

SHARI`A LAW AND
MODERN MUSLIM
ETHICS

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3. Available at <http://www.capitol.tn.gov/Bills/107/Bill/SB1028.pdf>.
4. Available at <https://www.sos.ok.gov/documents/questions/755.pdf>.
5. Anver M. Emon, "Banning Shari'a," *The Immanent Frame*, September 6, 2011, <http://blogs.ssrcc.org/tif/2011/09/06/banning-shari'a/>.
6. On the other versions of this bill, see Emon, "Banning Shari'a."
7. For a critique of the secular as it relates to religion, see Asad (2003).
8. On the political context underlying Mir-Hosseini's analysis, see Mir-Hosseini (2012, 293–98).
9. Kaplan, Robert D. 2010. *Monsoon: The Indian Ocean and the Future of American Power*. New York: Random House.
10. On tourism and its implications for local cultural politics, see Picard (2008).
11. For the video, see <http://www.youtube.com/watch?v=i5H64OOkeXA>.
12. *Fourth Tourism Master Plan, 2013–2017* (Male: Maldives Ministry of Tourism, 2012), 19, http://www.tourism.gov.mv/downloads/news/2012/4TMP_DRAFT_Vol_2_BACKGROUND_ANALYSIS.pdf. For more on the ongoing political debates around guest houses, as well as former President Nasheed's characterization of the issue, see his speech (2013) on the guest house enterprise.
13. Moreover, in 2006, the Maldives issued a reservation to article 18 (freedom of religion and conscience) of the International Covenant on Civil and Political Rights (ICCPR). See http://www.geneva-academy.ch/RULAC/international_treaties.php?id_state=136.
14. Indeed, this is evident in the US State Department's 2012 *Report on Religious Freedom*, available at <http://www.state.gov/j/drl/rls/irf/2012/sca/208434.htm>.
15. In a limited fashion, Christian missionaries continue to contest the Maldives' prohibitions against proselytizing faiths other than Islam. See, for example, Nazeer (2012).
16. One exception is Saudi Arabia's use of these rules to inform wrongful death compensation claims. See Emon (2012a, 232–45).
17. See, for example, Doumato (2003).
18. On the "institutional turn" in law, see Sunstein and Vermeule (2003).
19. For greater detail, see Emon (2012a, ch. 3).
20. On the state, see James Scott (1998).
21. On ISIS's invocation of the dhimmi rules, see Philp (2014).

3 Moral Contestations and Patriarchal Ethics: Women Challenging the Justice of Muslim Family Laws

Ziba Mir-Hosseini

ARTICULATION OF THE ethical values and norms of Islam's sacred texts has been, at least until recently, the business of Muslim scholars. The classical jurists—through *fiqh*, the science of Islamic jurisprudence—endeavored to translate these values and norms into legal rulings to govern various aspects of personal and public life in Muslim societies (see also this volume, chapters 1 and 2). These rulings (*ahkam*), which still constitute the established interpretations of shari'a, reflect premodern conceptions of justice that entitle individuals to different rights on the basis of their faith, status, and gender. During the twentieth century, however, these rulings were confronted by the ideals of universal human rights, equality, and personal freedom. In this encounter, some Muslims came to see the classical rulings as unjust and discriminatory and the interpretations of the textual sources on which they were based as hypocritical, or at best contradictory. The plethora of literature published by religious houses on relations between Islam and human rights, democracy, and women's rights, as well as the intensity of the debates among Muslims over what "true" Islam is and what shari'a stands for, speak of a collective anxiety that comes when old dogmas and constructs lose their theological validity.

This debate is nowhere more intense than in the area of gender relations, where the gap between contemporary notions of justice and rights and those that inform established interpretations of shari'a is most evident. These interpretations, as embodied in *fiqh* rulings, uphold a patriarchal model of family, treating women as second-class citizens and placing them under male authority. The religious legitimization of patriarchy raises a host of questions: The sacred texts speak of justice, but what do they mean by this? Does it include the notion of equality for women before the law? If so, how are we to understand those passages in the texts that appear not to treat men and women as equals? Can gender equality and shari'a-based laws go together?

Such key questions have been the subject of heated debate among Muslims for more than a century, a debate that continues to be tainted by the legacy and

politics of the colonial occupation of Muslim lands. Broadly speaking, we can say that Muslim participants in this debate fall into three broad camps: The first are traditional Muslims and those Islamists who claim that the established interpretations of shari'a, as embodied in fiqh rulings, are divine, open neither to change nor to reinterpretation. The second camp consists of those feminists who consider religion to be inherently patriarchal and thus see any engagement with it to be a futile and incorrect strategy. The third camp comprises Muslim feminist scholars and activists who challenge the patriarchal ethics of Muslim family laws from within, demanding that law and practice reflect the egalitarian principles and values of Islam.

This difference of approach speaks of different reactions to the confrontation between two systems of values: one shaped by the ideals of universal human rights, equality, and personal freedom as found and advocated in international human rights documents such as CEDAW (the Convention on the Elimination of All Forms of Discrimination Against Women) and the other rooted in earlier conceptions of justice, gender, and rights as found in the classical fiqh rulings that continue as the source of family law, to legitimize and sustain gender inequality in contemporary Muslim contexts.

In this chapter, I explore this confrontation, which unfolded in the course of the twentieth century, giving birth to a new gender discourse that has changed the terms of several debates among Muslims—most of all the debate over gender rights. I refer to Musawah (www.musawah.org), which defines itself as a global movement for equality and justice in the Muslim family. Attracting partners from across the globe, the movement was launched in February 2009 at a gathering in Kuala Lumpur, hosted by the pioneering Malaysian women's group Sisters in Islam. Musawah links scholarship with activism to bring fresh perspectives on Islamic teachings, with the aim of contributing constructively to the reform of family laws and practices.

In 2011 Musawah initiated a long-term and multifaceted project on rethinking the notion of authority in Muslim family laws. As a founding member of Musawah and convener of this project, I describe the formation of the movement, conveying some of our thinking and our internal debates. I also write as an anthropologist, a participant-observer in these debates.

I begin by outlining the twentieth-century shifts in the politics of religion, law, and gender that in the present century have led to the emergence of new forms of research and activism of which Musawah is a part. I then discuss the foundation of Musawah as a knowledge-building movement, outlining Musawah's conceptual framework, the project on rethinking the construction of authority in Muslim family laws, and the challenges that Musawah confronts in bringing about an egalitarian construction of family law from within Muslim legal tradition. I end by considering the potential of this new research and

of these emerging Muslim feminist voices for changing the patriarchal ethics of established interpretations of shari'a.

Two themes run through the chapter and link its different parts. First, gender equality is a modern ideal that has only recently, with the expansion of human rights and feminist discourses, become inherent to generally accepted conceptions of justice. In Islam, as in other religious traditions, the idea of equality between men and women was neither relevant to notions of justice nor part of the juristic landscape. To use an idiom from Muslim juristic tradition, gender equality is among the "newly created issues" (*masa'il mustahdatha*)—that is, an issue for which there are no previous rulings. Simply put, gender equality is an issue that Muslim jurists did not have to address until the twentieth century.

Second, the idea of gender equality has created an "epistemological crisis" in Muslim legal tradition that Muslims have been trying to resolve, with varying degrees of success, since the late nineteenth century. I borrow this concept from the philosopher Alasdair MacIntyre, who argues that every rational inquiry is embedded in a tradition of learning and that that tradition reaches an epistemological crisis when, by its own standards of rational justification, disagreements can no longer be resolved rationally (see also this volume, chapter 1). According to MacIntyre, this gives rise to an internal critique that will eventually transform the tradition if it is to survive (MacIntyre 1988, 350–52; 2000). In Muslim legal tradition, I contend, the internal critique and epistemological breakthrough came about only recently, with the rise of new reformist and feminist voices and scholarship (Mir-Hosseini 2013).

Twentieth-Century Shifts

In much of the Muslim world, the first part of the twentieth century saw the expansion of secular education, the retreat of religion from politics, and the secularization of laws and legal systems. With the end of colonial occupation, many of the new nation-states founded in Muslim-majority countries put aside Islamic jurisprudence (fiqh) in most areas of law. But in the area of family law, they selectively reformed classical fiqh rulings, codifying and grafting them onto new and unified legal systems inspired by Western models (Anderson 1976; Mahmood 1972; see also this volume, chapters 1 and 2). The best-known exceptions were Saudi Arabia, which preserved classical fiqh as fundamental law and attempted to apply it in all jurisdictional spheres; Turkey, which abandoned fiqh in all areas of law; and Muslim populations that came under communist rule. In other countries where classical fiqh remained the main source of family law, the impetus and extent of reform varied. However, with the exception of Tunisia (which banned polygamy), 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 established procedural devices such as eclectic choice (*takhayyur*) and mixing (*tafiq*); the exercise of *ijtihad* remained limited. Reforms focused on increasing the age of marriage, expanding women's access to judicial divorce, and restricting men's right to polygamy (Rahman 1980). 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 marriages and divorces that did not comply with official state-sanctioned procedures. Classical fiqh conceptions of marriage and family remained unchallenged (Mir-Hosseini 2009; Welchman 2004).

These developments transformed the interaction between fiqh and social practice and had two consequences that continue to haunt the Muslim politics of gender and law reform. First, the partial reform and codification of fiqh provisions led to the creation of a hybrid family law that was neither classical fiqh nor Western. As codes and statute books took the place of classical fiqh manuals, family law was no longer solely a matter for Muslim scholars operating within particular fiqh schools but also became the concern of legislative assemblies of a particular nation-state; these had neither the legitimacy nor the inclination to challenge pre-modern interpretations of shari'a. Deprived of the power to define and administer family law, the custodians and practitioners of traditional fiqh were no longer accountable to the community but were confined to the ivory tower of the *madrasa* or seminary. They lost touch with changing political realities and were unable to meet the epistemological challenges of modernity, including the idea of gender equality. These developments in practice worked against women, limited their ability to bargain with religious law and their access to legal justice, and gave fiqh rulings a new lease on life: They could now be applied through the machinery of modern nation-states. By contrast, recent studies of medieval and Ottoman court archive materials and judgments show that not only did judges generally take a liberal and protective attitude toward women, but also women could choose between legal schools and judges (Rapoport 2005; Sonbol 1996; Tucker 2000).

The second consequence of these changes was that putting aside fiqh as the source of other areas of law reinforced the religious tone of those provisions that related to gender rights, turning them into the last bastion of traditionalist Islamic authority. Thus, fiqh became a closed book, removed from public debate and critical examination. It was in these circumstances, then, that we witnessed the emergence of a new gender discourse and a genre of literature, which elsewhere I have termed *neotraditionalist* (Mir-Hosseini 1999; 2003), although perhaps *neofiqh* is a better term. Published by religious houses in both Muslim and Western countries, this literature is available (much of it on the internet) in a variety of languages, English among them. Largely written by men—at least until

very recently—these texts range from sound scholarship to outright polemic. Not being strictly legal in their language or arguments, the texts are also accessible to the general public. Aware of and sensitive to criticisms of the patriarchal bias of Muslim family laws, these texts are punctuated by general and abstract statements such as “Islam affirms the basic equality between men and women,” “Islamic law grants women all their rights,” and “Islamic law honors and protects women.” The authors' stated aim is to “clarify misunderstandings” about the “status of women in Islam.” They quote Qur'anic verses and *ahadith* that affirm the essential equality of the sexes in marriage, which they define using the terms “equity” and “complementarity.” They reread the sacred texts in search of new solutions to what they perceive to be a new and worrying challenge: women's demand for legal equality (Mir-Hosseini 2012).

Despite their variety and diverse cultural origins, what these rereadings have in common is an oppositional stance and a defensive or apologetic tone: oppositional because their concern is to resist the advance of what they see as alien “Western” values and lifestyles; apologetic because they attempt, by going back to classical fiqh texts, to explain and justify the gender biases that they inadvertently reveal. They see gender equality as an imported Western concept that must be rejected. In its place they put forward the notions of “complementarity” and “balance” in gender rights and duties. They formulate these notions, premised on a theory of the “naturalness” of shari'a law, as follows: Although men and women are created equal and are equal in the eyes of God, the roles assigned to men and women in creation are different, and classical fiqh rules reflect this difference. Differences in rights and duties, these authors maintain, do not mean *inequality* or *injustice*. On the contrary, if correctly understood, they are in line with human nature, hence the very essence of justice (Mir-Hosseini 2009).

In the second part of the twentieth century, with the rise of various new forms of political Islam, the *neofiqh* texts and their gender discourse became closely identified with Islamist political movements whose rallying cry was “return to shari'a.” The new political Islam had its biggest triumph in 1979 with the popular revolution in Iran that brought Islamic clerics to power. The same year saw the dismantling of reforms introduced earlier in the century by modernist governments in Iran and Egypt, as well as the introduction of the Hudud Ordinances in Pakistan. Yet this was also the year when the UN General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), giving gender equality a clear international legal mandate (Mir-Hosseini 2012).

The decades that followed saw the concomitant development, globally and locally, of two powerful but seemingly opposed trends. On the one hand, with the encouragement of CEDAW, in the 1980s, the international women's movement

expanded and NGOs emerged, with international funding and transnational links, to give women a voice in policymaking and public debate over the law. On the other hand, Islamist political movements—whether in power or in opposition—started to invoke shari'a in order to dismantle earlier efforts at reforming or secularizing laws and legal systems. Tapping into popular demands for social justice, the Islamists presented this dismantling as “Islamization,” the first step in bringing about their vision of a moral and just society.

Political Islam's drive for Islamization, however, had some unintended consequences. Most important, in several countries, the Islamists brought classical fiqh texts out of the closet, exposing them to unprecedented critical scrutiny and public debate. Muslim women now found ways to sustain a critique, from within, of patriarchal readings of shari'a and of the gender biases of fiqh texts. 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. Using the conceptual tools and theories of other branches of knowledge, these thinkers expanded on the work of previous reformers and developed further interpretive-epistemological theories. In this respect, the works of Mohammad Arkoun (Gunter 2004), Khaled Abou El Fadl (2001), Nasr Hamid Abu Zayd (Kermani 2004), Mohammad Mojtahed Shabestari (Vahdat 2004), and Abdolkarim Soroush (Sadri and Sadri 2000) are among the most important and relevant. Unlike earlier twentieth-century reformist thinkers, these new thinkers no longer seek an Islamic fiqh genealogy for modern concepts such as equality, human rights, and democracy. Instead, they emphasize the ways in which religion is understood, religious knowledge is produced, and rights are constructed in Islamic legal tradition.

By the early 1990s, there were clear signs of the emergence of a new consciousness, a new way of thinking about gender that was feminist in its aspiration and demands, yet Islamic in its language and sources of legitimacy (Badran 2002; Mir-Hosseini 1996; 2006; Najmabadi 1998). Some versions of this new discourse came to be labeled “Islamic feminism”—a conjunction that was unsettling to many Islamists and some secular feminists. This new discourse is nurtured by Muslim feminist scholars, who are uncovering a hidden history and rereading textual sources to contribute to an egalitarian construction of Muslim family laws.

In short, twentieth-century shifts in the politics of religion, law, and gender brought Muslim women onto center stage. Rather than merely being the subjects of family law reforms, they became active participants in the production of religious knowledge and in the process of lawmaking. At the same time, gender equality became inherent in global conceptions of justice, acquiring a clear legal mandate through CEDAW, which all Muslim states (except Iran, Somalia, and Sudan) have ratified—though in most cases subject to “Islamic reservations” (Krivenko 2009; Musawah 2012).

The Making of Musawah

The new century opened with the politics of the “war on terror” in the aftermath of the September 11 attacks on the United States. This added another layer of complexity to the politics of gender and Islam, with the illegal invasions of Afghanistan and Iraq being justified, in part, as campaigns to promote “freedom” and “women's rights.” In conjunction with the double standards employed in promoting UN sanctions, these initiatives showed that—as is also the case with shari'a and fiqh ideals—international human rights and feminist ideals are vulnerable to gross political manipulation, suffering a wide gap between ideal and practice. Many scholars and activists found themselves in the crossfire. On the one hand, Islamists were denying equality in the name of shari'a; on the other, hegemonic global powers were pursuing a neocolonial agenda in the name of feminism and human rights. For those of us who found ourselves in this position, the only way out of our predicament was to bring Islamic and feminist frameworks together lest our century-old quest for legal equality remain hostage to the fortunes of domestic political groups and global agendas (Mir-Hosseini 2012). Because the vast majority of women whose rights we championed were believers and wanted to live according to the teachings of Islam, effective change could come only through meaningful and constructive engagement with those teachings.

To pursue our ends, we needed to reclaim the egalitarian ethics of Islam, creating a public voice for our vision of Islam. We faced two different forms of resistance. The first came from religious establishments, leaders, and groups who claim to know and speak for “authentic” Islam. They view both international human rights and feminism with suspicion and refuse to engage meaningfully with their advocates. Their vision of Islam is the one that reaches most Muslim women, who consequently do not share our quest for legal equality. The other form of resistance is from women's rights nongovernmental organizations (NGOs) and activists, a large majority of whom are reluctant to address religious perspectives on women's issues. For many of them, Islam itself is the main obstacle in their struggle for equality; they work solely within the terms and discourse of human rights frameworks.

One of the very few women's NGOs that are happy to identify as both Islamic and feminist is the Malaysia-based Sisters in Islam (SIS). Since its inception in 1988, SIS has argued for women's rights and equality from within an Islamic framework, engaging scholars and the media in a public debate on religion. Zainah Anwar, founder and director of SIS, has written about her own journey from the local politics of Islam and women in Malaysia to the creation of SIS—and the launch of Musawah (Anwar 2009). In February 2007, she organized a workshop in Istanbul that brought together a diverse group of women's activists and scholars from different countries. The meeting led to the formation of a planning

committee charged to set out the vision, principles, and conceptual framework of the movement that we called Musawah (Equality) with the aim of forging a new strategy for reform. Inspired by the activism of Moroccan women and their success at bringing radical reforms in Moroccan family law in 2004, we adopted their slogan: "Change is necessary and change is possible" (see Collectif 95 Maghreb-Egalité 2005). We sought to link research with activism to develop a holistic framework integrating Islamic teachings, universal human rights law, national constitutional guarantees of equality, and the lived realities of women and men.

We commissioned a number of concept papers by reformist thinkers such as Amina Wadud, Khaled Abou El Fadl, and Muhammad Khalid Masud, as a way of opening new horizons for thinking and to show how the wealth of resources within Islamic tradition, as well as in the Qur'anic verses on justice, compassion, and equality, can support the promotion of human rights and a process of reform toward more egalitarian family relations. These papers were published as the book *Wanted: Equality and Justice in the Muslim Family* (Anwar 2009); we made them available in Arabic, English, and French and used them as the basis for a wider discussion with a larger group of Muslim scholars and human rights and women's rights activists. Our discussions continued for two years and included two further workshops in Cairo and London, as well as regular electronic communications among the members of the committee. Our efforts culminated in the *Musawah Framework for Action* (Anwar 2009, 11–21).¹

Drawing on the latest Muslim reformist thought and feminist research, our *Framework for Action* grounds our claim to equality and arguments for reform simultaneously in Islamic and human rights frameworks. Taking a critical feminist perspective, but working within the tradition of Islamic legal thought, we invoke two of the latter's main distinctions. The first distinction is between shari'a and fiqh. In Muslim belief, shari'a (lit. "the way"; see also this volume, chapters 1 and 2) is God's will as revealed to the Prophet Muhammad. Fiqh ("understanding") is Islamic jurisprudence, the process and the methodology for discerning shari'a and extracting legal rules from the sacred sources of Islam: the Qur'an and the *Sunna* (the practice of the Prophet as recorded in *ahadith* traditions). Like any other system of jurisprudence, fiqh is mundane, temporal, and local.

The second distinction is between the two main categories of legal rulings (*ahkam*): *'ibadat* (ritual/spiritual acts) and *mu'amalat* (social/contractual acts). Rulings in the first category, *'ibadat*, regulate relations between God and the believer, where jurists contend there is limited scope for rationalization, explanation, and change, since they pertain to the spiritual realm and divine mysteries. This fixity is not the case with *mu'amalat*, which regulate relations among humans and remain open to rational considerations and social forces. Most rulings concerning women and gender relations belong to the category of *mu'amalat*.

These analytic distinctions gave us the language and conceptual tools with which to challenge patriarchy from within Muslim legal tradition. The genesis of gender inequality in fiqh, we argued, lies in a contradiction between the ideals of shari'a and the patriarchal structures in which these ideals unfolded and were translated into legal norms. Islam's call for freedom, justice, and equality was submerged in the norms and practices of Arab society and culture in the seventh century and the formative years of Islamic law. As the fiqh schools emerged, patriarchal norms began to be assimilated into their rulings through a set of theological, legal, and social theories and assumptions that were part of the fabric of society and that reflected the state of knowledge of the time. Existing marriage practices and gender ideologies were sanctified, and women were gradually excluded from the production of religious knowledge (Mir-Hosseini 2003). Women had once been among the main transmitters of the *hadith* traditions, but by the time the fiqh schools were consolidated, more than a century after the Prophet's death, they had reduced women to sexual beings and placed them under men's authority. The farther we move from the era of the Prophet, we argued, the more we find women marginalized and deprived of political clout. Their voice in the production of religious knowledge is silenced, their presence in public space curtailed—their critical faculties so far denigrated as to make their concerns irrelevant to lawmaking processes. An extensive debate is ongoing in the literature on just this subject. Some argue that the advent of Islam weakened the patriarchal structures of Arabian society, others that it reinforced them. The latter also maintain that, before the advent of Islam, society was undergoing a transition from matrilineal to patrilineal descent and that Islam facilitated this by giving patriarchy the seal of approval—and, moreover, that Qur'anic injunctions on marriage, divorce, inheritance, and whatever relates to women both reflect and affirm such a transition (Ahmed 1992; Mernissi 1991; Smith 1985; Spellberg 1991).

Engaging with International Human Rights Law

Musawah actively pursues international advocacy and engagement with international human rights treaties and instruments, with a particular focus on CEDAW. Our aim is to break down the perceived dichotomy between Islam and human rights and promote perspectives derived from the Musawah framework. We share the framework with the CEDAW committee and other relevant actors as an alternative approach that demystifies religious-based objections and constructs arguments based on Islamic teachings, human rights, constitutional guarantees of equality, and social realities. We also submit thematic reports on article 16 of CEDAW, on which many Muslim states have placed reservations on the grounds of its incompatibility with "Islamic shari'a."² This article requires "state parties

to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.”

To understand the dynamics of interaction between Muslim countries and the CEDAW committee, and to offer our egalitarian vision of shari'a, we conducted a study in which we reviewed the documents of forty-two countries that are home to a Muslim majority or significant Muslim minority populations and that reported to the committee between 2005 and 2010. The report, published as *CEDAW and Muslim Family Laws: In Search of Common Ground* (Musawah 2011), comprises three parts: The first examines the justifications by Muslim states that failed to reform discriminatory elements of family laws in their countries. The second examines the CEDAW committee's responses to such justifications. In the third part, we show how the Musawah *Framework for Action* can be used to respond to Muslim states' justifications for noncompliance as well as to open possibilities for more just and equal Muslim family laws.

Our report reveals that Muslim states and the CEDAW committee are talking at cross purposes and how the language and rhetoric used by each side hinder meaningful dialogue. The justifications offered by states for their failure to introduce legal equality are either that the laws and practices in their respective countries are based on “shari'a” and are therefore immutable or that customs, traditions, and culture prevent them from implementing the CEDAW committee's recommendations. Not being in a position to challenge the state's version of the shari'a, the CEDAW committee has responded by reiterating its obligation to reform discriminatory laws and to comply with the committee's recommendation. We aim to break into this dialogue of the deaf by introducing the Musawah approach, and particularly by highlighting the crucial distinction between shari'a and fiqh. Through training sessions and seminars, we present the Musawah approach to those women's human rights NGOs and activists who are involved in preparing CEDAW shadow reports and are engaging with CEDAW committee members on key issues related to Islam and women's rights in their countries. (Shadow reports, which are submitted by NGOs, provide activists with an opportunity to present their own narrative of the status of women's rights in their respective countries as distinct from that presented by their government.)

Rethinking the Patriarchal Family

In 2010, as part of its knowledge-building area of work, Musawah initiated a long-term, multifaceted project to rethink the notion of authority in Muslim family laws. It has two interconnected elements.³ The first is the production of new feminist knowledge that critically engages with those concepts that continue to legitimate and institutionalize a patriarchal model of family and gender relations. Here the focus is on the two legal concepts of *qiwama* and *wilaya*. As constructed

in classical fiqh and as embodied in contemporary laws and practices in Muslim contexts, both concepts place women under male guardianship. *Qiwama* is understood as a husband's authority over and responsibility to provide for his wife. *Wilaya* denotes the guardianship rights of a father (or, in his absence, another male member of the family) over his sons until they are adults and his daughters until they are married. The second element of the project involves documenting the life stories of Muslim women and men in different countries with the aim of revealing how they experience, understand, and contest these two legal concepts in their lived realities.⁴

Our aim is to insert women's concerns and voices into the processes of production of religious knowledge and legal reform. In this sense, what we are doing is part of the larger struggle for the democratization of knowledge in Islam and for the authority to interpret its sacred texts. For the project, we commissioned eight background papers that expound and interrogate the construction of these two concepts in classical fiqh texts and their underlying religious and legal rationales. The papers focus on the theological, jurisprudential, ethical, historical, sociological, and legal aspects of *qiwama* and *wilaya*. They focus especially on Qur'an 4:34, which provides the main textual evidence in support of men's authority over women. Indeed, it is often the only verse that ordinary Muslims know that pertains to family law:

Men are *qawwamun* (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 *qanitat* (obedient) guarding the unseen according to what God has guarded. Those [Women] whose *nushuz* (rebellion) 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.

This translation is by Kecia Ali (2003), who points out that any rendering of the highlighted words amounts to an interpretation—and indeed they are now the focus of debate among Muslims. The translations I have given approximate the consensus of classical jurists, as reflected in the rulings (*ahkam*) that they devised to define marriage and gender relations. Marriage is a contract that in legal structure was patterned after the contract of sale (*bay'*), which served as model for most contracts in Islamic jurisprudence. The contract 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 themes of sexual access and compensation, as expressed in two legal concepts: *tamkin*

and *nafaqa*. *Tamkin*, obedience or submission—specifically sexual access—was the husband's right and thus the wife's duty, whereas *nafaqa*, or maintenance—specifically, shelter, food, and clothing—was the wife's right and the husband's duty. A wife's refusal to fulfill her marital duties put her in a state of *nushuz* (disobedience), which could free the husband from the duty to maintain her (Mir-Hosseini 2003).

Such a conception of marriage, in modified form, continues to be the backbone of Muslim family laws. It reflects, we argue, the patriarchal culture and ethics of the world in which the classical jurists lived. It is premised on a single postulate: that God made men *qawwamun* of women and placed them under male authority. This postulate, we show, is derived from a reading of Qur'an 4:34 that is no longer in line with either contemporary notions of justice or the lived realities of the vast majority of Muslims.

In one of our studies, Omaima Abou-Bakr shows how and through what processes the first sentence—*al-rijal qawwamun 'ala al-nisa' bi-ma faddal Allah ba'dahum 'ala ba'd wa-bi-ma anfaqu min amwalihim* (men are *qawwamun* in relation to women according to what God has favored some over others and according to what they spend from their wealth)—was continually reinterpreted (Abu Bakr 2015). She identifies four stages in the evolution of interpretations. In the first, the sentence was isolated from the rest of the Qur'an and turned into "an independent and separate (trans-contextual) patriarchal construct." This, she shows, was done by taking the term *qawwamun* out of its immediate context and transforming it into a grammatical *masdar* (a verbal noun or infinitive) of *qiwama*. In the second stage, when the concept was consolidated, rational arguments and justifications were provided for hierarchal relations between men and women. In the third stage, *qiwama* was expanded by linking it to the idea that men have an advantage over women, from the last phrase in Qur'an 2:228—"But men have a *daraja* (degree) over them (women)." This phrase, part of a long passage on the theme of divorce, was again taken out of its immediate context and interpreted as further support for male superiority; moreover, selected *ahadith* were also invoked to establish women's duty of obedience. The final stage came in the twentieth century with the modernist thinkers, who linked *qiwama* with the theory of the naturalness of "Islamic law" and the ideology of domesticity, using pseudopsychological knowledge to argue for men's and women's different natures (*fitra*).

Our other studies show that male authority over women, being a juristic construct without Qur'anic basis, cannot be defended on religious grounds. The term *qawwamun*, from which the jurists derived the concept of *qiwama*, only appears once in the Qur'an in reference to marital relations. Many other verses speak of the essential equality of men and women in the eyes of God and the world. In relation to marriage, two other terms appear more than twenty times: *ma'ruf* (good practice) and *rahmah wa muwadah* (compassion and love).

The closely related term *wilaya* does occur in the Qur'an, in the sense of friendship and mutual support, but never as endorsing male authority over women—the interpretation of the term that is enshrined, alongside *qiwama*, in juristic rulings on marriage (Lamrabet 2015).

One of main objectives of the project is to bring insights from feminist theory and gender studies into the debates around Muslim family law, and to ask new questions. Why and how did verse 4:34, and not other verses in the Qur'an, become the foundation for the legal construction of marriage? Why is *qiwama* still the basis of gender relations in the imagination of modern-day jurists and Muslims who resist and denounce the idea of equality in marriage as alien to Islam? How, and through what juristic processes, was men's authority over women legitimated and translated into laws? What does male guardianship, derived from the concepts *qiwama* and *wilaya*, entail in practice? How can we Muslim women rethink and reconstruct these concepts in ways that reflect our own notions of justice? 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?

Life Stories and Lived Realities

The second element of our project involves case studies from different countries, which show the actual working of these gendered concepts. The cases enable us to counter apologetic arguments based on ideology and hypothetical cases rather than on empirical evidence regarding women's experience and the lived realities of Muslim families. Islamist and traditionalist discourses present *qiwama* and *wilaya* as enjoining "protection," not discrimination. They argue that ensuring the "protection" of women guarantees a happy and stable family in which men are providers and women are maintained and protected.

These studies show that such arguments ignore the situation of most Muslim families today and conceal the domination and discrimination that men's authority over women entails in practice. The *fiqh* model of family rests on a series of assumptions: that in all classes, in all families, at all times, men are the sole providers and women do not contribute to household income; that a harmonious and stable family depends on men's rights to own, to decide, and to command; and that if women were given equal rights, the entire order would be threatened. If these assumptions were once valid (which is open to question), they are so no longer. Few families today—and generally only the better off—can exist with men as sole providers able to exert their legal authority, yet men's identity and sense of worth depends on the appearance, if not the fact, that they are the primary breadwinners and that their wives depend on them. When men fail to live up to an ideal that has little basis in reality, the result is often marital discord—and

violence. The structure of authority by which men are, at least in legal theory, the owners of family resources and the sole decision makers often forces women to make unfair compromises in marriage and to give up the few rights they have. Polygamy and unequal access to divorce and child custody do not create harmony and happiness but only pain and suffering for women and children, and often for men too. Empirical studies, including those of marital disputes in courts, reveal a real disjuncture between the fiqh model of the family as defined in classical fiqh and practices (see, for instance, Al-Sharmani 2013; Mir-Hosseini 1993; Welchman 1999). Happy and stable families, we contend, are those in which there is equality, mutuality in rights and responsibilities, and resources shared by the spouses.

In 2015, the first outcome of the project appeared as a collected volume, *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (Mir-Hosseini et al. 2015). Its main thesis is that male authority over women cannot be supported on religious grounds and that *qiwama* and *wilaya*, in the sense of placing women under male guardianship, are not Qur'anic concepts but juristic constructs that in time became the building blocks of patriarchy in Muslim legal tradition. The concepts rest on the assumption that God gave men authority over women, a theological fiction that became a legal postulate whose main function now is to sustain gender inequality. The contributors to the volume are scholars from different disciplines and backgrounds who use their expertise to demystify these terms and reinterpret them from within the Islamic tradition and its core theological and ethical principles. Above all, they ground these understandings in lived realities and women's experiences, which form the core of the life stories element of the project (Al-Sharmani and Rumminger 2015).⁵

Musawah is still in its formative phase, and the project I have outlined is still unfinished. The movement has, however, already been studied in several master's and doctoral theses, as well as in academic publications, and it has been recognized as an attempt to bridge the gulf between Islamic and human rights discourses, and also as a new and important social movement (for example Derich 2010; Sunder 2009). Musawah has also been the subject of academic criticism. For example, Margot Badran sees Musawah as promoting "communalism" and imposing a global agenda on women's local struggles for equality (Badran 2011, 83–85). Anthropologist Lila Abu-Lughod, on the other hand, criticizes Musawah and its advocacy of egalitarian Muslim family laws as an elitist project that is "incommensurable" with the lived realities of the Muslim women she studied in an Egyptian village. By opting for a rights framework, Abu-Lughod claims, Musawah's researchers fail to recognize the entanglement of their work with global governance and structures of inequality; thus, wittingly or unwittingly, they are conforming to "imperialist" and "neo-liberal" policies (Abu-Lughod 2013, 177–200). This is not the place for a detailed response to these criticisms.⁶ Suffice it to say that, although Badran and Abu Lughod differ

in their perspectives, their comments ignore or misunderstand the origins and objectives of the feminist project in Islam. They do not appreciate the personal, ethical, and spiritual side of the project, whose proponents seek to promote the values of equality, justice, and human dignity that they believe are inherent in their religion. Speaking for Musawah, I deny that we are naively idealistic; we are quite familiar with global politics and the shortcomings of the rights framework. Indeed, we are seeking to do something about both. We come from and operate in different local, national, regional, and institutional contexts, and we know our constraints. However, we are determined to be constructive—to aspire for and work toward bringing about egalitarian interpretations of shari'a.

Concluding Remarks

Let me summarize my argument and consider the potential of Muslim feminist voices in transforming the patriarchal ethics in Muslim legal tradition. One of the key obstacles that Muslim women have confronted in their struggle for equality is the linkage between the religious and political dimensions of identity in Muslim contexts. This linkage is not new—it has its roots in the colonial era—but it took on a new and distinct expression in the 1970s with the resurgence of Islam as a political and spiritual force. With the end of the colonial era, the rise of secular and despotic regimes in Muslim countries and their suppression of progressive forces left a vacuum that was filled by Islamist movements. Strengthened dramatically by the success of the Iranian Revolution of 1979, Islamist movements gained momentum with the subsequent perceived defeat of communism. With the US response to the events of September 11—in particular its invasions of Afghanistan in 2001 and Iraq in 2003—Muslim women found themselves in the crossfire.

A second strand of my argument is that the rise of political Islam had certain unintended—yet, in my view, positive—consequences: notably, the demystification of power games conducted in a religious language. This, in turn, led to the emergence by the 1990s of new reformist and feminist voices and scholarship in Islam that began to offer an internal critique of premodern interpretations of shari'a. Musawah is only one among many Muslim groups and voices that are now active in meetings as well as through lively online and social media, challenging patriarchy from within. In doing so, they are changing the terms of debates among Muslims and, above all, paving the way for the democratization of religious knowledge and for an egalitarian interpretation of shari'a. Their very existence is clear proof that a paradigm shift in the politics of Islam and gender is well under way—the old rationale and logic for patriarchal laws, previously undisputed, have lost their power to convince and cannot be defended on ethical grounds.

Finally, in Muslim contexts, the struggle for gender equality is as much political as it is theological, and we find it difficult, and at times futile, to decide when theology ends and politics begins. A growing popular understanding of the nature of this struggle has been one of many unintended consequences of the rise of political Islam and the politics of the War on Terror. These developments revealed the extent to which the fate of women's rights in Muslim contexts is vulnerable to local and global power struggles between forces with other priorities. Groups such as Musawah articulate a public voice that can break down ideological polarizations such as those between "secular" and "religious" feminism, and between "Islam" and "human rights," to which women's quest for equality and, in turn, the transition to democracy have remained hostage since the early twentieth century. They point us to the main site of battle, which is between patriarchal and authoritarian structures on the one hand and egalitarian, pluralist, and democratic aspirations and forces on the other.

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Notes

1. Available in five languages; see <http://www.musawah.org/about-musawah/framework-action>.
2. See <http://www.musawah.org/international-advocacy/thematic-reports>.
3. See <http://www.musawah.org/what-we-do/knowledge-building>.
4. See <http://www.musawah.org/what-we-do/qiwamah-and-wilayah>.
5. The planned outcomes are videos and a book of women's narratives.
6. I have engaged with Badran's criticisms elsewhere (Mir-Hosseini 2011); see also Terman (2015) for an incisive analysis of why Abu Lughod's line of criticism is problematic.

4 Gender, Legality, and Public Ethics in Morocco

Zakia Salime

#RIPamina/We Are All Amina Filali

The suicide of sixteen-year-old Amina Filali sparked a public outcry and heated controversies about unethical law in Moroccan society. Amina's case started with an alleged rape when she was fifteen years old; continued with her marriage to the alleged rapist, Mustafa, a twenty-four-year-old man; and ended with her death on March 10, 2012. Amina was a student and, according to some accounts, a factory worker; her husband works as a driver and lives with his parents. After spending a year in what some have described as a very abusive marriage, Amina ingested rat poison, readily available in subaltern neighborhoods, to end her life. But the heart of the controversy was not about this individualized economy of death, nor the "indirect" "structural violence" behind it (Skidmore 2004, 160), but rather its legalization.

At stake was article 20 of the Moroccan Family Code, which authorizes a judge to legalize the marriage of a minor (someone younger than eighteen years old), and article 475 of the penal code, which authorizes a judge to authorize the marriage of a rapist to his victim. Underlying this legal rationale are questions of family honor and a girl's disgrace in relation to a broken hymen. Article 475 states:

Whoever, without violence, threats, or fraud, abducts or attempts to remove or divert a minor under eighteen years, is punished by imprisonment of one to five years and a fine of 200 to 500 dirhams. When a nubile minor is removed or diverted and marries her captor, the latter may only be prosecuted when a complaint is filed by a person(s) entitled to apply for annulment of marriage and cannot be sentenced until after the annulment of marriage been pronounced.

The news of Amina's suicide went viral on the internet as human rights and cyberactivists began to spread the word through Twitter and Facebook, gathering support and calling for action. Over the following week, the hashtag #RIPamina choked Twitter feeds while activists formed online groups that soon materialized as street protests. The local press, even in its mainstream form,