

Sexuality in Muslim Contexts

RESTRICTIONS AND RESISTANCE

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2012



Zed Books  
LONDON | NEW YORK

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Sexuality and inequality:  
the marriage contract and Muslim legal tradition

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Constructions of sexuality and gender inequality inherent in Muslim legal tradition are informed by a strong patriarchal ethos. They are based on pre-modern interpretations of the sacred textual sources, and the rulings that Muslim jurists derived from them to regulate sexuality. It is not only in Muslim contexts that such perspectives linger on and prevent women from enjoying their full equality and citizenship rights. In *The Sexual Contract*, Carole Pateman (1988) reveals how the theorists of the Western Enlightenment, whose ideas nurtured democracy and civil society, also played an important role in sustaining patriarchy. In their commentaries on the 'original contract' or 'social contract', they ignored the 'sexual contract' – by which men provide and women obey – which constitutes half the story of the 'original contract'. This to some extent accounts for the lingering of patriarchal structures, even if women in the West have won most of the legal reforms they have been asking for since the nineteenth century.

In this essay, I probe the working of the 'sexual contract' in Muslim legal tradition. My aims are more limited than Pateman's; I confine my inquiry to the rulings (*ahkam*) that Muslim jurists devised to regulate marriage and women's covering (the dress code), and the theological, legal, sexual assumptions and theories that inform them. These legal rulings are only one element in the complex set of norms, practices and structures that define and regulate sexuality

in Muslim contexts and must be understood and analysed in their own proper contexts.<sup>1</sup> But given the intimate links between religion, law and culture, and the resurgence of Islam as both a spiritual and a political force in the last decades of the twentieth century, I maintain that, to achieve gender equality, these rulings must be debated, challenged and redressed, not just on human rights grounds, but also from within, on Islamic grounds. Otherwise, Muslim women's quest for equality will remain a hostage to the political fortunes of various political forces and tendencies, as was the case in the twentieth century. While the earlier part of the century saw a process of secularization and modernization of laws and legal systems and women's increasing presence in public space, in the large majority of Muslim states, with the rise of political Islam, there were attempts to reverse this process, and women lost some of their earlier gains.<sup>2</sup>

I begin by examining the link between constructions of sexuality and inequality inherent in the laws that classical Muslim jurists devised for the regulation of sexuality, and then proceed to examine twentieth-century reconstructions and modifications of this link, and its disruption by the emerging feminist scholarship in Islam. There are three elements to my argument. First, the rulings regarding marriage and women's covering are in effect two sides of the same patriarchal imperative that legitimated and institutionalized control over women in both the private space of the family and the public space of society. Second, these rulings are informed by patriarchal readings of Islam's sacred texts and premised on a set of assumptions and theories about male and female sexuality, notably ideas of female sexuality as both property and a danger to the social order. These assumptions and theories linking sexuality and inequality are explicit and transparent in classical jurisprudential texts, but they have become implicit and obscured in modern Islamic discourses. Finally, since it is this link that sustains women's subordination in contemporary Muslim contexts, exposure of the link can contribute to breaking it, an essential step in arguing for and constructing egalitarian laws in Muslim contexts.

I start from the premiss that assumptions about sexuality and gender in Islam, as in any other religion, are necessarily social/cultural constructions, thus historically changing and subject to

negotiation. There is neither a unitary nor a coherent concept of sexuality and gender rights in Islamic legal thought, but a variety of competing concepts which, in part, reflect a tension in the sacred texts between ethical egalitarianism as an essential part of their message and the patriarchal context in which this message was unfolded and implemented (Ahmed 1991: 58). This tension enables both proponents and opponents of gender equality to claim textual legitimacy for their respective positions and gender ideologies. As feminist scholarship in religion has shown, this tension, which is inherent in all scriptural religions, is productive and allows contestation from within.

There are other premisses. First, I reject statements beginning 'Islam says...' or 'Islam allows...' or 'Islam forbids...'. Islam does not speak; rather, it is people who claim to speak in the name (with the authority) of Islam, selecting sacred texts (usually out of context) that appear to support their claims, and repressing other texts that oppose them.

Being concerned with Muslim legal traditions and discourses, I must also register my discomfort with the term 'Islamic law(s)', though I have used it in my own writing. 'Islamic laws', like other laws, are the product of socio-cultural 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. In my view, it is more analytically fruitful and productive to speak of 'Muslim legal tradition'.

Further, it must be remembered that, as in other religious and legal traditions, notions of justice among Muslims have not until recently included gender equality in its current sense. Only around the turn of the twentieth century did the idea of gender equality become inherent to conceptions of justice, and Muslim women's demands and struggle for equality and justice present Muslim legal tradition with a challenge that it has been trying to meet.

Moreover, to understand the nature of this challenge, and map the process and dynamics of change in Muslim legal tradition, we need to recognize one of its main classical distinctions: that between *shari'a* and *fiqh*. *Shari'a*, 'the path', in Muslim belief is the totality

of God's will as revealed to the Prophet Muhammad. *Fiqh*, 'understanding', denotes the process of human endeavour to discern and extract legal rulings from the sacred sources of Islam: that is, the Qur'an and the Sunna (the practice of the Prophet, as contained in Hadith, Traditions).<sup>3</sup> While the *shari'a* in Muslim belief embodies the revealed law, *fiqh* is the science of Muslim jurisprudence, the process of human attempts to discern and extract legal rulings from the sacred sources of Islam, as well as the 'laws' that result from this process. What we know of '*shari'a*' is only an interpretation, an understanding (i.e. *fiqh*), which like any other system of jurisprudence is human, mundane, temporal and local.

This classical distinction was central to the emergence of the various schools of law, and of a multiplicity of positions and opinions within them. But it has been distorted and obscured in modern times, when colonial authorities and nation-states created new legal systems and selectively reformed and codified elements of *fiqh*, and when a new political Islam has emerged that uses *shari'a* as an ideology. From a critical feminist perspective, it is essential to revive the distinction because it both engages with the past and enables action in the present; it empowers us to contest the patriarchal interpretations of Islam's sacred texts from within by piercing the veil of sanctity that surrounds *fiqh* and to demystify the processes of law-making.

### Sexuality and inequality in classical *fiqh* texts

The classical jurists' conceptions of sexuality and gender are encapsulated in two sets of legal rulings: those that define marriage and divorce, on the one hand, and those that define women's dress code (*hijab*), on the other hand. The discussion here is confined to delineating their salient features and legal structures in classical *fiqh* texts; whether these rulings corresponded at the time to actual gender relations and marriage practices is, of course, another question, and one that recent feminist scholarship in Islam has started to address. This scholarship warns us not to take classical *fiqh* texts at face value, since there is a gap between what they prescribe and what happened in courts and in practice. Studies of medieval and Ottoman court archive materials and judgments show that *fiqh* texts should be treated as a discourse, in the sense that, rather than

telling us about customary marriage and gender relations, they tell us how those who had the legitimacy and power to define the law wished them to be.<sup>4</sup>

#### Marriage: contract and domination

In classical *fiqh* texts marriage is not a sacrament, but a civil contract to render sex between a man and woman licit; sex outside this contract constitutes *zina*, which is defined as a crime subject to punishment.<sup>5</sup> The contract is called '*aqd al-nikah*' ('contract of coitus') and is patterned after the contract of sale, which served as the model for most contracts. It has three essential elements: the offer (*ijab*), the acceptance (*qabul*), and the payment of dower (*mahr*), a sum of money or any valuable that the man pays or undertakes to pay to the woman before or after consummation.

The contract places a wife under her husband's *qiwama*, a mixture of dominion and protection, and produces a set of fixed rights and obligations for each party, some supported by legal force, others by moral sanction. 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). *Tamkin*, defined as sexual submission, is a man's right and thus a woman's duty; whereas *nafaqa*, defined as shelter, food and clothing, is a woman's right and thus a man's duty. According to some schools, a woman is entitled to *nafaqa* only after consummation of the marriage; in others this comes with the contract itself; but in all schools she loses her claim if she is in a state of *nushuz* (disobedience), which the classical jurists defined only in sexual terms. 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), because such acts may violate the husband's right of 'unhindered sexual access'. Likewise, a man can enter up to four marriages at a time,<sup>6</sup> and enjoys the exclusive right to terminate each contract at will. A woman cannot be released without her husband's consent, although she can secure her release through offering him inducements, by means of *khul'*, which is 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. 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. If she fails to secure his consent, 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 if the wife establishes one of the recognized grounds – which again vary from school to school. Since marriage is a contract, a woman can also at time of the marriage or later acquire from the husband the right to release herself from the contract, which is referred to as *talaq al-tafwiz*, or delegated divorce.

#### Hijab: covering and seclusion

Classical *fiqh* texts contain little on the dress code for women. The prominence of *hijab* in Islamic discourses is a recent phenomenon, dating to the nineteenth-century Muslim encounter with colonial powers. It is then that we see the emergence of a new genre of literature in which the veil acquires a civilizational dimension and becomes both a marker of Muslim identity and an element of faith.<sup>7</sup>

Classical Islamic legal texts – at least the genre that sets out rulings (*ahkam*) or what we can call 'positive law' – contain no explicit rulings on women's dress, nor on how women should appear in public.<sup>8</sup> They do not use the term *hijab*, and they use *sitr* (covering) to discuss the issue of dress for both men and women, but only in two contexts: first, rulings for covering the body during prayers; second, rulings that govern a man's 'gaze' at a woman prior to marriage.

The rulings are minimal, but clear-cut. During prayer, both men and women must cover their '*awrah*', their private parts; for men, this is the area between knees and navel, but for women it means all parts of the body apart from hands, feet and face. As regards the 'gaze', it is forbidden for a man to look at the uncovered body of a woman to whom he is not closely related – a ban that can be removed when a man wants to contract a marriage and needs to inspect the woman he intends to marry. The rulings on covering during prayer are discussed in the Book of Prayer (*kitab al-salah*) and are among the '*ibadat*' (ritual/worship acts, duties to God), while those

on 'gaze' come in the Book of Marriage, and fall under *mu'amilat* (social/contractual acts, duties to people).

There is, however, another sense of *hijab* that remains implicit in these texts: 'confinement'. This rests on two interrelated juristic constructs that cut across *fiqh*'s two main divisions: *'ibadat* and *mu'amilat*. The first construct defines a woman's whole body as *'awrah*, a sexual zone, that must be covered both during prayers (before God) and in society (before men). These are found in the Book of Prayer under 'covering of private parts' (*sitr al-'awrah*), which remains the only source that requires the covering of specific parts of the body. The second construct considers a woman's sexuality to be *fitna*, a source of danger to public order, and consequently grants men the right to control women's movements. The rulings on segregation (banning interaction between unrelated men and women) have their logic in this second construct. This construct, as recent feminist scholarship in Islam has shown, was linked to political and socio-economic factors, in particular during 'Abbasid rule, such as the public presence of female slaves, who were treated as sexual commodities and forbidden to cover in order to distinguish them from free women. Significantly, classical jurists considered the *'awrah* of a female slave or servant to be different from that of a free woman; some held it to be the same as that of men, between navel and knees; others argued that it was between chest and knees.<sup>9</sup>

#### The link: women's sexuality as property

These were, in a nutshell, the rulings on marriage and *hijab* in classical *fiqh* texts. As already mentioned, they should be seen as elements in a complex system of norms and practices to regulate sexuality in ways that sanction the appropriation of women's sexual and reproductive capacity. At the core of this system is the notion of women's sexuality as property, an old patriarchal idea that, as feminist scholarship has shown, pre-dates the emergence of Abrahamic religions, including Islam.<sup>10</sup> There were, of course, differences between the classical schools and among jurists within each school, and there were gaps between law and practice.<sup>11</sup> But the fact remains that all schools shared the same inner logic and patriarchal readings of Islam's sacred texts; if they differed, it was in the manner and extent to which they translated this conception into legal rulings.

For instance, dominant opinion in the Maliki school granted women the widest grounds for divorce (the husband's absence for a year, his mistreatment, failure to provide, and failure to fulfil marital duties), but prohibits them from contracting a marriage without the presence and consent of a male guardian (*wali*). In Hanafi law, by contrast, women were not required to have a marriage guardian and may contract their own marriages, but their access to divorce was more limited: for a husband's absence to qualify as grounds for judicial divorce, it must last 99 years. These differences were of practical importance for women, who could resort to the judge whose legal school provided them with a better option in the event of marital dispute, a kind of forum shopping. These differences also remain significant for reforms and were used during the codifications of family law in the course of the twentieth century. For instance, by adopting the more liberal principles from Maliki law, governments have been able to expand women's access to divorce while staying within the bounds of *shari'a*.<sup>12</sup>

In revisiting these rulings we need to remember that classical jurists lived in a world in which patriarchy and slavery were part of the fabric of society; inequality and hierarchy were the natural order of things. This world and value system informed their reading and understanding of Islam's sacred texts. The jurists neither disguised nor denied the patriarchal logic of their rulings on sexual and gender relations; in their discussion, they were transparent, rational and legalistic. They alluded to parallels between the status of wives and female slaves, to whose sexual services husbands/owners were entitled, and who were deprived of freedom of movement. For instance, Al-Ghazali, the twelfth-century Muslim philosopher and jurist, in his monumental work *Revival of Religious Sciences*, devoted a book to marriage, where he echoed the prevalent views of his time. Significantly, he ends the discussion with a section on 'Rights of the Husband', in which he does not invoke any Qur'anic verses but relies on Hadith literature to enjoin women to obey their husbands and remain at home.<sup>13</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. (Al-Ghazali 1998: 89)<sup>14</sup>

In delineating the legal structure of the marriage contract, classical jurists had no qualms in using the analogy of sale. This is how Muhaqqiq al-Hilli, the thirteenth-century Shi'a jurist, defined marriage:

Marriage etymologically is uniting one thing with another thing; it is also said to mean coitus and to mean sexual intercourse ... it has been said that it is a contract whose object is that of dominion over the vagina (*bad'*), without the right of its possession. (Hilli 1985: 428)

Khalil ibn Ishaq, the fourteenth-century Maliki jurist, was equally explicit when it came to dower (*mahr*) and its function in marriage:

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*. As in any other bargain and sale, only useful and ritually clean objects may be given in dower. (Ruxton 1916: 106)<sup>15</sup>

I am not suggesting that in classical *fiqh* marriage is on a par with a sale contract. Aware of possible misunderstandings, classical jurists were careful to stress that marriage resembles sale only in form, not in spirit, and drew a clear line between free and slave women in terms of rights and status.<sup>16</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). Certainly, there were significant differences and disagreements about this among the schools, and debates within each, with legal and practical implications. This is not the point. The point is that the notion and legal logic of 'ownership' and sale underlie their conception of marriage and define the parameters of laws and practices, where a woman's sexuality, if not her person, becomes a commodity and an object of exchange, even if it is for only one transaction.

#### Sexuality and inequality in contemporary Islamic discourses

During the nineteenth and twentieth centuries, the colonial rulers of Muslim countries and the subsequent new nation-states in most cases put aside classical *fiqh* in all areas of law except family and personal

status law, where they selectively reformed, codified and grafted the rulings of classical *fiqh* on to unified legal systems inspired by Western models. In codifying these rulings, the modernizers left the substance of the marriage contract as defined by classical jurists more or less intact, and instituted reforms through procedural rules, such as requiring the registration of marriage and divorce, and limiting men's rights to unilateral divorce and polygamy. There were notable exceptions: Tunisia banned polygamy altogether in 1956; the Turkish Republic abandoned *fiqh* in all spheres of law and replaced it with Western-inspired codes; while Saudi Arabia preserved classical *fiqh* as fundamental law and attempted to apply it in all spheres of law.<sup>17</sup>

Codification transformed the relationship between the Muslim legal tradition, the state and social practice, and had two consequences that are of relevance to our discussion. First, by limiting the flexibility and plurality that was a feature of the classical schools, when one could choose among different interpretations, codification narrowed the possibilities of substantial reform. As codes and statute books took the place of classical *fiqh* manuals, laws regulating sexuality were no longer solely a matter for Muslim scholars, the *ulama*, operating within particular *fiqh* schools, but became the concern of the legislative assembly of a particular nation-state. Deprived of the power to define and administer family law, *fiqh* and its practitioners lost touch with changing political realities and were unable to meet the epistemological challenges of modernity, including the idea of gender equality. Second, codification, which began under colonial powers and expanded in the new nation-states, gave patriarchal notions of marriage and sexuality a new lease of life: they could now be applied through the legal machinery of a modern state. These governments lacked either the legitimacy or the inclination to challenge pre-modern interpretations of the *shari'a* as embodied in *fiqh* rulings on personal status and marriage.

From the late nineteenth century, we witness the emergence of a new body of texts whose prime objective has been to shed light on 'Islamic laws of marriage' and to correct 'misunderstandings'. Published by religious houses in both Muslim and Western countries, this literature is still available (much of it on the Internet) in a variety of languages, including English.<sup>18</sup> Written by men, at least until recently, these texts range from sound scholarship to outright

polemics; not being strictly legal in their arguments, they are accessible to the general public.

A popular genre of this literature, which can perhaps be best described as marriage manuals, has no qualms about reproducing classical *fiqh* conceptions of sexuality and gender relations. Sold at news-stands or bookshops near mosques or shrines, these texts aim to inform would-be spouses in the popular classes how to live a 'proper Islamic family life'.<sup>19</sup> The texts in this genre have a similar format; oral in style, they are primarily based on sayings of the Prophet or quotations from classical jurists. They contain no argument, no discussion, only commands and warnings. A woman is told that she should keep herself covered so that her beauty is not seen by anyone apart from her husband, and that she should satisfy her husband's sexual needs and his other wishes; otherwise her place will be in hell, as one Hadith has it. According to another Hadith, if she refuses her husband, she will be cursed all night by angels. A man is told to make sure that his wife observes the rule of *hijab*, and to have mercy on her. In effect, they are banal replicas, in style and world-view, of Ghazali's *Adab al-Nikah (Etiquette of Marriage)*, which is part of his monumental *Revival of Religious Sciences*, referred to earlier. Most include chapters or sections on 'the virtues of marriage' and 'the rights and duties of each spouse in marriage'. Some also include discussions of 'sexual etiquette', covering matters such as the time, frequency and manner of sexual intercourse, permissible and non-permissible positions, states of purity and impurity and menstruation, and so on. Their language is sexually explicit, using terms such as *shahvat* (sexual desire, lust, passion), *jama'* (intercourse), etc. They reflect the concept of active female sexuality, which Mernissi (1985) observes is prevalent when women's seclusion and gender segregations are emphasized, and which she claims to be the implicit theory of sexuality in Muslim societies.<sup>20</sup>

The following passage from an Iranian manual illustrates the working of the theory and its key concepts:<sup>21</sup>

Sexual desire [*shahvat*] is ten times greater in woman than in man. God has chained women's *shahvat* with modesty and chastity [*haya va 'iffat*]. If their modesty were taken away, it is possible that every man would be followed by ten women wanting to make love with him. In *Lali*

*al-Akhhbar* Imam Ali is quoted as saying: what motivates the beasts of prey is their hunger, and what motivates women and draws them to men is to extinguish the fire of their desire [*shahvat*]. Modesty [*haya*] has ten parts, of which nine parts are in women and one part in men. Then, when a woman is asked for in marriage, one part of her modesty goes; when she is contracted in marriage, another part goes; when she gives birth, another part goes; when her husband has intercourse with her, another part goes; she is left with five parts, and if she commits the hideous act of *zina*, all her modesty is removed. Pity the people, when all modesty is taken from women. (Qarani and Haj 1991: 53-4)

The three concepts (*ghairat*, *haya* and *shahvat*) form a theory of sexuality according to which God gave women greater sexual *shahvat* than men, but this is mitigated by two factors, women's *haya* (modesty, shyness) and men's *ghairat* (sexual honour and jealousy). Women who show *ghairat* (when their husbands are polygynous), and do not observe the rulings on *hijab* are lacking in faith and do not believe in the *shari'a*.

These 'marriage manuals' make no mention of the issue of women's rights; they do not engage with contemporary discourses or non-religious sources; they adhere to a gender perspective that I call 'traditionalist'.

This is not the case with texts that come under the general rubric of 'women's rights in Islam', which I classify as 'neo-traditionalist'. The authors of these texts do engage with contemporary issues; their overt aim is to clarify what they see as 'misunderstandings of Islamic law'. These texts differ in style, language and sophistication, but they follow the same line of argument, based on the premisses of the 'naturalness' of laws in Islam and the 'innate difference' between men and women. These two premisses become the pillars of a new defence of gender inequality, as follows: men and women are created equal and are equal in the eyes of God, but the roles assigned to them in creation are different, and *fiqh* rules reflect this difference. Differences in rights and duties do not mean inequality or injustice; if correctly understood, they are the very essence of justice. This is so because these rulings not only reflect the *shari'a*, the 'divine' blueprint for society; they are also in line with 'human nature' (*fitra*) and take into consideration the biological and psychological differences between the sexes.

Aware of and sensitive to criticisms of the patriarchal bias of family law in Muslim contexts, these texts are punctuated by general and abstract statements such as 'Islam affirms the basic equality between men and women', 'Islamic law grants women all their rights', 'Islamic law honours and protects women'. They focus on the ethical and moral rules that marriage entails for each spouse, but they overlook the fact that these ethical rules, in effect, carry no legal sanction; nor do they offer comprehensive and viable arguments for translating them into imperatives. They quote Qur'anic verses and Ahadith that affirm the essential equality of the sexes in marriage, which they define using the terms 'equity' and 'complementarity'. But they keep silent on the logic that underlies the whole edifice of marriage in classical *fiqh* texts: women's sexuality as property and marriage as a form of sale.

This logic is so repugnant to modern sensibilities and values, so alien from contemporary Muslims' experience of marriage, that no author can openly admit to following it. But it comes to the surface once these texts resort to reasoning, as in Abul A'la Maududi's *Purdah and the Status of Women in Islam* and Morteza Mutahhari's *System of Women's Rights in Islam*.<sup>22</sup> Both authors were Islamic ideologues, and their writings, rooted in anti-colonial and anti-Western discourses, have become seminal texts for contemporary Islamist groups and movements; they offer a new defence of the classical *fiqh* rulings, and contain a new theory of sexuality.

Writing in Urdu in the 1930s, in the context of pre-partition India, Maududi appeals to radical Islamists in his adamant rejection and condemnation of modernity and liberal values. For him, the problem with Muslims is that they have abandoned the principles of Islam and its laws, which are in line with the 'Laws of Nature', and have adopted secular (i.e. Western and to some extent Hindu) values that have corrupted them and are destroying their civilization. The solution he offers is 'return to Islamic law', which recognizes the 'Law of Nature' that mandates leadership by men, and the submission of women and their exclusion from public life. 'Sexual attraction' is the force behind human civilization; 'real advancement and well-being is [geared to] the proper adjustment of the mutual relationship between husband and wife' (Maududi 1998: 1). This is the very essence of *shari'a*, as it is the 'Law of Nature', which

Maududi takes to be that defined by the jurists when it comes to gender relations. He builds his theory of sexuality and defence of classical *fiqh* notions of gender rights on a Qur'anic verse, and entitles it 'Real Significance of Sex':

The first thing that has been stated and explained in this connection is: 'All things We made in Pairs' (41:49). This verse makes a reference to the universality of the sex-law and the Master of the Universe Himself divulges the secret of His Creation. He says that the universe has been designed on the relationship of pairs. In other words, all parts of this great machine have been created in pairs, and all that one can see in this world is indeed the result of the mutual attraction of these pairs.

Now let us consider the nature of the sex-relationship. This relationship itself implies that one partner in the pair should be active and the other receptive and passive, one prompt to influence and the other ready to be influenced, one prepared to act and the other willing to be acted upon. ... This is the basic relation that gives rise to all other relations functioning and operating in the world. (Maududi 1998: 134)

Having established the meaning of the verse, Maududi goes on to deduce from it three principles, which contain the gist of his theory of sexuality and offer a new rationalization of *fiqh* rulings on marriage and *hijab*. The first principle is that God as the 'Maker and Owner of the Factory cannot desire that His Factory cease to function', and that 'the existence of both the active and the passive partners is equally important for the purposes of the Factory'. From this follows the second principle, the gist of which is that if we want to keep the smooth working of the 'Factory', everything must work and be placed in the order that the 'Maker' ordained. This takes Maududi to his third principle: the superiority of men and the subordination of women:

'Activity' in itself is naturally superior to 'passivity' and femininity. This superiority is not due to any merit of masculinity against demerit in femininity. It is rather due to the fact of possessing natural qualities of dominance, power and authority. A thing that acts upon something else is able to do so on account of its being dominant, more powerful and impassive. On the other hand, the thing that submits and yields, behaves so simply because it is by nature passive, weak and inclined to be impressed and influenced. Just as the existence of both the active and passive partners is necessary for the act to occur, so it is also necessary



that the active partner should be dominant and able to produce the desired effect, and the passive partner yielding and inclined to be receptive ... these principles can be deduced from the basic fact of divisions into the male and female. The human male and female, being physical entities, do by their nature require that these principles should govern all their relationships. (1998: 136)

Mutahhari offers a more nuanced argument for the 'naturalness of Islamic law', and his text is more popular with moderate Islamist groups. Writing in Persian in 1960s' Iran as part of the religious opposition to the secularizing policies of the Pahlavi regime, he is less adamant in his opposition to modernity, and less overtly patriarchal, taking issue with both classical *fiqh* texts and secular discourses. He rejects one of the main assumptions of classical *fiqh* texts, that 'women are created of and for men'; and contends that, in the Islamic view, women are equal to men in creation, and do not depend on men for attaining perfection, but attain their perfection independently. At the same time, he rejects the idea of gender equality, and argues instead for the 'complementarity of rights'. Differences in rights and duties between the sexes do not mean inequality or injustice; if properly understood, they are the very essence of justice. This is so because roles assigned to men and women in creation are different; 'Islamic laws' reflect this difference.

The theory of the naturalness of 'Islamic laws' was first advanced by the most renowned twentieth-century Shi'a philosopher, Allamah Tabataba'i, in his monumental, twenty-volume Qur'anic commentary commonly known as *al-Mizan*.<sup>23</sup> Interestingly, Tabataba'i saw sexual desire not as fixed and innate but as malleable and social. He rejected the belief (popularly attributed, as quoted earlier, to Imam 'Ali) that women's sexual desire is nine times greater than men's; if that were so, and if *shari'a* laws work with, not against, the grain of nature, then how can they allow men but not women to contract more than one marriage at a time? Hence his advocacy of the proper Islamic education of women in society, which enhances men's sexual desire and constrains that of women.

Women's religious education in an Islamic society teaches them chastity and modesty [*iffat va haya*]; contrary to the common belief that women's desire [*shahvat*] is greater than men's, for which women's desire for beauty and ornaments is taken as proof, [proper religious education] makes

women's desire much less than men's, and this is what Muslim men who have Islamically trained wives know well. Therefore, a man's desire on average requires him to have more than one wife and even two and three. (Tabataba'i n.d.: 52)

While concurring with this objective, Mutahhari adds a psychological twist, contending that men and women desire in different ways:

Man is the slave of his own desire [*shahvat*] and woman is the prisoner of a man's love [*muhabbat*] ... A man wants to take possession of the woman's person and to wield power over her, a woman wants to conquer the man's heart and prevail upon him through his heart ... A man wants to embrace the woman and a woman wants to be embraced ... A woman is better able to control her desire than a man. Man's desire is primitive and aggressive, woman's desire is reactive and responsive. (Mutahhari 1991: 207)<sup>24</sup>

Mutahhari's language differs from that of Maududi and the classical *fiqh* texts, but his male-centred views of creation and of marriage as dominance are the same.

The association of married life rests upon the pillar of spontaneous attachment and has a unique mechanism. Creation has given the key to strengthening it, and also the key to bringing it down and shattering it, into the hand of man. Under the command of creation, every man and woman has a certain disposition and certain characteristics, when compared with each other, which cannot be exchanged and are not the same. (Mutahhari 1991: 274)

Women's sexuality, now defined as passive, is subordinated to that of men.

Nature has devised the ties of husband and wife in such a form that the part of woman is to respond to the love of man. The affection and love of a woman that is genuine and stable can only be that love which is born as a reaction to the affection and admiration of man towards her. So the attachment of the woman to the man is the result of the attachment of the man to the woman and depends upon it. Nature has given the key of love of both sides to the man, the husband. If he loves his wife and is faithful to her, the wife also loves him and remains faithful to him. It is admitted that woman is naturally more faithful than man, and that a woman's faithfulness is a reaction to the unfaithfulness of the man. (Mutahhari 1991: 274)

Mutahhari's language and arguments are less bluntly patriarchal and are more nuanced than those of Maududi; yet he too subordinates women's feelings, needs and sexuality to those of men. In this way, both authors not only justify male domination and control over women but, by resorting to notions such as 'nature' and 'essential differences', perpetuate gender stereotypes that stem from and reinforce unequal power relations in marriage.

### The forming of a new discourse

In the second part of the twentieth century, with the rise of political Islam, the theory of 'the naturalness of *shari'a* law' became closely identified with Islamist political movements. Islamist forces – whether in power or in opposition – started to invoke *shari'a* as a legitimizing device. Tapping into popular demands for social justice, they presented 'Islamization' as the first step to root out corruption, to combat crime and immorality, and to bring about a moral and just society. These issues spoke to the masses, and played on the popular belief among Muslims that Islamic *shari'a* is the essence of justice; hence no law that is 'Islamic' can be unjust.

The 1980s saw the introduction of regressive gender policies in many parts of the Muslim world; for instance, gender segregation and compulsory dress codes for women in Iran and Sudan, the enforcement of Hudud Ordinances that led to the persecution of many women in Pakistan, the dismantling of family law reforms introduced earlier in the century in Iran and Egypt, and restrictions imposed on women elsewhere by state or non-state forces, as in Sudan and Algeria. But the 1980s also saw the expansion of human rights legislation, the rise of an international women's movement, and the emergence of women's NGOs in many Muslim countries. The human rights framework, instruments like CEDAW, international funds and transnational links gave women's rights activists what they needed most: a point of reference, a language and organizational tools for their struggle to resist the regressive policies of political Islam.

Like all ideologies, however, political Islam carried the seeds of its own transformation. Attempts to translate classical *fiqh* notions of gender rights into policy provoked criticism and spurred women to increased activism. The defence of pre-modern patriarchal

interpretations of the *shari'a* 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 Muslim 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'a* 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.

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. This discourse owes much to a new trend of reformist religious thought that is consolidating a conception of Islam and modernity as compatible, not opposed. Its advocates do not reject an idea simply because it is Western, nor do they see Islam as providing a blueprint, as having an inbuilt 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 and Muhammad Iqbal, 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>25</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. They make it possible to examine critically the older interpretations and epistemologies and to expose the contradictions inherent in earlier discourses on family and gender rights.

Yet these new religious thinkers have not addressed the issue of sexuality, as opposed to gender. In fact, while some of them are now openly advocating gender equality in society and the family, they have been silent on the issue of sexuality. The silence is significant and needs further attention. While it speaks of their ambivalence and anxiety, it has both epistemological and strategic implications that should not be overlooked: epistemological in the sense that constructing women's sexuality as defined and regulated by familial and social circumstances suggests that it is not determined by nature or the divine; that Islam as a religion has nothing to say on the subject; that what may be claimed as 'Islamic' are merely the views and perceptions of some Muslims, which are neither sacred nor immutable but human and changing – and open to challenge. Their silence is strategic because it carves out a space within Muslim legal tradition where women can be treated as social rather than merely sexual beings. In classical *fiqh* texts, gender rights and women are discussed only in terms of sexuality, and only in the context of rulings on marriage and divorce and women's covering. By diverting the focus away from women's supposed 'nature' to their 'social' experience, the debate on gender equality can be moved onto new ground, and the link (implicit in classical *fiqh* rulings) between gender inequalities and theories of sexuality can be broken.

### Conclusion

The emerging gender discourse and the reformist Islam of which it is a part are still in a formative phase, and their future prospects are tied to political developments all over the Muslim world – and to global politics. Their prospects of redressing the gender inequalities in dominant interpretations of the *shari'a* rest on women's ability to organize and participate in the political process and as well as in the production of religious knowledge. Let me conclude with two comments on these prospects.

First, recent reformist and feminist scholarship in Islam heralds a new egalitarian legal paradigm that is still in the making. Feminist scholars in particular are both discovering a hidden history and rereading the textual sources to unveil an egalitarian interpretation of the *shari'a*. They contend that the classical jurists' notions of gender

are not sacrosanct, nor are their rulings above critical evaluation. In contrast to scholars such as Maududi and Mutahhari, who resort to 'scientific' and 'naturalist' theories to explain and justify the disparity between men and women's rights in the *shari'a*, feminist scholars return to the textual sources and read them in light of the changed conditions of women and contemporary notions of justice in which gender equality is now inherent. In so doing they are explicitly severing the link between sexuality and inequality in Muslim legal tradition that has sustained gender inequality, despite the fact that spiritual equality of the sexes is now an undisputed element of contemporary gender discourses.

My second comment is that legal systems and jurisprudential theories must be understood in the cultural, political and social contexts in which they operate. Both the old *fiqh* paradigm, with its strong patriarchal ethos, and the emerging feminist readings of the *shari'a* should be viewed in this complex double image, as both expressing and moulding social norms and practices. Legal change often comes when theory or jurisprudence reacts to changes in social practices, to political, economic and ideological forces, and to people's experiences and expectations. Islamic legal theory is no exception – as attested to by the ways in which both legal systems and women's lives and social experiences were transformed in the course of the twentieth century, and by the feminist challenge from within that the Muslim legal tradition faces in the new century.

### Notes

1. The issue of 'sexuality in Islam' has been the subject of many scholarly works, using different approaches ranging from historical to feminist. Notable among them are: Boudhiba 1975; Marsot 1979; Musallam 1983; Sabah 1984; Mernissi 1985; Yeganeh and Keddie 1986; Imam 1997; Ali 2006; Souaiaia 2007; Ilkharacan 2008; Kugle 2010; for an insightful discussion of sexuality and women's rights, see Othman 2000.
2. For an analysis of the legal developments, see Welchman 2007; Mir-Hosseini 2009.
3. According to classical legal theory, the sources of Islamic law are four: the Qur'an, the Hadith (pl. Ahadith, 'sayings', the body of literature that recorded the sayings, decisions and actions of the Prophet), *qiyas* (reasoning by analogy) and *ijma'* (the consensus of the jurists). While the first two sources have their roots in divine revelation, the other two are the

- products of human reasoning. For concise accounts, see Rahman 2002: 68–84; Bassouni and Badr 2002.
4. See, for instance, Sonbol 1996; Rapoport 2005; Tucker 2008.
  5. 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 introductions to and translations of classical texts on marriage, see Farah 1984, and Sectorsky 1993; for critical analysis of the marriage contract, see Ali 2006, 2010; and on *zina*, see Mir-Hosseini and Hamzic 2010.
  6. In Shi'a law a man may contract as many temporary marriages (*mut'a*) as he desires or can afford. For this form of marriage, see Haeri 1989.
  7. See, for instance, Ahmed 1992; Hoodfar 1997; El Guindi 1999.
  8. Clark (2003) shows that the Hadith literature has little concern with women's covering, and does not refer explicitly to the covering of hair; there are more Ahadith on men's dress and covering their *'awrah* than on women's dress.
  9. For discussion and sources, see Abou El Fadl 2001: 255–7 nn 106, 107.
  10. See Lerner (1986), who argues that the establishment of patriarchy was not a single 'event' but a process developing over a period of nearly 2,500 years from approximately 3100 to 600 BCE.
  11. Many legal schools emerged but few survived. Important among the surviving ones are five. The Hanafi, named after Abu Hanifa (d. 767), emerged in Baghdad and is dominant today in Turkey, Syria, Iraq, Lebanon, Jordan, Egypt, Pakistan and Afghanistan. The Maliki, named after Malik ibn Anas (d. 795), emerged in Medina and is dominant today in North and West Africa. The Shafi'i, named after Idris al-Shafi'i, emerged in Baghdad and is dominant today in Indonesia, Malaysia, Singapore, Philippines, Sudan, Upper Egypt and Southern Arabia. The Hanbali, named after Ahmad ibn Hanbal (d. 855), emerged in Baghdad; it was made popular by Abd al-Wahhab at the beginning of the twentieth century, and is dominant in Saudi Arabia. The Ja'fari or Twelver School, named after Ja'far, the 6th Shi'a Imam (d. 765), is dominant in Iran and Iraq. For a discussion of differences of marriage laws among schools in the formative period of *fiqh*, see Ali 2010.
  12. For concise accounts of the reform methods, see Rahman 1980.
  13. For critical discussion of these Ahadith, see Abou El Fadl 2001: 232–47.
  14. For another rendering of this passage, see Farah 1984: 120.
  15. 'Genital *arvum mulieris*' is Ruxton's prudish translation of *bad'* (vagina); Jorjani, another Maliki jurist, defines marriage as follows: 'a contract through which the husband acquires exclusive rights over the sexual organs of a woman' (quoted by Pesle 1936: 20).
  16. For similarities between conceptions of slavery and marriage, see Marmon 1999; Ali 2010.
  17. For codification and reforms, see Anderson 1976; Rahman 1980; Welchman 2007.
  18. A sample of texts available in English include Maududi 1983, 1998; Doi 1989; Mutahhari 1991, 1992; Chaudhry 1995; Al-Sadlaan 1999. For discussion of such writings in the Arab world, see Stowasser 1993; for Iran, see

- Mir-Hosseini 1999; for Muslims living in Europe and North America, see Roald 2001; for a critical engagement with them, see Shehadeh 2003.
19. Texts I have collected in Iran and Morocco since the early 1990s include titles such as: *Guide to Marital Relations from Islam's View*; *The Union of Two Flowers or the Bride and the Groom: Marriage in Islam*; *The Bride's Gift or the Happy Islamic Marriage*; *A Muslim's Conduct with his Wife*.
  20. For a discussion, see Othman 2000.
  21. Translations of these passages are mine.
  22. Maududi 1998 (published in Urdu 1939, in pre-1947 India); Mutahhari 1991 (published in Persian 1972, in pre-revolutionary Iran); both books are available in English and Arabic and have been reprinted many times. For analysis of their gender discourse, see Shehadeh 2003.
  23. The gist of this theory is found in a small pamphlet entitled *Polygamy and the Status of Women in Islam* (Tabataba'i, n.d.).
  24. The published English translation renders *shahvat* variously as 'sexual drive' and 'passion'. For this passage, I supply my own translation, but later passages are taken from the published one.
  25. For the textual genealogy of this thinking, see Kurzman 1998.

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## PART II

Sites of contestation:  
reclaiming public spaces