

THE CONSTRUCTION OF GENDER IN ISLAMIC LEGAL THOUGHT AND STRATEGIES FOR REFORM

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Abstract

This paper explores ways in which women can pursue and achieve equality and justice in Islamic law. It begins by examining constructions of gender rights in Islamic legal thought, with a view to identifying both the legal theories and assumptions that inform them, and concludes by exploring the kinds of strategies for reform that are needed to reflect the spirit of the age. I argue that, broadly speaking, Islamic legal thought contains three distinct discourses on gender rights. While the first two are premised on various forms of inequality between the sexes, the third argues for equality. The first, which is the discourse of the classical *sharī'a* texts, I call Traditionalist. The second, which developed in the early part of the twentieth century and is reflected in the modern legal codes in Muslim countries, I call Neo-Traditionalist—though it is commonly referred to as Modernist. The third, which I call Reformist, emerged in the last two decades and is still in the process of formation. It is within this discourse that gender equality in law can be achieved.

INTRODUCTION

In this paper I explore ways in which women can pursue and achieve equality and justice in Islamic law.¹ I argue, first, that conceptions of gender rights in Islamic law are neither unified nor coherent, but competing and contradictory; and secondly, that gender rights as constructed in Islamic jurisprudence (*fiqh*) not only neglect the basic objectives of the *sharī'a* (*maqāṣid al-sharī'a*) but are unsustainable under the conditions prevailing in Muslim societies today.

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I begin by examining constructions of gender rights in Islamic legal thought, with a view to identifying both the legal theories and the cultural assumptions that inform them, and I conclude by exploring the kinds of strategies for reform that are now needed both to reflect the spirit of the *sharīʿa* and to embody the principle of justice for women. I ask the following questions: if justice and fairness are indisputable objectives of the *sharīʿa*, should they not be reflected in laws regulating relations between, and the respective rights of, men and women? Can there be an equal construction of gender rights in Islamic law? If so, what are the strategies needed to achieve it?

Three preliminary notes are necessary: First, throughout the paper I distinguish between *sharīʿa* and the science of *fiqh*.² The *sharīʿa* is, on the one hand, the totality of God's law as revealed to the Prophet Muhammad; on the other, "in its popular usage it indicates the religion of Islam, God's true religion as it embodies revelation in praxis" (Sachedina 1999a: 15). *Fiqh*, however, is not part of revelation (*wahy*); it is that part of religious science whose aim is to discern and extract *sharīʿa* legal rules from the Qurʾān and Sunna. Strictly speaking, *fiqh* is a legal science with its own distinct body of legal theories and methodology as developed by *fuqahāʾ*³ over the course of centuries and in dialogue with other branches of religious and non-religious sciences. In other words, it is the *sharīʿa* that is sacred and eternal, not *fiqh*, which is a human science and changing. It is essential to stress this distinction, since *fiqh* is often mistakenly equated with *sharīʿa*, not only in popular Muslim discourses but also in specialist and political discourses, and often with an ideological intent.

Secondly, I start from the premise that gender rights are neither fixed, given, nor absolute. They are, on the contrary, cultural and legal constructs which are asserted, negotiated and subject to change. They are produced in response to lived realities, in response to power relations in the family and society, by those who want either to retain or to change the present situation. They exist in and through the ways in which we think and talk (both publicly and privately), and study and write about them (Mir-Hosseini 1999: 6).

² For this distinction, see Kamali (1989: 216). For an argument not employing the distinction, see An-Naʿim (2000: 33–4).

Finally, I do not aim to do what a Muslim jurist (*faqīh*) does, that is, to extract rules from sacred sources by adhering to *uṣūl-al-fiqh* theories and methodologies. Rather, I approach *fiqh* rules and their underlying theories from a critical feminist perspective, examining their validity in the light of contemporary gender theories and realities. My questions and assumptions are, thus, different from those of the majority of male jurists. Not only do I expose the inherent gender bias of *fiqh* rules and their inner contradictions but I ask whether these rules reflect the justice of the *sharīʿa* and the interests of Muslim individuals and societies. In so doing, I highlight what Sachedina calls “a crisis of epistemology in traditionalist evaluation of Islamic legal heritage” (Sachedina 1999a: 25). At the root of this crisis lies a non-historical approach to Islamic legal systems and a male-centred religious epistemology.

GENDER RIGHTS AND ISLAMIC LEGAL THOUGHT

Broadly speaking, Islamic legal thought contains three distinct discourses on gender rights. While the first two are premised on various forms of inequality between the sexes, the third argues for equality. The first, which is the discourse of classical *fiqh* texts, I call Traditionalist. The second, which developed in the early years of the twentieth century and is reflected in modern legal codes in Muslim countries, I call Neo-Traditionalist.³ The third, which I call Reformist, emerged in the last two decades and is still in the process of formation.

The Traditionalist Discourse: Genesis of Gender Inequality

In classical *fiqh* texts, gender inequality is taken for granted, *a priori*, as a principle. It reflects the world in which the authors of these texts lived, a world in which inequality between men and women was the natural order of things, the only known way to regulate the relations between them. It is a world in which biology is destiny, and there is no overlap between gender roles: a woman is

³ In the literature that deals with the codification of Islamic law, this discourse is commonly referred to as Modernist. For instance, see Anderson (1959); Coulson, and Hinchcliffe (1978).

created to bear and rear children; in the divine plan, this is her primary role and most important contribution to society. It is a world of duties where the very notion of “women’s rights”—as we mean it today—has no place and little relevance.⁴

It is this metaphysical and philosophical world-view that informs classical jurists’ understandings and readings of the sacred texts of Islam: the Qur’ān and the Sunna. In classical *fiqh* texts women are depicted as sexual beings not as social beings, and their rights are discussed only in the context of family law. The classical *fiqh* notion of women’s rights is nowhere more evident than in the definition of the marriage contract, which treats women as semi-slaves. One can say that the disparity between men’s and women’s rights in Muslim societies was—and still is—sustained largely through the rules that classical jurists devised for regulating the formation and termination of the marriage contract. In this respect, there is no major difference among the various *fiqh* schools: all share the same inner logic and conception of the family. If they differ it is in the way and the extent to which this conception is translated into legal rules.⁵

Yet the *fuqahā*’s construction of women’s rights is not free of logical contradictions, which are again nowhere more evident than in the marriage contract, as we shall see. Two competing voices can be detected, the one inspired by revelation (*wahy*) and the other constrained by the social order. While the first is an egalitarian voice, reflecting the justice of Islam, the second is a patriarchal voice, reflecting social, cultural and political expediencies. The further *fiqh* texts are removed from the time and the spirit of revelation, the stronger becomes their patriarchal voice.

To examine this tension—between the voice of revelation and the voice of social order—and to identify the guiding assumptions of the classical jurists, let us examine the salient features of the marriage contract.

Marriage as contract of exchange. Classical *fiqh* texts define marriage (*nikāh*) as a contract of exchange with fixed terms and uniform legal

⁴ It is this world that most of the Islamist movements that emerged in the second part of the twentieth century sought to recreate. See, for instance, Sharabi (1988).

⁵ For differences among the *fiqh* schools, see Esposito (1982), Maghniyyah (1997).

effect. Patterned after the contract of sale (*bayʿ*), the essential components of *nikāḥ* are: the offer (*ījāb*) by the woman or her guardian (*waliyy*), the acceptance (*qabūl*) 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. A woman has the right to refuse sexual access until she receives her *mahr* in full.⁶ In the Mālikī school, the importance of the exchange implied by the payment of *mahr* is such that its suppression, or any condition set in the contract that might lead to its obliteration, can render the marriage contract void. In other schools, the absence of a specified *mahr* does not void the contract but entitles the bride to a special type of *mahr* known as *mahr al-mithl*, the average dower.⁷

In discussing the legal structure of marriage, classical jurists often employed the analogy of the contract of sale, and drew on its legal logic. For instance, Shaykh Khalīl, the most prominent Mālikī jurist, writes:

Dower is analogous to sale price, that is, dower comprises the same fundamental conditions as those attached to sale. 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. For example, a slave may be given as a dower, and the bride, not the bridegroom, has the choice of the slave. (Ruxton 1916: 106)⁸

Such a conception of marriage is shared by jurists in other schools. This is how marriage is discussed in the Persian translation of one of the key texts of Muḥaqqiq al-Ḥillī, the most prominent Shīʿa jurist:

[M]arriage etymologically is uniting one thing with another thing; it is also said to mean coitus and to mean sexual intercourse. In *sharʿ*, there have been various interpretations of it. It has been said that it

⁶ But once she has given her consent to have sexual relations with the husband she can no longer refuse him.

⁷ See ‘Mahr’, in Gibb, and Kramers (1961: 315), Maghniyyah (1997: 74).

⁸ Jorjani, another Mālikī jurist, defines marriage in the following terms: “a contract through which the husband acquires exclusive rights over the sexual organs of the woman”. Quoted by Pesle (1936: 20).

is a contract whose object is that of dominion over the vagina, 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. (Hillī 1985: 428)

By saying that the contracts of marriage and sale share a similar legal structure, I do not mean to suggest that *fiqh* does conceptualize marriage as a sale. Classical jurists show themselves aware of possible misunderstanding and are careful to stress that marriage resembles sale only in form, not in spirit. Perhaps it is their awareness and sense of unease that led *fuqahā*⁹ to enumerate the ways in which the marriage contract differs from that of sale. Even in statements such as those quoted above, it is clear that a distinction is made 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). Such a distinction, as we shall see, has important implications for the rights and duties that marriage entails. What I want to suggest, rather, is that the logic of sale underlies the *fiqh* conception of women's rights, in which a woman's sexuality, if not she herself, is treated as a commodity—as an object of exchange in marriage.

In any *fiqh* text, the chapter on marriage starts with a discussion of its religious merits, and a list of religious duties and moral injunctions that are incumbent on each spouse. Yet, as we shall see, when it comes to the domain of legal rules these moral injunctions are overshadowed by those elements of the contract that concern the exchange. The boundaries between moral and legal obligations in marriage are hazy and at times arbitrary. What separates the moral from the legal is determined by the “purpose of marriage”. Here the jurists generally agree that the primary purposes of marriage are the gratification of sexual needs and procreation.⁹ Whatever serves or follows from the purposes of the *nikāḥ* contract falls within the range of compulsory duties incumbent on both spouses—referred to as *ahkām al-zawāj*. The rest, though still morally incumbent, remain legally unenforceable and are left to the conscience of individuals.

⁹ For a discussion, see Abd Al Ati (1997).

With the marriage contract, a woman comes under her husband's *ʿiṣma*. *ʿIṣma* can be translated as authority, control and protection: for each party it 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 concepts of *tamkīn* and *nafaqa*. *Tamkīn*—submission, defined as unhampered sexual access—is a man's right and thus a woman's duty; whereas *nafaqa*—maintenance, defined as shelter, food and clothing—is a woman's right and a man's duty. A woman becomes entitled to *nafaqa* only after consummation of the marriage, and she loses her claim if she is in a state of *nushūz* (disobedience). *Nushūz* literally means 'rebellion' and it implies the abandonment of marital duties; although it is acknowledged that such abandonment can take place on the part of either spouse, in *fiqh* sources the term *nāshīza* (rebellious) is used only in the feminine form and in relation to maintenance rights.

In line with the logic of the contract, a man can enter into more than one marriage (up to four) at a time,¹⁰ and can terminate each contract at will: no grounds are needed, nor are the wife's consent nor her presence required. Legally speaking, *ṭalāq* or repudiation of the wife is a unilateral act (*īqāʿ*), which acquires legal effect by the declaration of the husband. Likewise, a woman cannot be released without her husband's consent, although she can secure her release through offering him inducements, by means of *khulʿ*, often referred to as 'divorce by mutual consent'. As defined by the classical jurists, *khulʿ* is a separation claimed by the wife as a result of her extreme 'reluctance' (*ikrāh*) towards her husband, and the essential element is the payment of compensation (*ʿawad*) to the husband in return for her release. This can be the dower, or any other form of compensation. Here we see the logic of sale at work. Unlike *ṭalāq*, *khulʿ* is not a unilateral but a bilateral act, as it cannot take legal effect without the consent of the husband.

If she 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 *ṭalāq* or to pronounce it on his behalf. Known in classical *fiqh* as *tafriq* or *taṭlīq*, this outlet has become the

¹⁰ In Shīʿa law a man may contract as many temporary marriages (*muʿa*) as he desires or can afford. For this of form of marriage, see Haeri (1989).

common juristic basis on which a woman can obtain a court divorce in the contemporary Muslim world.¹¹ The facility with which women can obtain such a divorce, and the grounds on which they can do so, vary in different *fiqh* schools of Islamic law. The Mālikī is the most liberal and grants the widest grounds upon which a woman can initiate divorce proceedings.

This is, in brief, the *fiqh* notion of marriage, which *fuqahā'* claim to be divinely ordained and rooted in sacred texts. It is this notion that has come to be equated with the *sharī'a* model of family and gender relations. But the questions must be asked: How far does this notion conform with the equity and justice that are among the undisputed objectives of the *sharī'a*? Why and how does *fiqh* define marriage in such a way that it deprives women of free will and makes them subject to male authority? The questions become even more crucial if we accept—as I do—the sincerity of the *fuqahā'*'s claim that they derive their ideal model of gender relations from sacred sources: the Qur'ān and the Sunna.

“Women’s Status” and Fiqh Theories and Assumptions. There are three sets of related answers. The first set is more ideological and has to do with the strong patriarchal ethos that informs the *fuqahā'*'s readings of the sacred texts. The second is more epistemological and concerns the ways in which the ‘status of women’ became fixed in *fiqh*, and was taken to be the subject matter (*mawdū'*) of *ahkām* (rulings). The third is more political and has to do with the exclusion of women from the production of religious knowledge and their inability to have their voices heard and their interests reflected in law. The argument of this section is that classical jurists, by means of the legal and social theories that they developed—all rooted in the cultural and social fabric of their time and society—made gender rights a fixed notion in *fiqh*.

The *fiqh* model of gender relations 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 on

¹¹ Among modern states where Islamic law forms the basis of family law, in Tunisia women enjoy the easiest access to divorce in law. See Nasir (1990: 125–42). For reforms in divorce laws, see Anderson (1976), Mahmood (1972), El Alami, and Hinchcliffe (1996).

this in the literature, which I will not enter here.¹² Suffice it to say that the *fiqh* notion of gender relations, as embodied in *nikāḥ*, is rooted in a type of marriage agreement predominant in pre-Islamic Arabia. Known as ‘marriage of dominion’, this agreement closely resembled a sale through which a woman became the property of her husband. As Esposito notes, it “produced a situation in which a woman was subjugated by males, her father, brother or close male relatives when she was virgin and her husband when she became a wife. As a matter of custom, she came to be regarded as little more than a piece of property” (Esposito 1982: 14–15).

This subjugation is condemned in the Qurʾān. Yet it is reproduced in *fiqh*, though in modified terms. What *fuqahāʾ* did was redefine the pre-Islamic ‘marriage of dominion’ so as to accommodate the Qurʾānic reforms and to enhance women’s status within it. They made women parties to, not subjects of, the contract, and the recipients of *mahr*. Likewise, by modifying polygamy and divorce regulations, they 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 husbands or fathers. Fathers or guardians retained the right to contract the marriages of their daughters or female wards. While some schools give a woman the option to annul a contract involving her after she reaches puberty, in others the *waliyy* is invested with the power of *jabr*, that is, he can force his daughter or ward into a marriage without her consent. This points to another contradiction and a flaw in the juristic logic. On the one hand, jurists themselves define *nikāḥ* in such a way that it is the woman who makes the offer (*ījāb*) of marriage; on the other hand, by recognizing *jabr*, they deny a woman free will and treat her as a slave, which goes against the very grain of their own definition of marriage. Above all, here the jurists clearly

¹² Some argue that the advent of Islam weakened the patriarchal structures of Arabian society (Esposito 1982), others that it reinforced them (Ahmed 1992, Mernissi 1991). The latter also maintain that, before the advent of Islam, society was undergoing a transition from matrilineality to patrilineality, that Islam facilitated this by giving patriarchy the seal of approval; and that the Qurʾānic injunctions on marriage, divorce, inheritance, and whatever relates to women both reflect and affirm such a transition. Both base their conclusions on the work of William Robertson Smith. For concise accounts of the debate, see Smith (1985), Spellberg (1991).

negate the very spirit of the Qur'ānic reforms aimed at abolishing the practice of coercing women into unwanted marriages in the pre-Islamic era.

In producing these rulings, *fuqahā'* based their theological arguments on a number of philosophical, metaphysical, social and legal assumptions and theories. The philosophical/metaphysical thesis that underlies *nikāh* and other *fiqh* rulings on gender rights is that "women are created of and for men". While this thesis cannot be supported by sacred texts—as Riffat Hassan (1987), Fatima Mernissi (1991) and Amina Wadud (1999) have shown—it became and continues to remain the main implicit theological assumption for *fuqahā'* in discerning legal rules from sacred texts. The moral and social rationale for this 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 factors, men's *gh̄ira* (sexual honour and jealousy) and women's *ḥayā'* (modesty, shyness). What is concluded from this theory by both Shī'a and Sunni jurists is that women's sexuality, if left uncontrolled by men, runs havoc, and is a real threat to social order. Women's *ḥayā'* and men's *gh̄ira* are innate tools of this control. So it is for the good of family and society, and in the name of religion, that women are subjugated to men (Mir-Hosseini 2003). Fatma Sabbah (1984) provides vivid accounts of the working of this theory in medieval legal and erotic texts, and Fatima Mernissi (1985) shows how it continues to dominate women's lives in contemporary Muslim societies. The sale contract, as already discussed, provides the juristic basis for women's subjugation in marriage.

I am not suggesting that there was a conspiracy among classical jurists to undermine women, or that they deliberately sought to ignore the voice of revelation (*wahy*). Rather I argue that, in their understanding of sacred texts, these jurists were guided by their outlook, and in discerning the terms of the *sharī'a*, they were constrained by a set of legal and gender assumptions and theories that reflected the state of knowledge and normative values of their time. These theories, which are the product of either juristic speculations or social norms, continued to be treated by subsequent generation of jurists as though they were immutable, and part of the *sharī'a*.

The marriage contract betrays the dilemma, the unease, of the classical jurists in fusing social norms with Qur'ānic ideals. On the

one hand, they could not apply to marriage the logic and rules of sale, as it went against the very voice of *wahy* by denying women's humanity. On the other hand, they could not free themselves from the logic of the sale contract in determining the legal effects of marriage—*ahkām al-zawāj*. Perhaps that is why they defined marriage as a religious duty, thus elevating it to the level of *'ibādāt* (ritual/spiritual act). *Nikāh* is one of the very few contracts in *fiqh* that crosses the boundary between *'ibādāt* and *mu'āmalāt* (social/private contracts). Though *fuqahā'* often speak of marriage as an act of worship (*'ibāda*), they deal with its legal form under the category of *mu'āmalāt*. This is important because, unlike rulings in the realm of *'ibādāt*—which regulate relations between God and humans, where there is limited scope for rationalization and explanation—those in the realm of *mu'āmalāt*—which regulate relations between humans—generally remain open, almost without restriction, to rational consideration. Since human affairs are in a state of constant change and evolution, there is thus a need for new interpretations of these rulings in line with the realities of the time. This is the very rationale for *ijtihād*, which, as Hashim Kamali notes, “in the sense of self-exertion is a method of finding solutions to new issues in light of the guidance of *wahy*” (1996: 21). In other words, while the *shar'ā* sets specific legal rulings in the realm of *'ibādāt*, in the realm of *mu'āmalāt* its rulings are intended to establish principles and guidelines so as to ensure propriety and fair play.

Moreover, many jurists and scholars of Islam agree that most Qur'ānic verses dealing with family and women are not *ta'sīsī* (constitutive), but are either *imdā'ī* (endorsed) or *islahī* (corrective). That is to say, they are not among those Qur'ānic rulings that aim to establish a new practice, but among those that aim either to endorse or to correct an existing practice. In other words, marriage, family and women's status in the Qur'ān are treated as human categories and practices that existed in Arabia, that is, as part of *'urf* (custom). This means that women's status and gender relations are neither created by *shar'ā* rulings nor divinely ordained and immutable. It also means that *shar'ā* rulings relating to women and the family are not only not immutable but are in need of constant reform if they are to reflect the spirit of *wahy* and the justice of Islam. Gender is a social and human concept, and like other human concepts, it evolves and changes in response to social and political

forces. In the Qurʾān, “women’s status” is treated neither as divinely ordained nor as immutable, but as social practice in need of change. Qurʾānic verses are strongly critical of women’s low status in pre-Islamic Arabia, and bring substantial reforms in the ways in which women were viewed and treated pre-Islamic Arabia. For instance, the practice of female infanticide is condemned, aspects of marriage, divorce and inheritance practices are reformed to give women a greater say and autonomy (Qurʾān 16: 58–9; Esposito 1982: 14–15).¹³

Classical jurists showed their cognisance of this by placing marriage and other rulings related to ‘women’s status’ and gender relations under the category of *muʿāmalāt*. But by their scholastic formulations of these rulings, *fuqahāʾ* came to turn what is essentially a time-bound, temporary phenomenon into a judicial principle of permanent validity. This was done, first by assimilating social norms into *sharʿa* ideals, and secondly, by treating any rulings pertaining to ‘women’s status’ as though they belonged to the category of *ʿibādāt*, as immutable and not open to rational arguments and modifications. In this way, ‘women’s status’ and theories and norms underlying gender relations came to be divorced from their social context and historical development, and were assumed to be fixed and unchanging.

To repeat, the reason why ‘women’s status’ and gender relations became fixed matters in *fiqh* is rooted in the tension between the dictates of *wahy* and those of social order. The marriage contract—*ʿaqd al-nikāh*—is the product of this tension, in which the social order, the voice of patriarchy, outweighs the voice of *wahy*. It is also this tension that lies at the root of what Sachedina calls: a crisis of epistemology in traditionalist evaluation of Islamic legal heritage.

Islamic law has been regarded as the embodiment of Divine Justice. In order for Muslims to attain that divine scale of justice they must implement these norms of justice in their everyday life. Ironically, the tension felt by the Muslims in the fulfilment of this obligation is the consequence of elevating the historical development of Islamic law to the plane of restricted historicity of juridical prescriptions for

¹³ There is no consensus on this in the literature: see note 12 for the debate as to whether the Qurʾānic reforms weakened or strengthened the patriarchal structures of the time.

everyday life. 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. What did represent a real constraint on their exegetical and legislative activities to respond to the new exigencies were those judicial conventions based on a common inalienable structure designated by Muhammad Arkoun as "logocentricity" of the juridical corpus in Islam [emphasis added]. (Sachedina 1999a: 29)

This epistemological crisis prevails in the realm of women's rights in Islam. Rather than embodying the *sharī'a* ideals, *fiqh* rulings are literal expressions of the classical jurists' ideal model of family and gender relations, divorced from time and space. This takes us to the third set of reasons for fixing 'women's status' in *fiqh*; that is to say, excluding women from production of religious knowledge. As Sachedina notes:

It is remarkable that even when women transmitters of hadith were admitted in the *‘ilm al-rijāl* ("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'ān 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. (Sachedina 1999b: 149)

By the time that the *fiqh* schools emerged, women were already excluded from the interpretative and intellectual process involved in deducing the terms of the *sharī'a* from the sacred sources. There is a consensus among students of gender rights in Islam that the further we move from the time of Revelation, the more women's voices are marginalized and excluded from the political life of Muslim society.¹⁴ The patriarchal ideology of the time, as reflected in the *fiqh* texts, was so entrenched and so much part of the reality

¹⁴ See Ahmed (1992: Chapter 4, The Transitional Age).

of classical jurists' life that it left little room for debate and criticism from within. Most women of their time had little difficulty in accepting the *fuqahā'*'s rulings, as they reflected the way in which their roles were defined, and more importantly they had no choice but to submit to them. Those women who did not accept these roles could find leeway in *fiqh*, such as the insertion of stipulations in the marriage contract, enabling them to acquire a certain measure of autonomy in marriage.¹⁵ Women with property and financial means were certainly in a different situation, which points to another paradox in the *fiqh* construction of women's rights. While jurists recognize women's autonomy and right of control over their property, when it comes to marriage, they deny women the right of control over their bodies, thus treating them the same as slaves.

With the rise of Western hegemony over the Islamic world and the spread of secular systems of education in the nineteenth century, the ideological hold of *fiqh* on social reality began to be broken. At the same time, the changed status of women and their increasing participation in the politics of the Muslim world made the *fuqahā'*'s conception of 'women's status' increasingly irrelevant to modern realities. All this gradually paved the way for the emergence of new discourses on gender.

Neo-Traditionalists: Gender Balance

The first new discourse emerged in the Muslim world's encounter with Western colonial powers. In this encounter, the 'status of women' became a contested issue, and since then it has remained a battleground between the forces of traditionalism and modernity in the Muslim world.

Though the roots of this discourse can be traced to the nineteenth century, its impact is linked with the emergence in the

¹⁵ Here I am concerned with the ideology of Islamic law, not with its practice. It is essential to note that, while at the ideological level the *fuqahā'* claim that Islamic law is immutable, at the level of practice, flexibility and adaptability are two salient features of Islamic law, which have enabled it to be meaningful in a variety of cultures and social contexts from the outset. For an insightful discussion of the ways in which women in pre-modern times related to Islamic law, see Sonbol (1996, esp. Introduction); for contemporary examples, see Mir-Hosseini (1993).

Muslim world of modern nation-states and the creation of modern legal systems inspired by Western models in the twentieth century. It was during this stage that, in many such nation-states, *fiqh* legal rules on family and gender rights were selectively reformed, codified and gradually grafted onto a unified legal system.¹⁶ The impetus of reform varied from one country to another. On the whole, one can say that each Muslim country followed one of three paths: abandoning *fiqh* in all spheres of law and replacing it with Western-inspired codes; retaining and codifying *fiqh* with respect to personal status law (family, inheritance), while abandoning it in other areas of law; or preserving *fiqh* as fundamental law and attempting to apply it in all spheres of law. A large majority chose the second path; Turkey was the only country to opt for the first; the third was followed by Gulf countries (see Mahmoud 1971).

In the process of adaptation, Islamic law changed from being the province of private scholars operating within a particular legal school (*madhhab*) to that of the legislative assembly of a particular nation-state. The statute books started to take the place of *fiqh* manuals in regulating the legal status of women in society. This led not only to the creation of a hybrid family law, neither *fiqh* nor Western, but also a new discourse which is neither traditionalist nor modern. Though commonly subsumed under Modernist Islamic discourses, I suggest that Neo-Traditionalist is a more appropriate term, because this new discourse shares the same notion of gender rights as traditional *fiqh*; what it does is to enforce it through the machinery of the modern nation-state, which not only infuses the *fiqh* discourse on gender with a new force and power but gives it a new dynamic. In codifying family law, governments introduced reforms through procedural rules, which in most cases left the substance of the *fiqh* ruling more or less unchanged.

This discourse is found not only in the legal codes, but in a new type of literature in the twentieth century, which I categorize as '*fiqh*-based'. Unlike *fiqh* texts proper, these texts are neither strictly legal in their reasoning and arguments, nor necessarily produced by *fuqahā*'. Largely written by men—at least until very recently—these texts aim to shed a new light on the 'status of women' in

¹⁶ For a concise discussion of the terms of the marriage contract and their adoption by legal codes in Arab countries, see El Alami (1996).

Islam, and to clarify the Islamic laws of marriage and divorce.¹⁷ The authors re-read the sacred texts in search of new solutions—or more precisely, Islamic alternatives—to accommodate women’s aspirations for equality, and at the same time to redefine “women’s status”. Despite their variety and diverse cultural origins, what these re-readings have in common is an oppositional stance and a defensive or apologetic tone: oppositional, because their agenda is to resist the advance of the “Western” values and lifestyles espoused by twentieth-century Muslim states and their secular elites; apologetic, because they attempt to explain and justify the gender biases which they inadvertently reveal by going back to *fiqh* texts.

Neo-Traditionalist texts also lack the sense of real conviction, the confidence that imbues classical *fiqh* texts. Their confidence was undermined by the encounter with colonial discourses on women and voices of dissent from within the Muslim world. The authors of these texts, unwilling to accept that the aspiration for gender equality is not just an imported—Western—concept but part of the twentieth-century reality of Muslim women’s lives, find themselves in a contradictory position. On the one hand they uphold the *fiqh* model of family and gender relations, and on the other hand they are aware of, and sensitive to, current discussions of gender and criticisms, from both secular and religious women, of the patriarchal biases of *fiqh* rules. Education and employment, divorce laws and the question of *ḥijāb* are the main themes through which they address the issue of women’s rights and define a range of positions. It is common to find a single text arguing for gender equality on one issue (for example, women’s education and employment), but rejecting it on another (for example, divorce).¹⁸

In their defence of the *fiqh* notion of gender, Neo-Traditionalist texts have unwittingly come to modify some of the theories and assumptions underlying the *fiqh* gender discourse. For instance, they take issue with the assumption that “women are created of or for men”, contending instead that in the Islamic view women are equal

¹⁷ For a discussion of such writings in the Arab world, see Haddad (1998), Stowasser (1993); for Iran, see Mir-Hosseini (1999), for a sample of these texts in English, see Chaudhry (1995), Doi (1989), Khan (1995), Maudoodi (1983), Mutahhari (1991), Rahman (1986), Siddiqi (1952).

¹⁸ This is the case with all the texts in English mentioned in the previous footnote.

to men in creation, and do not depend on men for attaining perfection, but can attain their perfection independently. Yet they uphold the *fiqh* model of gender relations, reject gender equality and instead put forward the notion of complementarity of gender rights and duties. This notion, premised on a theory of the naturalness of *sharīʿa* law, goes 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 *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, they argue, because *sharīʿa* rulings reflect not only the Divine blueprint for society, but are also in line with human nature.

This new defence of the *fiqh* notion of women's rights has, ironically, further accentuated the internal contradictions and anachronisms in *fiqh* rules. For example, if women's sexual desire is greater than men's and in need of tighter control, and if *sharīʿa* laws both reflect Divine Justice and 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? Surely God would not give women greater sexual desire, and then allow men to be the polygamists? Such contradictions eventually led to modifications in the Traditionalist theory of sexuality, to eliminate its conflict with the newly advocated theory of the naturalness of *sharīʿa* law. This theory found currency in the twentieth century, and indeed has no precedent in classical *fiqh* texts.¹⁹

What is important to note here is that, in arguing for a new notion of marriage and sexuality, Neo-Traditionalist authors do not look to Islamic but to Western sources, namely psychological and sociological studies. Their readings of these sources are quite selective, and they cite as 'scientific evidence' only those that are in line with *fiqh* definitions of marriage. They are also selective in their usage of *fiqh* concepts and definitions, and they try to distance

¹⁹ In the Iranian context, Allameh Tabataba'i, the renowned Shīʿa philosopher, was the first to advance this theory in his monumental Qur'ānic commentary known as *Al-mīzān*, written in Arabic between 1954 and 1972. It was developed by his student, Murtaza Mutahhari, who spelled out the ideological dimension and turned it into a new defence of *sharīʿa* laws. See Mir-Hosseini (1999: 23–5).

themselves from those that are overtly gender biased. There is no allusion to marriage as a contract of exchange patterned on the sale contract, instead the emphasis is on the emotional and moral side of marriage.

To give a flavour, I quote from Ayatollah Murtaza Mutahhari's *The System of Women's Rights in Islam*, which in my view remains the most eloquent and refined text among those that hold that the concept of gender equality has no place in Islam. This is argued on the basis of *shari'ah* laws reflecting human nature (*fitra*). Though the language is different from classical *fiqh* texts, the male-centred view of creation is 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: 297)

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 unfaithfulness is a reaction to the unfaithfulness of the man. (*Ibid.*: 274)

Having modified the theory of sexuality underlying *fiqh* rules, Mutahhari now gives a new rationalization as to why, in Islamic law, the right of divorce is given to men.

Nature has deposited the key of the natural dissolution of marriage in the custody of man. In other words, it is man who by his own apathy and unfaithfulness towards his wife makes her cold and unfaithful. Conversely, if the indifference begins on the side of the wife, it does not affect the affection of the man, rather, incidentally, it makes the affection more acute. (*Ibid.*: 297)

The logical conclusion to be drawn is that there is no need for any change or reform of the divorce laws, or even in the form of divorce (i.e. *ṭalāq*, repudiation of the wife by the husband).

Sometimes these people ask: “Why does divorce take the form of a release, an emancipation? Surely it should have a judicial form.” To answer these people it should be said: “Divorce is a release in the same way that marriage is a state of dominance. If you can possibly do so, change the natural law of seeking a mate in its absoluteness with regard to the male and the female, remove the natural state of marriage from the condition of dominance; if you can, make the role of the male and female sexes in all human beings and animals identical in their relations, and change the law of nature. Then you will be able to rid divorce of its aspect of release and emancipation.” (*Ibid.*: 298)

With the rise of political Islam in the second part of the twentieth century, these texts and their gender discourse became closely identified with Islamist movements, whose rallying cry was the return to *sharīʿa* as embodied in *fiqh* rulings. Some of the reforms introduced earlier in the century by modernist governments in some Muslim countries were dismantled (for instance in Iran, Algeria and Egypt). Paradoxically, the Islamist attempt to translate *fiqh* notions of gender into policy became the catalyst for a critique of these notions and a spur to women’s increased activism. A growing number of women came to see no contradiction between fighting for equal rights and remaining good Muslims, no inherent or logical link between patriarchy and Islamic ideals. In so doing, they came to free their feminism from the straitjacket of anti-colonial and nationalist discourses. (see Mir-Hosseini 1999: 9)

A new phase began in the politics of gender, which gradually brought home to Muslim women from all walks of life the harsh reality of subjugation to *fiqh* when applied by the machinery of a modern state. Two crucial elements of this new phase have been that it placed women themselves—rather than the “status of woman”—at the heart of the battle between forces of traditionalism and modernism, and that a space has been opened where a critique of gender biases in Islamic law and culture can be sustained in ways that were previously impossible.

The Reformists: Gender Equality

At the close of the twentieth century, these developments gave rise to a second discourse which argues for gender equality in Islam on all fronts. This discourse is part of the new, Reformist religious thinking that is consolidating a conception of Islam and modernity as compatible, not opposed, and contends 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.²⁰

Unlike earlier discourses, the new one sees the gender inequality embedded in *fiqh* rules not as a manifestation of divine justice, but as a construction by male jurists which goes contrary to the very essence of divine will as revealed in the sacred texts of Islam. Again, in contrast to the other two discourses, the new one sees women's sexuality as defined and regulated by familial and social circumstances, not by nature and divine will. In this way, the new discourse has severed the link, implicit in all *fiqh* rulings, between constructions of gender rights and theories of sexuality. This can have important epistemological consequences, in the sense that it can remove the issue of sexuality or "women's status" from the domain of *fiqh* rulings. If this is taken to its logical conclusion, then it can be argued that some rules that have been hitherto claimed to be "Islamic", and part of the *shari'a*, are in fact the views and perceptions of some Muslims, and social practices and norms that are neither sacred nor immutable but human and changing.²¹

It is perhaps too early to say how and when this new discourse on women will make its impact and redress the inequalities inherent in orthodox interpretations of Islamic law. Both the new discourse and the reformist movement of which it is a part are still in a formative phase, and their fortunes are tied to political developments all over the Muslim world. But two remarks can be made at this stage.

First, the emerging discourse on women has the potential, in my view, to shift the old and tired debate on "Women's rights in Islam" onto new ground, to bring about a paradigm shift. This is achieved

²⁰ For a sample of the textual genealogy of this thinking, see Kurzman (1998).

²¹ For this discourse in Iran, see Mir-Hosseini (1999: Part III).

by severing the existing link between sexuality and gender rights, which underlies the inability of other Islamic discourses to deal with the issue of women's legal rights, despite the growing debate on women's rights. This disconnection can both free the advocates of this discourse from taking a defensive position and enable them to go beyond old *fiqh* wisdoms in search of new questions and new answers.

Secondly, by advocating a brand of feminism that takes Islam as the source of its legitimacy, the new discourse can challenge the hegemony of orthodox interpretations and question the legitimacy of the views of those who until now have spoken in the name of Islam.²² Such a challenge has been made possible, even inevitable, by Islamists' ideological construction of Islam, and the very methods and sources that Neo-Traditionalists used in their defence and rationalization of *fiqh* constructions of gender rights. By appealing to the believer's logic and reasoning, relying on arguments and sources outside religion, and imposing their vision of Islamic law through the machinery of a modern state, they have inadvertently paved the way for an egalitarian reading of the *shari'a*.

STRATEGIES FOR REFORM

Before discussing the kinds of strategies needed to achieve an equal construction of gender rights in Islamic law, let me return to the two questions raised earlier: how and why were constructions of gender in Islamic law premised on such a strong notion of inequality that in time they came to by-pass the objectives of the *shari'a*? Can there be an equal construction of gender rights in Islamic law?

I answered the first question in the context of the Traditionalist discourse, as found in classical *fiqh* texts. The gist of my argument there is that the genesis of gender inequality in Islamic law lies in the inner contradictions between the ideals of the *shari'a* and the social norms of Muslim cultures. While *shari'a* ideals call for freedom, justice and equality, Muslim social norms and structures in the formative years of Islamic law impeded their realization. Instead, these social norms were assimilated into *fiqh* rulings through a set

²² There is a growing literature on this; in addition to works mentioned in note 18, see Engineer (1992), Jawad (1998), Al-Hibri (1997).

of theological, legal and social theories and assumptions such as: “women are created of and for men”, “marriage as contract of sale”, “women are inferior to men”, “women need to be protected”, “men are guardians and protectors of women”, and “male and female sexuality differ and the latter is dangerous to the social order”. All these either were developed by the *fuqahā* themselves, or reflected the state of knowledge of the time, or were part of the cultural fabric of society. In this way, the science of *fiqh* became the prisoner of its own legal theories and assumptions, which in time came to by-pass the Qur’ānic call for justice and reform, thus negating the spirit of the *sharī’a*. As the *fiqh* construction of gender rights was more or less in line with prevalent social norms and values, it remained unchallenged until the twentieth century.

I explored the second question—the possibility of an equal construction of gender in Islamic law—through a discussion of the two new legal discourses that emerged in the twentieth century. The first—the Neo-Traditionalist—succeeded in rounding some of the harsher edges of classical *fiqh* notions of gender rights, but because of its defensive and ideological construction of Islam it was eventually appropriated by Islamist movements in the second part of the century. The second new discourse, which argues for gender equality in Islam, emerged in the closing years of the century as part of the new religious thinking, which displays a refreshing pragmatic vigour and a willingness to engage with non-religious perspectives. Its advocates do not reject an idea simply because it is Western, nor do they see Islam as a blueprint with an in-built programme of action for the social, economic, and political problems of the Muslim world. They are thus not only posing a serious challenge to totalitarian conceptions of Islam but carving a space within which equal constructions of gender in Islamic law can be achieved.

It is in the context of this second new discourse that I believe we need to explore strategies for the reform of Islamic law to accommodate women’s aspiration for equality and justice in contemporary Muslim societies. The first discourse, in my view, has not only exhausted its potential but has played its historical role. One can speak of two types of strategies: general and specific. While the first takes us into the domain of politics, conceptions of Islam and approaches to the sacred texts, the second pertains to the mechanisms available within Islamic law. Now that the political map of

the Muslim world is one of nation-states, and state legislation rather than *fiqh* texts defines what Islamic law is, the two types of strategies are necessarily intertwined.

In my view, instead of the search for an Islamic genealogy for feminism or human rights—the main concern of those who operated within the first discourse—we need to move beyond such a quest by placing the emphasis on understandings of religion, and how religious knowledge is produced. In this respect, the works of the new wave of Muslim intellectuals, such as Abdolkarim Soroush, can be of immense importance and relevance. Soroush makes a distinction between religion (*dīn*) and religious knowledge (*maʿrifat-e dīnī*), arguing that whereas the first is sacred and immutable, the second is human and evolves in time as a result of forces external to religion itself. Soroush’s interpretative-epistemological theory of the evolution of religious knowledge—known as “The Contraction and Expansion of *sharīʿa*”—makes it possible to reconcile faith with rationality, to be a Muslim in the modern world.²³ In his words:

Our understanding of revealed texts is contingent upon the knowledge already set around us; that is to say that forces external to Revelation drag our interpretation and understanding of it in various directions . . . Believers generally conceive of religion as something holy or sacred, something constant. You cannot talk about change or evolution of religious knowledge. They stick to the idea of fixity. But as I have demonstrated in my work, we have to make a distinction between religion on the one side and religious interpretation on the other. By religion here I mean not faith which is the subjective part of religion but the objective side which is the revealed text. This is constant, whereas our interpretations of that text are subject to evolution. The idea is not that religious texts can be changed but rather over time interpretations will change.

We are always immersed in an ocean of interpretations. The text does not speak to you. You have to make it speak by asking questions of it. Suppose that you are in the presence of a learned man but you do not ask him any questions and he stays silent. You are obviously not going to benefit from his knowledge. If you do ask him questions, you will draw knowledge according to the level of your questions. If the questions are learned, the answers will also be profound. Therefore, interpretation depends on us. A layman’s interpretation is bound to be different from a philosopher’s understanding.

²³ For summaries of this theory in English, see Soroush (1998, 2000).

Revelation does not show us its secrets by speaking to us directly. We have to go and excavate those and find the jewels that are there. All we gain and get from religion is interpretation. (Soroush 1996)

Such an approach to religious texts can in time open the way for radical and positive changes in Islamic law to accommodate concepts such as gender equality and human rights.²⁴ Whether this will ever happen, and whether these concepts will ever be reflected in state legislation, depends on the balance of power between Traditionalists and Reformists in each Muslim country, and on women's ability to organize and participate in the political process, and to engage with the advocates of each discourse.

But it is important to remember two things. First, *fiqh* is reactive, in the sense that it reacts to social realities, to the situation on the ground, and that it has both the potential and the legal mechanisms to deal with women's demand for equality in law. Here I present a selection of legal mechanisms which have successfully been used:

- Insertion of stipulations in the marriage contract to place a woman in a better negotiating situation if her marriage breaks down. For instance, the right to choose the place of residence (which gives her freedom of movement and enables her to continue to demand *nafaga* after leaving the marital home), the right to study and work (which frees her from her husband's consent), the delegated right to divorce (this can be conditional, for example on the husband taking a second wife, or unconditional). But, as I have argued elsewhere, such stipulations in the marriage contract can be effective only if they are compulsory, that is, if they are automatically inserted in every marriage contract by the state, and only if they are unconditional. Insertion of stipulations has been used in Iran as a means of enlarging women's access to divorce

²⁴ Although Soroush himself, in line with many other religious intellectuals in Iran, does not subscribe to the gender equality perspective, his ideas have not only laid the foundation of what became later known in Iran (following President Muhammad Khatami's election in 1997) as the reform movement, but have enabled religious women like those in *Zanan* magazine to reconcile their faith with their feminism. For Soroush's ideas on gender and my debate with him, see Mir-Hosseini (1999: Chapter 7) and Mir-Hosseini (2002).

both in pre- and post-revolutionary times (see Mir-Hosseini forthcoming).

- Redefining the boundary between the moral and legal rights in marriage so as to expand the wife's rights and limit the husband's arbitrary power. For instance, the concept of *'usur va haraj* or *zarar*—that is, hardship or harm—can be defined so as to give a woman better access to divorce. Iran and Egypt are among the countries that have expanded the grounds upon which a woman can obtain a court divorce.
- Invoking Qur'ānic verses or *uṣūl-al-fiqh* arguments for change. An example of the first is the most recent divorce law in Egypt which enables a woman to obtain a *khul'* divorce without her husband's consent if she renounces all her financial rights and if she returns the *mahr*. *Sūrat al-Baqara* (2: 229) is quoted to prove the validity of the law. An example of the second is the kind of argument promoted by supporters of 'dynamic *fiqh*' in Iran in response to women's demand for equal rights. One of them is: when there is change in the subject (*mawḍū'*) of a *sharī'a* ruling (*ḥukm*), either internally or externally, naturally there will be a need for a different ruling. This argument was advanced in 1988, when Ayatollah Khomeini made the purchase and sale of chess sets *ḥalāl*, as usage had changed. It was forbidden, it was argued, when chess was used for gambling, whereas now, according to expert evidence, chess is a game, a mental exercise. In other words, the rule that chess used for gambling is forbidden has not changed; what has changed is the subject of the rule, i.e. the usage of chess, which necessitated a new ruling which makes chess licit. This is a form of *tanqīḥ al-manāt*, which technically means "connecting the new cause to the original cause by eliminating the discrepancy between them".²⁵ The same logic can be applied to bring about new rulings relating to women, as the link between *'illa* and *ḥukm* in many rulings needs to be re-examined in the light of changes that have occurred in modern times with respect to women's status in society and gender relations.

²⁵ Literally, *tanqīḥ* means purifying, *manāt* means cause; it implies that a ruling (*ḥukm*) may have more than one cause, and the jurist must identify the proper one. See Kamali (1991: 213).

Secondly, *fiqh* is still the monopoly of male scholars, whose knowledge of women comes from texts and manuals, all written by men, all constructed with juristic logic, reflecting the realities of another age and a different set of interests. This monopoly must be broken; this can be done only when Muslim women participate in the production of knowledge, when they are able ask new and daring questions.²⁶ It is then that “Revelation” can speak to us, and “show us its secrets”.

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²⁶ The process has already started, but there is a long way to go for a critical mass. For instance, Ahmed (1992), Al-Hibri (1982), Hassan (1996), Mernissi (1991), Wadud (1999), Mir-Hosseini (1999), Barlas (2002), Jawad (1998).

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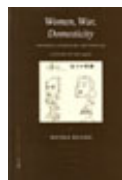


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