

Men in Charge?

*Rethinking Authority in
Muslim Legal Tradition*

Edited by Ziba Mir-Hosseini,
Mulki Al-Sharmani and Jana Rumminger



ONEWORLD

A Oneworld Book

First published by Oneworld Publications, 2015

Copyright © Ziba Mir-Hosseini, Mulki Al-Sharmani and Jana Rumminger 2015

All rights reserved
Copyright under Berne Convention
A CIP record for this title is available
from the British Library

ISBN 978-1-78074-716-3
ISBN 978-1-78074-717-0 (eBook)

Typeset by Siliconchips Services Ltd, UK
Printed and bound in Great Britain by TJ International Ltd,
Padstow, Cornwall

Oneworld Publications
10 Bloomsbury Street
London WC1B 3SR
England

Stay up to date with the latest books,
special offers, and exclusive content from
Oneworld with our monthly newsletter

Sign up on our website
www.oneworld-publications.com

Muslim Legal Tradition and the Challenge of Gender Equality*

Ziba Mir-Hosseini

The twentieth century saw a proliferation of debates among Muslims on the theme of 'the status of women in Islam'. Much of the argument was apologetic – a defence against modernists' criticisms of the discriminatory family laws and unequal gender relations that were understood to be justified by Islamic texts and Muslim legal tradition.¹ Muslim women advocates of equality between men and women in law, let alone in social or political life, were late to find a voice, though only marginally later than their counterparts among non-Muslims.

In this chapter, I trace the story of how the idea of gender equality emerged as a challenge to Muslim legal tradition during the twentieth century. The rise of nation states and of the modern concept of citizenship in Muslim contexts in the early part of the century brought the beginnings of developments, such as the growth of literacy among both men and women and the rapid growth of mass media, which radically, and at an accelerating speed, changed the way in which knowledge was produced and distributed. Major transformations in the politics of religion, law and gender in Muslim contexts accompanied a sharpening confrontation between two notions of justice and two modes

* This chapter develops the treatment of the subject in Mir-Hosseini (2013).

¹ For an overview of these arguments, see Stowasser (1993), Ali (2003), Mir-Hosseini (2007) and Duderija (2011).

of knowledge production. The pre-modern ideas that informed Muslim legal tradition encountered modern ideals of universal human rights, equality and personal freedom. Laws and practices that supported male authority over women, once considered natural and common sense, came to be seen as unjust and discriminatory. Established patriarchal interpretations of the *Shari'ah* have been strongly challenged, and the textual sources that supported them have been criticized as hypocritical, or at best contradictory.

I begin by outlining the notion of male authority as constructed by classical jurists, which continues to be reflected in contemporary Muslim family laws. I then explore the endeavour that has been underway since the early twentieth century to produce new and transformative knowledge about the notions of gender equality and justice in Islamic legal thought. I focus on three texts by reform thinkers that appeared at significant moments in the history of family law reforms, which together offer a framework and a methodology for reinterpreting Islam's sacred texts relating to family and gender relations. I do this against a background of the shifts in the politics of religion, law and gender in Muslim contexts since the early twentieth century that led, by the end of the century, to the emergence of feminist voices and scholarship in Islam. I end with the implications of these developments for the project of constructing egalitarian family laws from within an Islamic framework.

MALE AUTHORITY AS A LEGAL POSTULATE

At the heart of the unequal construction of gender rights in Muslim legal tradition is the idea that God has given men authority over women. Defenders of male authority frequently invoke, as their main textual justification, Qur'anic verse 4:34, from which classical jurists derived the concept of *qiwamah*, developing it into a guiding principle to define and regulate gender relations. Thus we should start with this verse and the ways in which it has been interpreted and translated into legal rulings. It reads,

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.

Kecia Ali, from whom I have taken this translation, leaves the italicized words untranslated, pointing out that any translation of each of these key terms amounts to an interpretation (Ali, n.d.). I have inserted translations that approximate the consensus of classical Muslim jurists and are reflected in a set of rulings (*ahkam*) that they devised to define marriage and marital relations. These rulings rest on a single postulate: that God made men *qawwamun* over women and placed them under male authority. For these jurists, men's superiority and authority over women was a given, legally inviolable; it was in accordance with a conception of justice that accepted slavery and patriarchy, as long as slaves and women were treated fairly. They naturally understood the verse in this light; they used the four key terms in the verse to define relations between spouses, and notions of justice and equity.

This is what Lynn Welchman (2011, p. 7) refers to as the *qiwamah* postulate – using 'postulate' in the sense defined by Masaji Chiba (1986, p. 7): 'A value system that simply exists in its own right'. It operates in all areas of Muslim law relating to gender rights, but its impact is most evident in the laws that classical jurists devised for the regulation of marriage and divorce. Welchman's chapter in this volume illustrates how the postulate works in contemporary family laws.

I have discussed elsewhere the legal structure of marriage in classical *fiqh* or jurisprudence (Mir-Hosseini, 2003; 2007; 2012); here I merely outline its salient features. The jurists defined marriage as a contract of exchange and patterned it on the contract of sale (*bay'*), which served as a model for most contracts in *fiqh*. The contract, called '*aqd al-nikah* (the contract of coitus), has three essential elements: *ijab*, the offer made by the woman or her guardian; *qubul*, acceptance by the husband; and *mahr*, a gift from the husband to the person of the bride. 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 central legal concepts: *tamkin* (also *ta'a*) and *nafaqah*. *Tamkin*, obedience or submission, specifically sexual access, becomes the husband's right and thus the wife's duty; whereas *nafaqah*, maintenance, specifically shelter, food and clothing, becomes the wife's right and the husband's duty. But if a wife is in a state of *nushuz* (disobedience) she loses

her claim to maintenance.² Whereas the husband has the unilateral and extra-judicial right to terminate the contract by *talaq* or repudiation, a wife can only terminate the contract with her husband's consent or the intervention of the court – if she produces a valid reason.³

There were, of course, differences between and within the classical schools over the meanings of these three interrelated concepts – *nafaqah*, *tamkin* and *nushuz* – but they all shared the same conception of marriage, and the large majority made a woman's right to maintenance dependent on her obedience to her husband. They disagreed, Ibn Rushd (1996) tells us, over 'whether maintenance is a counter-value for (sexual) utilization, or compensation for the fact that she is confined because of her husband, as in the case of one absent or sick' (p. 63). And it was within the parameters of this logic – men provide and women obey – that notions of gender rights and justice acquired their meanings.

This is not to deny that classical jurists were concerned with women's rights or their welfare; they did their best to protect women against a husband's potential abuse by narrowing the scope of his authority to the unrestricted right to sexual relations with his wife. This in turn limited a wife's duty of obedience to her sexual availability, and 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 classical *fiqh* texts at face value, according to some of them a wife had no obligation to do housework or to care for the children, even to suckle her babies; if she did these, she could demand 'wages'. Likewise, a man's right to discipline a wife who was in a state of *nushuz* was severely restricted; he could discipline her, but not inflict harm. For this reason, some jurists recommended that he should 'strike' his wife only with a handkerchief or a *miswak*, a twig used for cleaning teeth (Mahmoud, 2006, footnote 35). But they made no attempt to limit a man's right to *talaq* (unilateral divorce), although there are numerous moral injunctions that could have enabled them to do so. For instance, there are sayings of the Prophet to the effect that *talaq* is among the most detested of permitted acts and that when a man pronounces it God's throne shakes. In its legal structure, *talaq*, unlike marriage, was defined as a unilateral act that needed neither grounds nor the consent of the wife.

² For a concise discussion of *nushuz* in Islamic discourses, see Ali (2007).

³ For further discussions of how early jurists conceptualized marriage, see Rapoport (2005) and Ali (2010).

Whether these rulings reflect the Qur'anic conception of marriage or corresponded to actual practices of marriage and gender relations is another area of enquiry that recent scholarship in Islam has started to uncover. Studies on courtroom practices give us a much more complex picture of marital relations and court practices in pre-modern times (Rapoport, 2005; Sonbol, 1996; Tucker, 2000), while those which examined the Qur'anic concept of marriage show the theological error in the very idea that God has given men authority over women (Hassan, 1987; 1999; Wadud, 1999; 2006; Barlas, 2002; al-Hibri, 1982; 2003). Five chapters in this volume (Abou-Bakr, Chaudhry, Lamrabet, Shaikh and Wadud) give us very cogent arguments and convincing textual evidence to this effect and offer alternative egalitarian interpretations of Islam's sacred texts.

I suggest that the juristic construct of *qiwamah*, developed in the context of the marriage contract, provided the rationale for other legal disparities, such as men's rights to polygamy and to unilateral repudiation, women's lesser share in inheritance, and the ban on women being judges or political leaders. That is to say, women were not qualified to occupy positions that entailed the exercise of authority in society because they were under their husband's authority and not free agents and they would thus be unable to deliver impartial justice. Similarly, since men provided for women, women's lesser share of inheritance was just. These inequalities in rights were also rationalized and justified by other arguments, based on assumptions about innate, natural differences between the sexes, such as women being by nature weaker and more emotional, qualities inappropriate in a leader, and that they are created for childbearing, a function that confines them to the home, which means that men must protect and provide for them.⁴

MEETING THE CHALLENGE OF EQUALITY: REFORMIST APPROACHES

With the advent of modernity, the idea of male authority over women started to lose its hold. From the turn of the twentieth century, Muslim reformist thinkers have tried to reconcile what they understood to be fundamental

⁴ For the ways in which these arguments shape legal rulings, see in particular Ali (2010), 'Abd Al'Ati (1997) and Mahmoud (2006).

principles in Muslim law and ethics with modernist conceptions of justice and gender relations.

In what follows I discuss and contextualize three reformist writings that appeared at key moments in the politics of Muslim family law reforms. The first is a 1930 book by the Tunisian Tahir al-Haddad, *Women in the Shari'a and in Our Society*,⁵ written in the context of the early twentieth-century debates surrounding codification, when *fiqh* rulings were being grafted onto modern legal systems. The second is an article by the Pakistani Fazlur Rahman, 'The Status of Women in Islam: A Modernist Interpretation' (1982b); it was published when political Islam was at its zenith and Islamists, proclaiming the slogan 'Return to *Shari'ah*', were dismantling earlier reforms. The third is a paper by the Egyptian Nasr Abu Zayd, 'The Status of Women between the Qur'an and *Fiqh*' (2013), written when Muslim feminist voices had already emerged and were in conversation with reform thinkers like him.

I have chosen to focus on these three particular writings for several reasons. First, they offer a framework for rethinking the notions of justice and gender relations that underpin classical *fiqh* rulings. Each of these texts tells us about not only the state of the debate at the time, but also the forces against which Muslim reformists have had to struggle. Secondly, all three authors met a great deal of opposition in their own countries, where their ideas were declared heretical; all three paid a price for their ideas and for going against official dogma. Yet, thirdly, their writings proved instrumental in shaping later discourse and developments and inspired the feminist scholarship in Islam exemplified in this volume.

The first moment: codification

During the twentieth century, many Muslim-majority countries adopted new legal codes relating to marriage and family. The new codes were based on classical *fiqh* rulings, but incorporated reformed elements in order to accommodate some modern expectations and realities.⁶ Reforms were introduced from the framework of Muslim legal tradition, by mixing principles and rulings from different *fiqh* schools and by procedural devices, without directly challenging

⁵ A recent English translation by Husni and Newman (2007) is titled *Muslim Women in Law and Society: Annotated Translation of al-Tahir al-Haddad's Imra'tuna fi 'l-shari'a wa 'l-mujtama'*. Unless otherwise stated, quotations and references are from this translation.

⁶ For codification, see Anderson (1976) and Mahmood (1972).

the patriarchal construction of marriage and marital relations.⁷ They focused 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 and divorces that did not comply with official, state-sanctioned procedures (Mir-Hosseini, 2009).

While making some concessions to contemporary demands for improved rights for women, the effect of these reforms was not only to give the state an unprecedented authority to enforce its chosen prescriptions for marriage procedures and family practices, but also to entrench traditional patriarchal interpretations of the sacred texts and the legal and ethical assumptions behind them.⁸

The first of our texts appeared in this political context of the codification and superficial reform of Muslim family laws. Tahir al-Haddad (1899–1936) studied Islamic sciences at Zaytouna, the prestigious centre of religious studies in Tunisia, and qualified as a notary in 1920. He opted for journalism and became involved in the movement for independence from France. He developed a keen interest in workers' and women's conditions and became active in the trade union movement. His activism made him deeply concerned about the situation of workers and women and the injustices to which they were subjected. In 1927 he published a book on labour law and in 1930 a second book, *Our Women in the Shari'a and Society*, which contains his critique of the way in which women were treated in Tunisian society, which al-Haddad attributed to erroneous interpretations of Islam's sacred texts. This book caused an immediate uproar in Tunisia; he was denounced and his degree revoked by his seminary colleagues in Zaytouna, and he was declared an apostate.⁹ Al-Haddad died in 1936 in poverty and isolation.

Our Women in the Shari'a and Society is part of a nationalist and reformist debate on the 'status of women in Islam' that was ignited by the encounter

⁷ These were established *fiqh* devices: eclectic choice (*takhayyur*) and mixing (*talfiq*) of legal opinions and rulings from different schools; the exercise of *ijthad* remained limited. For a discussion, see Rahman (1980).

⁸ For discussion of how these reforms have had mixed benefits for women, see Abu-Odeh (2004), Mir-Hosseini (2007; 2009) and Sonbol (1996; 1998).

⁹ For the political context, reactions to al-Haddad's book, and the politics of family law in Tunisia, see Salem (1984), Boulby (1988) and Charrad (2001).

with Western colonial powers.¹⁰ Critical of *fiqh* rulings, reformists called for women's education, for their participation in society and for unveiling. One subtext in this debate was the repudiation of the colonial premise that 'Islam' was inherently a 'backward' religion and denied women their rights; another was the quest for modernization 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.¹¹ Al-Haddad's book was distinctive in one major respect: it went beyond mere criticism by providing a framework for rethinking *fiqh* legal concepts.

There are two related elements to al-Haddad's framework. First is the distinction between norms and prescriptions that are essential to Islam as a religion, thus eternal, and those which are contingent, thus time and context bound. In al-Haddad's words:

We 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 mind set that existed in Arab society in the pre-Islamic era when Islam first emerged. (Husni and Newman, 2007, p. 36)

The second element is what he termed *al-siyasa al-tadrijiyya*, the policy of gradualism, which he argued governed the process of legislation in the Qur'an and *Sunnah*. 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' (Husni and Newman, 2007, 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' (Husni and Newman, 2007, p. 48). This toleration was a concession to the socioeconomic imperatives of

¹⁰ Qasim Amin's *The Liberation of Women* (1899) was the most influential of this literature; for a critical discussion, see Ahmed (1992, chapter 8).

¹¹ For the intellectual genealogy of al-Haddad's text, see Husni and Newman's introduction (2007, pp. 1–25); for accounts of the intellectual and social change that made women's issues central to politics, see Ahmed (1992, chapter 7); for the experience of different countries, see Keddie (2007, pp. 60–101).

the time. It was not then possible to do away with slavery altogether, 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, patriarchy was tolerated then, but again the Qur'an made it clear that the principle in Islam remains equality.

This framework enabled al-Haddad to offer different readings of verses 4:34 and 2:228 – the two verses that constitute the prime textual support for the institution of male authority over women.¹² 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; the intent in both verses was to restrain these privileges and to protect women in the face of them. This becomes clear when we read these verses in their entirety and in conjunction with those which 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' can be ensured; he is given the right to 'correct' his wife's behaviour in order to prevent a greater ill, namely divorce. This verse is not speaking about the rights and duties of spouses, but is about the course of action to be taken when there is marital discord, and it offers ways to resolve such discord. 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 right, 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 2:228,¹³ which the jurists read as evidence of men's superiority, al-Haddad maintains that it must be read in its entirety and in connection with the previous and following verses, 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.

¹² For how the link between these two verses was made through the exegesis, see Abou-Bakr in this volume.

¹³ Verse 2:228 reads, 'Divorced women shall wait concerning themselves for three monthly periods. Nor is it lawful for them to hide what Allah Hath created in their wombs, if they have faith in Allah and the Last Day. And their husbands have the better rights to take them back in that period if they wish for reconciliation. And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree [of advantage] [*darajah*] over them. And Allah is Exalted in Power, Wise.'

With respect to marriage and gender roles, 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 did not assign fixed roles to men and women... Nowhere in the Qur'an can one find any reference to any activity – no matter how elevated it may be, and whether in government or society – that is forbidden to woman' (Husni and Newman, 2007, 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. 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.'¹⁴

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 love and mercy between your (hearts): Verily in that are signs for those who reflect. (verse 30:21)

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. (Husni and Newman, 2007, p. 57)

By shifting the focus from verse 4:34 to verse 30:21, al-Haddad was able to break the link not only between maintenance and obedience as constructed in classical *fiqh* texts, but also between male authority over women (*qiwamah*), as derived from verse 4:34, and male superiority (*darajah*), derived from verse

¹⁴ 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' (Husni and Newman, 2007, p. 31).

2:228. By contextualizing these verses, he was able to offer an egalitarian interpretation of both. This also enabled him to make freedom of choice (*hurriyyat al-ikhtiyar*) the starting point for regulating marriage. Love and compassion, al-Haddad argues, cannot develop in a relationship that is imposed; women, like men, must have the freedom to choose their spouses and must be able to leave an unwanted marriage, and this is what Islam mandates.

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 to his book. He 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.¹⁵ 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 Bourghiba, the modernists embarked on 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; when women were still not vocal participants in the debate.¹⁶

The second moment: the rise of political Islam

Following the Second World War, more Muslim-majority countries, including newly founded states such as Pakistan, broke away from their colonial rulers and, along with increasing modernization in various forms, came under the control of monarchies or republics of different political hues. Political movements proliferated, in different shapes and combinations – Marxist, nationalist and, increasingly, Islamist.

The rise of Islam as both a spiritual and a political force in the 1970s brought a reversal of the movement towards secularization of laws and legal systems. Some of the reforms introduced earlier in the century by modernist governments were dismantled, for example in Egypt, but particularly in Iran, where political Islam had its greatest triumph in the 1979 popular

¹⁵ A joint campaign by Moroccan and Tunisian women's organizations went public in 2006 with a two-volume publication (Association des Femmes Tunisiennes pour la Recherche et le Développement [AFTURD], 2006).

¹⁶ For an overview and analysis of these reforms, see Kelly (1996).

revolution that brought clerics into power. In the same year, Pakistan introduced the Hudood Ordinances that extended the ambit of *fiqh* to certain aspects of criminal law. Yet 1979 was also the year when the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which gave gender equality a clear international legal mandate.

Our second text, 'The Status of Women in Islam: A Modernist Interpretation' appeared in 1982, when political Islam was at its zenith and Islamists, proclaiming the slogan 'Return to *Shari'ah*', were busy reversing earlier reforms. Fazlur Rahman (1919–88) was another reformer whose ideas met a great deal of opposition in his own country, Pakistan. The formation of his ideas belongs to the tail end of Western colonialism in Muslim contexts, when processes of nation-building, modernization and reform of the judiciary, and codification of family law were well underway. Rahman was more of a scholar than an activist; his intellectual genealogy is from reform thinkers in the Indian subcontinent. He was instructed in traditional Islamic sciences by his father, a renowned Islamic scholar, and went on to study Arabic and Islamic studies at Punjab University in Lahore and Islamic philosophy at the University of Oxford.

In 1961 he was invited by General Ayub Khan to help reform religious education in Pakistan, and he became director of the Islamic Research Institute, an intellectual think tank tasked with steering the path of modernization and reform in ways that would not offend the religious establishment (Saeed, 2004).¹⁷ His reformist ideas and critical approach to Islamic tradition made him a target for Ayub Khan's influential religious and political opponents. The fiercest opposition came from religious conservatives and 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 publications. His work in turn has been the subject of study, and played an important role in the development of Islamic studies in the US.¹⁸ But his vast output, all in English, remains almost unknown in the

¹⁷ Major family law reforms in the Indian subcontinent, namely the 1939 Dissolution of Marriages Act and the 1961 Muslim Family Laws Ordinance, took place before Rahman's directorship. Women's groups were instrumental in pushing for these reforms.

¹⁸ For studies on Fazlur Rahman's work, see Sonn (1991), Moosa (2000) and Saeed (2004). For his impact on American Islamic discourse, see Waugh and Denny (1998).

Arab world and in traditional religious circles, and his influence in his own country, Pakistan, has been 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. 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 (Rahman, 1980). 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.¹⁹

His last major work, *Islam and Modernity* (1982a), is a call for a fresh engagement with the Qur'an and a critical reassessment of the entire Islamic intellectual tradition: theology, ethics, philosophy and jurisprudence. The Qur'an, Rahman contends, is not a book of law; it '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' (Rahman, 1982a, p. 5). Not all of these solutions are relevant or applicable to all times and all contexts; but the moral principles behind them are immutable and permanently valid. These moral principles show us the way, the *Shari'ah*, and how to establish a society on earth where all humans can be treated as equals, as they are equal in the eyes of God (Sonn, 1998, p. 128).

In the course of the historical development of Islam, the moral principles behind Qur'anic laws came to be distorted; and a body of law named *Shari'ah* (never mentioned in the Qur'an in the sense of a system of law) became the defining element of Islam. This distortion had its roots in political developments after the Prophet's death and in the subsequent decay and stagnation of Islamic intellectualism, which pre-date Islam's encounter with Western colonial powers. Muslims failed to create a viable system of Qur'an-based ethics. From the outset, jurisprudence in Islam overshadowed the science of ethics; Muslim scholars relied more on Persian and Greek sources to develop an Islamic ethics than on the Qur'an. Rahman suggests that 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 *Sunnah*: between essentials and accidentals, and between prescriptive and descriptive (Saeed, 2004, pp. 43–5).

¹⁹ For his views on gender rights and his impact on the development of a new Islamic feminism, see Sonn (1998).

In 'The Status of Women in Islam: A Modernist Interpretation' (1982b), published in the same year as *Islam and Modernity* (1982a), Rahman contends that the legal passages in the Qur'an on the subject of women are part of an 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. By 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. What the reforms achieved was 'the removal of certain abuses to which women were subjected': they banned female infanticide and widow inheritance and reformed the laws of marriage, divorce and inheritance. As with slavery, however, these reforms did not go as far as abolishing patriarchy; they expanded women's rights and brought tangible improvements in their position – though not social equality. Women retained the rights they had to property and were no longer treated as property; they could not be forced into marriage against their will and they received a marriage gift (*mahr*); they also acquired better access to divorce and were allocated shares in inheritance (1982b, pp. 286–9).

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' (1982b, p. 291). Rahman adds,

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. (1982b, p. 293)

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' (1982b, p. 292) and marriage. Such sayings also contradict what we know of the Prophet's own conduct, thus must be rejected. The Qur'an does speak of inequality between sexes. But when it does, it gives the rationale, which has to do with socioeconomic factors. Verse 4:34 'gives two rationales for male superiority: (1) that man is "more excellent", and (2) that man is charged entirely with household expenditure' (1982b, p. 294).

What the Qur'an appears to say, therefore, is that since men are the primary socially operative factors and breadwinners, 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. (1982b, 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 socioeconomic 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 socioeconomic developments. Once women acquire education and participate in society and economy, the 'degree' 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 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' (1982b, p. 295). 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' (1982b, 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 sociohistorical 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. (1982b, 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 (1982b, p. 308).

The third moment: the emergence of 'Islamic feminism'

Fazlur Rahman's article addressed a debate that had been going on for many decades among Muslim modernists – almost all of them men. Women were still largely absent from the debate, as they had been from the process of reform and codification of family law in the first part of the century. But the article appeared at the point when women's rights had just become part of human rights discourse, and human rights treaties and documents, in particular CEDAW, were giving women a new language in which to frame their demands.

The last two decades of the twentieth century saw the concomitant development, globally and locally, of two powerful but seemingly opposed frames of reference. On the one hand, with the encouragement of CEDAW, the international women's movement expanded and NGOs emerged with international funding and transnational links and gave women a voice in policymaking and public debate about the law. On the other hand, Islamist political movements – whether in power or in opposition – started to invoke *Shari'ah* in order to dismantle earlier efforts to reform and/or secularize laws and legal systems. Tapping into popular demands for social justice, they presented this dismantling as 'Islamization' and as the first step to bringing about their vision of a moral and just society.

These Islamist measures, however, had some unintended consequences. The most important was that they brought the classical *fiqh* texts out of the closet, exposing them to unprecedented critical scrutiny and public debate. 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 have extended the work of previous reformers and developed further

interpretive-epistemological theories. What distinguishes them from their predecessors is that instead of seeking an Islamic genealogy for modern concepts like equality, human rights and democracy, they focus on how religion is understood, how religious knowledge is produced and how rights are constructed in Muslim legal tradition.

Meanwhile, attempts to translate anachronistic patriarchal interpretations of the *Shari'ah* into policy provoked many women to increasing criticism and drove them to greater activism. Socioeconomic imperatives had already brought many more women than before into education and employment. These developments opened new spaces for activism and debate. Women were now finding ways to sustain a critique, from within, of patriarchal readings of the *Shari'ah* and of the gender biases of *fiqh* texts. A new discourse, a new way of thinking about gender, arose among Muslims, which has come to be labelled 'Islamic feminism' – a conjunction that was unsettling to many Islamists and some secular feminists (Mir-Hosseini, 2006). This discourse was further facilitated by the rapid spread of new technologies, notably the internet; and these new technologies have regularly shown their potential for the mobilization of campaigns for change. Uncovering a hidden history and rereading Islam textual sources, the new 'Islamic feminists' started to reclaim Islam's egalitarian message. Pioneers among them were Azizah Al-Hibri, Riffat Hassan, Amina Wadud and Fatima Mernissi, followed by others who are breaking new ground.²⁰ Their voices started to draw attention from media and academia, via public meetings and workshops that provided a platform for scholar-activists.

In the new century, in the aftermath of the 11 September 2001 attacks, the 'War on Terror' added another level of complexity to the politics of gender and Islam. The invasions of Afghanistan and Iraq – both partially justified as promoting 'freedom' and 'women's rights' – combined with the double standards employed in promoting UN sanctions, showed that both international human rights and feminist ideals are open to manipulation and that there is a huge gap between these ideals and the practices of their proponents. For some Muslim women this was also a turning point, as they felt caught between those trying to impose a patriarchal and violent vision of their faith and those trying to impose a neocolonial project in the name of human rights and feminism (Mir-Hosseini, 2012).

²⁰ For recent assessment of this body of work, see Abou-Bakr (2013), Seedat (2013) and Hermansen (2013).

This was the context in which our final text was produced. The author, Nasr Hamid Abu Zayd, was among the most prominent and radical of the new reformist thinkers. He presented ‘The Status of Women between the Qur’an and *Fiqh*’ to participants at a workshop in Cairo in January 2010, including conservatives, reformists and feminists.²¹

A notable scholar of the Qur’an, Nasr Hamid Abu Zayd (1943–2010) was born in a small village in Egypt, where he received a traditional religious education; he later studied literature in Cairo University and obtained his doctorate in Islamic studies. In a compelling account of his engagement with Qur’anic studies, Abu Zayd traced its evolution, starting from memorization of the entire Qur’an as a child, his early sympathies with the Muslim Brotherhood, his entering the academic world and his vocal criticism of the dominant Islamic discourse in Egypt, which led to his exile (Abu Zayd, 2011). His aim was ‘to achieve a scientific understanding of the Qur’an, and... to brush aside layers of ideological interpretation, in order to unearth the historical reality of the text’ (Kermani, 2004, p. 175). In 1990 he published a groundbreaking book, *The Concept of the Text (Maḥmū al-Nass)*, in which he brought to the traditional field of Qur’anic studies concepts and tools from other scholarly disciplines, namely modern linguistics and philosophical hermeneutics. His criticism of the instrumentalization of religion, and his challenge to the ulama’s monopoly of sacred texts, made him the target of attacks by Islamists and religious leaders in Egypt, who denounced him as an apostate and tried to annul his marriage. Forced into exile in 1995, he resumed his academic career in the Netherlands as professor of Islamic studies at Leiden University, where he remained until his untimely death in June 2010. His critical approach to the Qur’an has enlivened the international scholarly debate on Islam and human rights.

A deeply religious man, Abu Zayd defined himself as ‘one of the Arab and Muslim adherents of “rationalism”, a “rationalism” which does not exclude or despise religion as mere psychological phantom’ (2011, p. 55). Equally at ease with popular Islam and with his deep knowledge of classical religious sciences, Abu Zayd engaged in international scholarly debate on Islam and human rights. In two books (both in Arabic), he addressed the issue of women’s rights. His latest thinking on the issue was presented at the Cairo workshop

²¹ This workshop was organized under the auspices of the Norwegian Centre for Human Rights as part of their project New Directions in Islamic Thought (<http://www.jus.uio.no/smr/english/about/programmes/oslocoalition/islam/>). Musawah had recently been launched and Abu Zayd was an enthusiastic supporter.

in January 2010, in a paper that he had intended to expand and revise for publication.²²

In this paper, 'The Status of Women between the Qur'an and *Fiqh*', Abu Zayd starts by quoting the Egyptian reformist Muhammad 'Abduh (1845–1905), who contrasts *fiqh* and Qur'anic conceptions of marital relations:

Marriage, according to *fiqh*, is a contract which renders the female vagina the property of a male. The Qur'an's view, however, is that marriage is one of the Divine signs (*ayat*): '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 you; verily in that are Signs for those who reflect' (verse 30:21). (2013, p. 153)

The vast chasm between Qur'anic and *fiqh* conceptions of marriage, Abu Zayd argues, has to do with how, early in the history of Islamic sciences,

The worlds of the Qur'an, or its multi-dimensional worldview, were separated, in fact fragmented. Theology took over the world of divinity, i.e. the divine nature; philosophy took over the world of metaphysics, i.e. the cosmos, the grades of existence, nature, and so on; Sufism took over the ethical-spiritual world; and legal theory took over the legislative world. (2013, p. 154)

All reformists, from the onset, have been concerned with the consequences of this fragmentation, which have come to be felt more acutely in modern times. In the past few centuries, the gradual but steady marginalization of theology, philosophy and mysticism has left the legal domain as the only representative of Islam. This is particularly problematic, Abu Zayd reminds us, because what has now come to define Islam comprises a very limited portion of the Qur'an; out of 6,236 verses, at most only 500 contain legal material (2013, p. 157).

This has intensified the disconnect between the Qur'an's ethical/spiritual domains of meaning, in which human equality is affirmed, and social/legalistic domains of meaning, in which this equality is negotiated. 'To reconnect the

²² The paper was not published until after his death in June of that year. I was a convener of the workshop and an editor of the resultant book, *Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Tradition*, in which we decided to publish his paper in its original form (Abu Zayd, 2013).

worlds of the Qur'an, he argues, 'we need to approach the Qur'an differently,' and it is here that the tools and theories of modern linguistics and hermeneutics can come to our aid.

The Qur'an was communicated as a series of oral discourses during the last twenty years of the Prophet's life (612–632); each discourse has its occasion, audience, structure, type, mode and message. These discourses were later collected, arranged and written down in the *mushaf*.²³ The difference between the *mushaf* arrangement and the chronological order of these discourses is a well-known fact. The *mushaf* gave the Qur'an the form of a book, which in its turn redefined the Qur'an as a Text. (Abu Zayd, 2013, p. 154)

To reach and transmit his message, God adopted a human language; the first addressees of the Qur'an were the seventh-century Arabs, whose language, which was part of their social reality, became also the language of the Qur'an. Like any text, the language of the Qur'an is not self-explanatory, but is in need of interpretation, which is the *raison d'être* of the Qur'anic sciences (*ulum al-Qur'an*), whose task has been to decipher and understand the language of the Qur'an. When we read classical Qur'anic scientific literature in the light of modern theories about textual analysis, we realize, in Abu Zayd's words,

The Qur'an, although recognized as a holy text, is a historically and culturally determined text. This historical text is the subject of understanding and interpretation, whereas God's words exist in a sphere beyond any human knowledge. Therefore, sociohistorical analysis is needed for its understanding and a modern linguistic methodology should be applied for its interpretation. The Qur'an is a message revealed from God to man through the Prophet Muhammad, the Messenger of God and a human. The Qur'an is very clear about that. A message represents a communicative link between a sender and a recipient through a code or linguistic system. Because the sender in the case of the Qur'an cannot be the object of scientific study, the scientific introduction to the analysis of the text of the Qur'an can only take place

²³ In Qur'anic studies *mushaf*, literally 'collection of pages,' denotes the 'compiled, written pages of the Qur'an' as distinct from the Qur'an, which denotes the specific 'revelation that was read to the Prophet Muhammad.'

through the study of the contextual reality and the cultural milieu of seventh-century Arabia. (2011, p. 82)

So, 'it will be always necessary to analyse and to interpret the Qur'an within the contextual background from which it originated'; but, 'being a unique text, the Qur'an employs a special linguistic encoding dynamics in order to convey its specific message' (2011, p. 83). To understand what seem to be 'contradictions' with respect to equality in general, and between genders in particular, Abu Zayd contends that, apart from removing the layers of ideological interpretation, which entails consciousness of the historical reality of the Qur'an, we need to realize that the Qur'an 'was originally a series of discourses', and to analyse it as such.

For now, I propose dividing the worlds of the Qur'an – its multi-dimensional worldview – into five interdependent domains, each of which reflects one level that has been taken away and disconnected from the other levels in one of the Islamic disciplines, namely *fiqh*, theology, philosophy and mysticism. (2013, p. 155)

These domains are: 1) cosmology; 2) the divine–human relationship; 3) the ethical and moral dimension; 4) the societal level; and 5) punishment (*hudud*) (2013, pp. 155–6). To understand the Qur'anic view on gender relations, Abu Zayd maintains that, apart from removing the layers of ideological interpretation, which entails consciousness of the historical reality of the Qur'an, we need to reconnect the different domains of meanings – or different worlds – of the Qur'an.

On the cosmological level, [human equality] is stated in the opening verse of the chapter 'Women' (*Al-Nisa'*, 4:1), which addresses humans: 'O mankind! Reverence your Lord Who created you from a single soul from which He created its mate and from them He emanated countless men and women; reverence Allah through Whom you demand your mutual (rights) and (reverence) the wombs (that bore you): for Allah ever watches over you.' It is quite significant that the term 'soul', *nafs*, is a feminine word, and that the mate created from it is named *zawjaha*, which is a masculine word that could be translated as 'twin' or 'husband'. The second meaning is highlighted in 7:189: 'It is He who created you from a single soul and made out of it its mate that he might dwell

with her (in love).’ As the chapter about women opens with absolute cosmological equality, the entire chapter, which contains most of the legal regulations concerning marriage, should always be connected to the principle of equality. Another point to support this proposition is the frequent reference to justice, *‘adl*. (2013, p. 161)

Likewise, ‘On the ethical-spiritual level, equality is also sustained; both men and women receive the same reward for their righteous actions. In a cluster of verses [16:90, 16:97, 4:124, 40:40, 3:195] presenting a discourse of admonition, divine justice is put forward as the governing principle.’ In verses 9:71–2 ‘the believers are presented as one unified community of males and females in mutual intimate guardianship’ (p. 161).²⁴

On the societal level, however, differentiation is acknowledged. In the case of religious difference, there exists a discourse of discrimination. Gender differentiation, however, is free from any discrimination. Qur’anic gender differentiation developed into discrimination in the *fiqh* literature due to a certain cultural and socio-historical context. (p. 162)

The existence of passages in the Qur’an that treat men and women differently, Abu Zayd stresses, is not an obstacle to an egalitarian construction of gender rights in Islam. He concludes his paper by raising two questions:

[W]hy should we demand of the Qur’an that it violate the established rules in the societal domain of meaning? It should be recognised that when the Qur’an sustains absolute equality in both the cosmological and the ethical–spiritual domain, this is the direction in which the Qur’an would like Muslims to upgrade the societal domain of inequality. Traditional law-makers failed to do so because there was no socio-cultural development in this direction ...

The demand for gender equality is a product of our modern era of human rights. The challenging question is: are Muslims able to exert the same courage to upgrade the societal domain of meaning to the high level of the cosmological and the ethico-spiritual domains? (Abu Zayd, 2013, p. 164)

²⁴ See Lamrabet’s chapter in this volume for an expansion of this theme.

*

The authors of all three texts considered here sacrificed a great deal personally to propose gender-egalitarian readings of key Qur'anic passages and offer radical approaches and methods for reforming discriminatory legal practices. They have all had great influence on the development of current reformist thinking – and not surprisingly have put proponents of traditionalist ideas and practices on the defensive. Their writings have become the backbone of feminist scholarship in Islam, which is taking reformist thought onto new ground by insisting on gender as a major framework of analysis.

EGALITARIAN FAMILY LAWS: PROSPECTS AND IMPLICATIONS

Against this background we can now turn, in conclusion, to the project of constructing egalitarian family laws within an Islamic framework, its prospects of success and the challenges that confront its advocates. It is clear from the arguments of the foregoing texts that current discriminatory laws regarding marriage and gender relations are neither divine nor immutable; rather, they are juristic constructions premised on a postulate that is no longer valid or acceptable: that God placed women under male authority. By establishing gender hierarchy and discrimination, the juristic concepts *qiwamah* and *wilayah* are in effect the 'DNA of patriarchy'²⁵ in Muslim legal tradition. Those who seek to establish an egalitarian construction of gender rights in Muslim contexts must address and redefine the understanding of these legal concepts in line with contemporary notions of justice, in which gender equality is inherent.

Because of the radical transformations, global and local, in the politics of religion, state and gender since the early twentieth century, Muslim legal tradition faces growing challenges that pose, in effect, an epistemological crisis.²⁶ But moments of crisis are also moments of opportunity and change.

²⁵ I take this from Gilligan, who calls the gender binary and hierarchy the 'DNA of Patriarchy' (2011, p. 18).

²⁶ I borrow this concept from the philosopher Alasdair MacIntyre (1988, pp. 350–2), who argues that every rational enquiry 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, he goes on, gives rise to an internal critique that will eventually transform the tradition.

There are several dimensions to this crisis. One is the changed relationship between Muslim legal tradition, state and social practice. As we have seen, in the course of the twentieth century in many Muslim countries, the partial reform and codification of *fiqh* provisions led to the creation of a hybrid family law; codes and statute books replaced *fiqh* manuals, and family law became the concern of the legislative assembly of a nation state, which had neither the legitimacy nor the inclination to challenge patriarchal interpretations of the *Shari'ah*. With the rise of political Islam in the last part of the century, these *fiqh* manuals and their gender discourse became closely identified with Islamist political movements whose rallying cry was 'Return to *Shari'ah*'. At the same time, the expansion of international feminism and creation of women's NGOs brought women to centre stage, so that women themselves, rather than the abstract notion of 'gender equality', are now at the heart of family law reforms. Earlier in the century, women were merely the subject of these debates and were absent from the processes of reform and codification of family law; as the century came to a close, they 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. These developments intensified the confrontation between Islamists and feminists, which by the end of the century led to the emergence of new forms of activism and a new gender discourse, now known as 'Islamic feminism', to separate patriarchy from the reading of Islam's sacred texts.

Another dimension of this crisis is that ideas of 'justice' have changed, posing challenges to traditionalist Muslim theology, law and society. Where patriarchal and authoritarian/discriminatory laws and practices have prevailed with regard to gender issues and family structures, they are justified in religious terms, notably with reference to concepts derived from the much-debated verse 4:34. Muslim legal thought traditionally operates with an Aristotelian, deserts-based notion of justice (Kadivar, 2013), as in the *fiqh* axiom, 'justice is maintaining everything in its proper place': men and women have their proper, essential places in family and society, and justice consists of keeping them in these places and giving them rights accordingly.²⁷ Such a notion of justice, which once dominated most legal systems, has been profoundly contested by the modern expansion of democratic and human rights discourses that have made equality inherent to generally accepted conceptions of social justice. Yet it continues to be reproduced, in a modified form, in contemporary Muslim

²⁷ For another critical discussion, see Eshkevari (2013, pp. 192–3).

family laws that adopt a ‘protectionist’ approach. This perpetuates outmoded gender stereotypes that keep hierarchical power relations intact, referring to the fundamental premise of *qiwamah*; that is to say, because the sexes are different, because women are weak and men are strong, because men protect and provide for women, justice mandates that men have authority and superior rights.

The dissonance between contemporary notions of justice and gender rights and those which underpin the established interpretations of the *Shari’ah* is one of the challenges that face those attempting to construct an egalitarian family law within an Islamic framework. Muslim reformist thinkers – like those in other major religious traditions – have devised a number of strategies for meeting the challenge.²⁸ Chief among these strategies have been differentiating the changeable from the unchangeable in the texts, referred to by some authors as the specific and the universal, mutable and immutable, accidental and essential, descriptive and prescriptive; discerning the Lawgiver’s aims (*maqasid*) and the changes that these aims would have led to in the course of time; and locating both the sacred texts and the rulings that the classical *fuqaha* derived from them in their historical and political contexts.²⁹

Armed with these strategies, some twentieth-century Muslim reformists, responding to the multiple and diverse legal and social dilemmas faced by Muslim families and societies, have argued, from within the tradition, for bringing *Shari’ah*-based family laws into conformity with contemporary expectations and realities. I have gone into some detail to show how three reformists deployed these strategies in texts that appeared at key moments of the debate. All three were pioneers of the new trend of Islamic reformist thought that is seeking a fresh engagement with Islam’s sacred texts. What this new trend is making clear is that the textual sources of Islam are not inherently patriarchal, nor do they set out an exhaustive body of eternal laws. What they give us is ethical guidance and principles for the creation of just laws. The Qur’an upholds justice and exhorts Muslims to stand for justice; but it does not give us a definition of justice; rather it gives direction, the path to follow towards justice, which is always time and context bound. To understand the Qur’an’s direction, they contend, we need a critical reassessment

²⁸ Silvio Ferrari (2006) discusses how religious legal systems adapt to change, drawing parallels between the Roman Catholic Church and Jewish and Islamic law.

²⁹ Kurzman (1998; 2002) introduces and gives samples of the works of Muslim thinkers; Abu Zayd (2006) provides a critical historical analysis.

of the entire Islamic intellectual tradition: theology, ethics, philosophy and jurisprudence.

But, as the accounts of al-Haddad, Rahman and Abu Zayd testify, this fresh approach faces a major obstacle: entrenched patriarchal and authoritarian structures and the way they conspire to silence voices of reform and change. The proponents of traditionalist ideas and practices will not easily relinquish established interpretations of the *Shari'ah*, as reflected in classical *fiqh* rulings that allowed discrimination on the basis of gender and faith. The struggle for gender equality in Muslim contexts is part of the wider struggle for political democracy, pluralism and freedom of expression; the democratization of the production of religious knowledge has an essential role in this struggle. The fate of women's rights, and in turn the transition to democracy, remained hostage to the fortunes of political forces and tendencies during the twentieth century. More recent political developments – notably, the emergence and suppression of the Green movement in Iran in the aftermath of the disputed 2009 presidential election, and subsequent uprisings in Egypt, Tunisia, Libya, Syria and Turkey – have once again revealed the extent to which women's rights in Muslim contexts are vulnerable to local and global power struggles between forces with other priorities. Islamist elements, which tend to win popular support in times of upheaval, are almost always motivated by traditionalist patriarchal assumptions and policies supported by established pre-modern interpretations of the *Shari'ah*. These interpretations provide Islamists with the theological and ideological justification to keep women under male authority and treat them as second-class citizens.

In other words, the problem is not with the text but with context and the ways in which the text is used to sustain patriarchal and authoritarian structures. The strategy must be not just logical argument and informed reinterpretations from within the tradition; there must also be challenges on the political front. What are the motives and interests of those who claim the authority to speak in the name of religion, who manipulate established interpretations of the texts for authoritarian purposes and who in effect appeal to concepts such as *qiwamah* not only to support male authority in the family but also to maintain authoritarian and absolutist approaches to religion?

Feminist voices and scholarship in Islam take up these challenges. They are opening the way for a meaningful and constructive conversation between feminism and Muslim legal tradition. This conversation has both epistemological and political implications. On the epistemological side, feminist critical theory enables us to see how unreflective assumptions and 'commonsense'

arguments limit and deform our knowledge, and so gives us tools for analysing relations between the production of knowledge and the practices of power.³⁰ It also provides us with a research methodology for giving voice to women and inserting their concerns and interests in the process of law-making.³¹ Above all, it enables us to ask new questions: What is the best way of approaching the tension between 'protection' and 'domination' that is inherent in the very concepts of *qiwamah* and *wilayah*, however we define them? What does 'protection' mean? Does it have to entail hierarchy and control? How do we achieve equality and justice in the family? What kind of laws and legal reforms are needed to promote them? Do they entail identical rights and duties for spouses? When does unequal treatment in law become discrimination? How can we deal justly with differences between men and women?

These questions have been at the centre of feminist legal theory, as evidenced in the shift from 'formal' to 'substantive' approaches to equality.³² A formal model of equality, which often advocates gender-neutral laws, focuses on equal treatment in law but does not necessarily enable women to enjoy their rights on the same basis as men. This is so because it rests on a false premise; neither the starting point nor the playing field are the same for both sexes. Not only do women not have the same access as men to socioeconomic resources and political opportunities, but women are not a homogeneous group; class, age, race and socioeconomic situation are all important factors in the ways in which women have been disadvantaged. A substantive approach to equality, by contrast, takes these factors into account, by aiming 'at the elimination of individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society' (Kapur, 2012, p. 268). Instead of striving for gender-neutral laws, the emphasis here is on the kinds of laws and legal reforms that regulate power relations between genders in such a way that women are able to enjoy dignity, security and respect in the family and full participation in society.

On the political front, bringing current Islamic legal thought into conversation with feminism can pave the way for transcending ideological dichotomies such as 'secular' versus 'religious' feminism, or 'Islam' versus 'human rights', to which Muslim women's quest for equality and dignity has remained hostage

³⁰ This is a particular concern of feminist standpoint theory; for a discussion, see Harding (2004, pp. 11–15).

³¹ For a discussion, see Ramazanoğlu (2002).

³² For a concise discussion of these two different approaches, see Kapur (2012, pp. 266–72).

since the early twentieth century. These dichotomies have masked the real site of the battle, which is between patriarchal and authoritarian structures, on the one side, and egalitarian and democratic ideologies and forces, on the other. Unmasking this reality entails two linked processes: recovering and reclaiming the ethical and egalitarian ethos in Islam's sacred texts, and decoding and exposing the relation between the production of knowledge and the practices of power. It is only then that we can aspire to real and meaningful change that can transform the deep structures that have shaped our religious, cultural and political realities.

REFERENCES

- 'Abd Al'Ati, Hammudah. 1997. *The Family Structure in Islam*. Indianapolis: American Trust.
- Abou-Bakr, Omaima (ed.). 2013. *Feminist and Islamic Perspectives: New Horizons of Knowledge and Reform*. Cairo: Women and Memory Forum with the Danish–Egyptian Dialogue Institute and the Danish Centre for Research on Women and Gender.
- Abu-Odeh, Lama. 2004. 'Modernizing Islamic Law: The Case of Egypt'. *Vanderbilt Journal of Transnational Law* 37 (4): pp. 1043–146.
- Abu Zayd, Nasr. 1990. *The Concept of the Text: A Study of the Qur'anic Sciences* (Mafhum al-Naṣṣ: Dirasah fi'Ulum al-Qur'an). Cairo: al-Hayah al-Misriyah al-Ammah lil-Kitab.
- Abu Zayd, Nasr. 2006. *Reformation of Islamic Thought: A Critical Historical Analysis*. Amsterdam: Amsterdam University Press.
- Abu Zayd, Nasr. 2011. 'Towards Understanding the Qur'an's Worldview: An Autobiographical Reflection'. In *New Perspectives on the Qur'an: The Qur'an in its Historical Context*, edited by Gabriel Said Reynolds, pp. 47–87. London: Routledge.
- Abu Zayd, Nasr. 2013. 'The Status of Women between the Qur'an and *Fiqh*'. In *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, pp. 153–68. London: I.B. Tauris.
- AFTURD. 2006. *Egalité dans l'Héritage: Pour Une Citoyenneté Pleine et Entière*. Tunis.
- Ahmed, Leila. 1992. *Women and Gender in Islam: Historical Roots of a Modern Debate*. New Haven: Yale University Press.
- Al-Hibri, Azizah. 1982. 'A Study of Islamic Herstory: Or How Did We Ever Get into This Mess'. In *Women's Studies International Forum* 5 (2): pp. 207–19.
- Al-Hibri, Azizah. 2003. 'An Islamic Perspective on Domestic Violence'. *Fordham International Law Journal* 27 (1): pp. 195–224.
- Ali, Kecia. 2003. 'Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law'. In *Progressive Muslims: On Justice, Gender, and Pluralism*, edited by Omid Safi, pp. 163–89. Oxford: Oneworld.
- Ali, Kecia. 2007. 'Religious Practices: Obedience and Disobedience in Islamic Discourses'. In *Encyclopedia of Women in Islamic Cultures*, vol. 5, edited by Suad Joseph, pp. 309–13. Leiden: Brill.

- Ali, Kecia. 2010. *Marriage and Slavery in Early Islam*. Cambridge, MA: Harvard University Press.
- Ali, Kecia. n.d. 'Muslim Sexual Ethics: Understanding a Difficult Verse, Qur'an 4:34'. <http://www.brandeis.edu/projects/fse/muslim/diff-verse.html>, accessed 1 January 2014.
- Anderson, James Norman. 1976. *Law Reforms in the Muslim World*. London: Athlone.
- Barlas, Asma. 2002. *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur'an*. Austin: Texas University Press.
- Boulby, Marion. 1988. 'The Islamic Challenge: Tunisia since Independence'. *Third World Quarterly* 10 (2): pp. 590–614.
- Charrad, Mounira. 2001. *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria and Morocco*. Berkeley: University of California Press.
- Chiba, Masaji. 1986. 'Introduction'. In *Asian Indigenous Law in Interaction with Received Law*, edited by Masaji Chiba, pp. 1–9. London: Kegan Paul International.
- Duderija, Adis. 2011. *Constructing a Religiously Ideal 'Believer' and 'Woman' in Islam: Neo-traditional Salafi and Progressive Muslims' Methods of Interpretation*. New York: Palgrave.
- Eshkevari, Hassan Yousefi. 2013. 'Rethinking Men's Authority over Women: *Qiwama*, *Wilaya* and Their Underlying Assumptions'. In *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, pp. 191–212. London: I.B. Tauris.
- Ferrari, Silvio. 2006. 'Adapting Divine Law to Change: The Experience of the Roman Catholic Church (with Some References to Jewish and Islamic Law)'. *Cardozo Law Review* 28 (1): pp. 53–65.
- Gilligan, Carol. 2011. *Joining the Resistance*. Cambridge, UK: Polity Press.
- Harding, Sandra (ed.). 2004. *The Feminist Standpoint Theory Reader: Intellectual and Political Controversies*. London: Routledge.
- Hassan, Riffat. 1987. 'Equal before Allah? Woman–Man Equality in the Islamic Tradition'. *Harvard Divinity Bulletin* 17 (2): http://www.globalwebpost.com/farooqm/study_res/islam/gender/equal_riffat.html, accessed 1 January 2014.
- Hassan, Riffat. 1999. 'Feminism in Islam'. In *Feminism and World Religions*, edited by Arvind Sharma and Kate Young, pp. 248–78. New York: State University of New York Press.
- Hermansen, Marcia. 2013. 'New Voices of Women Theologians'. In *Muslima Theology: Voices of Muslim Women Theologians*, edited by Ednan Aslan, Elif Medeni and Marcia Hermansen, pp. 11–34. Frankfurt: Peter Lang.
- Husni, Ronak, and Daniel Newman (eds). 2007. *Muslim Women in Law and Society: Annotated Translation of al-Tahir al-Haddad's Imratuna fi 'l-shari'a wa 'l-mujtama', with an Introduction*. London: Routledge.
- Ibn Rushd. 1996. *The Distinguished Jurist's Primer*, vol. 2 (*Bidayat al-Mujtahid wa Nihayat al-Muqtasid*), translated by Imran Ahsan Khan Nyazee. Reading: Garnet.
- Kadivar, Mohsen. 2013. 'Revisiting Women's Rights in Islam: "Egalitarian Justice" in Lieu of "Deserts-Based Justice"'. In *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, pp. 213–36. London: I.B. Tauris.
- Kapur, Ratna. 2012. 'Unveiling Equality: Disciplining the "Other" Woman through the Human Rights Discourse'. In *Islamic Law and International Human Rights Law*, edited by Anver M. Emon, Mark S. Ellis and Benjamin Glahn, pp. 265–90. Oxford: Oxford University Press.

- Keddie, Nikki. 2007. *Women in the Middle East: Past and Present*. Princeton, NJ: Princeton University Press.
- Kelly, Patricia. 1996. 'Finding Common Ground: Islamic Values and Gender Equity in Tunisia's Reformed Personal Status Law'. In *Shifting Boundaries in Marriage and Divorce in Muslim Communities, Special Dossier*, edited by Homa Hoodfar, pp. 74–105. Grabels, France: Women Living under Muslim Laws.
- Kermani, Navid. 2004. 'From Revelation to Interpretation: Nasr Hamid Abu Zayd and the Literary Study of the Qur'an'. In *Modern Muslim Intellectuals and the Qur'an*, edited by Suha Taji-Farouki, pp. 169–92. Oxford: Oxford University Press.
- Kurzman, Charles (ed.). 1998. *Liberal Islam: A Sourcebook*. Oxford: Oxford University Press.
- Kurzman, Charles (ed.). 2002. *Modernist Islam 1840–1940: A Sourcebook*. Oxford: Oxford University Press.
- MacIntyre, Alasdair. 1988. *Whose Justice? Which Rationality?* Indiana: University of Notre Dame Press.
- Mahmood, Tahir. 1972. *Family Law Reforms in the Muslim World*. Mumbai: N.M. Tripathi.
- Mahmoud, Mohamed. 2006. 'To Beat or Not to Beat: On Exegetical Dilemmas over Qur'an 4:34'. *Journal of the American Oriental Society* 126 (4): pp. 537–50.
- Mir-Hosseini, Ziba. 2003. 'The Construction of Gender in Islamic Legal Thought: Strategies for Reform'. *Hawwa* 1 (1): pp. 1–28.
- Mir-Hosseini, Ziba. 2006. 'Muslim Women's Quest for Equality: Between Islamic Law and Feminism'. *Critical Inquiry* 32 (1): pp. 629–45.
- Mir-Hosseini, Ziba. 2007. 'Islam and Gender Justice'. In *Voices of Islam*, vol. 5, *Voices of Diversity and Change*, edited by Vincent Cornell and Omid Safi, pp. 85–113. Westport, CT: Greenwood.
- Mir-Hosseini, Ziba. 2009. 'Towards Gender Equality: Muslim Family Laws and the *Shari'ah*'. In *Wanted: Equality and Justice in the Muslim Family*, edited by Zainah Anwar, pp. 23–63. Petaling Jaya: Musawah.
- Mir-Hosseini, Ziba. 2012. 'Sexuality and Inequality: The Marriage Contract and Muslim Legal Tradition'. In *Sexuality in Muslim Contexts: Restrictions and Resistance*, edited by Anissa Helie and Homa Hoodfar, pp. 124–48. London: Zed Books.
- Mir-Hosseini, Ziba. 2013. 'Muslim Family Laws, Justice and Equality: New Ideas, New Prospects'. In *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, pp. 7–34. London: I.B. Tauris.
- Moosa, Ibrahim. 2000. 'Introduction'. In *Revival and Reform in Islam*, by Fazlur Rahman. Oxford: Oneworld.
- Rahman, Fazlur. 1980. 'A Survey of Modernization of Muslim Family Law'. *International Journal of Middle Eastern Studies* 11 (4): pp. 451–65.
- Rahman, Fazlur. 1982a. *Islam and Modernity: Transformation of an Intellectual Tradition*. Chicago: University of Chicago Press.
- Rahman, Fazlur. 1982b. 'The Status of Women in Islam: A Modernist Interpretation'. In *Separated Worlds: Studies of Purdah in South Asia*, edited by Hanna Papanek and Gail Minault, pp. 285–310. Delhi: Chanakya.
- Ramazanoğlu, Caroline with Janet Holland. 2002. *Feminist Methodology: Challenges and Choice*. London: Sage.

- Rapoport, Yossef. 2005. *Marriage, Money and Divorce in Medieval Islamic Society*. Cambridge, UK: Cambridge University Press.
- Saeed, Abdullah. 2004. 'Fazlur Rahman: A Framework for Interpreting the Ethico-legal Content of the Qur'an'. In *Modern Muslim Intellectuals and the Qur'an*, edited by Suha Taji-Farouki, pp. 37–66. Oxford: Oxford University Press.
- Salem, Norma. 1984. 'Islam and the Status of Women in Tunisia'. In *Muslim Women*, edited by Freda Hussain, pp. 141–68. London: Croom Helm.
- Seedat, Fatima. 2013. 'When Islam and Feminism Converge'. *Muslim World* 103 (3): pp. 404–20.
- Sonbol, Amira El-Azhary (ed.). 1996. *Women, Family and Divorce Laws in Islamic History*. Syracuse, NY: Syracuse University Press.
- Sonbol, Amira El-Azhary. 1998. 'Ta'a and Modern Legal Reform: A Reading'. *Islam and Christian-Muslim Relations* 9 (3): pp. 285–94.
- Sonn, Tamara. 1991. 'Fazlur Rahman's Islamic Methodology'. *Muslim World* 81 (3–4): pp. 212–30.
- Sonn, Tamara. 1998. 'Fazlur Rahman and Islamic Feminism'. In *The Shaping of An American Islamic Discourse: A Memorial to Fazlur Rahman*, edited by Earle H. Waugh and Frederic M. Denny, pp. 123–45. Atlanta: Scholars Press.
- Stowasser, Barbara. 1993. 'Women's Issues in Modern Islamic Thought'. In *Arab Women: Old Boundaries, New Frontiers*, edited by Judith E. Tucker, pp. 3–28. Bloomington: Indiana University Press.
- Tucker, Judith. 2000. *In the House of Law: Gender and Islamic Law in Ottoman Syria and Palestine*. Berkeley: University of California Press.
- Wadud, Amina. 1999. *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective*. Oxford: Oxford University Press.
- Wadud, Amina. 2006. *Inside the Gender Jihad: Women's Reform in Islam*. Oxford: Oneworld.
- Waugh, Earle H. and Frederic M. Denny (eds). 1998. *The Shaping of an American Islamic Discourse: A Memorial to Fazlur Rahman*. Atlanta: Scholars Press.
- Welchman, Lynn. 2011. 'A Husband's Authority: Emerging Formulations in Muslim Family Laws'. *International Journal of Law, Policy and the Family* 25 (1): pp. 1–23.