ISLAMIC FAMILY LAW AND SOCIAL PRACTICE: ANTHROPOLOGICAL REFLECTIONS ON THE TERMS OF THE DEBATE

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Since the early 20th century, one of the main areas of debate among Muslims has been the application of Shari'a-based family laws to contemporary life. For some, these laws embody the ideal model of family and gender relations; for others, they encapsulate the patriarchal logic of pre-modern interpretations of Islam's sacred sources.

With the rise of political Islam in the 1970s, and the Islamists' slogan of 'Return to Shari'a', the debate took a new turn and acquired a new dimension. It became part of a larger intellectual and political struggle among the Muslims between two opposed understandings of their religion and two ways of reading its sacred texts. One is a patriarchal, legalist and absolutist Islam, premised on the notion of 'duties', which makes little concession to contemporary realities and the aspirations of Muslims, such as the changed status of women in society and their demand for equal rights. The other is an egalitarian, pluralist and democratic Islam, premised on the notion of 'rights', which is making room for modern realities and values such as democracy, pluralism, human rights and gender equality.

This paper has two aims. First is to sketch the contours of the Muslim debate over religion, law and gender, a debate that is embedded in the history of polemics between Islam and the West, and the anti-colonial and nationalist discourses of the first half of the 20th century. 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.

The second aim is to draw attention to one of the paradoxical and unintended consequences of the rise of political Islam: the emergence of a new gender consciousness and feminist discourse among Muslims, and their potential for changing the terms of the debate from within.

POSITION AND CONCEPTUAL FRAMEWORK

First, a few words are in order about my approach and conceptual framework. Stereotyped images and conceptions of Islam and Muslims still dominate both popular and academic discourses. Images often conceal the diversity and the complexity of Muslim politics and culture. I was struck by the background image on the conference programme, depicting an old man seated on the ground with a pair of scales and a bag of produce. I could not see the relevance of the image to the theme of the conference – unless the scales were an allegory of justice? The scene could be almost anywhere from Morocco to Afghanistan; was the old man intended to be a representative 'Muslim'? This is not the place for a full semiotic analysis of this image, so let it suffice to note that stereotyped images of Islam and Muslims, whether intentional or unthinking, are the currency not only of those promoting a Clash of Civilizations, but of Islamist ideologues themselves.

As for Islam, too often we hear statements beginning 'Islam is', 'the Koran says', or 'according to Islamic law or Shari'a'. Too rarely do those who speak in the name of Islam admit that theirs is no more than one opinion or interpretation among many. The holy texts, and the laws derived from them, are matters of human interpretation. Moreover, those who talk of Islam, or indeed of 'religion' in relation to Islam, fail to make a distinction now common when talking of religion in other contexts, namely between faith (and its values and principles) and organized religion (institutions, laws and practices). The result is the pervasive polemic/rhetorical trick of either glorifying a faith without acknowledging the horrors and abuses that are committed in its name, or condemning it by equating it with those abuses. Of course, religious faith and organization are linked – but they are not the same thing, as is implied by confounding them in the label 'Islamic' or 'religious'.

Though my approach and analysis are those of a legal anthropologist, I do not claim to be a detached observer.[1] As a believing Muslim woman, I am a committed participant in debates over the issue of gender equality in law; and I place my analysis within the Islamic legal tradition by invoking one crucial distinction in that tradition. This distinction is made by all Muslim jurists and has been upheld in all schools of Islamic law, but it has been distorted and obscured in modern times, when modern nation-states have created uniform legal systems and selectively reformed and codified elements of Islamic family law, and when a new political Islam has emerged that uses Islamic law as an ideology.

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[1] A clear statement of position is important, as the literature on Islam and women is replete with polemic in the guise of scholarship (see Mir-Hosseini, 1999: 3–6).

This is the distinction between Shari'a, revealed law, and *fiqh*, the science of Islamic jurisprudence. This distinction underlies the emergence of various schools of Islamic law, and, within them, a multiplicity of positions and opinions.[2] Shari'a, 'the way', in Muslim belief is the totality of God's will as revealed to the Prophet Muhammad. *Fiqh*, jurisprudence, 'understanding', is the process of human endeavour to discern and extract legal rules from the sacred sources of Islam: that is, the Qur'an and the Sunna (the practice of the Prophet, as contained in *hadith*, Traditions). In other words, while the Shari'a is sacred, eternal and universal, *fiqh* is human and – like any other system of jurisprudence – mundane, temporal and local.

It is essential to stress this distinction and its epistemological and political ramifications. *Fiqh* is often mistakenly equated with Shari'a, not only in popular Muslim discourses but also by specialists and politicians, and often with ideological intent: that is, what Islamists and others commonly assert to be a 'Shari'a mandate' (hence divine and infallible), is in fact the result of *fiqh*, juristic speculation and extrapolation (hence human and fallible). In other words, while the Shari'a is sacred, eternal and universal, *fiqh* is human and – like any other system of jurisprudence – mundane, temporal and local.

THE CONTOURS OF THE DEBATE

With this background, let us now turn to the interaction between religion, family law and social practice in Muslim contexts, that has produced a lively and contentious debate as well as a vast literature displaying differing perspectives.

In terms of gender, these perspectives group into three broad discourses or genres. The first, which I term Traditionalist, is premised on gender inequality and reflects the notion of gender rights found in classical *fiqh*, which in its classical and uncodified format is still in operation in only a few Muslim countries, notably Saudi Arabia and certain Gulf states. The second perspective, which is the dominant one, developed in the early years of the 20th century and is 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 rights – hence I term this perspective Neo-Traditionalist. The third, which I call Egalitarian/Feminist, argues for gender equality on all

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[2]   Among current scholars of Islamic law, Kamali (1989: 216) and Abou El Fadl (2001: 32–5) use this distinction; An-Na'im (2000: 33-4) does not.

fronts; it emerged in the last decade of the 20th century and is still in the process of formation and is not yet translated fully into any legal codes, though the 2004 Moroccan Family Code comes close.[3]

TRADITIONALISTS: GENDER INEQUALITY

Let me describe the differences between these three perspectives in a little more detail. The Traditionalist one embodies the patriarchal construction of gender rights in classical *fiqh* texts, in which gender inequality is taken for granted, *a priori*, as a principle, reflecting the world in which their authors lived. In this world, inequality between men and women was the natural order of things, the only way to regulate relations between them. Biology was destiny: a woman was created to bear and rear children; this was her primary role and her most important contribution to society. This view of gender is also reflected in other religious traditions.

The classical *fiqh* notion of gender is nowhere more evident than in the rules that the classical jurists devised for the formation and termination of marriage. In these matters, the various *fiqh* schools all share the same inner logic and patriarchal conception. If they differ, it is in the manner and extent to which they have translated this conception into legal rules.[4] A brief examination of these rules is in order here, as it was through these rules that the subjugation of women has been legitimated and institutionalized in pre-modern times and continues to be sustained in contemporary Muslim societies.

Classical jurists defined marriage as a contract that is imbued with a strong patriarchal ethos. In its legal structure, marriage (*nikah*) is contract of exchange, with fixed terms and uniform legal effects. With the contract, a wife comes under her husband's dominion and protection, entailing a set of defined rights and obligations for each party; some supported by legal force, others by moral sanction. Those with legal force revolve around the twin themes of sexual access and compensation, embodied in the concepts of *tamkin* (women's obedience or submission) and *nafaqa* (maintenance). *Tamkin* – defined as unhampered sexual access – is the husband's right and thus the wife's duty; whereas *nafaqa* – defined as shelter, food and clothing – is the wife's right and the husband's duty. In some schools, a wife is

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[3] These reforms, which were the subject of women's activism, eventually were achieved when the wider political context became amenable; for a discussion, see Maddy-Weitzman (2005), and for a comparative analysis of politics of reform with Iran, Mir-Hosseini (2007b).

[4] Space does not allow me to elaborate on these differences; the discussion here is intended merely to outline the salient features of the marriage contract. For differences among the fiqh schools, see Maghniyyah (1997) and Ali (2002).

entitled to *nafaqa* only after consummation of the marriage, and in all schools she loses her claim if she is in a state of *nushuz* (disobedience).

The contract establishes neither a shared matrimonial regime nor reciprocal obligations between the spouses: the husband is sole provider and owner of the matrimonial resources and the wife is possessor of her *mahr* or marriage gift and her own wealth. The only shared space is that involving the procreation of children, and even here the wife is not legally compelled to suckle her child unless it is impossible to feed it otherwise. Only a man can enter more than one marriage at a time; and only the husband can terminate each contract at will: he needs no grounds and neither the wife's presence nor her consent are required. Wives can, however, through the insertion of stipulations in the contract, modify some of its terms and acquire, for example, the right to choose the place of residence or to work, or the delegated right to divorce if the husband contracts another marriage.

These are, in a nutshell, the classical *fiqh* rulings on marriage that many contemporary Islamists and Muslim traditionalists claim to be immutable and divinely ordained. They also claim that these rulings embody the Shari'a notion of gender, and thereby invoke them to legitimate patriarchy on religious grounds. But such claims have been challenged by the emerging feminist scholars, who aim to separate these patriarchal readings of Islam's sacred texts from the ideals and objectives of the Shari'a. Among the important questions these scholars pose are: how far does this notion of gender reflect the principle of justice that is inherent in the Shari'a? Why and how did classical *fiqh* come to define marriage in terms that make woman subject to male authority? What are the moral and rational bases of this definition of marriage?

The genesis of gender inequality in Islamic legal tradition, this emerging feminist scholarship tells us, lies in the inner contradiction between the ideals of the Shari'a and the patriarchal structures in which these ideals unfolded and were translated into legal norms. Islam's call for freedom, justice and equality was submerged in the patriarchal norms and practices of seventh-century Arab society and culture and the formative years of Islamic law. In discerning the terms of the Shari'a, and in reading the sacred texts, classical Muslim jurists were guided by their outlook, the social and political realities of their age, and a set of legal, social and gender assumptions and theories that reflected the state of knowledge and the normative values and patriarchal institutions of their time. Their rulings on family and gender relations (as I, among others, have shown in my research) were all the product of either juristic speculations or social norms and practices. But they came to be treated by successive generations of jurists as though they were immutable, as part of the Shari'a. In short, rather than embodying the principles of justice and equity

inherent in Shari'a ideals, *fiqh* rulings on marriage reflect the classical jurists' constructions of marriage and gender relations; in their conception of justice, equality, as we understand it, had no place.[5]

NEO-TRADITIONALISTS: GENDER EQUITY OR COMPLEMENTARITY

Let me now turn to the Neo-traditionalist perspective, which is that of the majority of Muslims today.

With the advent of modernity, concomitant with the rise of Western hegemony over Muslim lands, the spread of secular systems of education, as well as the changed status of women in Muslim societies, the classical *fiqh* conception of gender rights became a battleground between the forces of traditionalism and modernity in the Muslim world; and it is against this backdrop that the Neo-Traditionalist perspective must be placed.

Though its roots can be traced to the 19th century, its impact was linked with the emergence of modern nation-states in the 20th century. It was then that, in many such nation-states, classical *fiqh* provisions on family were selectively reformed, codified and grafted onto unified legal systems inspired by Western models. With the exception 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, inheritance). The impetus for, and the extent of, reform varied from one country to another. For instance, while substantial reforms were introduced in some countries such as Tunisia, in others reforms were limited.[6]

The codification of *fiqh* provisions on family law not only transformed the interaction between Islamic law and social practice but also led to the creation of a hybrid family law that was neither classical *fiqh* nor Western. 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

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[5] For a fuller treatment, see Mir-Hosseini (2009).

[6] For a discussion of the terms of the marriage contract and its adoption in the legal codes of two Arab countries, see El Alami (1992); for codification and reforms see Anderson (1968) and Rahman (1980); for more recent debates surrounding codification and reforms, see Moors (1999) and Welchman (2007).

assembly of a particular nation-state. In codifying family law, governments introduced reforms through procedural rules, which in most cases left the substance of the classical laws more or less unchanged. This gave the classical *fiqh* construction of gender rights a new life and unprecedented power. It could now be imposed through the machinery of the modern nation-state.[7]

Moreover, once *fiqh* rulings were codified, the law itself came to replace the Muslim scholars, the *ulema*, as the source of authority. The codification took away their final say over the content of the law and transferred that power to the state. As *fiqh* and its practitioners became confined to the ivory tower of the seminaries, they lost touch with changing social and political realities and were unable to meet the epistemological challenges of modernity. Thus Islamic law lost its dynamism and became a closed book, removed from public debate and critical examination.

It is crucial to remember that the idea of equality in the family belongs to the modern world, and was naturally absent in pre-modern legal theories and systems. Yet until the 19th century, Islamic law granted women better rights than any Western law. For instance, under Islamic law women have always been able to retain their legal and economic autonomy in marriage, while in England it was not until 1882, with the passage of the Married Women's Property Act, that women acquired the right to retain the ownership of property after marriage.[8]

Putting aside *fiqh* as the source in other areas of law had the indirect result of reinforcing the religious tone of provisions that related to gender rights and the family. *Fiqh* provisions on the family became the last bastion of Islamic law – a closed book, removed from public debate and critical examination. It is then that we witness the emergence of a new genre of literature and discourse that I call *fiqh*-based. Largely written by men – at least until very recently – this literature aims to shed new light on the 'status of women' in Islam, and to clarify Islamic laws of marriage and divorce.[9] The authors re-read the sacred texts in search of new solutions – or more precisely, Islamic alternatives – to accommodate women's contemporary aspirations for equality, and at the same time to define 'women's rights in Islam'. 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

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[7]   Mir-Hosseini (2000: 10–13)

[8]   See Wright (2004); her discussion of the assumptions that informed English family law in the eighteenth century reveals striking parallels with those of classical fiqh.

[9]   For a discussion of such writings in the Arab world, see Haddad (1998), Stowasser (1993); for Iran, see Mir-Hosseini (1999); for a sample of texts in English, see Doi (1989), Maududi (1983), Mutahhari (1991), Rahman (1986)

which they inadvertently reveal, by going back to classical *fiqh* texts. They see gender equality as an imported Western concept that must be rejected. Instead they put forward the notion of complementarity or balance in gender rights and duties. This notion, premised on a theory of the naturalness of Shari'a law, goes as follows: though men and women are created equal and are equal in the eyes of God, the roles assigned to men and women in creation are different, and classical *fiqh* rules reflect this difference. Differences in rights and duties, Neo-Traditionalists maintain, do not mean inequality or injustice; if correctly understood, they are the very essence of justice, as they are in line with human nature.[10]

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'a' as embodied in *fiqh* rulings. Political Islam had its biggest triumph in 1979 with the popular revolution in Iran that brought Islamic clerics in power. This year saw the dismantling of reforms introduced earlier in the century by modernist governments in some Muslim countries – for instance in Iran, Algeria and Egypt – and the introduction of Hudood Ordinances in Pakistan; developments that apparently heralded a reversal of the gains that Muslim women had made earlier in the 20ᵗʰ century. Yet this was also the year when the United Nations adopted the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).

FEMINISTS: EQUALITY

As the century drew to a close, political Islam produced its own antithesis. Paradoxically, the Islamists' attempt to translate patriarchal notions of classical *fiqh* into policy became a catalyst for a critique of these notions, and a spur to women's increased activism. The defence of these rulings as 'God's law' and the attempt to impose them opened a space for the articulation of an internal critique that is unprecedented in the Muslim history.[11]

By the early 1990s, there were clear signs of the emergence of a new consciousness, a new way of thinking, a gender discourse that is 'feminist' in its aspiration and demands, yet 'Islamic' in its language and sources of legitimacy. Some versions of this new discourse came to be labelled 'Islamic feminism' – a conjunction that is unsettling to many Islamists and some human rights activists.

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[10] For discussion and critique of this perspective, see Ali (2003) and Mir-Hosseini (2007a)

[11] See Mir-Hosseini (1999, 2007a).

Among others, I have written and spoken at some length about this emerging feminism, which is quite diverse and speaks with many voices.[12] In my view it is difficult and perhaps futile to put these voices into neat categories, and to try to generate a definition that reflects the diversity of positions and approaches of so-called 'Islamic feminists'. As with other feminists, their positions are local, multiple and evolving. Many of them have difficulty with the label, and object to being called either 'Islamic' or 'feminist'. They all seek gender justice and equality for women, though they do not always agree on what constitutes 'justice' or 'equality' or the best ways of attaining them.

But what is important to stress is the potential of a brand of feminism that takes Islam as the source of its legitimacy, to challenge both the hegemony of patriarchal interpretations of the Shari'a and the authority of those who speak in the name of Islam. This places the so-called 'Islamic feminism' in a unique position to expose the inequalities embedded in current interpretations of the Shari'a, as constructions by male jurists rather than manifestations of divine will. This exposure can have important epistemological and political consequences. Epistemological, because if it is taken to its logical conclusion, then it can be argued that some rules that until now have been claimed as 'Islamic', and part of the Shari'a, are in fact only the views and perceptions of some Muslims, and are social practices and norms that are neither sacred nor immutable but human and changing. Political, because it can both free Muslims from taking a defensive position and enable them to go beyond old jurisprudential dogmas in search of new questions and new answers.

The potential of this emerging feminism to resolve the inherent conflict between Islamic law and CEDAW has been undermined substantially by post-9/11 developments and the so-called 'War on Terror' – a war most Muslims, rightly or wrongly, perceive as a 'War of Civilizations' directed against Islam. The result has been, on the one hand, to make Muslims insecure and thus more likely to cling to their religious tradition, but on the other, to delegitimize internal voices for change and to discredit International Human Rights law and discourses.

CONCLUDING REMARKS

Let me end my mapping of the interaction between religion, law and family with two observations.

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[12] There is a growing literature on Islamic feminism; for a discussion of the literature, see Mir Hosseini (2006) and Badran (2002, 2009).

First, 20th-century developments have shifted the debates over religion, law and family in the Muslim world onto new ground. The earlier part of the century saw the retreat of religion from politics and the secularization of law and legal systems. The rise of political Islam in the 1970s reversed this process, bringing religion back into politics and law. Muslims hold varying positions on gender relations, from those who endorse the classical *fiqh* rules, to those who seek their modification in the notion of 'complementarity', to those who advocate gender equality on all fronts. Irrespective of their position and gender perspective, all Muslims agree on one thing: that justice and fairness are integral to the Shari'a and that 'Islam honours women's rights'. Even those who see classical *fiqh* rulings on marriage and gender roles as immutable, as part of the Shari'a, no longer invoke the juristic theories and the theological assumptions on which they are based. This is so because such notions and statements are so repugnant to modern sensibilities and ethics, so alien from the experience of marriage among contemporary Muslims, that no one can openly acknowledge them. To me, this is a clear proof that the classical *fiqh* definition of marriage has become irrelevant to the contemporary experiences and ethical values of Muslims, and that a paradigm shift is well under way in 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 that were previously undisputed lose their power to convince and cannot be defended on rational and ethical grounds.

Secondly, legal systems and jurisprudential theories must be understood in the cultural, political and social contexts in which they operate. The old *fiqh* paradigm, with its strong patriarchal ethos, as well as the new feminist readings of the Shari'a, should be understood in this complex double image, as both expressing and moulding social norms and practice. We must not forget that legal theory or jurisprudence is often reactive, in that it reacts to social practices, to political, economic and ideological forces and people's experience and expectations; in other words, law most often follows or reflects practice; that is to say, when social reality changes, then social practice will effect a change in the law. Islamic law is no exception – as attested by the ways in which both legal systems and women's lives and social experiences have been transformed in the course of the last century. In the new century, Islamic law has to meet the feminist/gender egalitarian challenge from within – a challenge that it can no longer ignore.[13] Political Islam has let the genie out of the bottle.

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[13] In February 2009, 250 women from 47 countries gathered in Kuala Lumpur for the launch of Musawah, which aims to be a global movement for equality and justice in the Muslim family. The Musawah Framework of Action provides the conceptual framework for the movement and brings together the Islamic and human rights frameworks. For this document and others, see www.musawah.org.

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31

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