

Islamic law and the question of gender equality

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Introduction

Gender equality is a modern ideal that did not enter Islam's juristic landscape until the 20th century, along with the expansion of feminist and human rights discourses. Since then it has been the subject of an impassioned debate – a debate that is entangled in the history of the polemics between Islam and the West, and the anti-colonial and nationalist discourses of the first part of the 20th century. With the rise of political Islam in the second half of the century, and the Islamist slogan of 'Return to *Shari'ah*', the debate became part of a larger intellectual and political struggle among the Muslims between two understandings of their religion and two ways of approaching its sacred texts. One is an absolutist, dogmatic and patriarchal Islam that makes little concession to contemporary realities, such as the changed status of women in society. The other is a democratic, pluralist and rights-based Islam that is making room for these realities and values, including gender equality. In the new century, the politics of the 'war on terror' and the invasions of Afghanistan and Iraq – both of them partly justified as promoting women's rights – added a new layer of complexity to the political and rhetorical dimensions of the debate.

In this chapter I outline the conceptions of gender evident in Islamic legal tradition, summarizing how classical Muslim jurists, in the dominant interpretations of the *Shari'ah*, conceived of gender difference and gender relations. I show how 20th-century developments – notably the rise of Muslim nation-states and changed relations between Islamic law, state and practice – challenged these traditionalist conceptions of gender, and led to the debate between two competing contemporary trends, which I have termed neo-traditionalist and reformist. I then introduce the work of recent reformist and feminist voices and scholarship in Islam, and the political and hermeneutical challenges they face in their attempts to bring about an egalitarian construction of gender. Finally, I give the example of the work of Musawah, a movement of scholars and activists for justice and equality in the Muslim family.¹

Two themes run through the chapter and link its different sections.

First, ideas about gender, equality and justice have always been socially constructed; they were shaped and evolved in interaction with ideological, political, socio-economic forces,

and people's experiences and expectations. The same goes for interpretations of Islam's sacred texts and the legal rulings that the jurists derived from them. There is a dynamic tension between spiritual-ethical egalitarianism as an essential part of Islam's message and the patriarchal context in which this message was unfolded and translated into law. This tension has enabled both proponents and opponents of gender equality to claim textual legitimacy for their respective readings and gender ideologies.²

Second, the contemporary quest for gender equality in Islamic law is part of a larger struggle for social justice, which is enmeshed in an intricate dialectic between religion, politics and practice. The democratization of the production of religious knowledge is an essential part of this struggle.

1 Gender in Islamic legal tradition

The lively and contentious debate over gender equality and Islamic law, and the vast literature that it has produced, can be grouped around three competing discourses. The first, which I term Traditionalist, is premised on gender inequality as prescribed by classical Muslim jurists, and is still in operation in its unmodified form in only a few Muslim countries, notably Saudi Arabia. The second discourse is the dominant one, developed in the early years of the 20th century and reflected in the legal codes of many Muslim countries. It advocates 'complementarity' of rights, often referred to as 'gender equity', which, as we shall see, is a new defence and modification of the classical notion of gender inequality – hence I term this perspective Neo-Traditionalist. The third discourse, which I call Reformist-Feminist, emerged in the last decades of the 20th century and is still in the process of formation; it argues for gender equality on all fronts; while the other two discourses take a protectionist approach to women's rights, Reformist-Feminists aim to democratize the dynamics of gender relations in law and in practice, both in the private sphere of the family and in society at large.

1.1 Traditionalists: gender inequality

Traditionalists take a literal approach to the texts, and their gender discourse is an ahistorical and simplified version of that of classical *fiqh* texts.³ These texts take male superiority for granted, reflecting the world in which their authors lived. Biology is destiny; there is no overlap between gender roles; a woman is created to bear and rear children as her only contribution to society; her place is at home. Such a notion of women's roles and duties informs the ideology and practice of the most conservative Islamist political groups, which take it as the indisputable interpretation of the *Shari'ah*. They are today a small minority, but as they often enjoy substantial financial support from Saudi Arabia they are able to be active in propagating their views in many countries.

The gender discourse in classical *fiqh* was encapsulated in two sets of legal rulings (*aḥkām*): those that defined the marriage contract and those that regulated women's dress and access to public space. In these matters, the various *fiqh* schools all shared the same inner logic and patriarchal bias. If they differed, it was in the manner and extent to which their conception was translated into legal rules. A brief examination of these rulings is in order here, as they are at the centre of the debate about gender equality and Islamic law.

Here, I must stress, I am only concerned with the ways in which classical jurists understood and defined gender relations;⁴ whether these rulings corresponded at the time to actual practices of marriage and women's covering is, of course, another question, and one that

recent scholarship in Islam has started to answer. What this scholarship warns us is not to take the classical *fiqh* texts at face value; in pre-modern times judicial rules and court practices were quite different, and women had better access to legal justice than has been the case in more recent times; they frequented courts to negotiate the terms of their marriages and divorces and were present in public space.⁵

1.1.1 Marriage in classical *fiqh*

In classical *fiqh*, marriage is one of the very acts that cross the boundary between its two categories of rulings: those pertaining to *‘ibādāt* (ritual/spiritual acts) and those pertaining to *mu‘āmalāt* (social/contractual acts). In spirit, marriage belongs to *‘ibādāt*, in that Muslim jurists spoke of it as a religious duty ordained by God. In form, it comes under the category of *mu‘āmalāt*, in that Muslim jurists defined it as a civil contract between a man and a woman such that any sexual contact outside this contract constitutes the crime of *zinā* (fornication), and is subject to punishment. In its legal structure, marriage is a contract of exchange with defined terms and uniform effects and is patterned after the contract of sale (*bay‘*), which has served as model for other contracts. Its essential components are: the offer (*ījāb*) by the woman or her guardian, the acceptance (*qubūl*) by the man, and the payment of dower (*mahr*), a sum of money or any valuable that the husband pays or undertakes to pay to the bride before or after consummation, according to their mutual agreement.⁶

With the contract, a woman comes under her husband’s *‘isma/qiwāma* (authority, dominion and protection), entailing a set of defined rights and obligations for each party: some with moral sanction and others with legal force. Those with legal force revolve around the twin themes of sexual access and compensation, embodied in concepts of *tamkīn/ta‘ā* (submission) and *nafaqa* (maintenance). *Tamkīn* (unhampered sexual access) is a man’s right and thus a woman’s duty, whereas *nafaqa* (shelter, food and clothing) is a woman’s right and a man’s duty. A woman becomes entitled to *nafaqa* only after consummation of the marriage, and she loses her claim if she is in a state of *nushūz* (disobedience).⁷ The contract establishes neither a shared matrimonial regime nor identical rights and obligations between spouses: the husband is the sole provider and owner of the matrimonial resources and the wife is possessor of the *mahr* and her own wealth. The only shared space is that involving the procreation of children, and even here a woman is not legally required to suckle her child and can demand compensation if she does.

A man can enter more than one marriage at a time: up to four permanent ones in all law schools, and in *Shi‘i* law also as many temporary marriages (*mut‘a*)⁸ as he desires, or can afford. He can terminate each contract at will: no specific grounds are needed, nor is the wife’s consent or presence required. Legally speaking, *ṭalāq*, repudiation of the wife, is a unilateral act (*iqā‘*), which acquires legal effect simply by the husband’s declaration. A wife cannot be released without her husband’s consent, although she can secure her release by offering him inducements, by means of *khul‘*, often referred to as ‘divorce by mutual consent’. As defined by classical jurists, *khul‘* is a separation claimed by the wife as a result of her extreme ‘reluctance’ (*karahiya*) towards her husband, and the essential element is the payment of compensation (*‘iwaḍ*) to the husband in return for her release. This can be the return of the dower, or any other form of compensation. Unlike *ṭalāq*, *khul‘* is not a unilateral but a bilateral act, as it cannot take legal effect without the husband’s consent. If the wife fails to secure his consent, then her only recourse is the court’s intervention and the judge’s power either to compel the husband to pronounce *ṭalāq* or to pronounce it on his behalf.

1.1.2 Hijab in classical *fiqh*

Unlike rulings on marriage, classical *fiqh* texts contain little on the dress code for women. The prominence of veiling regulations in Islamic discourses is a recent phenomenon, dating to the 19th-century Muslim encounter with colonial powers. It was then that we see the emergence of a new genre of literature in which the veil acquires a civilizational dimension and becomes both a marker of Muslim identity and an element of faith.⁹

Classical texts – at least those that set out rulings or what we can call ‘positive law’ – address the issue of dress for both men and women under ‘covering’ (*sitr*) in the Book of Prayer, among the rules for covering the body during prayers, and in the Book of Marriage, among the rules that govern a man’s ‘gaze’ at a woman prior to marriage.¹⁰ The rules are minimal, but clear-cut: during prayer, both men and women must cover their ‘*awra*, their pudenda; for men, this is the area between knees and navel, but for women it means all the body apart from hands, feet and face. A man may not look at the uncovered body of an unrelated woman; but a woman may look at an unrelated man. The ban can be removed when a man wants to contract a marriage and needs to inspect the woman he is marrying. The rules concerning covering during prayer are discussed under ‘*ibādāt* (ritual/worship acts), while rules of ‘looking/gaze’ fall under *mu‘āmalāt* (social/contractual acts).

There are also related rules in classical *fiqh* for segregation (banning any kind of interaction between unrelated men and women) and seclusion (restricting women’s access to public space). They are based on two juristic constructs: the first is the one that defines all of a woman’s body as ‘*awra*, pudenda, a zone of shame, which must be covered both during prayers (before God) and in public (before men); the second defines women’s presence in public as a source of *fitna*, chaos, a threat to the social order.

These are, in a nutshell, the classical *fiqh* rulings on marriage and covering that the Traditionalists claim to be immutable and divinely ordained. They also claim that these rulings embody the *Shari‘ah* notion of gender, and thereby invoke them to legitimate male domination on religious grounds, thus closing the door to any constructive debate.

1.2 Neo-Traditionalists: equity-complementarity

Neo-Traditionalists take a more pragmatic approach; they recognize that a way must be found of responding to the challenges of the modern world, to changing social and economic conditions. While they recognize that classical *fiqh* conceptions of gender are untenable, they see ‘gender equality’ as a ‘Western’ and alien concept that must be resisted. Instead, they argue for ‘gender equity’ or ‘gender complementarity’, which as we shall see, is reflected in the laws of most Muslim majority countries. The majority of Muslims subscribe to these views, which are also reflected in the vast literature that emerged in the early 20th century under the rubric of ‘women’s status in Islam’.

The roots of this gender discourse can be traced to the Muslim encounter with modernity, which coincided with the painful and humiliating encounter with Western colonial hegemony. In this encounter, ‘women’s status’ and Islamic law became symbols of cultural authenticity and carriers of religious tradition – a situation that has continued ever since. The first part of the 20th century saw the expansion of secular education, the rise of modern nation-states and the creation of new legal systems inspired by Western models. In many such nation-states, classical *fiqh* provisions on the family were selectively reformed, codified and gradually grafted onto unified legal systems. With the exceptions of Turkey, which abandoned *fiqh* in all spheres of law and replaced it with Western-inspired codes, and Saudi

Arabia, which preserved classical *fiqh* as fundamental law and attempted to apply it in all spheres of law, the large majority of Muslim nations retained and codified *fiqh* only with respect to personal status law (family and inheritance). The impetus for, and the extent of, reform varied from one country to another, but on the whole one can say that with the exception of the 1956 Tunisian Family Code, which banned polygamy, the classical *fiqh* rulings were left more or less intact. Reforms were introduced by mixing (*talfiq*) and choosing (*ikhtiyār*) principles and rulings from different *fiqh* schools, and through procedural rules. They focused on increasing the age of marriage, expanding women's access to divorce and restricting men's right to polygamy. This involved requiring registration of marriage and divorce, and the creation of new courts to deal with marital disputes.¹¹

The codification of *fiqh* provisions on family law transformed the interaction between Islamic legal tradition, the state and judicial practice. Codes and statute books took the place of classical *fiqh* manuals in regulating the legal status of women in society; family law was no longer solely a matter for private scholars operating within a particular *fiqh* school, rather it became the concern of the legislative assembly of a particular nation-state. Once it existed in a codified form and was applied by the machinery of the modern nation-state, 'Islamic law' itself came to replace the Muslim scholars, the *'ulama*, as the main source of legal authority and transferred that power to the state.

All this led to the creation of a hybrid family law that was neither classical *fiqh* nor Western, and a new gender discourse and genre of literature that is neither traditionalist nor modern. Though commonly subsumed under Modernist Islamic discourse, I suggest that 'Neo-Traditionalist' is a better term, because this discourse upholds the classical *fiqh* rulings while providing a new rationalization for them. Hence the new genre of literature that emerged in the late 19th century but proliferated in the course of the 20th century. Largely written by men – at least until mid-century – the stated aims of these authors are to shed new light on the status of women in Islam and to clarify what they see as 'misunderstandings'. They re-read the sacred texts in search of solutions – or more precisely, 'Islamic' alternatives – to contemporary problems such as women's aspiration for equality.

Despite their variety and diverse cultural origins, what these re-readings have in common is an oppositional stance and a defensive or apologetic tone. Oppositional, because their concern is to resist the advance of what they see as alien 'Western' values and lifestyles; apologetic, because they attempt to explain and justify the gender biases which they inadvertently reveal, by going back to classical *fiqh* texts. However, they have problems responding to the voices of dissent within the Muslim world itself.¹²

They do not see men's privileges in marriage, such as polygyny and the unilateral right to divorce, as discrimination but as an admission of the differences in male and female natures and sexualities, and between men's rational and women's emotional dispositions. They place their focus on the ethical and moral rules that marriage entails for each spouse, drawing attention to those Qur'anic verses and hadith that affirm the essential equality of the sexes; ignoring the fact that these ethical rules, in effect, carry no legal sanction, they put forward no argument for translating them into law. As for *hijab*, they see it as a religious obligation whose function is to protect women and to safeguard public morality, while they keep silent on classical *fiqh*'s construction of women's body as *'awra*, the sexual zone.

Unwilling to accept that aspirations for gender equality are not just imported from the West but part of 20th-century reality, they find themselves in a contradictory position. On the one hand, they uphold *fiqh* rulings on marriage and gender relations; on the other, they are aware of and sensitive to current discussions of women's rights and to criticisms, from both secular and religious women, of the patriarchal biases in Islamic legal tradition. Education and

employment, divorce laws and the question of *hijab* are the main themes through which they address issues of women's rights and define a range of positions. It is common to find a single scholar arguing for gender equality on one issue (for example, rights to education and employment), yet rejecting it on another (for example, divorce). In short, in these texts, the inequalities embedded in the classical *fiqh* construction of marriage and gender relations are defended and rephrased in terms such as 'equity' and 'complementarity of rights and duties'.

With the rise of political Islam in the second part of the 20th century, these Neo-Traditionalist texts and their gender discourse became closely identified with Islamist political movements, whose rallying cry was 'Return to *Shari'ah*' as embodied in *fiqh* rulings.

1.3 Reformist-Feminists: gender equality

A small but increasingly vocal minority, Reformists hold that the best way to defend Islam in the modern world is by radically re-interpreting the sacred texts, in ways that will be both faithful to the basic principles of Islam and fully take account of time and place, that is of changing and varied social conditions. They do not reject an idea simply because it is Western; they see Islam's textual sources not as providing a blueprint, an in-built programme of action for the social, economic and political problems of the Muslim world, but rather as giving us ethical guidance and principles for the creation of just laws. The more daring Reformist scholars have offered new interpretations that advocate gender equality; but the principle of gender equality has not yet been fully translated into the legal code of any Muslim majority country.¹³

Two parallel developments acted as catalysts for emergence of an egalitarian gender discourse. The first was the ways in which the successes of political Islam and the ideological use of *Shari'ah* transformed relations between religion, law and politics for Muslims. The slogan of 'Return to *Shari'ah*' in practice amounted to little more than attempts to translate into state policy classical *fiqh* rulings on gender relations and family and some areas of penal law. In late colonial times and the immediately post-colonial middle decades of the century, activist women in Muslim contexts had increasingly come to identify Islam with patriarchy, and to fear that the removal of the latter could not be achieved under a polity and a legal regime dominated by Islam. Towards the end of the century, wherever Islamists gained power or influence – as in Iran, Pakistan and Sudan – their policies proved the validity of these fears. Arguing for patriarchal rulings as 'God's Law', as the authentic 'Islamic' way of life, Islamists tried to reverse some of the legal gains that women had acquired earlier in the century; they dismantled elements of earlier family law reforms and introduced morality laws, such as gender segregation and dress codes.

But these Islamist measures had some unintended consequences; the most important was that, in several countries, they brought classical *fiqh* texts out of the closet, and exposed them to unprecedented critical scrutiny and public debate. A new wave of Muslim reform thinkers started to respond to the Islamist challenge and to take Islamic legal thought onto new ground. Building on the earlier reformers, these new thinkers contended that the human understanding of Islam is flexible, that Islam's tenets can be interpreted to encourage both pluralism and democracy, that Islam allows change in the face of time, place and experience. But instead of searching for an Islamic genealogy for modern concepts like gender equality, human rights and democracy, they placed the emphasis on how religion is understood and how religious knowledge is produced.¹⁴

The second development was the expansion of transnational feminism and women's groups, and the emergence of NGOs, which led to the opening of a new phase in the

politics of gender and Islamic law. Earlier in the century women were largely absent from the process of reform and codification of family law and the debates that surrounded it. But by the end of the century, Muslim women were refusing to be merely objects of the law, but rather claiming the right to speak and to be active participants in the debates and in the process of law making. The changed status of women in Muslim societies, and other socio-economic imperatives, meant that many more women than before were educated and in employment. Women's rights were by now part of human rights discourse, and human rights treaties and documents, in particular the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), gave women a new language in which to frame their demands.

These developments opened new spaces for activism and debate. Women were now finding new ways to sustain a critique, from within, of patriarchal readings of Islam's sacred texts and the gender biases of *fiqh* texts. By the early 1990s, there were clear signs of the emergence of a new consciousness, a new way of thinking, and critical voices and scholarship that argued for gender equality on all fronts. Some versions of this new discourse came to be labelled 'Islamic feminism' – a conjunction that was unsettling to many Islamists and some feminists. Taking Islam as the source of its legitimacy, Islamic feminists began to question both the hegemony of patriarchal interpretations of the *Shari'ah* and the authority of those who speak in the name of Islam. Their voices started to draw attention from media and academia, via publications, public meetings and workshops that provided a platform for scholar-activists.

The genesis of gender inequality in Muslim legal tradition, these scholars showed, lies in a contradiction between the ideals of Islam on the one hand, and on the other, the male-dominated structures in which these ideals unfolded and were translated into legal norms. They have produced an impressive body of scholarship to tackle patriarchal interpretations and text-based sources of gender inequalities and to reclaim Islam's egalitarian message.¹⁵ This literature is extensive and diverse in approach;¹⁶ here I can merely outline the argument as to how and why male dominance came to be embedded in Muslim legal tradition. This was done through two sets of related processes. The first set is ideological and political, and has to do with the strong patriarchal ethos that informed readings of the sacred texts, the exclusion of women from the production of religious knowledge, and their consequent inability to have their voices heard and their interests reflected in law.

The second set is more epistemological, and involves the processes through which existing social norms, marriage practices and gender ideologies were sanctified, and then turned into fixed entities and legal concepts. That is, rather than considering them as social, thus temporal, institutions and phenomena, they were treated as 'divinely ordained', thus immutable.

There is an extensive debate in the literature on this, which I will not enter.¹⁷ But there are two points of consensus. The first is that the revelatory texts outlawed only some of the existing patriarchal practices of the time (such as burying infant girls alive and coercing women into unwanted marriages) and left others intact (such as polygamy and men's right to unilateral divorce). As with slavery, the institution of patriarchy was not abolished; what the Qur'an and the Prophet did was to set in motion a process to transform them in the direction of justice, and to rectify injustices as they were understood at the time. The second consensus is that the further we move from the time of revelation, the more women are marginalized; their voices are silenced and their presence in public space is curtailed and eventually they lose their political clout. Women had been among the main transmitters of the *hadith* traditions, but by the time the *fiqh* schools were consolidated, over a century after the Prophet's death, their critical faculties were so far denigrated as to make their concerns irrelevant to law-making processes.¹⁸ As for *hijab*, in contrast to Neo-Traditionalists, they do not see it as

an obligation but as a right, and defend a woman's choice whether to adopt it or not. They have shifted the whole premise of *hijab*, not only the rationale for it.

In short, by re-reading textual sources and recovering a hidden history, Muslim feminist scholars are not only reclaiming the egalitarian message of their faith, but also inserting women's voices in the production of religious knowledge and the process of law making. To give a concrete example of how they do this, I briefly discuss Musawah and its first major research initiative.

2 Musawah: scholarship and activism

Musawah as a global movement for equality and justice in the Muslim family was initiated in 2007 by the pioneering Malaysian women's group, Sisters in Islam, and launched in Kuala Lumpur in February 2009. Inspired by the activism of Moroccan women, and their success in bringing radical reforms in Moroccan family law in 2004, we (I was one of the founders) adopted their slogan, 'Change is necessary and change is possible'.¹⁹ 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 Khaled Abou El Fadl, Muhammad Khalid Masud and Amina Wadud, as a way of opening new horizons for thinking, to show how the wealth of resources within Islamic tradition, and 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*;²⁰ we made them available in English, French and Arabic 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. This discussion, including two further workshops in Cairo and London, followed by constant electronic communication among the members of the committee, led to the *Musawah Framework for Action*.²¹

Drawing on the latest Muslim reformist thought and feminist scholarship in Islam, in *Framework for Action* we ground our claim to equality and arguments for reform simultaneously in Islamic and human rights frameworks. Taking a critical feminist perspective, but most importantly working within the tradition of Islamic legal thought, we invoke two of its main distinctions. The first distinction, which underlies the emergence of the various schools of Islamic law and within them a multiplicity of positions and opinions, is between *Shari'ah* and *fiqh*. *Shari'ah* ('the way') in Muslim belief is God's will as revealed to the Prophet Muhammad. *Fiqh* ('understanding') is Islamic jurisprudence, the process and the methodology for discerning the *Shari'ah* and extracting legal rules from the sacred sources of Islam: the Qur'an and the Sunnah (the practice of the Prophet, as contained in *ahadith*, traditions). Like any other system of jurisprudence, *fiqh* is mundane, temporal and local.

The second distinction, referred to earlier, is that between the two main categories of legal rulings (*ahkām*): *ibādāt* (ritual/spiritual acts) and *mu'āmalāt* (social/contractual acts). Rulings in the first category, *ibādāt*, 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 is not the case with *mu'āmalāt*, which regulate relations among humans and remain open to rational considerations and social forces, and to which most rulings concerning women and gender relations belong.

These distinctions give us the language, the conceptual tools, to argue for gender equality from within Muslim legal tradition. Our main objective is to re-insert women's concerns

and voices, which were silenced by the time that the *fiqh* schools emerged, into the processes of the production of religious knowledge and law making. In this sense what we are doing is part of the larger struggle for the democratization of production of knowledge in Islam, and for the authority to interpret its sacred texts. Two questions are at the centre of our work: If justice and equality are values central to Islam, as we believe they are, why have women been treated as inferior to men in Muslim legal tradition and in Muslim societies? And if equality has become inherent to conceptions of justice in modern times, as many Muslims now recognize, how can it be reflected in Muslim laws?

In 2010, Musawah initiated a multi-faceted project to rethink two central concepts that we argue lie at the basis of the unequal construction of gender rights in Muslim family laws. These are *qiwāma* and *wilāya*, which, as understood and translated into legal rulings by Muslim scholars, place women under male control. *Qiwāma* denotes a husband's authority over his wife; *wilāya* denotes the right and duty of male family members to exercise guardianship over female members (e.g. fathers over daughters when entering into marriage contracts). These two concepts underlie the logic of most contemporary Muslim family laws and are manifested in legal provisions that regulate spousal and parental duties and rights.²²

The project has two interconnected elements. The first is the production of new feminist knowledge that critically engages with these concepts and redefines them in line with contemporary notions of justice. 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.

For the first element, we invited scholars from different disciplines to write background papers that expound and interrogate the construction of *qiwāma* and *wilāya*, their associated religious and legal doctrines, and their place and working in contemporary laws and practices. Then, in the course of several intensive workshops we discussed these background papers and shared their insights with our advocates and those involved in the life stories element.

This, of course, took us to Qur'an 4:34, which constitutes the main textual evidence in support of men's authority over women, and is often the only verse that ordinary Muslims know in relation to gender relations and family law. It reads:

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

This verse has been the focus of intense contestation and debate among Muslims for over a century. There is now a substantial body of literature that attempts to contest and reconstruct the meanings and connotations of the four Arabic terms above (italicized). Kecia Ali, from whom I have taken the translation of the verse, leaves the emphasized words untranslated, pointing out that any translation of each of these key terms amounts to an interpretation.²³ I have inserted translations that approximate the consensus of classical Muslim jurists and are reflected in a set of rulings (*aḥkām*) that they devised to define marriage and marital relations. These rulings rest on a single postulate: that God placed women 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 in our project we refer to as the *qiwāma* postulate – using ‘postulate’ in the sense defined by Japanese legal scholar Masaji Chiba: ‘A value system that simply exists in its own right’.²⁴ 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. As outlined earlier, they defined marriage as a contract that automatically places a wife under her husband’s *qiwāma* (authority) and presumes an exchange: the wife’s obedience and submission (*tamkin*) in return for maintenance (*nafaqah*) by the husband.

Yet the term *qawwāmūn*, from which the jurists derived the concept of *qiwāma*, only appears once in the Qur’an in reference to marital relations.²⁵ The closely related term *wilāya* does occur in the Qur’an, but never in a sense that specifically endorses men’s guardianship over women, which is the interpretation of the term that is enshrined in classical *fiqh*.²⁶ 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 numerous times: *ma’rūf* (that which is commonly known to be right) and *rahma wa mawadda* (compassion and love).

One of the main objectives of the project is to bring the insights from feminist theory and gender studies into conversation with Islamic legal tradition, and to ask new questions: Why and how did verse 4:34, and not other relevant Qur’anic verses, become the foundation for the legal construction of marriage? What does male guardianship, as translated in the concepts *qiwāma* and *wilāya*, entail in practice?

How can we rethink and reconstruct them in line with contemporary notions of justice and *ma’rūf* of our time? What do equality and justice entail in family and society? Do they entail identical rights and duties for spouses?

These questions are central to the ongoing struggle for equality and justice in Muslim families, and our project seeks to clarify them and suggest some answers. The first product of our research is a collected volume: *Men in Charge? Rethinking Authority in Muslim Legal Tradition*.²⁷ Its main thesis is that the concepts of *qiwāma* and *wilāya* have mistakenly been understood as a divine sanction for men’s authority over women, with the result that they have become the building blocks of patriarchy within Muslim legal tradition.

3 Justice and equality: changing and contested concepts

One of the central challenges that Muslim women face in their struggle for equality is how to address in a meaningful and coherent way the wide gap that exists between modern notions of justice, to which equality is inherent, and the notions of justice that underpin established understandings of the *Shari’ah*. It is here that the insight of feminist legal theory is important, not least in clarifying the different understanding of ‘equality’.

While the Neo-Traditionalists admit the gender equality in the spiritual cosmology (creation and afterlife), when it comes to the social realm, they basically adhere to the classical *fiqh* model of gender relations according to which women, because of their ‘nature’, are in need of protection. Their main argument goes as follows: equality amounts to a denial of the differences between men and women, and to give them equal rights would be against not only the laws of nature but also the requirements of justice.

Such a notion of justice, reflecting the Aristotelian idea of proportional equality, was profoundly challenged during the 20th century by the expansion of the human rights framework. An egalitarian understanding of social justice requires us to go beyond the binary of equality versus difference, to see them not as opposites but as interdependent. As feminist

scholarship made evident, creating a binary opposition between the two creates a false choice when it comes to gender relations: ‘between endorsing either “equality” or its presumed antithesis, “difference”’. Equality is not the elimination of difference, and difference does not preclude equality.²⁸ We need equality as a principle of justice in society, in law, for regulating human relations, including gender relations, precisely because all humans are different in their capacities, access to resources, etc.

This way of thinking about equality and difference is reflected in the shift from ‘formal’ to ‘substantive’ models, which take into account differences between the sexes and the direct and indirect discrimination that such differences can produce.²⁹ A *formal* model of equality, which advocates gender-neutral laws, does not necessarily enable women to enjoy their rights on the same basis as men. This is because it rests on a false premise: that the starting point and the playing field are the same for men and women. Not only do women *not* have the same access as men to socio-economic resources and political opportunities, but women are not a homogeneous group; they do not experience legal inequality and discrimination in the same ways; class, age, ethnicity, socio-economic 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. Instead of striving for gender-neutral laws, the emphasis is on the kinds of laws and legal reforms that can ensure equality of opportunity and result; that regulate power relations between men and women in such a way that women are able to enjoy dignity, security and respect in the family, and full participation in society.

It is this substantive model of equality that is advocated by members of Musawah and many other Islamic feminists, who, while not denying differences between men and women, yet strive for just outcomes. Inspired by the Qur’anic vision of justice and gender relations, they contend, equality can only be achieved with laws that transform power relations in the family and in society in the direction of just outcomes. A *protectionist* approach, on the other hand, by keeping power relations in marriage and society intact, in effect leads to injustice. This is so because it not only perpetuates gender stereotypes, but more importantly it curtails women’s freedom and the sphere of their activities, with the rationale of ‘protecting’ them from harm and wrongdoing. In doing so, it treats them as perpetual minors, which undermines their human dignity (*karamāt*) and prevents them from fulfilling their potential in both spiritual and social realms.

Conclusion

The egalitarian position on women’s rights and roles, coming from within an Islamic framework, has yet to make its impact by rectifying the inequalities inherent in orthodox interpretations of *Shari‘ah*, and by eliminating social and cultural practices that oppress and discriminate against women in Muslim societies. Both the egalitarian position and the reformist movement of which it is a part are still in a formative phase, and their fortunes are tied to political developments, both global and local.

I end with two observations. First, the very existence of the debate, and the growing literature on ‘women in Islam’ that has emerged since the early years of the 20th century, are signs of the passing of an era. Available in a variety of languages (and much of it now on the internet) and ranging from sound scholarship to outright polemics, this literature displays different positions and different gender perspectives, from those who endorse the classical *fiqh* rules, to those who seek their modification in the idea of ‘complementarity of rights’, to those who advocate gender equality on all fronts. Irrespective of their position and gender

perspective, all contributors to this literature agree that ‘Islam honours women’s rights’, and that justice and fairness are integral to the *Shari‘ah*; they disagree on what these rights are, what constitutes justice for women, and how to realize it within an Islamic framework. The intensity of the debate, and the diametrically opposed positions taken, are indications of a paradigm shift in thinking about gender rights, Islamic law and politics. We become aware of the old paradigm only when the shift has already taken place, when the old rationale and logic, previously undisputed, lose their power to convince and cannot be defended on ethical grounds. Feminist voices and scholarship in Islam herald the coming of an egalitarian legal paradigm that is still in the making.

Second, legal systems and theories are embedded in the cultural, political and social contexts in which they exist and operate. The old *fiqh* paradigm, with its strong patriarchal ethos, as well as the new feminist readings of the *Shari‘ah*, should be understood in this complex double image, as both expressing and shaping socio-legal norms and practices. It is important to remember that legal theory or jurisprudence develops in interaction with social practices, political, economic and ideological forces and people’s experience and expectations. In other words, most often law follows or reflects practice; that is to say, when social reality changes, then social practice will effect a change in the law. Islamic legal tradition is no exception – as attested by the way both legal systems and women’s lives and social experiences have been transformed in the course of the last century, and in the new one by the feminist challenge from within to patriarchal interpretations of the *Shari‘ah*.

Notes

- 1 This chapter draws on and expands my arguments in Ziba Mir-Hosseini, ‘The Construction of Gender in Islamic Legal Thought and Strategies for Reform’, *Hawwa* 1(1) (2003): 1–28; ‘Towards Gender Equality: Muslim Family Law and the *Shari‘a*’, in *Wanted: Equality and Justice in Muslim Family Law*, ed. Zainah Anwar (Kuala Lumpur: Sisters in Islam, 2009), <http://www.musawah.org/sites/default/files/Wanted-ZMH-EN.pdf>. My warmest gratitude goes to Richard Tapper for his support in the process of writing.
- 2 Such a tension is present in other scriptural religions, as revealed by feminist scholarship. See, for example, Rosemary Radford Ruether, *Sexism and God-Talk: Toward a Feminist Theology*, 2nd edn (Boston, MA: Beacon Press, 1993) for Christianity; and Susannah Herschel (ed.), *On Being a Jewish Feminist: A Reader*, 2nd edn (New York: Schocken Books, 2005) for Judaism.
- 3 By classical *fiqh* texts I intend those produced before the late 19th century.
- 4 For such a discussion, see Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge, MA: Harvard University Press, 2010) and Yossef Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge: Cambridge University Press, 2005).
- 5 See, for instance, Amira El Azhary Sonbol (ed.), *Women, Family and Divorce Laws in Islamic History* (Syracuse, NY: Syracuse University Press, 1996); Judith Tucker, *In the House of Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 2000); Kristen Stilt, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (Oxford: Oxford University Press, 2011).
- 6 For a concise discussion of the terms of the marriage contract in classical *fiqh* texts, see Kecia Ali, ‘Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines’, in *The Islamic Marriage Contract: Case Studies in Islamic Family Law*, ed. Asifa Quraishi and Frank E. Vogel (Cambridge, MA: Harvard University Press, 2008), 11–45.
- 7 *Nushuz* literally means ‘rebellion’ and it implies the abandonment of marital duties. Despite the fact that *fiqh* sources acknowledged that such abandonment can take place on the part of both spouses, they use the term *nāshiza* (rebellious) only in the feminine form and in relation to maintenance rights; see Kecia Ali, ‘Religious Practices: Obedience and Disobedience in Islamic Discourses’, in *Encyclopedia of Women and Islamic Cultures*, vol. 5, ed. Suad Joseph (Leiden: Brill, 2007), 309–13.
- 8 For this form of marriage, see Shahla Haeri, *Law of Desire: Temporary Marriage in Iran* (London: I. B. Tauris, 1989).

- 9 Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven, CT: Yale University Press, 1992), 144–68.
- 10 Many terms commonly used today in different countries for ‘the veil’, such as *hijab*, *parda* (‘purdah’), *chador*, *burqa*, are not found in classical *fiqh* texts.
- 11 For codification, see James Norman Anderson, *Law Reforms in the Muslim World* (London: Athlone, 1976); for reforms, see Fazlur Rahman, ‘A Survey of Modernization of Muslim Family Law’, *International Journal of Middle East Studies* 11 (1980): 451–65.
- 12 For a discussion of such writings in the Arab world, see Yvonne Yazbeck Haddad, ‘Islam and Gender: Dilemmas in the Changing Arab World’, in *Islam, Gender and Social Change*, ed. Yvonne Yazbeck Haddad and John Esposito (Oxford: Oxford University Press, 1998), 3–29; Barbara Stowasser, ‘Women’s Issues in Modern Islamic Thought’, in *Arab Women: Old Boundaries, New Frontiers*, ed. Judith E. Tucker (Bloomington: Indiana University Press, 1993), 3–28. For Iran, see Ziba Mir-Hosseini, ‘Women’s Rights and Clerical Discourses: The Legacy of ‘Allameh Tabataba’i’, in *Intellectual Trends in Twentieth-Century Iran*, ed. Negin Nabavi (Gainesville: University Press of Florida, 2003), 193–217. For a sample of texts in English, see Maulana Abul A’la Maududi, *The Laws of Marriage and Divorce in Islam* (Kuwait: Islamic Book Publishers, 1983); Murtaza Mutahhari, *The Rights of Women in Islam*, 4th edn (Tehran: World Organization for Islamic Services, 1991). For general critique, see Kecia Ali, ‘Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law’, in *Progressive Muslims: On Justice, Gender, and Pluralism*, ed. Omid Safi (Oxford: Oneworld, 2003), 163–89; Adis Duderija, *Constructing a Religiously Ideal ‘Believer’ and ‘Woman’ in Islam: Neo-traditional Salafi and Progressive Muslims’ Methods of Interpretation* (New York: Palgrave, 2011); Ziba Mir-Hosseini, ‘Sexuality and Inequality: The Marriage Contract and Muslim Legal Tradition’, in *Sexuality in Muslim Contexts: Restrictions and Resistance*, ed. Anissa Helie and Homa Hoodfar (London: Zed Press, 2012), 124–48.
- 13 The 1956 Tunisian and the 2004 Moroccan family codes come close.
- 14 In this respect, the work of thinkers such as Khaled Abou El Fadl, Nasr Hamid Abu-Zayd, Mohammad Arkoun, Mohammad Iqbal, Mohammad Khalid Masud, Mohammad Mojtahed-Shabestari, Fazlur Rahman, Tariq Ramadan, Abdolkarim Soroush and Amina Wadud are of immense importance and relevance. For introductions and samples of the work of Muslim reform thinkers, see Charles Kurzman (ed.), *Liberal Islam: A Sourcebook* (Oxford: Oxford University Press, 1998) and Katjun Amirpur, *New Thinking in Islam: The Jihad for Freedom, Democracy and Women’s Rights* (London: Gingko Library, 2015); for a critical historical analysis, see Nasr Hamid Abu-Zayd, *Reformation of Islamic Thought: A Critical Historical Analysis* (Amsterdam: Amsterdam University Press, 2006).
- 15 See, for instance, Aziza Al-Hibri, ‘A Study of Islamic Herstory: How did We Get into this Mess’, in *Islam and Women*, Special issue of *Women’s Studies International Forum* 5(2) (1982): 207–19; Riffat Hassan, ‘Equal before Allah? Woman–man Equality in the Islamic Tradition’, *Harvard Divinity Bulletin* 7(2) (Jan–May 1987), http://www.globalwebpost.com/farooqm/study_res/islam/gender/equal_riffat.html (accessed 1 January 2014); Fatima Mernissi, *Women and Islam: An Historical and Theological Enquiry*, trans. Mary Jo Lakeland (Oxford: Blackwell, 1991); Amina Wadud, *Qur’an and Woman: Rereading the Sacred Text from a Woman’s Perspective* (New York: Oxford University Press, 1999); Kecia Ali, ‘Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law’, in *Progressive Muslims*, ed. Omid Safi (Oxford: Oneworld, 2003), 163–89; Asma Barlas, *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur’an* (Austin: University of Texas Press, 2002); Sa’diyya Shaikh, ‘Knowledge, Women, and Gender in Hadith: A Feminist Interpretation’, *Islam and Christian-Muslim Relations* 15(1) (2004): 99–108.
- 16 For recent assessments of this literature, see Omaira Abou-Bakr (ed.), *Feminist and Islamic Perspectives: New Horizons of Knowledge and Reform* (Cairo: Women and Memory Forum with the Danish–Egyptian Dialogue Institute and the Danish Center for Research on Women and Gender, 2013); Fatima Seedat, ‘When Islam and Feminism Converge’, *The Muslim World* 103(3) (2013): 404–20; Marcia Hermansen, ‘New Voices of Women Theologians’, in *Muslima Theology: Voices of Muslim Women Theologians*, ed. Ednan Aslan, Elif Medeni and Marcia Hermansen (Frankfurt-am-Main: Peter Lang, 2013), 11–34; Adis Duderija, ‘Toward a Scriptural Hermeneutics of Islamic Feminism’, *Journal of Feminist Studies in Religion* 31(2) (2015): 45–64.
- 17 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, that Islam facilitated this by giving patriarchy the seal of approval, and that the Qur’anic injunctions on marriage, divorce, inheritance

- and whatever relates to women both reflect and affirm such a transition. For concise accounts of the debate, see Jane Smith, 'Women, Religion and Change in Early Islam', in *Women, Religion and Social Change*, ed. Yvonne Yazbeck Haddad and Ellison Banks Findly (Albany, NY: SUNY Press, 1985), 19–35; Denise Spellberg, 'Political Action and Public Example: 'A'isha and the Battle of the Camel', in *Women in Middle Eastern History: Shifting Boundaries in Sex and Gender*, ed. Beth Baron and Nikki Keddie (New Haven, CT: Yale University Press, 1991), 45–57.
- 18 Women remained active in transmitting religious knowledge, but their activities were limited to the informal arena of homes and mosques and their status as jurists was not officially recognized, as Abou-Bakr, 'Feminist and Islamic Perspectives', and Asma Sayeed, *Women and the Transmission of Religious Knowledge in Islam* (Cambridge: Cambridge University Press, 2013) show.
 - 19 Collectif 95 Maghreb-Egalité, *Guide to Equality in the Family in the Maghreb*. Women's Learning Partnership for Rights, Development and Peace, 2005, <http://learningpartnership.org/guide-to-equality> (accessed 24 July 2018).
 - 20 Zainah Anwar (ed.), *Wanted: Equality and Justice in the Muslim Family* (Kuala Lumpur: Sisters in Islam, 2009).
 - 21 See *Framework for Action*, available in five languages, <http://www.musawah.org/about-musawah/framework-action> (accessed 24 July 2018).
 - 22 The project built on an earlier one, 'New Directions in Islamic Thought', hosted by the Oslo Coalition for Freedom of Religion or Belief, in which some of us were involved. See Ziba Mir-Hosseini, Kari Vogt, Lena Larsen and Christian Moe (eds), *Gender Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Tradition* (London: I. B. Tauris, 2013).
 - 23 Kecia Ali, 'Muslim Sexual Ethics: Understanding a Difficult Verse, Qur'an 4:34', <http://www.brandeis.edu/projects/fse/muslim/mus-essays/mus-ess-diffverse.html> (accessed 1 January 2014).
 - 24 Masaji Chiba (ed.), *Asian Indigenous Law in Interaction with Received Law* (London and New York: Kegan Paul International, 1986).
 - 25 *Qawwamun* appears in two other verses (4:135 and 5:8), where it has a very different, positive and gender-inclusive meaning. See Asma Lamrabet, 'An Egalitarian Reading of the Concepts of Khalifah, Wilayah and Qiwwamah', in *Men in Charge? Rethinking Authority in Muslim Legal Tradition*, ed. Ziba Mir-Hosseini, Mulki Al-Sharmani and Jana Rumminger (London: Oneworld, 2015), 65–87.
 - 26 *Wilāya* appears in Verse 18:44, where it refers to God's protection of humans. However, words derived from it, such as *wali*, appear in many verses as an attribute of God or to describe human beings in particular contexts and stories in the Qur'an. More importantly, none of the verses on which the jurists based the doctrine of *wilāya* in regard to marriage guardianship (2:221, 2:232, 2:234, 2:237, 4:2, 4:3, 4:6, 4:25, 24:32, 60:10, 65:4) use the term *wali* or *wilāya*; see Mohammad Khalid Masud, 'Gender Equality and the Doctrine of Wilaya', in Mir-Hosseini et al. (eds), *Gender Equality in Muslim Family Law*, 132–3.
 - 27 Mir-Hosseini et al. (eds), *Men in Charge?*
 - 28 Joan Scott, 'Deconstructing Equality-versus-Difference: OR, the Uses of Poststructuralist Theory for Feminism', *Feminist Studies* 14(1) (1998): 33–50.
 - 29 For instance, Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide', *South African Journal of Human Rights* 21 (2005): 163–90; Ratna Kapur, 'Unveiling Equality: Disciplining the 'Other' Woman Through the Human Rights Discourse', in *Islamic Law and International Human Rights Law*, ed. Anver M. Emon, Mark S. Ellis and Benjamin Glahn (Oxford: Oxford University Press, 2012), 265–90.

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