

# 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' (*tamlīk*) 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'.

## References

- 'Abd Al 'Ati, Hammudah (1997), *The Family Structure in Islam*, Indianapolis: American Trust Publications.
- Abou-Bakr, Omaima (2003), 'Teaching the Words of the Prophet: Women Instructors of the Hadith (Fourteenth and Fifteenth Centuries)', *Hawwa: Journal of Women of the Middle East and the Islamic World*, 1 (3): 306-28.
- Abou El Fadl, Khaled (2001), *Speaking in God's Name: Islamic Law, Authority and Women*, Oxford: Oneworld.
- (2004–5), 'The Place of Ethical Obligations in Islamic Law', *UCLA Journal of Islamic and Near Eastern Law*, 4 (1): 1–40.
- (2007), 'The Human Rights Commitment in Modern Islam', in Joseph Runzo, Nancy Martin and Arvind Sharma (eds.), *Human Rights and Responsibilities in the World Religions*, Oxford: Oneworld, pp. 301-64.
- Abu Zayd, Nasr Hamid (2001), 'The Qur'anic Concept of Justice', available online at <http://polylog.org/3fan-en.htm> (accessed 24 July 2008).
- (2006), *Reformation of Islamic Thought: A Critical Analysis*, Amsterdam: Amsterdam University Press.
- Ahmed, Leila (1991), 'Early Islam and the Position of Women: The Problem of Interpretation', in Nikki Keddi and Beth Baron (eds.), *Women in Middle Eastern History*, New Haven: Yale University Press, pp. 58-73.
- (1992), *Women and Gender in Islam: Historical Roots of a Modern Debate*, New Haven: Yale University Press.
- Al-Ghazali, Imam Abu Hamid (1998), *The Proper Conduct of Marriage in Islam (Adab an-Nikah), Book Twelve of Ihya 'Ulum ad-Din (Revival of Religious Sciences)*, translated by Muhtar Holland, Hollywood, Fla.: Al-Baz.

- Al-Hibri, Aziza (1982), 'A Study of Islamic Herstory: Or How Did We Get Into This Mess', in *Islam and Women*, special issue of *Women's Studies International Forum*, 5 (2): 207-19.
- (1997), 'Islam, Law and Custom: Redefining Muslim Women's Rights', *American University Journal of International Law and Policy*, 12, pp. 1-44.
- (2001), 'Muslim Women's Rights in the Global Village: Challenges and Opportunities', *Journal of Law and Religion*, 15 (1 & 2): 37-66.
- (2003-2004), 'An Islamic Perspective on Domestic Violence', *Fordham International Law Journal*, 27, pp. 195-224.
- Ali, Kecia (2003), 'Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law', in Omid Safi (ed.), *Progressive Muslims: On Justice, Gender, and Pluralism*, Oxford: Oneworld, pp. 163-89.
- (2006), *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith and Jurisprudence*, Oxford: Oneworld.
- Anderson, James Norman (1976), *Law Reforms in the Muslim World*, London: Athlone.
- An-Na'im, Abdullahi Ahmed (2000), 'Islamic Foundation for Women's Human Rights', in Zainah Anwar and Rashidah Abdullah (eds.), *Islam, Reproductive Health and Women's Rights*, Kuala Lumpur: Sisters in Islam, pp. 33-51.
- Badawi, Jamal (1995), *Gender Equity in Islam: Basic Principles*, Indianapolis: American Trust Publication.
- Barazangi, Nimat Hafez (2004), *Women's Identity and the Qur'an: A New Reading*, Gainesville: University of Florida Press.
- Barlas, Asma (2002), *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur'an*, Austin: Texas University Press.
- Doi, Abdul Rahman (1989), *Women in the Shari'a*, London: Ta-Ha.

- El-Alami, Dawoud (1992), *The Marriage Contract in Islamic Law in the Shari'ah and Personal Status Laws of Egypt and Morocco*, London: Graham and Trotman.
- Esposito, John (1982), *Women in Muslim Family Law*, Syracuse: Syracuse University Press.
- Farah, Madelain (1984), *Marriage and Sexuality in Islam: A Translation of Al-Ghazali's Book on the Etiquette of Marriage from the Ihya*, Salt Lake City: University of Utah Press.
- Gross, Rita (1993), *Buddhism after Patriarchy*, Albany: SUNY Press.
- Gunther, Ursula (2004), 'Mohammad Arkoun: Towards a Radical Rethinking of Islamic Thought', in S. Taji-Farouki (ed.), *Modern Muslim Intellectuals and the Qur'an*, Oxford: Oxford University Press, pp. 125-67.
- Haddad, Yvonne Yazbeck (1988), 'Islam and Gender: Dilemmas in the Changing Arab World', in Yvonne Yazbeck Haddad and John Esposito (eds.), *Islam, Gender and Social Change*, Oxford: Oxford University Press, pp. 1-29.
- Haeri, Shahla (1989), *Law of Desire: Temporary Marriage in Iran*, London: I. B. Tauris.
- Hallaq, Wael (1997), *A History of Islamic Legal Theories*, Cambridge: Cambridge University Press.
- Hassan, Riffat (1987), 'Equal Before Allah? Woman-Man Equality in the Islamic Tradition', *Harvard Divinity Bulletin*, 7 (2), Jan-May.
- (1996), 'Feminist Theology: Challenges for Muslim Women', *Critique: Journal for Critical Studies of the Middle East*, 9, pp. 53-65.
- Heschel, Susannah (1983), *On Being a Jewish Feminist*, New York: Schocken Books.
- Hilli, Muhaqqiq (1985), *Sharayi' al-Islam*, vol. II, Persian translation by A. A. Yazdi, compiled by Muhammad Taqi Danish-Pazhuh, Tehran: Tehran University Press.

- Husein Muhammad, Faqihuddin Abdul Kodir, Lies Marcoes Natsir and Marzuki Wahid (2006), *Dawrah Fiqh Concerning Women: Manual for a Course on Islam and Gender*, Cirebon, Indonesia: Fahmina Institute.
- Ibn Rushd (1996), *The Distinguished Jurist's Primer*, vol. II (*Bidayat al-Mujtahid wa Nihayat al-Muqtasid*), translated by Imran Ahsan Khan Nyazee, Reading: Garnet Publishing.
- Kamali, Muhammad Hashim (1996), 'Methodology in Islamic Jurisprudence', *Arab Law Quarterly*, pp. 3–33.
- (1998), *Freedom, Equality and Justice in Islam*, Malaysia: Ilmiah Publishers.
- (2006), *An Introduction to Shari'ah*, Malaysia: Ilmiah Publishers.
- Kermani, Navid (2004), 'From Revelation to Interpretation: Nasr Hamid Abu Zayd and the Literary Study of the Qur'an', in Suha Taji-Farouki (ed.), *Modern Muslim Intellectuals and the Qur'an*, Oxford: Oxford University Press, pp. 169-92.
- Khadduri, Majid (1984), *The Islamic Conception of Justice*, Baltimore: John Hopkins University Press.
- Khan, Maulana Wahiduddin (1995), *Woman Between Islam and Western Society*, New Delhi: The Islamic Centre.
- Kuhn, Thomas (1962), *The Structure of Scientific Revolutions*, Chicago: University of Chicago Press.
- Kurzman, Charles (ed.) (1998), *Liberal Islam: A Sourcebook*, Oxford: Oxford University Press.
- Lampe, Gerald E. (ed.) (1997), *Justice and Human Rights in Islamic Law*, Washington DC: International Law Institute.
- Maghniyyah, Muhammad Jawad (1997), *Marriage According to Five Schools of Islamic Law*, vol. V, Tehran: Department of Translation and Publication, Islamic Culture and Relations Organization.

- Marmon, Shaun (1999), 'Domestic Slavery in the Mamluk Empire: A Preliminary Sketch', in Shaun Marmon (ed.), *Slavery in the Islamic Middle East*, Princeton: Department of Near Eastern Studies, pp. 1-23.
- Masud, Muhammad Khalid (1997), *Shatibi's Philosophy of Islamic Law*, New Delhi: Kitab Bhvan.
- (2001), *Muslim Jurists' Quest for the Normative Basis of Shari'a*, Inaugural Lecture, Leiden: International Institute for the Study of Islam in the Modern World.
- Maududi, Maulana Abul A'Ala (1983), *The Laws of Marriage and Divorce in Islam*, Kuwait: Islamic Book Publishers.
- (1998), *Purdah and the Status of Women in Islam*, 16th edn., Lahore: Islamic Publication.
- Mernissi, Fatima (1985), *Beyond the Veil: Male-Female Dynamics in Muslim Society*, rev. edn., London: Al Saqi.
- (1991), *Women and Islam: An Historical and Theological Enquiry*, translated by Mary Jo Lakeland, Oxford: Blackwell.
- Mir-Hosseini, Ziba (1993), *Marriage on Trial: A Study of Islamic Family Law, Iran and Morocco Compared*, London: I. B. Tauris.
- (1999), *Islam and Gender: The Religious Debate in Contemporary Iran*, Princeton: Princeton University Press.
- (2003), 'The Construction of Gender in Islamic Legal Thought and Strategies for Reform', *Hawwa: Journal of Women of the Middle East and the Islamic World*, 1(1): 1-28.
- (2004), 'Sexuality, Rights and Islam: Competing Gender Discourses in Post-Revolutionary Iran', in Guity Nashat and Lois Beck (eds.), *Women in Iran from 1800 to the Islamic Republic*, Urbana and Chicago: University of Illinois Press, pp. 204-17.
- (2006), 'Muslim Women's Quest for Equality: Between Islamic Law and Feminism', *Critical Inquiry*, 32 (1): 629-45.

- (2007), 'Islam and Gender Justice', in Vincent J. Cornell and Omid Safi (eds.), *Voices of Islam*, vol. 5, Westport: Praeger, pp. 85-113.
- Mutahhari, Murtaza (1991), *The Rights of Women in Islam*, 4th edn., Tehran: World Organization for Islamic Services.
- Plaskow, Judith (2005), *The Coming of Lilith: Essays on Feminism, Judaism, and Sexual Ethics, 1972-2003*, Boston: Beacon Press.
- Pesle, Octave (1936), *Le Mariage chez les Malekites de l'Afrique du Nord*, Rabat: Moncho.
- Rahman, Fazlur (2002), *Islam*, Chicago: Chicago University Press.
- Rapoport, Yossef (2005), *Marriage, Money and Divorce in Medieval Islamic Society*, Cambridge: Cambridge University Press.
- Ruether, Rosemary Radford (1983), *Sexism and God-Talk: Toward a Feminist Theology*, Boston: Beacon Press.
- Ruxton, F. H. (1916), *Maliki Law: A Summary from French Translations of Mukhtasar Sidi Khalil*, London: Luzac.
- Sachedina, Abdulaziz (1999), 'The Ideal and Real in Islamic Law', in R. S. Khare (ed.), *Perspectives on Islamic Law, Justice and Society*, New York: Rowman and Littlefield, pp. 15-31.
- (1999), 'Woman, Half-the-Man? Crisis of Male Epistemology in Islamic Jurisprudence', in R. S. Khare (ed.), *Perspectives on Islamic Law, Justice and Society*, New York: Rowman and Littlefield; article available at <http://people.virginia.edu/~aas/article/article1.htm> (accessed 25 July 2008).
- Schussler Fiorenza, Elizabeth (1995), *Bread Not Stone: The Challenge of Feminist Biblical Interpretation*, Boston: Beacon Press.
- Sharma, Arvind and Katherine Young (eds.) (1999), *Feminism and World Religions*, Albany: SUNY Press.

- Smith, Jane (1985), 'Women, Religion and Social Change in Early Islam', in Yvonne Yazbeck Haddad and Ellison Banks Findly (eds.), *Women, Religion, and Social Change*, Albany: SUNY Press, pp. 19-36.
- Sonbol, Amira El-Azhary (ed.) (1996), *Women, Family and Divorce Laws in Islamic History*, Syracuse: Syracuse University Press.
- (2003-4), 'Women in Shariah Courts: A Historical and Methodological Discussion', *Fordham International Law Journal*, 27, pp. 225-53.
- Soroush, Abdolkarim (1998), 'The Evolution and Devolution of Religious Knowledge', in Charles Kurzman (ed.), *Liberal Islam: A Sourcebook*, Oxford: Oxford University Press.
- (2000), 'Islamic Revival and Reform: Theological Approaches', in *Reason, Freedom, & Democracy in Islam: Essential Writings of 'Abdolkarim Soroush*, translated and edited with a critical introduction by Mahmoud Sadri and Ahmed Sadri, Oxford: Oxford University Press.
- (2002), 'Islam, Revelation and Prophethood: An Interview with Abdolkarim Soroush about the Expansion of Prophetic Experience', *Aftab*, no. 15; available at <http://www.dr.soroush.com/English.htm> (accessed 25 July 2008).
- (2007), 'The Beauty of Justice', *CSD Bulletin*, 14 (1 & 2) (Summer): 8-12; available at <http://www.dr.soroush.com/English.htm> (accessed 25 July 2008).
- Spectorsky, Susan (1993), *Chapters on Marriage and Divorce: Responses of Ibn Hanbal and Ibn Rahwayh*, Austin: Texas University Press.
- Spellberg, Denise (1991), 'Political Action and Public Example: A'isha and the Battle of the Camel', in Beth Baron and Nikki Keddie (eds.), *Women in Middle Eastern History: Shifting Boundaries in Sex and Gender*, New Haven: Yale University Press.

- Stowasser, Barbara (1993), 'Women's Issues in Modern Islamic Thought', in Judith E. Tucker (ed.), *Arab Women: Old Boundaries, New Frontiers*, Bloomington: Indiana University Press.
- Tucker, Judith (2000), *In the House of Law: Gender and Islamic Law in Ottoman Syria and Palestine*, Berkeley: University of California Press.
- Vahdat, Farzin (2004), 'Post-Revolutionary Modernity in Iran: The Subjective Hermeneutics of Mohamad Mojtahed Shabestari', in Suha Taji-Farouki (ed.), *Modern Muslim Intellectuals and the Qur'an*, Oxford: Oxford University Press, pp. 193-224.
- Wadud, Amina (1999), *Qur'an and Woman: Rereading of the Sacred Text from a Woman's Perspective*, New York: Oxford University Press.
- (2004), 'Qur'an, Gender and Interpretive Possibilities', *Hawwa: Journal of Women of the Middle East and the Islamic World*, 2 (3): 317-36.
- (2006), *Inside the Gender Jihad: Women's Reform in Islam*, Oxford: Oneworld.
- Webb, Gisela (ed.) (2000), *Windows of Faith: Muslim Women Scholar-Activists in North America*, Syracuse: Syracuse University Press.
- Welchman, Lynn (2007), *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy*, Amsterdam: Amsterdam University Press.
- Willis, John Ralph (1985), 'Introduction: The Ideology of Enslavement in Islam', in John Ralph Willis (ed.), *Slaves and Slavery in Muslim Africa*, vol. 1, London: Frank Cass, pp. 1-15.
- Wright, Danaya (2007), 'Legal Rights and Women's Autonomy: Can Family Law Reform in Muslim Countries Avoid the Contradictions of Victorian Domesticity?', *Hawwa: Journal of Women of the Middle East and the Islamic World*, 5 (1): 33-54.