

GENDER AND EQUALITY IN
MUSLIM FAMILY LAW
Justice and Ethics in the
Islamic Legal Tradition

EDITED BY
ZIBA MIR-HOSSEINI, KARI VOGT,
LENA LARSEN AND CHRISTIAN MOE

I.B. TAURIS

LONDON · NEW YORK

1

JUSTICE, EQUALITY AND MUSLIM FAMILY LAWS

New Ideas, New Prospects¹

Ziba Mir-Hosseini

Contemporary notions of justice, informed by the ideals of human rights, equality and personal freedom, depart substantially from those that underpin rulings in classical *fiqh* (Islamic jurisprudence) and established understandings of the Shari'a. This disjunction is a central problem that permeates debates and struggles for an egalitarian family law in Muslim contexts.

For instance, take the following two statements:

The fundamentals of the Shari'a are rooted in wisdom and promotion of the welfare of human beings in this life and the Hereafter. Shari'a embraces Justice, Kindness, the Common Good and Wisdom. Any rule that departs from justice to injustice, from kindness to harshness, from the common good to harm, or from rationality to absurdity cannot be part of Shari'a.²

The wife is her husband's prisoner, a prisoner being akin to a slave. The Prophet directed men to support their wives by feeding them with their own food and clothing them with their own clothes; he said the same about maintaining a slave.³

Both statements are by Ibn Qayyim al-Jawziyya (1292–1350), a fourteenth-century jurist and one of the great reformers of his time.⁴ The first statement speaks to all

contemporary Muslims, and both advocates of gender equality and their opponents often use it as an epigraph.⁵ But the second statement, which reflects classical *fiqh* conceptions of marriage, goes against the very grain of what many contemporary Muslims consider to be 'Justice, Kindness, the Common Good and Wisdom'. Consequently, Muslim legal tradition and its textual sources have come to appear hypocritical or, at best, contradictory. This presents those who struggle to reform Muslim family laws with a quandary and a host of questions: what is the notion of justice in Islam's sacred texts? Does it include the notion of equality for women before the law? If so, how are we to understand those elements of the primary sources of the Shari'a (Qur'an and hadith) that appear not to treat men and women as equals? Can gender equality and Shari'a-based laws go together?

These questions are central to the ongoing struggle for an egalitarian construction of family laws in Muslim contexts and have been vigorously debated among Muslims since the late nineteenth century.⁶ Some consider religion to be inherently patriarchal and any engagement with it to be a futile and incorrect strategy;⁷ others argue that, given the linkage between the religious and political dimensions of identity in Muslim contexts, the path to legal equality for women in those contexts necessarily passes through religion.⁸ This chapter aims to explore these questions and address what often remains neglected in this debate: how Muslim women's struggle for equality is embedded in the intimate links between theology and politics. My central argument has two elements. First, the struggle is at once theological and political, and it is hard and sometimes futile to decide when theology ends and politics begin. Secondly, in the last two decades of the twentieth century a growing confrontation between political Islam and feminism has made the intimate links between theology, law and politics more transparent. New voices and forms of activism have emerged that no longer shy away from engagement with religion. A new discourse, which came to be known as 'Islamic feminism', started to challenge the patriarchal interpretations of the Shari'a from within.

After a brief examination of the notion of gender justice in classical *fiqh* texts, I sketch twentieth-century developments in the politics of religion, law and gender in Muslim contexts. This is followed by a discussion of two reform texts that negotiate and bridge the chasm – the dissonance – between contemporary notions of justice and gender rights and those informed by classical *fiqh* rulings, and that lay the groundwork for an egalitarian family law. These are the book *Women in the Shari'a and in Our Society* (1930) by Tunisian religious reform thinker al-Tahir al-Haddad, and the article 'The status of women in Islam: a modernist interpretation' (1982) by Pakistani reform thinker Fazlur Rahman. I have chosen to focus on these two texts because they belong to two key moments in the Muslim debate and struggle to define the scope of women's rights in the twentieth century. Al-Haddad's book appeared in the context of early twentieth-century debates and the early phase of the codification of Muslim family law; Fazlur Rahman's article

was published when political Islam was at its zenith and Islamists, trumpeting the slogan ‘return to Shari‘a’, were dismantling some earlier reforms. Both thinkers met with a great deal of opposition from the clerical establishments in their own countries at the time, but their ideas, which conservative clerics declared to be heretical, proved to be instrumental in shaping later discourses and developments. Al-Tahir al-Haddad’s ideas informed Tunisian family law, which was codified in 1956, and to this day remains the only Muslim code that bans polygamy. Fazlur Rahman developed a methodology and framework that, by the end of the century, facilitated the emergence of feminist scholarship in Islam. I conclude by considering the implication of this scholarship with regard to changing the terms of reference of the debates over Muslim family law reforms.

1. Men’s authority over women: *qiwāma* as a legal postulate

At the heart of the unequal construction of gender rights in Muslim legal tradition lies the idea that men have guardianship or *qiwāma* over women. Verse 4:34 (from which the idea is derived) is commonly understood as mandating men’s authority over women, and is frequently invoked as the main textual evidence in its support. This verse is often the only verse that ordinary Muslims know in relation to family law. It reads:

Men are *qawwāmūn* (protectors/maintainers) in relation to women, according to what God has favored some over others and according to what they spend from their wealth. Righteous women are *qānitāt* (obedient) guarding the unseen according to what God has guarded. Those [women] whose *nushūz* you fear, admonish them, and abandon them in bed, and *adribuhunna* (strike them). If they obey you, do not pursue a strategy against them. Indeed, God is Exalted, Great.⁹

Since the early twentieth century, this verse has been the focus of intense contestation and debate among Muslims, centring on the four terms I have highlighted. There is now a substantial body of literature that attempts to contest and reconstruct the meanings and connotations of these terms as understood and turned into legal rulings by classical jurists.¹⁰ Recent contributions have been most concerned with the last part of the verse, and the issue of domestic violence.¹¹ Neither this concern nor the contestation over the meanings of these terms is new; they occupied the minds of classical Muslim jurists when they inferred from the verse legal rulings regarding the rights and duties of spouses in marriage.¹² But the nature and the tone of the debates are new. Juristic disagreements were not, as now, about the legitimacy or legality of a husband’s right to beat his wife if she defies his authority; they were about the extent and harshness of the beating he should administer. In classical *fiqh* texts, the validity and inviolability of men’s superiority and authority

over women was a given; the verse was understood in this light, and the four key terms were used to define relations between spouses in marriage, and notions of gender justice and equity. As we shall see, all revolved around the first part of the verse and the notion that men are women's *qawwāmūn*, protectors and providers.

Let us call this the *qiwāma* postulate,¹³ which I shall argue is the lynchpin of the whole edifice of the patriarchal model of family in classical *fiqh*. We see the working of this postulate in all areas of Muslim law relating to gender rights, but its impact is most evident, as I have argued elsewhere, in the laws that classical jurists devised for the regulation of marriage.¹⁴ They defined marriage as a contract (*nikāh*), and patterned it after the contract of sale (*bayʿ*). The contract renders sexual relations licit between a man and woman, and establishes a set of default 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, and are embodied in two central legal concepts: *tamkīn* (submission) and *nafaqa* (maintenance).¹⁵ *Tamkīn*, obedience or submission, specifically with regard to sexual access, is the husband's right and thus the wife's duty; whereas *nafaqa*, maintenance, specifically shelter, food and clothing, is the wife's right and the husband's duty. The wife loses her claim to maintenance if she is in a state of *nushūz* (disobedience). The husband has the unilateral and extra-judicial right to terminate the contract by *ṭalāq* or repudiation; a wife cannot terminate the contract without her husband's consent or the permission of the Islamic judge upon producing a valid reason. There are numerous moral injunctions that could have limited men's power to terminate marriage; for instance, there are sayings from the Prophet to the effect that *ṭalāq* is among the most detested of permitted acts, and that when a man pronounces it, God's throne shakes. Yet classical *fiqh* made no attempt to restrict a man's right to *ṭalāq*. He needs neither grounds nor the consent of his wife.

There were, of course, differences between and within the classical schools over what constituted and what defined the three interrelated concepts – *nafaqa*, *tamkīn* and *nushūz* – but they all shared the same conception of marriage, and the large majority linked a woman's right to maintenance to her obedience to her husband. The reason for their disagreement, Ibn Rushd tells us, was 'whether maintenance is a counter-value for (sexual) utilization, or compensation for the fact that she is confined because of her husband, as the case of one absent or sick'.¹⁶ And it was within the parameters of this logic – men provide and women obey – that notions of gender rights and justice acquired their meanings. Cognizant of the inherent tension in such a construction of marriage, and seeking to contain the potential abuse of a husband's authority, classical jurists narrowed the scope of this authority to the unhampered right to sexual relations with the wife, which in turn limited the scope of her duty to obey to being sexually available, and even here only when it did not interfere with her religious duties (for example, when fasting during

Ramadan, or when bleeding during menses or after childbirth). Legally speaking, if we take the *fiqh* texts at face value, according to some a wife had no obligation to do housework or to care for the children, even to suckle her babies; for these, she was entitled to wages. Likewise, a man's right to discipline a wife who was in the state of *nushūz* was severely restricted; he could discipline her, but not inflict harm. For this reason, some jurists recommended that he should 'beat' his wife only with a handkerchief or a *miswāk*, a twig used for cleaning teeth.¹⁷

Whether these rulings corresponded to actual practices of marriage and gender relations is another area of inquiry, one that recent scholarship in Islam has only just started to uncover.¹⁸ What is important to note here is that the *qiwāma* postulate served as a rationale for other legal disparities – such as men's rights to polygamy and unilateral repudiation, women's lesser share in inheritance, or the ban on women being judges or political leaders. That is to say, women cannot occupy positions that entail the exercise of authority in society because they are under their husband's authority – and are thus not free agents and not able to deliver impartial justice. Similarly, since men provide for their wives, justice requires that they be entitled to a greater share in inheritance. These inequalities in rights were also rationalised and justified by other arguments, based on assumptions about innate, natural differences between the sexes: women are by nature weaker and more emotional, qualities inappropriate in a leader; they are created for childbearing, a function that confines them to the home, which means that men must protect and provide for them.¹⁹

2. The reform and codification of classical *fiqh* provisions of family law²⁰

In the course of the twentieth century, as nation-states emerged among Muslim populations, classical *fiqh* conceptions of marriage and family were partially reformed, codified and grafted onto modern legal systems in many Muslim-majority countries.²¹ The best-known exceptions were Turkey and Muslim populations that came under communist rule, which abandoned *fiqh* in all areas of law, and Saudi Arabia, which preserved classical *fiqh* as fundamental law and attempted to apply it in all spheres of law. In countries where classical *fiqh* remained the main source of family law, the impetus and extent of family law reform varied, but, with the exception of Tunisia, which banned polygamy, on the whole the classical *fiqh* construction of the marital relationship was retained more or less intact. Reforms were introduced from within the framework of Muslim legal tradition, by mixing principles and rulings from different *fiqh* schools and by procedural devices, without directly challenging the patriarchal construction of marriage in *fiqh*.²² They centred on increasing the age of marriage, expanding women's access to judicial divorce and restricting men's right to polygamy. This involved requiring the state registration of marriage and divorce, or the creation of new courts to deal

with marital disputes. The state now had the power to deny legal support to those marriages that were not in compliance with official state-sanctioned procedures.

All these changes transformed relations between Muslim legal tradition, state and social practice. Codes and statute books took the place of *fiqh* manuals; family law was no longer solely a matter for private scholars – the *fuqahā'* – operating within a particular *fiqh* school, rather it became the concern of the legislative assembly of a particular nation-state. Confined to the ivory tower of the seminaries, the practitioners of *fiqh* became increasingly scholastic, defensive and detached from realities on the ground. Patriarchal interpretations of the Shari'a acquired a different force; they could now be imposed through the machinery of the modern nation-state, which had neither the religious legitimacy nor the inclination to challenge them.

With the rise of Islam as both a spiritual and a political force in the latter part of the twentieth century, Islamist political movements became closely identified with patriarchal notions of gender drawn from classical *fiqh*. Political Islam had its biggest triumph in 1979, in the popular revolution that brought clerics into power in Iran. This year also saw the dismantling of some of the reforms introduced earlier in the century by the modernist governments – for instance, in Iran and Egypt – and the introduction of the Hudood Ordinances in Pakistan, which extended the ambit of *fiqh* to certain aspects of criminal law. Yet this was the year when the UN General Assembly adopted CEDAW, which gave gender equality a clear international legal mandate.

The decades that followed saw the concomitant expansion, globally and locally, of two powerful but seemingly opposed frames of reference. On the one hand, the human rights framework and instruments such as CEDAW gave women's rights activists what they needed most: a point of reference and a language with which to resist and challenge patriarchy. The 1980s saw the expansion of the international women's movement, and the emergence of NGOs with international funds and transnational links that gave women a voice in policy-making and public debate over the law. On the other hand, Islamist forces – whether in power or in opposition – started to invoke 'Shari'a' in order to dismantle earlier efforts at reforming and/or secularising laws and legal systems. Tapping into popular demands for social justice, they presented this dismantling as 'Islamisation', and as the first step in bringing about their vision of a moral and just society.

In other words, the twentieth century witnessed the widening of the chasm between notions of justice and gender rights found in Muslim legal tradition and those that were being adopted internationally. This chasm, this dissonance, was, as we shall see, as much political as epistemological. I now turn to the texts of al-Tahir al-Haddad and Fazlur Rahman, which try to negotiate and bridge the chasm. They appeared at two critical moments in the twentieth-century politics of modernism: the struggle against colonial powers and the challenges posed by political Islam. At

both moments, the issue of gender rights and Muslim legal tradition became part of an ideological battle between different forces and factions.

3. Al-Tahir al-Haddad (1899–1935): a lonely reformer

Al-Tahir al-Haddad's book *Our Women in the Shari'a and Society* is part of a considerable nationalist and reformist literature dating to the early twentieth century and the fierce debate on the 'status of women in Islam' ignited by the encounter with Western colonial powers.²³ Two genres of texts emerged. The authors of the first more or less reiterated the classical *fiqh* positions, and confined themselves to enumerating the rights that Islam conferred on women. Texts of the second genre, the most influential of which was Qasim Amin's *The Liberation of Women* (1899), offered a critique of *fiqh* rulings and proposed reforms to realise women's rights. They called for women's education, for their participation in society and for unveiling. One subtext in these works was the refutation of the colonial premise that 'Islam' was inherently a 'backward' religion and denied women their rights; another was the quest for modernisation and the reform of laws and legal systems as part of the project of nation-building. Without women's education and their participation in society, the modern, independent and prosperous state for which they were struggling could not be achieved.²⁴

Al-Haddad's book belongs to the second genre, and is not free of the ambivalence that permeated the nationalist/modernist texts of the time, which have rightly been criticised for their patriarchal undertones.²⁵ But it differs from the rest in two respects. First, in his proposals for reform al-Haddad went much further than other twentieth-century reformers, even arguing for equality in inheritance, an issue that became a priority for Muslim women's movements only in the next century.²⁶ Secondly, al-Haddad provided a framework for rethinking *fiqh* legal concepts, and offered a definition of marriage that was premised on mutual affection and responsibility. In that sense, it is indeed a feminist text.

Al-Haddad received only a traditional education, first at Qur'anic school and later at the Great Mosque of Zaytouna, where he studied Islamic sciences.²⁷ He obtained accreditation as a notary in 1920, but opted for journalism instead of a seminary life. As a journalist he became involved in the movement for independence from France, and joined the Dustur Party, which promoted a vision of a socially just, democratic and modern Tunisia. Critical of its policies, however, al-Haddad left the party after a short time to become active in labour movements, helping to launch the country's first independent trade union. These activities sensitised al-Haddad and made him deeply concerned about the situation of workers and women, and the injustices to which they were subjected, for which he held erroneous interpretations of Islam's sacred texts accountable. In 1927, he published a book on labour law, and three years later his second book, *Our Women in the*

Shari'a and Society, which contains his critique of how women are treated in Tunisian society. The book caused immediate outrage: al-Haddad was denounced and declared an apostate, and Zaytouna revoked his degree and notary licence. Many of his modernist and nationalist friends deserted him; they were in a politically difficult situation at the time, and an easy way out was to compromise on an issue that was sensitive and was already triggering the anger of the religious establishment and conservative forces.²⁸ Al-Haddad died in 1936 in poverty and isolation.

4. Al-Haddad's framework and proposals for reform

What was it in al-Haddad's book that provoked such a reaction from his seminary teachers and colleagues? The book has two parts. The first, 'Legislative section: women in Islam', contains al-Haddad's critique of *fiqh* rulings and his proposals for reform. In the final chapter of this part, he poses a set of questions to the scholars and jurists, including his teachers at Zaytouna, who included eminent scholars of the time such as al-Tahir ibn 'Ashur,²⁹ a former judge and a leading scholar of Maliki law. He did this 'in the hope of getting answers from them that would elucidate our position and where we stand in our reform of the judiciary which is necessary for the benefit of justice and progress for women' (p. 81).³⁰ This chapter – fascinating to read – reveals the distance between al-Haddad's vision of Shari'a and that of the '*ulamā*' of his time. It also gives us a glimpse of why al-Haddad caused such outrage.

The second part, 'Social section: how to educate girls to be wives and mothers', is his critique of the current situation and his proposals for socio-cultural change. I confine my discussion to the first part, which contains al-Haddad's framework for redressing gender inequalities in Muslim legal tradition. Al-Haddad is neither apologetic nor defensive. 'I am not oblivious to the fact that Shari'a accorded lower status to women than men in certain situations,' and that the sacred texts 'make us believe that in essence [Islam] favoured men over women.' But he goes on to argue the need to go beyond the literal meanings of the two main sources of the Shari'a, the Qur'an and the Prophet's Sunna: 'if we look into their aims, we realize that they want to make woman equal to man in every aspect of life' (p. 104).

There are two related elements in al-Haddad's approach to Islam's textual sources. The first is the distinction between laws that are essential to Islam as a religion, and those that are contingent and time- and context-bound; in his words:

[W]e should take into consideration the great difference between what Islam brought and its aims, which will remain immortal in eternity, such as belief in monotheism, moral behaviour, and the establishment of justice, dignity and equality among people. Furthermore, we have to consider the social situation and the deep-rooted mindset that existed in Arab society in the pre-Islamic era when Islam

first emerged. The prescriptions for confirming or amending previous customs remained in force as long as these practices existed. Their disappearance, however, did not harm Islam as practices such as slavery, polygamy, etc. cannot be considered inherent to Islam. (p. 36)

The second element in his perspective is what he calls the ‘policy of gradualism’ (*siyāsa tadrījiyya*), which he argues governs the process of legislation in the Qur’an and Sunna. In Islam the ‘highest aim is equality among all God’s creatures’, but it was not possible to achieve this aim in the seventh century and during the lifetime of the Prophet; ‘the general conditions in the Arabian Peninsula forced the legal texts to be laid down gradually, especially those concerning women’ (p. 104). ‘Islam is the religion of freedom,’ but it tolerated ‘the selling and buying of human beings as goods, and their exploitation as animals for the duration of their lives’ (p. 48). This toleration was a concession to the socio-economic imperatives of the time. It was not then possible to do away with slavery all together, but the Qur’an and the Prophet encouraged the freeing of slaves, and made it crystal clear that the principle is freedom. For exactly the same reason, gender hierarchy was tolerated then, but the principle in Islam remains equality.

Although Islam highlights a number of differences between man and woman in several verses in the Qur’an, this does not in any way affect the principle of social equality between them when the necessary conditions were [to become] present over time since Islam in essence aims for complete justice and fairness. It introduced its laws and gradually adapted them according to the capacity of people to obey them. There is no reason to believe that the gradual changes that took place in the life of the Prophet should stop after the passing away of the Prophet. The gradual changes in the Shari’a law took place at a pace that could be sustained by society and there are clear examples to testify to that. (p. 48)

The Qur’an’s gradual ban on drinking wine, al-Haddad argues, is a clear example of the ‘policy of gradualism’ in the formulation of legislation that unfolded during the lifetime of the Prophet. At first, drinking was tolerated; then later verses abrogated the earlier one and the ban was introduced. But he maintains that other issues, such as slavery, polygamy, men’s authority over women and unilateral divorce were to be resolved later. Slavery was eventually abolished, when societies evolved and humans realised its evil; abolition took place first in the West, Muslim countries followed suit, and Shari’a-based laws relating to slavery all became obsolete. Now, he argues, the time has come to honour ‘Islam’s love for equality’ and to abolish unjust and discriminatory laws that have kept women backward and denied them their rights. To do so we must, first, discover the principle and the objective behind Qur’anic laws, and, secondly, understand that they were the means to an end;

they were not meant to be eternal or rigid in form, they are just shells and can be changed when they no longer serve the social objectives of Islam – freedom, justice and equality. These laws were revealed to the Prophet so that he could reform and change the unjust values and practices of his time.

With respect to family law, there are, again, two important elements in al-Haddad's approach. First, he rejects the argument that women are unfit for certain activities and that their primary role is motherhood. Islam does not assign fixed roles to men and women. 'Islam truly is a religion that is rooted in reality and evolves as it changes over time; herein lies the secret of its immortality. Nowhere in the Qur'an can one find any reference to any activity – no matter how elevated it may be – whether in government or society, that is forbidden to woman' (p. 39). Yes, men and women are different; women give birth and are physically and emotionally suited to care for children, but this in no way means that Islam wanted them to be confined to the home and to domestic roles. He argues for the creation of institutions to liberate women. As human societies progress and evolve, new institutions emerge to liberate women, such as crèches and nurseries, as in France and other nations that have advanced (p. 60). The problem is not with Islam but with patriarchy, with reducing women to sex objects; it is 'primarily due to the fact that we [men] regard them [women] as vessels for our penises'.³¹

Secondly, he breaks away from the transactional logic of marriage in *fiqh*, and places mutual affection and cooperation at the centre of the marital relationship.

Marriage involves affection, duties, intercourse and procreation. Islam regards affection as the foundation of marriage since it is the driving force, as witnessed by the following verse:

And among His signs is this, that He created for you mates from among yourselves, that you may dwell in tranquillity with them, and He has put love and mercy between your (hearts): Verily in that are signs for those who reflect.³²

As for duty, this refers to the fact that husband and wife have to work together to build a life. In this sense, duty both preserves and enhances the emotional ties that exist between them and which enable them to carry out their duty wilfully. (p. 57)

Having shifted the focus from verse 4:34 to verse 30:21, his starting point for discussing marriage becomes freedom of choice (*hurriyyat al-ikhtiyār*). Love and compassion cannot develop in a relationship that is imposed; women, like men, must have the freedom to choose their spouses and to be able to leave an unwanted marriage, and this is what Islam mandates. He then goes on to break the link between maintenance and obedience as constructed in classical *fiqh* texts.

If we look at the origin of the Shari'a in order to understand the meaning of duty in matrimony, we would find that it is incumbent upon the man to support his wife

and children financially, on the grounds that they are not able to do so themselves. With the exception of this, no duty is specified, for either the husband or the wife, to dictate how they behave within the marriage or toward each other. Whatever duties the man has towards his wife, they are equal to the duties she has towards him. This is illustrated in the following verse 'Women have such honourable rights as obligations.' (p. 59)

The verse to which al-Haddad refers here (2:228) goes on to say 'but men have a degree (of advantage) over them';³³ this part of the verse is often invoked in conjunction with 4:34 as textual evidence of men's superiority in order to justify their authority over women. But his reading of these two verses is different from that of the classical jurists. He argues that both verses must be read in the context of the marriage and divorce practices of the time, and the privileges that men enjoyed before Islam: both verses aim to restrain these privileges. This becomes clear when we read these verses in their entirety and in conjunction with those that precede and follow them. In verse 4:34, a husband is required to provide for his wife, so that 'the continued growth of the world' (p. 59) can be ensured; he was given the right to 'correct' his wife's behaviour in order to prevent a greater ill, divorce. According to al-Haddad, this verse is not speaking about the rights and duties of spouses, but about the course of action to be taken when there is marital discord, and it offers ways to resolve it. This becomes clear in the verse that follows, which reads 'if you have reason to fear that a breach might occur between a couple, appoint an arbiter from among his people and an arbiter from among her people; if they both want to set things aright, God may bring their reconciliation' (4:35). Men are addressed because they are the ones who, then as now, have the power to terminate marriage, and the objective was to restrain this power and give the marriage a chance. Likewise, with respect to verse 2:228, which the jurists quote to argue for men's superiority, al-Haddad maintains that it must be read in its entirety and in connection with the preceding and following verses,³⁴ which are all related to marital separation and the protection of women. The final part of the verse speaks of men's power to divorce, and this is what 'men having a degree over women' is about: divorce was in their hands.

After a lengthy discussion of various forms of divorce in *fiqh* and the injustices and suffering that they entail for women, al-Haddad concludes that men's right to *talāq* (i.e. unilateral and extrajudicial divorce) must be abolished:

[T]here is no other way of dealing with matters relating to marriage and divorce cases, except through the courts so that everything is done in conformity with the spirit and the letter of the Shari'a. (p. 72)

Asserting that 'the Qur'anic text generally sets forth means of achieving justice between man and woman' (p. 79), al-Haddad also argues for the abolition of

polygamy, which he contends 'has no basis in Islam; rather, it is one of the evils of the pre-Islamic era which Islam challenged through its gradualistic method' (p. 63). Polygamy is unjust, inimical to the very foundation of marriage, which is based on affection and harmony between the couple. It was one of those practices that Islam wanted to eradicate but had to tolerate and could only modify. The Qur'an limited the number of wives a man could have to four, and stipulated conditions of just equality among the wives; but made it clear that such justice is impossible to establish, however hard a man tries. Here al-Haddad quotes verse 4:3, which says 'Marry such women as seem good to you, two, three, four; but if you fear you will not be equitable, then only one.' He also rejects the conventional argument that the Prophet himself was polygamous, and thus his practice should be followed:

The fact that the Prophet had many wives does not mean that he legislated for this practice or wanted the Muslim community to follow this path. Indeed he had taken these wives before the limitation had been imposed. It is worth bearing in mind that the Prophet was also a human being, and as such was subject to human tendencies as regards issues that had not been sent down to him as revelation from the heavens. (p. 64)

In short, al-Haddad argues for legal equality for women in all areas, including in inheritance. According to him, the Qur'an's assignment of a lesser share of inheritance to women was due to the conditions of the time; it was a concession to the social order. But here again equality is the principle and when we look closely, we find that,

Islam did not allocate a lesser share in the woman's inheritance compared to that of man as a principle applicable to all cases. It gave her the same share in the case of parents inheriting from their dead son when there is a male child and if it involves inheritance among blood siblings ... (p. 47)

In other instances where women were allocated lesser shares, it had to do with the context; the Arabs then would not have accepted equal shares for women, which they would have seen as unjust, as women did not participate in warfare and were under men's protection. But 'there is no reason why such a position should remain fixed in time without change'.

Al-Haddad's ideas and proposals for reform were indeed radical for the time, which to a large extent explains the harsh reaction of the clerical establishment towards his book. A year later (1931), one of the officials of Zaytouna, Saleh ibn Murad, published a book in response, entitled *Mourning over al-Haddad's Woman or Warning off Errors, Apostasy and Innovation*. But, in 1956, in a changed political context, when the nationalists/modernists had prevailed and Tunisia was an

independent nation-state, many of al-Haddad's proposals for reform were adopted. Under the leadership of Habib Bourguiba, the modernists embarked on the reform of the judiciary, and among their first acts was the codification of family law. The new code made polygamy illegal and gave women equal access to divorce and child custody, though the inheritance laws remained unchanged. All these reforms were, of course, introduced from above, as women were still not vocal participants in the debate.³⁵

5. Fazlur Rahman (1919–1988): reforming Islamic intellectual tradition

Fazlur Rahman was another daring twentieth-century reformer whose ideas met with a great deal of opposition in his own country, Pakistan, though his situation and background were different from those of al-Haddad. More of a scholar than an activist, Fazlur Rahman's intellectual genealogy is through reform thinkers in the Indian subcontinent.³⁶ Furthermore, unlike al-Haddad, the formation of his ideas belongs to the tail end of Western colonialism in Muslim contexts, when processes of nation-building, modernisation and reform of the judiciary, and codification of family law were well under way.³⁷

Born in pre-partition India, Fazlur Rahman was instructed in traditional Islamic sciences by his father,³⁸ and went on to study Arabic and Islamic studies at Punjab University in Lahore, and Islamic philosophy at the University of Oxford. After graduation in 1958, he taught at universities in the United Kingdom and Canada until 1961, when he was invited by General Ayub Khan to help with the reform of religious education in Pakistan. He became director of the Islamic Research Institute, which had been recently created to provide intellectual backing for Ayub Khan's modernisation project and to steer the path of reform in ways that would not offend the religious establishment.³⁹ He became entangled with the politics of modernisation and reform in Pakistan, and his reformist ideas and approach to Islamic tradition from a critical perspective made him a target for Ayub Khan's influential religious and political opponents. The fiercest opposition came from religious conservatives, and was centred on the question of women's rights and the reform of family law. Rahman began to receive death threats, and eventually decided to return to academic life in the West. In 1968 he was appointed professor of Islamic thought at the University of Chicago, where he remained until his death in 1988, leaving behind an impressive body of scholarship. His work, in turn, has been the subject of scholarship, and played an important role in the USA in the development of Islamic studies.⁴⁰ But his vast output, all in English, remains almost unknown in the Arab world and in traditional religious circles, and his influence in his own country, Pakistan, is limited.

Unlike al-Haddad, Rahman did not write a book about women's rights, nor did he offer specific proposals for reforming Muslim family law. But his writings

are permeated by a critique of patriarchal readings of Islam's sacred texts, and his framework for interpreting the ethico-legal content of the Qur'an has been crucial to feminist scholarship in Islam.⁴¹ He considered the reform of Muslim family laws to be, on the whole, moving in the right direction, and he saw the weight of conservatism in Muslim contexts as the main obstacle to bringing about radical reform. In 'A survey of modernization of Muslim family law', an article published in the 1980s, Rahman opens the discussion by pointing to the fate of al-Haddad, and the harsh reaction his book and proposals for family law reform received from the very clerics who had not been perturbed by his earlier quasi-Marxist book on the rise of trade unionism and the interpretation of history.⁴²

In his approach to Islam's sacred texts, Rahman shares al-Haddad's historicism and gradualism in revelation and legislation. According to him, the Qur'an 'is the divine response, through the Prophet's mind, to the moral-social situation of the Prophet's Arabia, particularly to the problems of commercial Meccan society of the day'. Not all these solutions are relevant or applicable to all times and all contexts. What is immutable and valid are the moral principles behind these solutions. These moral principles, the Shari'a, show us how to establish a society on earth where all humans can be treated as equals as they are equal in the eyes of God. This is at once 'the challenge and the purpose of human existence, the trust – *amāna* – that humanity accepted at creation'.⁴³

But Muslims betrayed this trust as, in the course of the historical development of Islam, the moral principles behind Qur'anic laws were distorted. This distortion has its roots in political developments after the Prophet's death and in the subsequent decay and stagnation of Islamic intellectualism, which predates Islam's encounter with Western colonial powers. Muslims failed to create a viable system of Qur'an-based ethics, and from the outset jurisprudence has overshadowed the science of ethics in Islam; in developing the latter, Muslim scholars relied more on Persian and Greek sources than on the Qur'an itself. The link between theology, ethics and law will remain tenuous as long as Muslims fail to make the crucial distinctions in the Qur'an and the Prophet's Sunna, between essentials and accidentals, and between prescription and description. They mistakenly view the Qur'an as a book of law, and take its legal and quasi-legal passages to be relevant to all times and places.

To revive the élan of the Qur'an, Rahman argues, Muslims need two things. The first is a fresh engagement with the Qur'an and a critical reassessment of the entire Islamic intellectual tradition: theology, ethics, philosophy and jurisprudence. The second is a realistic assessment and understanding of the contemporary socio-political context. It is only then that Muslims can overcome centuries of decadence and backwardness and meet the challenges of modernity. The interpretative process that Rahman proposes for this revival is a 'double movement', that is, a movement 'from the present situation to Qur'anic times, then back to the present'. In the first

movement ‘general principles, values and long-range objectives’ of the Qur’an are elicited and separated from the socio-historical context of the revelation. In the second, these principles are applied to issues at hand, taking into consideration the current context and its imperatives.⁴⁴ In his words, this:

requires the careful study of the present situation and the analysis of its various component elements so we can assess the current situation and change the present to whatever extent necessary, and so we can determine priorities afresh in order to implement the Qur’anic values afresh. To the extent that we achieve both moments of this double movement successfully, the Qur’an’s imperatives will become alive and effective once again. While the first task is primarily the work of the historian, in the performance of the second the instrumentality of the social scientist is obviously indispensable, but the actual ‘effective orientation’ and ‘ethical engineering’ are the work of the ethicist.⁴⁵

In ‘The status of women in Islam: a modernist interpretation’,⁴⁶ Rahman suggests what ‘effective orientation’ and ‘ethical engineering’ entail when it comes to the issue of gender equality and family law. This is the only place where Rahman focuses his attention on this issue (apart from his 1980 article on family law reforms, already cited); elsewhere he mentions it only in passing. Published in 1982, the same year as his last major work (*Islam and Modernity*), this article can be seen as the application of his ‘double movement’ theory in the area of gender rights and family law reform. Rahman begins by identifying himself as a ‘Muslim modernist’, one who pursues social reform through a new interpretation of Islamic sources and ‘in contradistinction to the stance taken on most social issues by Muslim conservative–traditionalist leaders’. Islamic modernism, Rahman argues, ‘developed under the impetus of modern Western liberalism but contains within it tangible differences on sexual issues, but is to be sharply distinguished from secularism’.⁴⁷ He is equally critical of social reform without reference to Islam, which he calls ‘secularism (à la Mustafa Kemal Atatürk)’, and the ‘apologetic aspect’ of Islamic modernism that rationalises and justifies gender inequality (p. 285).⁴⁸

The legislation in the Qur’an on the subject of women, Rahman contends, is part of the effort to strengthen the position of the weaker segments of the community, which in pre-Islamic Arabia were the poor, orphans, women, slaves and those chronically in debt. Through reforming existing laws and practices and introducing new ones, the Qur’an aimed to put an end to their abuse and to open the way for their empowerment. Departing from the apologetic refrain on the position of women in pre-Islamic times, Rahman argues that the position of women was not altogether low, ‘for even a slave woman could earn and own wealth, like a slave male, let alone a free woman. Khadija, the first wife of the Prophet, owned a considerable business which the Prophet managed for her sometime before their

marriage, and after their marriage she helped him financially' (p. 286). But women could also be treated as property, as 'a son inherited his stepmother as part of his father's legacy and could force her to marry him or could debar her from marrying anyone else through her life, coveting her property' (p. 288). Women were also 'the central focus of the "honour" (*ird*) of a man whose "manliness" (*muruwwa*) demanded that her honour remain inviolate' (p. 287). This, according to Rahman, was the distorted logic behind the practice of female infanticide, which was a way of preventing the eventual infringement of a man's honour.

What the Qur'anic reforms achieved was 'the removal of certain abuses to which women were subjected': female infanticide and widow-inheritance were banned; laws of marriage, divorce and inheritance were reformed. As with slavery, however, these reforms did not go as far as abolishing patriarchy. But they did expand women's rights and brought tangible improvements in their position – albeit not social equality. Women retained the rights they had to property, but they were no longer treated as property; they could not be forced into marriage against their will, and they received the marriage gift (*mahr*); they also acquired better access to divorce and were allocated shares in inheritance.

The essential equality between the sexes is clearly implied in the Qur'an; both men and women are mentioned separately 'as being absolutely equal in virtue and piety with such unflinching regularity that it would be superfluous to give particular documentation' (p. 291). Those sayings attributed to the Prophet that speak of women's inferiority and require them to obey and worship their husbands, Rahman argues, are clearly 'a twisting of whatever the Qur'an has to say in matters of piety and religious merit' (p. 292) and marriage.

The Qur'an speaks of the husband and wife relationship as that of 'love and mercy' adding that the wife is a moral support for the husband (30:21). It describes their support for each other by saying, 'they (i.e. your wives) are garments unto you and you are garments unto them' (2:187). The term 'garment' here means that which soothes and covers up one's weakness. (p. 293)

Such sayings also contradict what we know of the Prophet's own conduct, thus must be rejected.

The Prophet's wives, far from worshipping him – with all his religious authority – wanted from him the good things of life, so that the Qur'an had to say, 'O Messenger! Say to your wives: "If you want to pursue this-worldly life and its good things, then I will give you wealth, but let you go in gentleness (i.e. divorce you)"' (33:[29]). What the Qur'an required from a woman was to be a good wife, adding, 'Good women are those who are faithful and who guard what is their husband's in his absence as God wants them to guard' (4:34). (p. 293)

The Qur'an does speak of inequality between sexes. But when it does, it gives the rationale, which has to do with socio-economic factors.

In 2:228 we are told, 'For them (i.e. women) there are rights (against them), but men are one degree higher than women.' That is to say, in the social (as opposed to religious) sphere, while the rights and obligations of both spouses towards each other are exactly commensurate, men are, nevertheless, a degree higher. The rationale is not given in this verse which simply adds 'And God is Mighty and Wise'. The rationale is given later, in verse 4:34. (p. 294)

This verse, Rahman continues, begins by saying that men are 'managers over (i.e., are superior to) women because some of humankind excel others (in some respects) and because men expend of their wealth (for women)', and then goes on to give them the authority to discipline their wives when they do not obey them. Thus the two rationales that this gives for male superiority in socio-economic affairs are: '(1) that man is "more excellent", and (2) that man is charged entirely with household expenditure', but not any inherent inequality between sexes (p. 294).

What the Qur'an appears to say, therefore, is that since men are the primary socially operative factors and bread-winners, they have been wholly charged with the responsibility of defraying household expenditure and upkeep of their womenfolk. For this reason man, because by his struggle he has gained more life-experience and practical wisdom, has become entitled to 'manage women's affairs', and, in case of their recalcitrance, admonish them, leave them alone in their beds and, lastly, to beat them without causing injury. (pp. 294-5)

Having given his interpretation of verse 4:34 and the rationale behind the gender inequality in the Qur'an, Rahman then poses two questions: are these socio-economic roles on which gender inequality is based immutable, even if women want to change them? If they are changeable, how far can they be changed? His answer to the first question is a definite no, these inequalities are not inherent in the nature of the sexes: they are the product of historical socio-economic developments. Once women acquire education and participate in society and economy, the 'degree' [of privilege] that the Qur'an says men have over women also disappears. But the answer to the second question, Rahman contends, is not that simple, and he is hesitant regarding whether 'women should ask or be allowed to do any and all jobs that men do' – although he admits that 'if women insist on and persist in this, they can and eventually will do so' (p. 295).

However, he has no doubt that law reforms must give women equality in all other spheres; classical *fiqh* rulings in marriage, divorce and inheritance can and must be reformed because 'it is the most fundamental and urgent requirement

of the Qur'an in the social sector that abuses and injustices be removed' (p. 295). These inequalities are now the cause of suffering and oppression and go against the Qur'anic spirit, which is that of the equality of all human beings.

He then goes on to discuss in detail the laws of polygamy, divorce, inheritance and hijab, and reiterates the gist of his framework:

One must completely accept our general contention that the specific legal rules of the Qur'an are conditioned by the socio-historical background of their enactment and what is eternal therein is the social objectives or moral principles explicitly stated or strongly implied in that legislation. This would, then, clear the way for further legislation in the light of those social objectives or moral principles. This argument remains only elliptically hinted at by the Modernist, who has used it in an *ad hoc* manner only for the issue of polygamy, and has not clearly formulated it as a general principle. (p. 301)

Rahman ends by stressing that legal reform can only be effective in changing the status of women in Muslim contexts when there is an adequate basis for social change. It is only then that the Qur'anic objective of social justice in general, and for women in particular, can be fulfilled; otherwise its success will be limited, transitory and confined to certain social groups (p. 308).

6. Where we are now: new contexts and new questions

Appearing at two different junctures in the twentieth century, these pioneering texts by al-Tahir al-Haddad and Fazlur Rahman laid the ground for an egalitarian construction of family law within an Islamic framework. The issues that they raise are still with us, and still relevant to current debates and struggles to reshape and redefine Muslim family laws, but two developments towards the end of the last century changed the context and tone of these debates.

The first was the ways in which the successes of political Islam and the ideological use of Shari'a transformed relations between religion, law and politics for Muslims. The slogan 'return to Shari'a' amounted, in practice, to nothing more than an attempt to translate classical *fiqh* rulings on gender relations and family and some areas of penal law into state policy. In late colonial times and the immediately post-colonial middle decades of the century, activist women in Muslim contexts had increasingly come to identify Islam with patriarchy, and to fear that the removal of the latter could not be achieved under a polity and a legal regime dominated by Islam. Now, wherever Islamists gained power or influence – as in Iran, Sudan, Pakistan and Malaysia – their policies proved the validity of the activists' fears. Arguing for patriarchal rulings as 'God's Law', as the authentic 'Islamic' way of life, they tried to reverse some of the legal gains that women had acquired

earlier in the century; they dismantled elements of earlier family law reforms and introduced morality laws, such as gender segregation and dress codes.

But these Islamist measures had some unintended consequences: the most important was that, in several countries, they brought classical *fiqh* texts out of the closet, and exposed them to unprecedented critical scrutiny and public debate. Muslim women now found ways to sustain a critique – from within – of patriarchal readings of the Shari‘a and of the gender biases of *fiqh* texts in ways that were previously impossible. At the same time, a new wave of Muslim reform thinkers started to respond to the Islamist challenge and to take Islamic legal thought onto new ground. Building on the efforts of previous reformers, and using the conceptual tools and theories of other branches of knowledge, they have developed further interpretive–epistemological theories. Their conceptual tools, such as the distinctions between religion (*dīn*) and religious knowledge (*ma‘rifat-e dīni*), between Shari‘a and *fiqh*, or between essentials and accidentals in the Qur’an, have stretched the limits of traditional interpretations of Islam’s sacred texts. Revisiting the old theological debates, they have revived the rationalist approach that was eclipsed when legalism took over as the dominant mode and gave precedence to the form of the law over the substance and spirit.⁴⁹

The second development was the expansion of transnational feminism and women’s groups, and the emergence of NGOs, which led to the opening of a new phase in the politics of gender and law reform in Muslim contexts. In the first part of the twentieth century women were largely absent from the process of the reform and codification of family law and the debates that surrounded it. But by the end of the century, Muslim women were refusing to be merely objects of the law, but rather claiming the right to speak and to be active participants in the debates and in the process of law-making. The changed status of women in Muslim societies, and other socio-economic imperatives, meant that many more women than before were educated and in employment. Women’s rights were, by now, part of human rights discourse, and human rights treaties and documents, in particular CEDAW, gave women a new language in which to frame their demands.

The confluence of these two developments opened new space for activism and debate. Both recognised religious authorities (*fuqahā’*), and those with other interpretations and agendas – not least women scholars and laypeople – started engaging in debate and in criticism of the interpretations, old and new, of key concepts such as *qiwāma*. There were always Muslim reformers and women who argued for an egalitarian interpretation of the Shari‘a, but it was not until the 1980s that critical feminist voices and scholarship emerged from within the Muslim legal tradition, in the form of a new literature that deserves the label ‘feminist’, in that it is sustained and informed by an analysis that inserts gender as a category of thought into religious knowledge. Pioneering authors of such literature included Azizah Al-Hibri, Riffat Hassan, Amina Wadud and Fatima Mernissi;⁵⁰ they are now being

followed by others who are breaking new ground.⁵¹ A new consciousness emerged, a gender discourse that came to be labelled 'Islamic feminism'.⁵² This discourse, energised by new feminist scholarship in Islam, was further facilitated by the rapid spread of new technologies, notably the internet, and these new technologies have regularly shown their potential for the mobilisation of campaigns for change.

By engaging with the tradition from within, these new feminist voices and scholars in Islam have begun to insert women's concerns and voices into the processes of the production of religious knowledge and legal reform. In so doing, they can bridge two gaps in the Muslim family law debates and in the Muslim legal tradition. First, a majority of Muslim religious scholars are gender blind, being largely ignorant of feminist theories and unaware of the importance of gender as a category of thought. Secondly, in line with mainstream feminism, many women's rights activists and campaigners in Muslim contexts have long considered working within a religious framework to be counter-productive; choosing to work only within a human rights framework, they have avoided any religion-based arguments. They have tended to ignore that there is also an epistemological side to feminism, in the sense of examining how we know what we know about women in all branches of knowledge and in religious tradition. This knowledge not only sheds light on laws and practices that take their legitimacy from religion but enables a challenge, from within, to the patriarchy that is institutionalised in Muslim legal tradition.

Before considering, finally, the implication of feminist scholarship for twenty-first century debates over Muslim family laws, let me bring together the two elements that run through my narrative and argument in this chapter. First, the idea of gender equality, which became inherent to global conceptions of justice in the course of the twentieth century, has presented Muslim legal tradition with an 'epistemological crisis'⁵³ with varying degrees of success. Secondly, the breakthrough came in the last two decades of the century with the emergence of feminist voices and scholarship in Islam, which, as I have argued elsewhere, is the 'unwanted child' of political Islam. The Islamists' attempt to turn patriarchal interpretations of the Shari'a into policy made the intimate links between theology, law and politics more and more transparent. It led to new forms of activism among Muslims and the emergence of new discourses, which eventually opened the way for a constructive and meaningful dialogue between Muslim legal tradition and feminism.

By bringing the insights of feminist theory and gender studies into Islamic studies, feminist scholarship in Islam can enable us to ask new questions. For example, the *maqāṣid* approach has captured the imagination of many Muslim reformist thinkers:⁵⁴ what does it have to offer to those seeking gender equality? Does the concept of *qiwāma* have positive elements that should be retained? Should the link affirmed by classical *fiqh* between maintenance (*nafaqa*) and obedience (*tamkīn*) be redefined or severed? One of the basic necessities that the Shari'a aims to protect

is *nasl*: progeny, family; so far, this has been done in a patriarchal form. What kind of family do Shari'a-based laws aim to protect? What do equality and justice mean for women and the family? Do they entail identical rights and duties in marriage? In other words, is legal equality good for women and the family?

These questions are at the centre of debates in feminist scholarship. There is a shift from 'formal' models of equality to 'substantive' models that take into account the differing needs of different women and the direct and indirect discrimination that they face.⁵⁵ A formal model of equality, which often simply requires a reversibility and comparison between the sexes, does not necessarily enable women to enjoy their rights on the same basis as men. Feminist legal theorist Catherine MacKinnon tells us why such a model of equality rests on a false premise: neither the starting point nor the playing field are the same for both sexes.⁵⁶ Not only do women not have the same access as men to socio-economic resources and political opportunities, but women are not a homogeneous group; they do not experience legal inequality and discrimination in the same way; and class, age, race and socio-economic situation are all important factors. In short, what kind of laws and legal reforms are needed so that equality of opportunity and result can be ensured? CEDAW, for instance, does not define equality; rather, its provisions are directed at eliminating discrimination, and here it rightly adopts an abolitionist language. How useful is such a language in Muslim contexts, given the primacy of law in Islamic discourses and the intimate links between *fiqh* and cultural models of the family? Is this the best way of approaching the tension between 'protection' and 'domination' that is inherent in the very concept of *qiwāma*, however we define it? In Islamist and traditionalist discourses, *qiwāma* is presented as a manifestation of 'protection', not of discrimination; such an approach could draw attention to the 'domination' side of *qiwāma* and counter apologetic arguments that are based on ideologies and hypothetical cases rather than on lived realities and women's experience.

The search for answers to these questions takes us to realms outside Islamic legal tradition, to human rights law, feminist legal theory and experiences of family law reform in other legal traditions. If, in the twentieth century, scholars like al-Tahir al-Haddad and Fazlur Rahman bridged the gap between classical *fiqh* and modern notions of justice by providing a framework for an egalitarian interpretation of Islamic sacred texts, in the twenty-first century the new feminist voices and scholarship in Islam have opened up a dialogue with Muslim legal tradition. But a meaningful and constructive dialogue can only take place when the two parties can treat each other as equals and with respect, when they are ready to listen to each other's arguments, and to change position if necessary. This takes us once again to the realm of power relations; the theological is also necessarily – and intensely – political, in ways similar to the feminist understanding that the personal is political.

Notes

- 1 I would like to thank Cassandra Balchin for her extensive and perceptive comments; and Richard Tapper, as always, for help with thinking through the argument and with editing. Any remaining faults are mine.
- 2 Al-Jawziyya, Ibn Qayyim, *I'lām al-Muwaqqi'in 'an Rabb al-'Ālamīn* (Beirut: Dar al-Fikr al-'Arabi, 1955), Vol. 3, p. 1.
- 3 Quoted in Rapoport, Yossef, *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge: Cambridge University Press, 2005), p. 52.
- 4 He is also an inspiration for Islamist movements in Sunni contexts. For his thought and scholarship, see Bori, Caterina and Livant Holtzman (eds), *A Scholar in the Shadow: Essays on the Legal and Theological Thought of Ibn Qayyim al-Ġawziyyah*, thematic issue of *Oriente Moderno* 90/1 (Rome: Herder, 2010).
- 5 For example, by Masud, Muhammad Khalid, *Shatibi's Philosophy of Islamic Law* (New Delhi: Kitab Bhavan, 1997); the statement also features on the Musawah website (www.musawah.org), as well as on those of many conservative and reactionary Muslim organisations.
- 6 In recent years this debate has come to centre on the notion of 'Islamic feminism', to which I return later. For recent contributions to this debate, see Badran, Margot, 'From Islamic feminism to a Muslim holistic feminism', *Institute of Development Studies Bulletin* 42/1 (2011), pp. 78–87; Mir-Hosseini, Ziba, 'Muslim women's quest for equality: between Islamic law and feminism', *Critical Inquiry* 32/1 (2006), pp. 629–45, and *idem*, 'Beyond "Islam" vs "Feminism"', *Institute of Development Studies Bulletin* 42/1 (2011), pp. 67–77.
- 7 For instance, see Moghissi, Haideh, *Feminism and Islamic Fundamentalism: The Limits of Post-Modern Analysis* (London: Zed Press, 1999).
- 8 For instance, see Mir-Hosseini, 'Muslim women's quest'.
- 9 The translation is by Ali, Kecia, 'Muslim sexual ethics: understanding a difficult verse, Qur'an 4:34', available at <http://www.brandeis.edu/projects/fse/muslim/diff-verse.html> (accessed 15 September 2012); transliteration added. Ali leaves the italicised words untranslated, pointing out that any translation is, in the end, an interpretation; she also provides links to three other translations of the verse and to additional interpretations: available at <http://www.brandeis.edu/projects/fse/muslim/translation.html> (accessed 15 September 2012).
- 10 See, for instance, AbuSulayman, AbdulHamid A., *Marital Discord: Recapturing the Full Islamic Spirit of Human Dignity*, Occasional Paper Series 11 (London and Washington: The International Institute of Islamic Thought, 2003); Al-Hibri, Aziza, 'An Islamic perspective on domestic violence', *Fordham Law Journal* 27 (2003–4), pp. 195–224; Wadud, Amina, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (Oxford and New York: Oxford University Press, 1999), pp. 70–9; *idem*, *Inside the Gender Jihad: Women's Reform in Islam* (Oxford: Oneworld, 2006), pp. 198–202; Guardi, Jolana, 'Women reading the Qur'an: religious discourse

- in Islam', *Hawwa: Journal of Women in the Middle East and the Islamic World* 2/3 (2004), pp. 301–15; Dunn, Shannon and Rosemary B. Kellison, 'At the intersection of scripture and law: Qur'an 4:34 and violence against women', *Journal of Feminist Studies in Religion* 26/2 (Fall 2010), pp. 11–36; Marín, Manuela, 'Disciplining wives: a historical reading of Qur'an 4:34', *Studia Islamica* 97 (2003), pp. 5–40; Shaikh, Sa'diyya, 'Exegetical violence: *Nushūz* in Qur'anic gender ideology', *Journal for Islamic Studies* 17 (1997), pp. 49–73; Mubarak, Hadia, 'Breaking the interpretive monopoly: a re-examination of verse 4:34', *Hawwa* 2/3 (2004), pp. 261–89; Mahmoud, Mohamed A., 'To beat or not to beat: on the exegetical dilemmas over Qur'an, 4:34', *Journal of American Oriental Society* 126/4 (2006), pp. 537–50.
- 11 For instance, a panel at the 2006 meeting of the American Academy of Religion was devoted to discussion of the verse; the papers were published in the *Comparative Islamic Studies* 2/2 (2006), see editorial; see also Al-Hibri, 'An Islamic perspective on domestic violence', pp. 195–224; Elsaidi, Murad H., 'Human rights and Islamic law: a legal analysis challenging the husband's authority to punish "rebellious" wives', *Muslim World Journal of Human Rights* 7/2 (2011), article 4, pp. 1–25.
 - 12 They remained at the level of ethical recommendations without legal force. For discussion of al-Shafi'i's treatment of this verse and its contradiction with the Prophet's Sunna, see Ali, Kecia, *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith and Jurisprudence* (Oxford: Oneworld, 2006); *idem*, 'The best of you will not strike', *Comparative Islamic Studies* 2/2 (2006), pp. 143–55.
 - 13 I take the concept of a 'legal postulate' from Chiba, who defines it as a norm, a value system that simply exists in its own right, as an element of a specific cultural context, which is connected with a particular 'official' or 'unofficial law'. For his tripartite model of legal systems ('official law', 'unofficial law' and 'legal postulates'), see Chiba, Masaji (ed.), *Asian Indigenous Law in Interaction with Received Law* (London and New York: KPI, 1986).
 - 14 Mir-Hosseini, Ziba, 'The construction of gender in Islamic legal thought and strategies for reform', *Hawwa* 1/1 (2003), pp. 1–28; *idem*, 'Towards gender equality: Muslim family law and the Shari'a', in Zainah Anwar (ed.), *Wanted: Equality and Justice in Muslim Family Law* (Kuala Lumpur: Sisters in Islam, 2009), available at <http://www.musawah.org/wanted-equality-and-justice-muslim-family> (accessed 10 September 2012).
 - 15 For discussions of how early jurists conceptualised marriage, see Ali, Kecia, *Marriage and Slavery in Early Islam* (Cambridge, MA: Harvard University Press, 2010); Rapoport: *Marriage, Money and Divorce*.
 - 16 Ibn Rushd, *The Distinguished Jurist's Primer: Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, trans. Imran Ahsan Khan Nyazee (Reading: Garnet Publishing, 1996), Vol. 2, p. 63.
 - 17 See Mahmoud, 'To beat or not to beat', n. 35.

- 18 See, for instance, Rapoport: *Marriage, Money and Divorce*; Sonbol, Amira El Azhary (ed.), *Women, the Family, and Divorce Laws in Islamic History* (Syracuse: Syracuse University Press, 1996); Tucker, Judith, *In the House of Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 2000).
- 19 For the ways in which these arguments shape legal rulings, see in particular Ali, *Marriage and Slavery*; ‘Abd Al ‘Ati, Hammudah, *The Family Structure in Islam* (Indianapolis: American Trust Publications, 1997); Mahmoud, ‘To beat or not to beat’.
- 20 This section repeats an argument I have published in other places, but which I feel is essential background to what follows; see ‘Criminalizing sexuality: *Zina* laws as violence against women in Muslim contexts’ (Women Living Under Muslim Laws, 2010), available at <http://www.stop-stoning.org/node/882> (accessed 15 September 2012).
- 21 For the codification, see Anderson, James Norman, *Law Reforms in the Muslim World* (London: Athlone, 1976); Mahmood, Tahir, *Family Law Reform in the Muslim World* (Bombay: N. M. Tripathi, 1972).
- 22 These were established *fiqh* procedures: eclectic choice (*takhayyur*) and mixing (*tafīq*) of legal opinions and rulings from different schools; the exercise of *ijtihād* remained limited. For a discussion, see Rahman, Fazlur, ‘A survey of modernization of Muslim family law’, *International Journal of Middle East Studies* 11 (1980), pp. 451–65.
- 23 The book was translated into English in 2007; Husni, Ronak and Daniel Newman, *Muslim Women in Law and Society: Annotated Translation of al-Ṭāhir al-Ḥaddād’s Imra’tunā fi ‘l-sharī’a wa ‘l-mujtama’*, with an introduction (London: Routledge, 2007).
- 24 For the intellectual genealogy of al-Haddad’s text, see Husni and Newman: *Muslim Women*, pp. 1–25; for accounts of the intellectual and social change that made women’s issues central to politics, see Ahmed, Leila, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: Yale University Press, 1992), pp. 127–43; for the experience of different countries, see Keddie, Nikki, *Women in the Middle East: Past and Present* (Princeton: Princeton University Press, 2007), pp. 60–101.
- 25 These reformist texts – as others have noted – often tended to reinforce patriarchal notions of women’s traditional roles as wives, mothers and guardians of Islamic tradition; Zayzafoon makes this criticism of al-Haddad’s text. Zayzafoon, Lamia Ben Youssef, *The Production of the Muslim Woman: Negotiating Text, History, and Ideology* (New York: Lexington Books, 2005), chapter 4. For another critique of Qasim Amin, see Ahmed, *Women and Gender*, chapter 8.

- 26 A joint campaign by Moroccan and Tunisian women's organisations went public in 2006, with a two-volume publication, *Egalité dans l'héritage: Pour une citoyenneté pleine et entière* (Tunis: Association des Femmes tunisiennes pour la Recherche et le Développement).
- 27 For this biographical account, I have largely relied on Husni and Newman's 'Introduction', *Muslim Women*, pp. 19–25.
- 28 For a discussion of the political context, reactions to al-Haddad's book and the politics of family law in Tunisia, see Salem, Norma, 'Islam and the status of women in Tunisia', in Freda Hussain (ed.), *Muslim Women* (London: Croom Helm, 1984), pp. 141–68; Boulby, Marion, 'The Islamic challenge: Tunisia since independence', *Third World Quarterly* 10/2 (1988), pp. 590–614; Charrad, Mounira, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria and Morocco* (Berkeley and Los Angeles: University of California Press, 2001).
- 29 Husni and Newman, *Muslim Women*, n. 58 p. 174. Ibn 'Ashur's treatise on *maqāṣid al-sharī'a* is now available in English: Ibn 'Ashur, Muhammad al-Tahir, *Treatise on Maqāṣid al-Sharī'ah*, trans. and annotated by Mohamed El-Tahir El-Mesawi (London and Washington: The International Institute of Islamic Thought, 2006).
- 30 Quotations and references are from Husni and Newman, *Muslim Women*.
- 31 This phrase appears towards the end of al-Haddad's preface to the book; here I did not use Husni and Newman's translation, which renders the phrase as 'we regard them as an object to satisfy our desires' (p. 31).
- 32 Qur'an 30:21, the translation is by Yusuf Ali, p. 1012; interestingly, Yusuf Ali finds it necessary to include a footnote comment to the effect that tranquillity, love and mercy are found in the normal relations of a father and mother, and love and mercy between men and women, excluding any possible alternative reading of the text.
- 33 This is from Yusuf Ali's translation, p. 92; see below for Asad's translation, which is rather different and, I find, clearer.
- 34 Asad's translation of the whole verse is: 'And the divorced woman shall undergo without marrying, a waiting period of three monthly courses: for it is not lawful for them to conceal what God may have created in their wombs, if they believe in God and the Last Day. And during this period their husbands are fully entitled to take them back, if they desire reconciliation; but, in accordance with justice, the rights of the wives [with regard to their husbands] are equal to [husbands'] rights with regard to them, although men have precedence over them [in this respect]. And God is almighty, wise.' Asad, Muhammad, *The Message of the Qur'an* (Bristol: Foundation Books, 2003), p. 61.
- 35 For an overview and analysis of these reforms, see Kelly, Patricia, 'Finding common ground: Islamic values and gender equity in Tunisia's reformed personal status

- code', in *Shifting Boundaries in Marriage and Divorce in Muslim Communities*, Special Dossier 1 (Women Living Under Muslim Laws, Autumn 1996), pp. 74–105.
- 36 Prominent among them were Syed Ahmad Khan (1817–1898) and Muhammad Iqbal (1877–1938). Iqbal delivered his reform agenda in a series of six lectures published in Lahore in 1930: Iqbal, Muhammad, *Reconstruction of Religious Thought in Islam* (London: Oxford University Press, 1934). These lectures, which did not receive much attention at the time, later became central to the formation of Muslim reform thought. For an illuminating exposition of Iqbal's lecture on the notion of *ijtihad*, see Masud, Khalid, *Iqbal's Reconstruction of Ijtihad* (2nd edn, Lahore: Saadat Art Press, 2003).
- 37 For an analysis of their impact on the rethinking of notions of gender rights in Muslim legal tradition, see Moosa, Ebrahim, 'The poetics and politics of law after empire: reading women's rights in the contestations of law', *UCLA Journal of Islamic and Near Eastern Law* 1/1 (Fall/Winter 2001–2), pp. 1–46.
- 38 His father, Mawlana Shibat al-Din, was a graduate of the Deoband Seminary in India.
- 39 Major family law reforms in the subcontinent took place before Rahman's directorship, such as the 1939 Dissolution of Marriages Act and the 1961 Muslim Family Laws Ordinance. Women's groups were instrumental in pushing for these reforms.
- 40 For studies on Fazlur Rahman's work, see Sonn, Tamara, 'Fazlur Rahman's Islamic methodology', *The Muslim World* 81/3–4 (1991), pp. 212–30; Ebrahim Moosa's introduction to Rahman's *Revival and Reform in Islam* (Oxford: Oneworld, 2000); Saeed, Abdullah, 'Fazlur Rahman: a framework for interpreting the ethico-legal content of the Qur'an', in Suha Taji-Farouki (ed.), *Modern Muslim Intellectuals and the Qur'an* (Oxford: Oxford University Press, 2004), pp. 37–66. For his impact on American Islamic discourse, see Waugh, Earle H. and Frederic M. Denny (eds), *The Shaping of An American Islamic Discourse: A Memorial to Fazlur Rahman* (Atlanta: Scholars Press, 1998).
- 41 For his views on gender rights and his impact on the development of a new Islamic feminism, see Part III of Waugh and Denny: *The Shaping*, in particular the chapter by Tamara Sonn, 'Fazlur Rahman and Islamic feminism', pp. 123–46.
- 42 Rahman, 'A survey of modernization', p. 451.
- 43 Sonn, 'Fazlur Rahman and Islamic feminism', p. 128.
- 44 Rahman, Fazlur, *Islam and Modernity: Transformation of an Intellectual Tradition* (Chicago and London: University of Chicago Press, 1982), p. 5.
- 45 Rahman, *Islam and Modernity*, p. 7.
- 46 Rahman, Fazlur, 'The status of women in Islam: a modernist interpretation', in Hanna Papanek and Gail Minault (eds), *Separate Worlds: Studies of Purdah in South Asia* (Delhi: Chanakya Publications, 1982), pp. 285–310. The article also appeared in a revised and shortened version in a later collection on women's

- rights in Islam: Nashat, Guity (ed.), *Women and Revolution in Iran* (Boulder, CO: Westview Press, 1983), pp. 37–54.
- 47 Rahman does not spell out the differences here, but in a later article he gives us a clue as to what he means when he states the position of a Muslim modernist: ‘While he espouses the cause of the emancipation of women, for example, he is not blind to the havoc produced in the West by its new sex ethics, not least in the dilapidation of the family institution.’ Rahman, Fazlur, ‘Islam and political action: politics in the service of religion’, in Nigel Biggar, Jamie Scot and William Schweiker (eds), *Cities of Gods: Faith, Politics and Pluralism in Judaism, Christianity and Islam* (New York: Greenwood Press, 1986), p. 160.
- 48 References are to Rahman, ‘Status of women’, in Papanek and Minault.
- 49 In this respect, the works of the new wave of Muslim thinkers such as Mohammad Arkoun, Khaled Abou El Fadl, Nasr Hamid Abu-Zayd, Mohammad Mojtahed Shabestari and Abdolkarim Soroush are of immense importance and relevance. For Arkoun, see Gunther, Ursula, ‘Mohammad Arkoun: towards a radical rethinking of Islamic thought’, in Taji-Farouki: *Modern Muslim Intellectuals*, pp. 125–67; for Abou El Fadl, see his *Speaking in God’s Name: Islamic Law, Authority and Women* (Oxford: Oneworld, 2001); for Abu-Zayd, see Kermani, Navid, ‘From revelation to interpretation: Nasr Hamid Abu-Zayd and the literary study of the Qur’an’, in Taji-Farouki: *Modern Muslim Intellectuals*, pp. 169–92; for Soroush, see his *Reason, Freedom, and Democracy in Islam: Essential Writings of ‘Abdolkarim Soroush*, trans. and ed. with a critical introduction by Mahmoud Sadri and Ahmed Sadri (Oxford: Oxford University Press, 2000) and the articles available on his website (<http://www.drSORoush.com/English.htm>), and for his ideas on gender, see Mir-Hosseini, Ziba, *Islam and Gender: The Religious Debate in Contemporary Iran* (Princeton: Princeton University Press, 1999), chapter 7; for Shabestari, see Vahdat, Farzin, ‘Post-revolutionary modernity in Iran: the subjective hermeneutics of Mohamad Mojtahed Shabestari’, in Taji-Farouki, *Modern Muslim Intellectuals*, pp. 193–224, and articles and interviews at *Qantara.de* (http://qantara.de/webcom/show_article.php/_c-575/i.html).
- 50 Their early works are: Al-Hibri, Aziza, ‘A study of Islamic herstory: how did we get into this mess?’ in *Islam and Women*, special issue of *Women’s Studies International Forum* 5/2 (1982), pp. 201–19; Hassan, Riffat, ‘Feminism in Islam’ in Arvind Sharma and Katherine Young (eds), *Feminism and World Religions* (New York: State University of New York Press, 1999), pp. 248–78; Mernissi, Fatima, *Women and Islam: An Historical and Theological Enquiry*, trans. Mary Jo Lakeland (Oxford: Blackwell, 1991); Wadud, *Qur’an and Woman*.
- 51 See, for instance, Ali, Kecia, ‘Progressive Muslims and Islamic jurisprudence: the necessity for critical engagement with marriage and divorce law’, in Omid Safi (ed.), *Progressive Muslims* (Oxford: Oneworld, 2003), pp. 163–89; Barlas, Asma,

- 'Believing Women' in Islam: Unreading Patriarchal Interpretations of the Qur'an* (Austin: University of Texas Press, 2002); Shaikh, 'Exegetical violence'; Engineer, Asghar Ali, *The Rights of Women in Islam* (London: Hurst, 1992); Jawad, Haifaa, *The Rights of Women in Islam: An Authentic Approach* (London: Macmillan, 1998); Mir-Hosseini: 'Construction of gender'; Sonbol, Amira El-Azhary, 'Rethinking women and Islam', in Yvonne Haddad and John Esposito (eds), *Daughters of Abraham: Feminist Thought in Judaism, Christianity, and Islam* (Gainesville: University of Florida Press, 2000); Anwar, *Wanted*.
- 52 I was among the first to use the term 'Islamic feminism', to refer to the new gender consciousness emerging in Iran a decade after the 1979 Revolution. Mir-Hosseini, Ziba, 'Stretching the limits: a feminist reading of the Shari'a in post-revolutionary Iran', in Mai Yamani (ed.), *Islam and Feminism: Legal and Literary Perspectives* (London: Ithaca, 1996), pp. 285–319. However, more recently I have questioned its usefulness as an analytical or descriptive tool, given the heavy political and rhetorical baggage it has since acquired. *Idem*, 'Beyond "Islam" vs "Feminism"', pp. 67–77.
- 53 I borrow this concept from the philosopher Alasdair MacIntyre, who argues that every rational inquiry is embedded in a tradition of learning, and that tradition reaches an epistemological crisis when, by its own standards of rational justification, disagreements can no longer be resolved rationally. This gives rise to an internal critique that will eventually transform the tradition, if it is to survive. It is then that thinkers and producers in that tradition of inquiry gradually start to respond and assimilate the idea that is alien to the tradition. See MacIntyre, Alasdair, *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988), pp. 350–2; *idem*, 'The rationality of traditions', in Christopher W. Gowans (ed.), *Moral Disagreements: Classic and Contemporary Readings* (London, Routledge, 2000), pp. 204–16. For a critique of MacIntyre's theory of justice and his neglect of gender, see Okin, Susan Moller, 'Whose traditions? Which understanding?' in *idem*, *Justice, Gender and the Family* (Princeton: Princeton University Press, 1987), chapter 3.
- 54 'Objectives of Shari'a'; for an explanation and discussion, see Khalid Masud's chapter, this volume.
- 55 For instance, see Scott, Joan, 'Deconstructing equality-versus-difference: or, the uses of poststructuralist theory for feminism', *Feminist Studies* 14/1 (1998), pp. 33–50; Fredman, Sandra, 'Providing equality: substantive equality and the positive duty to provide', *South African Journal of Human Rights* 21 (2005), pp. 163–90.
- 56 MacKinnon, Catherine, *Towards a Feminist Theory of the State* (Boston: Harvard University Press, 1989).