim contexts have followed this pattern.

Algeria's *20 Ans Barakat!* (20 Years Is Enough!) campaign produced a wonderful short DVD with a campaign song that raised the family law issue and inspired support from women across social classes. Morocco's reform campaigners produced several highly effective publications for various audiences, including a pamphlet called *Necessary and Possible* that was specifically designed to advocate with the King and those who could make a new *Moudawana* happen. Sisters in Islam in Malaysia have consistently developed and used alliances with media to strategically increase pressure on lawmakers for positive change in the family law, while in Pakistan a process of public advocacy spanning several years led to important amendments to provisions regarding *zina*—a topic which in Pakistan is intricately connected to validity of marriage and choice in marriage.

## vi. Demands for Reform Based Within the Framework of Religion

Claiming the right to *ijtihad* and using jurisprudential tools such as *takhayyur* and *talfiq* (selecting context-appropriate interpretations from across the various schools of law) as a basis for positive family law reform in Muslim contexts is not new. In pre-independence India, the 1939 Dissolution of Muslim Marriages Act, which codified women's access to divorce, drew upon schools beyond the locally dominant Hanafi school that offered only very restricted access. In Tunisia, the use of *ijtihad* legitimised state-led reform of the Personal Status Law 1956,<sup>7</sup> which had famously banned polygamy on the basis of reinterpretations of Qur'anic provisions. The Rashid Commission, which led to Pakistan's Muslim Family Laws Ordinance 1961, explicitly referred to *ijtihad*.

What is new, however, is the growing confidence with which the right to *ijtihad* is being claimed by female scholars and theologians who support equality and justice within the family, and by women's groups. The latter have particularly focused on self-education in *fiqh* and *tafsir*.

Numerous sources argue that gender justice is completely compatible with, and even an essential ingredient of, Islam's principle of social justice and community well-being.<sup>8</sup> It is not the place of this paper to discuss whether or not the use of arguments from within a religious framework is an appropriate strategy in any given context. But it is clear that over the past two decades in particular, faced with the growing political power of religious groups and the reality that religion is a fact of social life, women's organisations have increasingly also based their demands for positive reform within a religious framework.

In Malaysia, for example, Sisters in Islam have uncompromisingly and successfully advocated from within the framework of religion for both procedural and legal reforms benefiting women in the areas of family law and violence against women. They have been invited by the



government to submit further recommendations for family law reforms and have developed good working relationships with a number of *Shari'ah* court judges. Currently some of the most progressive reinterpretations regarding gender and Islam are coming out of Indonesia, where state research institutions and Islamic universities have led attempts at family law reform.

Over the past two decades, Iran stands out for its vibrant debates around family law reform from within the framework of religion. Whether as a strategic choice given the impossibility of secular and/or supposedly 'Western'-framed rights-based approaches or whether out of conviction that a progressive interpretation of Islam offers women the possibility of equitable rights within the family, women's groups in Iran have initiated an extraordinarily powerful movement for reform, challenging the conservative interpretations introduced in the immediate post-1979 period. They have engaged with religious scholars and launched widespread public debates; they have carefully documented the impact of inequitable provisions, giving a voice to women's daily experiences. Through their campaigns and a very calculated use of their power as voters, Iranian women have secured a new official marriage contract that lists in detail the wife's divorce rights. It also provides for a 50:50 division of marital property in the event of *talaq* 'not due to the fault of the wife'. Moreover, since 1993, following another struggle by women's groups, husbands divorcing their wives are legally obliged to pay 'wages for housework' in addition to the *nafaqa* and *mahr* due to wives according to the Muslim family law. The precise amount is determined by the court on the basis of the number of years of marriage and the status of the couple. Even if they acknowledge the difficulty in enforcing such provisions, Iranian women activists argue that the reforms have considerably strengthened women's bargaining power and in particular have effectively redressed some of the imbalances present in custody and divorce provisions for women.<sup>9</sup>

But in societies where there are substantial non-Muslim communities, the 'from within' approach can be problematic if it prioritises religion as a source of public policy. Again, Malaysia illustrates the problems. 'Since Malays form the majority of the Muslim population in Malaysia, any success in uplifting the position of Islamic law within the legal system may thus be construed by non-Malays as a win for Malays, thus reducing the space for non-Islamic institutions.'<sup>10</sup> Women's groups are concerned about a possible negative impact on communal harmony.

The countries of francophone West Africa can be divided into two groups, one with uniform family codes applicable to all communities (usually based on the Napoleonic Code and with adaptations based on custom and religion, e.g. Senegal, Mali), and the other where uniform family laws were drafted several years ago but are yet to be enacted or promulgated due to political opposition (e.g. Chad, Guinea, Benin). In both instances, focusing purely on reinterpretation is not regarded as strategically the most useful approach. In both, Islamists are demanding separate codes for each religious community, which activists fear will further fragment the nation and cause immense problems for those marrying across religious lines.

### **vii. Multiple Frames of Reference and Reconceptualising the Family**

The kinds of pitfalls that arise from using religion as a sole frame of reference for reform demands were successfully avoided in Morocco's inspiring campaign for a new *Moudawana*. A distinctive feature of the campaign was that it was rooted in multiple frames of reference articulated as mutually complimentary rather than mutually exclusive, which has often been an approach in feminist campaigning. Indeed, in the case of Morocco, which built on the Collectif 95 Maghreb Egalité

campaign that also inspired the positive changes in Algeria in 2005, the use of multiple frames of reference appears to have been a major factor in the campaign's success. This strategy combined not only a process of reclaiming jurisprudence and emphasising the compatibility of Islam with concepts of human rights, but also documenting women's realities and appealing to social reality, highlighting women's citizenship, and emphasising the country's obligations under international human rights law. In essence, such a strategy provides 'something for everybody'.

Moreover, in both Morocco and Turkey, women's activists deliberately sought for, and won, a complete reconceptualisation of the spousal relationship. They successfully argued that the enormous gap between the classic patriarchal construction of the family (whether under the Napoleonic Code or the old Maliki-dominated *Moudawana*) and the socio-economic realities of contemporary family relationships was damaging society as a whole and therefore needed a total re-think.

It can be difficult to distinguish between reform efforts that are based on an entire reconceptualisation of family relationships and those that merely tinker with existing relations of power. Partly, this is because legal systems and the realities of family relationships are so contextual. Thus, while I may regard the content of Bahrain's proposed new family law to be disappointingly conservative, Bahraini women counter that any form of codification sends the essential signal to men that they may not violate women's rights within the family with impunity; for them, this is a very profound change. Even the seemingly smallest change may, over time, produce a critical mass that leads to a reconfiguration of spousal relationships. Amendments in 2002 to Pakistan's Family Courts Act have introduced the possibility of women filing for a share of marital assets as part of their divorce proceedings rather than relying on the virtually impossible procedure of filing a separate civil suit for recovery under ordinary civil law (which could take decades). Traditionally, women in

Muslim marriages in the subcontinent who have divorced their husbands have had to abandon any hope of recovering or sharing assets; this introduces a hidden imbalance in the marital relationship based on the threat of financial loss and/or poverty if a woman exercises her right to divorce. The new law, if routinely accessed by women, could go a long way toward redressing this imbalance.

The use of multiple frames of reference and the reconceptualisation of the family are not concepts that can become popularised overnight, and an important aspect of this strategic approach to family law reform in Morocco and Turkey was that in both countries, activists have talked about how they recognised that they were ‘in it for the long-term’, that this new vision required an enduring commitment to change that would overcome intermediate set-backs and obstacles.

#### **IV. Regressive Law Reform Processes**

Despite the real progress made towards equality and justice in the Muslim family in recent decades, there have also been grave threats to women’s existing rights in family law. These have come from weaknesses and contradictions in post-colonial nation-building as well as from the rise in identity politics, specifically prioritising religion as the defining aspect of a person’s identity.

In the 1980s and 1990s, women’s access to justice in many Muslim contexts was considerably obstructed or reversed by the state. In places this was part of a deliberate state policy of ‘Islamisation’ (as in Pakistan, Sudan, Iran, Malaysia, post-unification Yemen, and more recently certain states of Nigeria), or using religion as a means of ‘divide and rule’. Palestinian feminists see the Israeli state’s preservation of different, religion-based family laws for the Arab minority not as a positive recognition of diversity but a useful means of dividing the

Palestinian community and perpetuating its social and economic backwardness.<sup>11</sup>

In other places, threats to women's rights were due to the government's 'convenient stance of vacillating and proffering short-term and piecemeal solutions to some of the most extreme demands made by the Islamic faction'.<sup>12</sup> Having woefully failed to meet its people's aspirations after liberation from French colonial rule, the Algerian Government introduced the regressive 1984 Code de la Famille (reformed in 2005) as a distraction and a sop to the power of the religious Right. The state's failure to see women and marginalised communities as citizens has allowed the resurgence of informal legal systems. In Bangladesh, religious groups have sought to use these informal systems as an entry point to gain greater social and political control. Since 1993, informal *salishes* (village councils) have carried out extreme punishments (including stoning) of women for the 'crimes' of divorcing their husbands or choosing their own marriage partners. Although a 2001 landmark judgement declared all fatwas illegal,<sup>13</sup> shifting political alliances and pressure from religious orthodox groups means the matter remains an election issue even today. In Uzbekistan in the early 1990s, the government permitted a parliamentary and media debate on the possible reintroduction of polygamy. Although no reform followed, this strengthened anti-women biases in the implementation of family law.<sup>14</sup> In Senegal a few years ago, some election candidates opportunistically raised a brief call for the introduction of separate, religion-based family laws. These threats continue today elsewhere. In Gambia, women face threatened reform of family laws based on conservative interpretations of Muslim jurisprudence as the government struggles to resist opposition from increasingly influential politico-religious extremists.

In a number of countries with a significant Muslim minority, the rise of religious identity politics has led to a debate over the possible

introduction of separate Muslim family laws. In the Philippines, although the Moro National Liberation Front climbed down from its demand for a separate Moro homeland, it continued to demand, and was granted in 1977, the introduction of a traditionalist Shafi'i interpretation of Muslim family law as part of its claim to a separate national identity.

Whatever the factor behind the regression, women's role as the repositories, reproducers and gatekeepers of the cultural and national collectivity<sup>15</sup> have meant that women have often been on the receiving end of legal reforms and the manipulation of cultural symbols such as family laws and dress codes. The impact on women has been well documented.<sup>16</sup> For women in Iran, Malaysia, Sudan and Yemen, the reversals meant the withdrawal of many rights granted under previous laws that at one time stood out in the Muslim world for their progressive nature.

In places where regressive reforms were introduced (whether through parliament or dictatorial decree), such processes were always characterised by the lack of space for debate and an intolerance of dissent or alternative interpretations. Across many Muslim contexts, even under supposedly democratic dispensations, states have tolerated and even encouraged slanderous attacks by politico-religious extremists against those demanding rights-based legal reform.

Introduction of regressive family law reform in the name of nation-building and recognition of identity seems particularly characteristic of post-conflict contexts where resources are few and there is a lack of political will to prioritise women's rights or include them in negotiations under UN Resolution 1325 (on peace, women and security). The recent regressive changes in Iraq's family law are an example. In post-conflict Sierra Leone (60 per cent Muslim), international development assistance has revitalised traditional and largely women-unfriendly adjudication systems.

Rising identity politics have complicated efforts by rights advocates to protect and promote women's rights within the family. In Lebanon (with separate family laws for the 18 religious communities recognised by the Constitution), women activists in 1998 demanded a uniform civil code as a counter to the country's social fragmentation. But this was bitterly opposed by almost all the self-declared guardians of the various communities' identities (with the exception of the Druze community), and was ultimately shelved for political reasons. In multi-ethnic and multi-religious India, family laws have been at the centre of extreme tensions between the country's Hindu and Muslim communities following an upsurge in communal politics, and in 1986 rioting instigated by Muslim fundamentalists led to a regressive change in maintenance laws for Muslim women. Feminist reform efforts were hampered by the existence of a Hindu fundamentalist government which raised the fear that any uniform code would essentially mean imposing Hindu laws on minority communities.

### **i. Safeguarding Women's Existing Rights in the Family**

Despite this bleak picture, it is significant that in several of the countries that saw some of the most regressive changes in women's rights in family law, more recently there has been a gradual shift back towards greater equality and justice—usually due in part to feminist efforts to promote and protect rights within the family. Thus, even where there has been a reversal, positive change and protection of existing rights has ultimately been possible.

Feminists have used a variety of strategies to resist the problematic aspects of state-imposed 'Islamisation' and legal reform arising out of identity politics, depending upon the particular local circumstances. Many of the strategies used to protect women's existing

rights within the family are the same as those discussed earlier in the section on positive reform processes.

In Canada in 2003-5, self-styled 'community leaders' sought to introduce '*Shari'ah* Courts' for family matters among Muslims under the Arbitration Act, 1991. Even though this was to be voluntary, opponents emphasised that for women, 'voluntary' often equates to social compulsion. The ultimately successful campaign of resistance featured a broad coalition of believing Muslims, atheists from a Muslim cultural background, and secularists within wider Canadian society; public advocacy through meetings and seminars; a deliberate claiming of women's right to interpret religion and a process of self-education; and an emphasis that this was a women's issue, beyond the question of religious or cultural identity.

International networking was particularly effective in the Canadian campaign, and has been important to many other successful family law campaigns. Activists in Muslim contexts who challenge the imposition of identity through 'Islamisation' and identity politics frequently face the accusation that their demands for gender justice are somehow not in consonance with 'tradition' and accepted norms of what constitutes a 'good Muslim woman'. International networking brings three important advantages in this context: first, those struggling to resist regressive reforms become aware that their struggle is mirrored across the world; this enables them to analyse more effectively the power structures and political objectives behind the reforms. Second, networking across boundaries involves a sharing of information about how women experience the law and legal reform in other contexts; this strengthens local activists' awareness of the potential benefits and pitfalls of legal reform. And third, networking allows a sharing of strategies. While these may not transfer effectively from one particular context to another, the sharing of strategies can undoubtedly inspire new initiatives.



National networking and a locally rooted awareness of what issues appeal to public and political sentiment is equally vital to protecting existing rights women have in family laws in Muslim contexts. Thus women's rights activists in contexts as diverse as Senegal and Pakistan have successfully resisted efforts by politico-religious forces to introduce regressive reforms. The strategy also works for promoting new rights. In the UAE and Saudi Arabia, activists demanding codification or improved application of uncodified jurisprudence have highlighted the extremely high numbers of divorces to prove that existing provisions are not conducive to the main leitmotif for the conservatives: a stable family.

## **V. Long-Term Empowerment Strategies**

Despite the success of their campaign to reform the country's civil code, leading Turkish women's rights activists such as Ferda Cilalioglu argue that, 'What really needs to change is not just the law but the mentality of people. Changing the value system will take decades.'<sup>17</sup> In other words, laws may change but legal reform is merely a small part of societal development.

Even after successful law reform efforts, there is the challenge of empowering women to access positive provisions. This has led to the development of the 'legal consciousness' concept. Going beyond simple legal literacy programmes that just inform people of existing laws and institutions, legal consciousness enables people 'to identify and articulate their oppression and exploitation. This is the first stage in the people's fight for a more just and equitable society.'<sup>18</sup> In concrete terms, it involves the building of alliances between women's organisations, the courts administering family law, and relevant ministries, as is currently happening in Morocco.

Importantly, legal empowerment programmes have not just focused on statutory law. They have consciously sought to unravel the interlinkages between custom, religion, legal practice and statutory law, thus enabling women to analyse more effectively the structures and sources of their oppression. This, in turn, has enabled them to develop more effective strategies for the reform of laws in the very broadest sense of the word. Thus, when the 1994-7 Pakistan Commission of Enquiry on the Status of Women sought opinions on legal reforms, grassroots women's groups were able to provide concrete recommendations that related to custom, procedural laws and personal laws. These were incorporated in the Commission's final 1997 Report,<sup>19</sup> and some eventually found their way into the 2002 Family Courts (Amendment) Ordinance that offered some real improvement in women's access to justice.

## **VI. Evaluating Efforts to Promote and Protect Women's Rights in the Family**

The actual pace of legal reform may not be a determinant of 'success'. Indeed, reform is often rapid where the state is interested in reform for its own ends and slow where the impetus has come from women's demands for justice and equality. Even where rapid reform has been at the initiative of women's demands, its very rapidity has later proved to be problematic, as intricacies (especially around implementation) may not have been properly thought through.

Moreover, evaluating positive reform and resistance to regressive change can be difficult both because the impact of attitudinal change can take decades to appear, and because indicators of success can be politically contentious. For example, family law reform that leads to an increase in the number of divorces granted to women might be judged successful by progressive women's groups but a negative indicator of the

'break-up of family and society' by conservatives. Quantitative indicators are also inadequate. For example, an increase in cases brought by women to the courts can potentially 'prove' two diametrically opposite trends: either that the reformed law is failing to provide women a secure base for their rights and is therefore failing to prevent disputes from arising, or that the reformed law is now successfully enabling women to access their rights within the family.

Additionally, reforms have to be examined in the totality of their impact upon all members of society, and not just those for whom the reform is 'intended'. For example, a 1994 amendment to Malaysia's polygamy provisions which aimed to protect the rights of the new wife arguably undermined the original spirit of the law, which sought to regulate—and thereby discourage—polygamy and to support the rights of first wives.

Finally, it is essential to challenge the notion that unsuccessful efforts to introduce positive reform or to prevent regressive change are an overall failure. The platforms and alliances that are often created during rights-based campaigns, the strengthening of analysis, the public awareness raised, the experience gained through interaction with the political and law-making structures, and the numerous related social issues raised may well lead to deeper, wider processes of change.

## **VII. Conclusion**

Reform of family laws and protection of rights within the family touches upon politically contested issues around cultural identity, raises questions about the rights and responsibilities of the state vis-à-vis the community and individuals, questions the utility of existing gender dynamics, and also involves the rights of some of the most silenced members of a society: women and children. Changes in law must also be seen as a

social process, and one in which actual textual amendments are but a small part. It is only when we take this wider perspective that we are able to foresee the potential pitfalls of reform and understand its impact on all aspects of social interaction and the structures of power. Moreover, the conditions which enable positive reform or trigger regressive change, as well as the strategies of women's rights activists that help create or respond to these conditions, vary according to the particular context. Small wonder, then, that engaging in family reform and protection of rights within the family is so challenging.

There have undoubtedly been severe setbacks in some contexts and there are remaining challenges in many others due to factors such as regional and national conflict, rising poverty, the persistence of authoritarian regimes and forces that exploit religion and religious identity for political gain. Yet despite the strength of these countervailing forces, overall over the past four decades family laws in Muslim contexts have been gradually and inexorably moving in a positive direction. While numerous social, economic and political forces are implicated in this process, the efforts of women's rights activists have made it clear that it is certainly necessary and possible to promote and protect equality and justice in the Muslim family. In the past ten years, a qualitatively new and positive direction has emerged in family laws. This emphasises a comprehensive reconceptualisation of the Muslim family that calls for an end to outmoded and unsuccessful relationships of dominance and subordination, and their replacement by loving relationships of equality and justice. Realising this vision of the family may be a long-term project, but recent developments have shown that it is now possible to envisage such a reality in Muslim contexts.

## Notes

- 1 The term 'general' is used here to describe family laws introduced by colonial rulers that were neither based on custom nor Islam. They are often called 'secular' or 'civil' law but since all family law is civil and since these laws are almost always based on a Christian conceptualisation of the family, I avoid these terms as inaccurate.
- 2 The inexorable shift towards positive change in Muslim family law is quite a contrast to the apparent trend in areas of international law where the Muslim-Catholic-Washington coalition has had some success in rolling back understandings of women's rights in international law debates, in particular in the areas of reproductive health and rights.
- 3 Kar and Hoodfar, 'Personal Status Law as Defined by the Islamic Republic of Iran'.
- 4 Kuppusamy, 'Muslim Women in Plea for Sharia Law Redress'.
- 5 See <http://www.wluml.org/english/pubsfulltxt.shtml?cmd%5B87%5D=i-87-16766>.
- 6 See <http://www.ep.liu.se/ea/iap/2005/003/iap05003.pdf>.
- 7 Kelly, 'Finding Common Ground', pp. 81-3.
- 8 An-Na'im, *Towards an Islamic Reformation*; Hassan, *Selected Articles*; Wadud, *Qur'an and Woman*.
- 9 Kar and Hoodfar, 'Personal Status Law'.
- 10 Endut, 'Malaysia's Plural Legal System and Its Impact on Women', p. 25.
- 11 Rouhana, 'Muslim Family Laws in Israel'. The state's intent may also change over the years. What may have been the initial post-colonial nationalist leadership's vision of respect for religious minorities in Pakistan has transformed into neglect, wilful or otherwise, under subsequent regimes.

- 12 Mohamad, 'Islamic Family Law Reforms in Malaysia', p. 69.
- 13 Writ Petition No. 5897 of 2000 (*Editor, The Banglabazar Patrika and others vs. District Magistrate and Deputy Commissioner, Naogaon*), heard by a two-member Bench including Justice Nazmun Ara Sultana, Bangladesh's first female High Court Division judge and reported as 21 BLD (2001) 45.
- 14 Tokhtakhodjaeva, 'Traditional Stereotypes and Women's Problems in Post-Soviet Uzbekistan'.
- 15 Yuval-Davis, *Gender and Nation*.
- 16 See Helie-Lucas, *L'internationalisme dans le mouvement des femmes*; Shaheed et al. *Shaping Women's Lives*; Mir-Hosseini, *Islam and Gender*; <http://www.acttogether.org/>.
- 17 Zaman, 'Turkey to Expand Rights of Women'.
- 18 Sobhan, 'Legal Literacy and Community Development in Bangladesh'.
- 19 Government of Pakistan, *Report of the Commission of Inquiry for Women*.

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# **Women's Place and Displacement in the Muslim Family: Realities from the Twenty-first Century**

*Kamala Chandrakirana*

The world in the twenty-first century is one propelled by unprecedented levels of information flow and movement of peoples, creating new challenges, opportunities and aspirations, and generating forces for change which are often uncontrollable and mostly irreversible. No part of the world is left untouched. Men, women and children are all affected—albeit, in different ways—and they are all actively taking part in the whirlwinds of this new century world, voluntarily or involuntarily, for better or for worse.

The forces of change are at times contradictory while consistently multidirectional. While more and more people experience wealth and prosperity, poverty and war remain widespread and continue to be unresolved. In spite of all this, or because of it, the twenty-first century global community has strengthened its commitment to freedom, human dignity, equality, justice, peace and the eradication of poverty, as stated definitively by world leaders at the birth of this new century through the Millennium Declaration in 2000.<sup>1</sup>

The Muslim world has never been isolated from the progress and challenges faced by humankind and, at times, has been one of its most influential forces. The realities of everyday lives of Muslim women and men—and the shape of Muslim families—are responses to these global challenges. It has therefore become imperative to take stock of the ways in which global forces of the twenty-first century have affected, shaped, and even changed the many faces of the Muslim family. A reimagining

of the Muslim family should be as much rooted in the stark realities of today, as it is inspired by the visionary values of Islam.

This paper uses existing global data<sup>2</sup> to paint a preliminary broad stroke picture of the lived realities of Muslim women today and capture the changing dynamics of the Muslim family in the twenty-first century. Available case studies demonstrate the challenges women today face within Muslim families and societies, and show how women and whole nations have come together to overcome these challenges by making legal and policy breakthroughs to better guarantee justice and equality for all. All in all, these realities compel us to acknowledge that gender equality and justice in the Muslim family have become undeniable necessities and that, through enlightened political leadership, vibrant democratic processes, and the hard struggles of Muslim women and their allies, their attainment is possible.

## **I. Muslim Women Making a Living in the Global Economy**

In the past ten years, 200 million more women have joined the labour force, bringing the total number of employed women worldwide to 1.2 billion.<sup>3</sup> In the process, the types of work women engage in have become more diversified: from primarily agricultural work, which was the main source of employment for women ten years ago, to the multifaceted service sector which now employs almost half of all working women.<sup>4</sup> Among these numbers are women from the Muslim world. While there is a wide gaping hole in statistics specifically on Muslim women, we can nevertheless begin to construct some general trends from existing global data on women's lives overall.

There is huge interregional variance among Muslim women worldwide, of course. For instance, according to the International Labour

Organisation (ILO), South-East Asian women—of which a large proportion are Muslims in Indonesia, Malaysia, Southern Philippines and Southern Thailand—have been among the most active participants in the labour force throughout the past decade, maintaining the third highest position globally, after East Asia and sub-Saharan Africa. By contrast, women in North Africa and the Middle East—most of whom are Muslims—have the lowest rates of labour participation in the world.<sup>5</sup> It is worth noting, however, that between 1990 and 2003 the Arab region witnessed a greater increase in women's share of economic activity (at more than six times the global rate) than what took place in all other regions of world; that is, women's share of economic activity increased by 19 per cent as compared to the 3 per cent increase for the world as a whole.<sup>6</sup>

Acknowledging variations and specificities from region to region, it is nevertheless an undeniable reality that more and more Muslim women are playing an active part in the labour force and the economy. In many cases, these Muslim women do so by moving back and forth across national borders. Indeed, women overall are increasingly becoming an integral part of the growing global movement of peoples, constituting almost half of all international migrants worldwide. According to the United Nations Population Fund (UNFPA),<sup>7</sup> this means 95 million women are crossing international borders, not even counting the many who move from one part of their own country to another. In Asia, with more than half of the world's Muslim population, the number of women migrating from their home countries has surpassed that of males.<sup>8</sup> In Indonesia, where about 176 million Muslims live, women constituted almost 80 per cent of all migrants leaving the country, between 2000 and 2003, to work. UNFPA explains, in their State of the World Population Report 2006, that

Migrant women move to marry, rejoin migrant husbands and family or to work. They are domestic workers, cleaners, caretakers of the

sick, the elderly and of children. They are farmers, waitresses, sweatshop workers, highly skilled professionals, teachers, nurses, entertainers, sex workers, hostesses, refugees and asylum-seekers. They are young and old, married, single, divorced and widowed ... Some are educated and searching for opportunities more consistent with their qualifications. Others are from low-income or poor rural backgrounds and seeking a better life for themselves and their children.<sup>9</sup>

Who benefits from the global migration of women? First and foremost, it is women's families at home who stand to benefit. Various studies<sup>10</sup> show that compared to migrant men, migrant women regularly and consistently send a higher proportion of their earnings overseas to their families in the home country. The money that women migrant workers send back home can raise families and even entire communities out of poverty. A study by the United Nations International Research and Training Institute for the Advancement of Women (INSTRAW) and the International Organisation for Migration (IOM) in 2000 shows, for instance, that Bangladeshi women working in the Middle East send home 72 per cent of their earnings on average, and that 56 per cent of the remittances were used for daily needs, health care or education—a pattern which reflects the spending priorities of migrant women elsewhere. In contrast, male migrants tend to have much of their remittance income spent on consumer items.<sup>11</sup> A snapshot of the life of an Indonesian migrant worker, Suminah, from West Nusa Tenggara who works in Saudi Arabia demonstrates this trend:

Suminah sends money every six months to her parents for four reasons. Firstly, the money is needed for her children who live with her parents; secondly, the money will be managed by her parents to

build a house; thirdly, Suminah does not want the money to be used by her husband Sanerdi's first wife; and, fourthly, Suminah too often hears of husbands mismanaging the earnings of their wives either for remarrying or philandering.<sup>12</sup>

In war-torn areas, women also play important roles in contributing to the survival of their families. According to the UN Office for the Coordination of Humanitarian Affairs, as much as 80 per cent of the internally displaced persons and refugees around the world are women and children.<sup>13</sup> Many of the women survivors must often take over the responsibilities as heads of households amidst death and destruction and change traditional gender roles in the process. A testimony from a humanitarian worker in West Darfur attests to this:

Women are bearing the brunt of the burden caused by the conflict in West Darfur. There are currently 710,000 displaced people living in camps and settlements throughout the state. Women – mothers and wives – are holding these families together. Some are now household heads, their husbands killed in the conflict, while others have become the sole breadwinners in a situation where men are too scared to leave the camps for fear of being attacked. This fact is particularly stark in Mornei, one of the largest camps in West Darfur. The camp is contained as there are Arab militia in the surrounding areas and the people are scared to move far beyond the perimeter. If a man wanders outside the camp and is found by the Janjaweed militias he will almost certainly be killed. A woman who goes outside the camp might 'only' be raped. Yet women must travel outside the camp on a daily basis to collect firewood for cooking and to sell as it is the only form of income generation within the crowded camp ... I worked with Hadija and Aisha to make our stove ... Hadija has ten children

and that morning had prepared food for them all before attending the training. On a normal day she will leave her home in darkness, early in the morning, and walk six hours to collect firewood. She returns to cook for her family and then she goes to the market to sell what is left of the wood. Hadija stays at the market for as long as it takes to sell the wood.<sup>14</sup>

In diverse contexts, Muslim women—rich and poor, in peace and in war—are playing undisputedly critical roles for the survival and growth of their families and communities. They contribute important and much-needed earnings (*nafkah*) for their children and other dependents, at times along with their husbands but often on their own as heads of households. The reality of today is that both men and women are equally breadwinners in their families, providing *nafkah* to their dependents. Overall, it is estimated that approximately 20 per cent of households in the world are headed by women.<sup>15</sup> Among predominantly Muslim countries, the percentage of female-headed households range from 7 per cent (in Pakistan) to 15 per cent (in Morocco) to 29 per cent (in Mauritania).<sup>16</sup>

And yet, the 19th Islamic Conference of Foreign Ministers has articulated in its Cairo Declaration on Human Rights in Islam, adopted on 5 August 1990, that ‘woman is equal to man in human dignity’ but that ‘the husband is responsible for the maintenance and welfare of the family’ (Article 6).<sup>17</sup> Denying women their roles as heads of households and the consequent entitlements which are due to them would be detrimental to the well-being of not only the women themselves, but also their families and communities.

Even in families where women are not the sole heads of households, their decision-making authority remains critical to the family’s welfare, particularly that of the children. The United Nations Children’s Fund (UNICEF) finds the following:

The consequences of women's exclusion from household decisions can be as dire for children as they are for women themselves. In families in which women are the key decision-makers, the proportion of resources devoted to children is far greater than in those in which women have a less decisive role. This is because women generally place a higher premium than men on welfare-related goals and are more likely to use their influence and the resources they control to promote the needs of children in particular and the family in general.<sup>18</sup>

In the process of providing much needed income and leadership for the family, Muslim women have secured their role in the economy and carved out their own modes of participation beyond their respective homes and into the global economy. It demonstrates that, as active economic actors, women are securing more and more influence in the overall socio-political life of entire nations. This has now become one of the irreversible social facts in the Muslim world today.

In response to such stark realities, key actors in the global economy and international development are changing the way they perceive and engage with women, acknowledging them as active economic decision makers, as full citizens in their respective countries, and as human beings with universal human rights. There is more and more awareness worldwide that societies that ignore these facts do so at their own peril. In its latest report on global employment trends, the ILO states: 'Society's ability to accept new economic roles for women and the economy's ability to create the jobs to accommodate them are the key prerequisites to improving labor market outcomes for women, as well as for economic development as a whole.'<sup>19</sup>

Global economic policymaking is increasingly more responsive to the specific realities of women's lives and struggles. In its 2007 report on the global gender gap, the World Economic Forum states:

... a nation's competitiveness depends significantly on whether and how it educates and utilises its female talent. To maximize its competitiveness and development potential, each should strive for gender equality ... [as] numerous studies have confirmed that reducing gender inequality enhances productivity and economic growth.<sup>20</sup>

How do these realities—created also by Muslim women—correlate with the stipulations found in various family laws in the Muslim world which make a broad stroke assumption that the head of family is singular and exclusively male? How can we explain this phenomenon and what are its impacts? What is needed to reconcile the new realities of women's lives with the laws which govern family and marriage within Muslim societies around the world?

## **II. Women in the Muslim Family: Discrimination and Violence by Law**

Dear Sisters in Islam, my name is Aisyiah. I've been a working woman and married for many years. All these years of marriage, my husband barely supports me. I suppose he feels that since I'm earning it is not necessary for him to provide basic things that a husband is required to give. So I'm the one who buys the house, the car, the furniture, my own clothes. I pay the doctor's bill when I'm sick, I help to pay for the children's education. Since I know I will get nothing from him, I invest my money so that I won't be a financial burden to anybody.

Section 107A of the newly-amended [Malaysian] Islamic Family Law says that a husband has the right to freeze the wife's account when



the marriage fails. Does he have the right to whatever property I own and claim them as joint marital assets when in actual fact, everything was solely acquired and owned by me? I hope and pray that the government will amend the laws ... and listen to the pleas of the majority of Muslim women in our country.<sup>21</sup>

In many Muslim countries, governments adopt interpretations of Islam which undermine women's rights and women's real contributions to the family and community. Such family laws legally codify that the husband is the head of the family, often requiring the wife to obey her husband, as in many such laws in the Middle Eastern countries, and at times giving the husband power over his wife's right to work and travel. In terms of inheritance, sisters get half of the shares of their brothers, and women generally get a smaller share of family property than do men. In Algeria, the family code stipulates that 'the duty of the wife is to obey her husband' (article 39). Ultimately, these laws create the foundations of legal inequality for women even beyond the family.<sup>22</sup>

In Egypt, the government has created two different systems for divorce, one for men and one for women.<sup>23</sup> Egyptian men have a unilateral and unconditional right to divorce and do not need to enter a courtroom to end their marriages, while Egyptian women must resort to backlogged and inefficient courts to divorce their spouses. Human Rights Watch explains that the pains involved in initiating divorce in the backlogged courts compel many Egyptian women to push their husbands to divorce them. In return, women usually agree to sacrifice their financial rights.

Meanwhile, Egyptian law also conditions a woman's right to housing on her having physical custody of children. This, in turn, deters women from seeking divorce, by instilling fear in them that they will be rendered homeless; and thus confine women in abusive relationships with their husbands.

I felt trapped. He wouldn't let me go outside. I felt depressed. He always wanted to have sex but I didn't want to. He asked for sex a lot ... He'd go to the office and before he left he'd say 'today's our day [for sex]'. He'd insult me ... When I refused him, he'd hit me. He'd give me a black eye ... But if I divorce him, where would I live? I won't get anything.<sup>24</sup>

As a result, too many women must find ways to survive in between deprivation and violence.

This trend spreads across regions within the Muslim world. In Indonesia, domestic violence is the most common form of violence faced by women. Indonesia's National Commission on Violence Against Women reported more than 20,000 cases of domestic violence reported and handled by various community, legal and health institutions nationwide in 2007.<sup>25</sup> A multi-country study conducted by the World Health Organisation (WHO) found that more than 50 per cent of women in Bangladesh have been subject to physical or sexual violence by intimate partners. In Afghanistan, the United Nations Development Fund for Women (UNIFEM) reported that out of 1,327 incidents of violence against women documented between January 2003 and June 2005, 36 women had been killed—in 16 of the cases by their intimate partners.<sup>26</sup>

Domestic violence is by no means specific to the Muslim world, but discriminatory family laws make Muslim women particularly vulnerable to this form of abuse. Such laws often use the *Shari'ah* as grounds to establish exceptions to the universality of human rights as it applies to women. The Cairo Declaration on Human Rights in Islam considers that only men have the 'right, within the framework of the Shari'ah, of free movement' and that it is prohibited to breach the right to safety from bodily harm 'without a Shari'ah-prescribed reason'.<sup>27</sup> Section 60 of Egypt's Criminal Code states that 'the provisions of the penal code shall not apply to any deed committed in good faith, pursuant to a right

determined by virtue of the Shari'ah'.<sup>28</sup> According to this law, the acts committed supposedly in good faith includes circumstances when the beating is not severe, the beating is not directed at the face; and the beating is not aimed at vulnerable 'fatal blow areas'.<sup>29</sup>

It is not just women family members—wives, daughters, daughters-in-law—who are vulnerable to discrimination and violence in the Muslim family. Unrelated women who are employed as domestic workers are particularly vulnerable, given their lower status and the prejudices of employers against them. In Indonesia, almost 500 cases of violence against domestic workers have been reported and handled by crisis centres between 2004 and 2007.<sup>30</sup> In the Gulf region and other parts of the Middle East, most domestic workers are from Asia, and many are Muslim women themselves, from Indonesia, Bangladesh and parts of Sri Lanka. In a recent report on Asian domestic workers in Saudi Arabia,<sup>31</sup> Human Rights Watch described practices of forced labour, slavery and slavery-like conditions in the employment of women domestic workers, aside from other forms of abuse, including rape. Excerpts from a testimony by an Indonesian domestic worker, Nour Miyati, describes the following practices of forced labour:

I never had a chance to rest, I woke up at 4 a.m., made breakfast for the children, I worked all day without rest. I went to sleep at 3 a.m. So many times I didn't get a chance to sleep at night, I worked around the clock.

My employer had my passport. He is a policeman ... I never got a chance to leave the house. They locked me in from the outside. When I had stayed there for one year, I got a chance to escape ... I got a taxi that took me to a police officer ... My employer came to the station and took me back ... When I reached the house, they beat me again.<sup>32</sup>

A Filipina domestic worker from the Muslim community of Mindanao explains the slavery-like conditions of her employment in Saudi Arabia:

They took me to an agency [in Saudi Arabia] where they trick people. I stayed in the agency for one week. I had to work in five houses in one week. One day the agent told me he was taking me to his sibling's house. He was the only one there. He started holding me, kissing me ... I was crying, "don't do this to me, I am a Muslim."

When we went back to the agency, my true employer ... brought me to the house. He said, "Be good so I don't send you back [to the agency]." ... After a while, [my] employer started showing some affection for me. He called me into his bedroom. He said, "I want to tell you how I got you from the agency." He said, "I bought you for 10,000 riyals." That is when I found out I had been sold ...<sup>33</sup>

Muslim women are also particularly vulnerable to harmful traditional practices, such as female genital mutilation (FGM), dowry-related crimes and honour killings. The lack of government policies that effectively protect women from these harmful practices is a distinct failure of state responsibility towards the human rights of all. Equally disconcerting is the perpetuation of belief that these practices are somehow related to the teachings of Islam.

In Africa and some countries in the Middle East, it is estimated that more than 130 million girls and women have undergone FGM, while two million girls are at risk every year. In Bangladesh, women and girls are subject to acid attacks due to disputes about dowry: 315 women were victims in 2002, and 267 in 2005. In the meantime, according to a 2002 report of the UN Special Rapporteur on Violence Against Women, honour killings take place in countries like Egypt, Iran, Jordan, Lebanon,

Morocco, Pakistan, Syria, Turkey, Yemen, and other Mediterranean and Gulf countries. UNFPA estimates that, every year, up to 5000 women worldwide become victims of honour killings<sup>34</sup> which has been called 'the most extreme form of domestic violence'.<sup>35</sup>

When governments condone or even adopt gender-based discriminatory and violent practices in society by creating laws to that effect which refer—directly or indirectly—to Islam, it betrays the all too common alliance made between the state and the patriarchal forces in Islam. In these situations, women become victims of systematic discrimination by both society and state, and they are left on their own with no effective means of protection or recourse. These laws contradict current overwhelming trends of the global society and undermine hard-earned social and economic achievements and gains made by individual women and entire communities. Within the framework of human rights, in which governments hold the ultimate responsibility for the fulfilment of the human rights of all their citizens, these laws also constitute a serious violation of human rights.

### **III. A Twenty-first Century Imperative: Changing Values and Laws for Justice in the Family**

Ultimately, laws follow society's sense of justice, and not the other way around. In the process of fulfilling increasingly critical roles for their families' survival and growth, and as active actors in the increasingly mobile and information-centred global community, Muslim women—and many young Muslim men—have developed new aspirations and new sensibilities which are shaped by current life experiences and have set them apart from many of their elders.

According to the UNDP Arab Human Development Report 2005, many Muslims no longer see polygamy as acceptable. A public opinion

survey for this report conducted in four Arab countries—Egypt, Jordan, Lebanon and Morocco—shows that at least half of the men and nearly all of the women surveyed disagreed with the practice of polygamy. And among those who did agree with it, they linked their approval to the agreement of the wives concerned.<sup>36</sup>

In the post-conflict and post-tsunami Aceh, a Muslim Indonesian woman who made a decision to divorce her abusive husband appreciates her newly found emancipation:

Although I must play the double role of mother as well as father, in which I must provide for my children, educate and assist them, I don't feel burdened. In fact, I feel happy because I can make decisions on my own and I don't have to fear my husband. I also have a sense of responsibility to raise my children. Whereas when my husband was still around, I was very dependent on him.<sup>37</sup>

Muslim women who migrate across national borders play a role beyond providing financial remittances to their families by actively promoting, as global citizens, the rights of women in all aspects of social, economic and political life in their home countries. For example, UNFPA notes the role of Afghan women who have lived outside the country in actively supporting women's participation in the constitution-making process in Afghanistan. New ideas, skills, attitudes and knowledge brought back by returning women migrants are recognised by the United Nations as 'social remittances'.<sup>38</sup>

Out of the hardships of famine, new roles emerged for women and changed the gender relations between men and women. In Sudan, women took leadership roles in the local economy and became the strongholds of their communities' survival, as indicated in this story:

During the time of famine (1984-85), those who chose to stay home fought vigorously to avoid starvation. They employed different strategies to survive and to secure their families' well being. The only hope for the survival of the people of Manawashai, Darfur, western Sudan, from the time of famine to the present, was to utilize traditional art in order to develop an economic means to save the families from starvation. Women artists in Manawashai took the initiative by weaving into their baskets new patterns and designs to create saleable products that could bring about economic change ... [These] women artists depicted patterns and symbols in their baskets to signify the cruelty of the times of hardship; it was a self-realization in conquering hunger, destitution, and an expression of a hope for a better life ... [As a result] a growing number of men were working as dealers for women's products [and] selling and buying the raw materials that women used in their traditional art. As Manawashai's sheikh put it, "It was our sisters who worked for our survival during famine time; without them we could have perished." [The men] were employed in different positions and were mostly supervised by women. 'Asha, a cafe owner, usually hires men to bring the water for her café, and she also employs a male butcher to slaughter the sheep everyday needed for her meat supply. In addition, there are some young boys who run errands.<sup>39</sup>

Whatever the reasons, whether it is the hard realities of living in poverty and war or the new interconnectedness of twenty-first century global citizenship, worldviews of Muslim individuals and communities are changing. More and more Muslims are accepting, by choice or through the force of survival, unprecedented roles of women in the economy and in politics.

In the meantime, Muslim women have made major advances in equipping themselves with new ways of organising and building solidarity among fellow women and with their allies. As a consequence, their concerns and interests are more effectively articulated and are more successfully integrated into political decision-making. In the Gambia, women have established a special means, in the form of the Gambia Committee on Traditional Practices Affecting the Health of Women and Children (GAMCOTRAP), to advocate for the rights of women and young girls, particularly in relation to FGM practices, early marriage, and the trafficking of women and children. The Committee's work goes beyond the local as it calls for law reform consistent with international conventions, such as the Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.<sup>40</sup>

Forward-thinking and insightful Muslim theologians are also increasingly taking public positions in support of women's rights. In 2006, a group of distinguished Islamic scholars who had assembled at Al-Azhar University in Cairo, issued recommendations recognising that female genital mutilation 'is a deplorable, inherited custom, which is practiced in some societies and is copied by some Muslims in several countries'. They affirmed that 'there are no written grounds for this custom in the Qur'an with regard to an authentic tradition of the Prophet' and acknowledged that 'female genital circumcision practiced today harms women psychologically and physically' and should be 'seen as a punishable aggression against humankind'. They emphasised that 'the practice must be stopped in support of one of the highest values of Islam, namely to do no harm to another', and called for its criminalisation.<sup>41</sup>

In effective democracies with vibrant social movements on women's rights, the combination of society's changing views on women and the family, on the one hand, and the increasingly effective local to



global advocacy campaigns for women's rights and human rights, on the other, have culminated in major policy and legal breakthroughs designed to reverse the effects of discriminatory laws and practices towards women. These successes reflect an increased accountability of states to national constituencies of women and men who believe in equality and justice for all.

In several Muslim democracies, domestic violence is already treated as a criminal act punishable by law, such as in Malaysia and Indonesia. Indonesia's Law on the Elimination of Domestic Violence, passed in 2004, criminalises not only physical abuse within families but also marital rape between spouses and violence against non-family members who live and work in the homes, namely domestic workers. In the same year, 2004, the Moroccan Parliament passed a series of sweeping revisions to its Civil Status Code that encompasses family law governing women's status. These revisions amounted to a new Family Code, called the *Moudawana*, establishing a woman's equal status within the family through provisions on 'joint responsibility for the family shared by both husband and wife (where previously responsibility rested exclusively with the husband), the removal of legal obligation for the wife to obey her husband, equality between men and women with respect to the minimum age for marriage, and important advances with respect to the state's obligation to enforce the law and protect women's rights'.<sup>42</sup>

In 2001, Turkey passed a new Civil Code which takes a new approach to the family and to women's role in the family. The old legal approach, which assigned women a legally subordinate position in the family with rights and duties defined in respect to the husband, has been abandoned in favour of one that defines the family as a union based on equal partnership. The terms 'the wife' and 'the husband' are replaced by 'the spouses'. Also, the husband is no longer the head of the family; spouses are equal partners, jointly running the matrimonial union with equal decision-making powers. Spouses have equal rights over the

family abode and both have equal rights over property acquired during marriage. Spouses have equal representative powers. The concept of 'illegitimate children', which was used for children born out of wedlock, has been abolished; the custody of children born outside marriage belongs to their mothers.<sup>43</sup>

As early as 1956, Tunisia produced a personal status code which establishes women's full and equal rights as an integral part of the nation's broader social and economic reforms at the birth of this republic nearly fifty years ago. Considered one of the most progressive family laws in the Arab world, Tunisia's personal status code abolishes polygamy and repudiation. It requires that both parties to a marriage be consenting and provides women with the right to divorce and child custody. It also establishes a minimum marriage age for girls and boys. A 1981 amendment grants women lifelong alimony upon divorce and provides a woman with automatic guardianship over her child at the death of the father. A further amendment, in 1993, criminalises domestic violence and treats honour killing as a crime equal to manslaughter which is punishable by life imprisonment.<sup>44</sup>

All laws passed to advance the rights of women and to enable them to live free from violence and discrimination are products of long struggles by women and their allies. The existence of these laws in the Muslim world signals the willingness of national leaders to break from the outdated alliance between the state and the patriarchal forces in Islam in the name of justice and human rights for all. They are also evidence of the integral part that women's rights plays in a nation's democratisation agenda and a recognition of women as a significant constituency within the nation's political landscape. These struggles do not end with the passing of laws, of course. They continue into the next phase to ensure effective implementation so that de jure rights become de facto realities.

## Conclusion: An Issue of Relevance

The overwhelming experiences of globalisation, war and poverty have been detrimental to the lives of men and women of the twenty-first century. As part of the global community, Muslim women and men have undergone major changes in the roles they play. In many Muslim societies, these changes are unprecedented. Many laws governing the Muslim family no longer fit with these new realities, and reflect more of an imagined past. On the other hand, there are countries within the Muslim world that have developed laws on marriage and the family which are in sync with women's active and critical roles in the economic, social and political arenas. These progressive laws are themselves a product of Muslim women's leadership in society.

While laws are always a product of political negotiation, they also reflect the vision of Islam held by society. This applies also for family and marriage laws in the Muslim world. When gender-sensitive laws on marriage and the family are genuinely based on society's belief that the Islamic principles of justice (*'adl*), equality (*musawah*), human dignity (*karamah*), mercy and compassion (*mawaddah wa rahmah*) must apply to women, there are more guarantees that these laws would actually be implemented effectively and positively affect the everyday lives of women and men. This means that the imperative for states to come up with progressive laws ensuring women's rights in the Muslim family is intricately linked to the new envisioning of Islam as a religion and its role as a source of law and public policy. Given the new realities of Muslim women and men's lives today, a stubbornly unchanged vision of Islam that regards women as inferior to men and therefore undeserving of a life of equal worth and dignity, could lead to the religion losing its relevance for men and women of the future.

In short, a new vision of Islam which affirms women's humanity and articulates itself in the form of gender-sensitive laws adopted by states is both equally necessary and possible. The time to make this a reality throughout the Muslim world is now.

## Notes

- 1 This then led to the formulation of the Millennium Development Goals. See <http://www.un.org/millenniumgoals/>.
- 2 Not many data are available that have been broken down to allow focus on the social, economic and political situations of Muslim women.
- 3 ILO, *Global Employment Trends for Women*, p. 1.
- 4 In 2007, 36.1 per cent of women worked in agriculture and 46.3 per cent in services. *Ibid.*, p. 3.
- 5 *Ibid.*, p. 5.
- 6 UNDP, *Arab Human Development Report 2005*, p. 8.
- 7 UNFPA, *State of World Population 2006*, p. 1.
- 8 *Ibid.*, p. 23.
- 9 *Ibid.*, p. 24
- 10 *Ibid.*, p. 29.
- 11 *Ibid.*
- 12 Krisnawaty et al., *Rumah-Dambaan Buruh Migran Perempuan*.
- 13 Inter-Agency Standing Committee, 'Policy Statement for the Integration of a Gender Perspective in Humanitarian Assistance', para. 2(b).
- 14 O'Boyle, 'Strength, Survival and Resilience'.
- 15 UNICEF, *State of the World's Children 2007*, p. 28.
- 16 United Nations Department of Economic and Social Affairs Statistics Division, *The World's Women 2005*, pp. 130-5.
- 17 Ertürk, 'Intersections Between Culture and Violence Against Women', p. 16.
- 18 UNICEF, *World's Children 2007*, p. 16.
- 19 ILO, *Global Employment*, p. 3.
- 20 Hausmann et al., *Global Gender Gap Report 2007*, p. 20.
- 21 Hanis Hussein, 'Letter'.

- 22 Freedom House, 'Women's Rights in the Middle East and North Africa'.
- 23 Human Rights Watch, *Divorced from Justice*, p. 1.
- 24 Ibid., p. 45.
- 25 Komnas Perempuan, *Annual Report on Violence Against Women*.
- 26 UNIFEM, 'Violence Against Women', p. 2.
- 27 Ertürk, 'Intersections', p. 16.
- 28 Egypt Law No. 58 (1937).
- 29 Ammar, 'In the Shadow of the Pyramids', as quoted in Human Rights Watch, *Divorced from Justice*, p. 14.
- 30 Komnas Perempuan, *Violence Against Women*.
- 31 Human Rights Watch, 'As If I Am Not Human'.
- 32 Ibid., p. 35.
- 33 Ibid., p. 42.
- 34 UNFPA, *The State of World Population 2000*, p. 29.
- 35 Human Rights Watch, *Honoring the Killers*, p. 1.
- 36 UNDP, *Development Report 2005*, p. 136.
- 37 Afrida Purnama, 'Nasib Syaripah Tidak Seperti Nasibku'.
- 38 UNFPA, *State of World Population 2006*, p. 14.
- 39 Muhammad, 'Famine, Women Creative Acts, and Gender Dynamics in Manawashai, Darfur, Western Sudan'.
- 40 *WLUML Newsletter*, p. 3.
- 41 Ertürk, 'Intersections', pp. 20-1.
- 42 UNIFEM, *Progress of the World's Women 2008/2009*, p. 74.
- 43 Women for Women's Human Rights, *Turkish Civil and Penal Code Reform from a Gender Perspective*, pp. 8-9.
- 44 Freedom House, 'Women's Rights'.

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## About Musawah

Musawah ('Equality' in Arabic), the Global Movement for Equality and Justice in the Muslim Family, was initiated by Sisters in Islam in Malaysia and is led by an international planning committee of twelve Muslim activists and scholars. Musawah builds on decades of effort to reform Muslim family laws that discriminate against women and to resist regressive amendments demanded by conservative groups within society. Musawah is pluralistic and inclusive, bringing together NGOs, activists, scholars, practitioners, policy makers and grassroots women and men from around the world.

Musawah's goal is to provide support for national and regional women's initiatives advocating for the advancement of women's human rights in Muslim contexts, including rights-based reform of Muslim family laws and the protection of existing rights within family laws.

Musawah's objectives are to:

- Strengthen women's voices demanding equality and justice in the family at the national, regional and international levels;
- Build analysis and strategies that bring together scholarship and experience regarding Muslim jurisprudence, human rights principles, fundamental rights guarantees, and the lived realities of families today;
- Provide those advocating for rights in the family with tools and resources, including a Framework for Action; and
- Raise the visibility of initiatives advocating for equality and justice in the Muslim family.

Musawah and its Framework for Action were launched at a Global Meeting in Kuala Lumpur, Malaysia, from 13-17 February 2009.

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