

THE FEMINIST ENCOUNTER WITH MUSLIM LEGAL TRADITION

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Abstract: The religious legitimization of patriarchy has been the subject of heated debates among Muslims since the 19th century, debates tainted with the legacy of colonialism and orientalism. For long, Islam and feminism have been perceived and portrayed as incompatible, and there is a plethora of literature and a host of arguments seeking to demonstrate this, both in the media and in academia. In the late 20th century, however, new forms of gender consciousness, activism, and scholarship have emerged that challenge patriarchy from within Muslim tradition have emerged, and have acquired the label ‘Islamic feminism’. Here I sketch the origins and development of this phenomenon, of which there are inevitably diverging accounts; and I shall argue that the struggle for gender equality in Muslim contexts is part of the larger struggle for social justice and democracy, intimately linked to a growing democratisation in the production of religious knowledge. I explore the potential of feminist voices and scholarship in Islam to bring about this rethinking, with reference to a project recently undertaken by Musawah (www.musawah.org), a global movement for justice and equality in the Muslim family.

Keywords: Muslim legal tradition, gender equality, Muslim family, Islamic law, international human rights

In mid-February 2009, several hundred scholars, activists, legal practitioners and policy-makers from 47 countries gathered for five days in Kuala Lumpur, Malaysia, to participate in the launch of Musawah, as a global movement for equality and justice in the Muslim family. The gathering was hosted by Sisters in Islam, the Malaysia-based women’s group, which since its formation in 1988 has argued for Muslim women’s rights and equality within an Islamic framework. Musawah (‘equality’ in Arabic) was planned over the course of two years, at workshops in Istanbul, Cairo and London, and through constant electronic communication. The planning committee, with members from eleven countries, consulted

a wide range of other Muslim activists and academics, and produced a *Framework for Action*, a programme for bringing together Islamic and feminist approaches to argue for an egalitarian construction of Muslim family laws.

As a member of the planning committee, here I want to tell something of the story behind the formation of Musawah. It is the story of the shaping of a new phase in the politics of religion and gender in Muslim contexts. One salient feature of this phase is women, rather than the abstract notion of gender equality, have taken centre stage. Another is the unmasking of the global and local power relations and structures within which Muslim women have to struggle for justice and equality. What initiated this phase was the growing opposition, in the last two decades of the twentieth century, between two powerful global movements: feminism and political Islam. The new century, which opened with the rhetoric and politics of the ‘war on terror’, has added a new dimension to this politics.

I begin by outlining the twentieth-century shifts in the politics of religion, law and gender that gave rise to new forms of activism that are feminist in their aspiration and demands, and Islamic in their source of source of legitimacy. I then discuss the foundation of Musawah as a knowledge-building movement, outlining its conceptual framework and the project that I have been leading, on rethinking the notion of male authority. I end by considering how new feminist voices and scholarship in Islam are bringing about a much-needed paradigm shift in the politics of gender in Muslim contexts.

As a founding member of Musawah, I describe the formation of the movement, conveying some of our thinking and our internal discussions. I write as an anthropologist – as participant-observer in these discussions. Two themes run through my narrative and link its different parts. First, gender equality is a modern ideal, which has only recently, with the expansion of human rights and feminist discourses, become inherent to generally accepted conceptions of justice. In Islam, as in other religious traditions, the idea of equality between men and women in the past was neither relevant to notions of justice nor part of the juristic landscape. The second theme is that the struggle for justice and equality in Muslim contexts is enmeshed in an intricate dialectic between theology and politics, in which it is hard and sometimes futile to ask when theology ends and politics begin. For a feminist project to bring sustainable change, I contend, it must recognise this fact and develop arguments and strategies that can effectively rupture the tenacious link between patriarchy and despotic politics, which sustains unjust laws and structures, whether in religious or secular contexts.

In the first part of the twentieth century, many of the new nation-states with Muslim majority populations adopted new legal codes that incorporated classical jurisprudential rulings—partially reformed—relating to marriage and family. The best-known exceptions were Saudi Arabia, which preserved classical jurisprudence as fundamental law and attempted to apply it in all spheres of law; Turkey, which abandoned Islamic jurisprudence in all areas of law; and Muslim populations that came under communist rule. In other countries, where Islamic jurisprudence remained the main source of family law, the impetus and extent of reform varied, but, with the exception of Tunisia, which banned polygamy, the classical construction of the marital relationship was retained more or less intact.

Reforms were introduced from within the framework of Muslim legal tradition, by mixing principles and rulings from different schools of Islamic law and by procedural devices, without directly confronting the patriarchal construction of marriage and the family. 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. Classical conceptions of marriage and gender rights remained unchallenged.²

In the last two decades of the 20th century, with the intensification of Islam as both a spiritual and a political force, Islamist political movements tried to reverse the earlier process of secularisation and reform of laws and systems. Political Islam had its biggest triumph in 1979 when a popular revolution in Iran brought an end to the US-backed monarchy and introduced an Islamic Republic. This year also saw the dismantling of some of the reforms introduced earlier in the century by modernist governments – for instance in Iran and Egypt – and the introduction of the Hudood Ordinances in Pakistan that extended the ambit of Islamic jurisprudence to certain aspects of criminal law. Yet this 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 a clear international legal mandate for advocating and enacting equality between men and women, and to the notion of women's rights as human rights.

The decades that followed saw the concomitant growth, globally and locally, of two powerful but seemingly opposed forces. On the one hand, with the encouragement of CEDAW (and the UN Decade of Women 1975-85), in the 1980s the international women's

movement expanded. CEDAW gave women's rights activists what they needed most: a point of reference, a language and the tools to resist and challenge patriarchy. On the other hand, Islamists – whether in power or in opposition – started to invoke 'Shari'a' in order to dismantle earlier efforts at reforming and/ or secularising laws and legal systems. Tapping into popular demands for social justice, they presented this dismantling as 'Islamisation' and as the first step to bringing about their vision of a moral and just society; yet the (re- introduction) of laws that conformed with traditionalist Islamic jurisprudence, notably regressive gender policies, had devastating consequences for women: compulsory dress codes, gender segregation, and the revival of cruel punishments and out-dated patriarchal and tribal models of social relations.

Political Islam's drive for 'Islamisation', however, had some unintended consequences; the most important was that, in several countries, they brought the classical jurisprudential texts out of the closet, exposing them to unprecedented critical scrutiny and public debate. At the same time, a new wave of Muslim reform thinkers started to respond to the Islamist challenge and to take Islamic legal thought onto a new ground. Unlike earlier twentieth-century reformists, these new thinkers no longer sought an Islamic genealogy for modern concepts like gender equality, human rights and democracy. Instead, they placed the emphasis on how religion is understood, how religious knowledge is produced, and how rights are constructed in Islamic legal tradition. Using the conceptual tools and theories of other branches of knowledge these thinkers expanded on the work of previous reformers and developed further interpretive-epistemological theories.³

Meanwhile, attempts by Islamists in Iran and elsewhere to translate anachronistic patriarchal interpretations of the shari'a into policy provoked many women to increasing criticism of these notions, and drove them to greater activism. Increasingly, women came to see no necessary or logical link between Islamic ideals and patriarchy, nor any contradiction between their faith and their struggle for equality. Political Islam enabled them to shape and sustain an unprecedented critique of the gender biases of the pre-modern Islamic jurisprudential texts. In doing so, women were not only articulating the egalitarian demands of the first wave of Muslim feminists,⁴ they were also finding the language, the legitimacy, that they needed to overcome prevailing discourses that construed demands for gender equality as a Western agenda.

By the early 1990s, there were signs of new ways of thinking about gender that are feminist in aspiration and demands, yet Islamic in language and sources of legitimacy. Some versions of this new discourse came to be labelled 'Islamic feminism'—a conjunction that

was unsettling to many Islamists and some feminists. The term ‘Islamic feminism’ remains contested; I was among the first to use it for the new gender consciousness emerging in Iran a decade after the 1979 revolution.⁵ This new discourse has been nurtured by feminist scholars who are developing a critique, from within, of the patriarchal ethics of the shari‘a. They have produced substantial body of scholarship that is uncovering a hidden history and re-reading textual sources to reclaim the egalitarian message of the Qur’an and contribute to an egalitarian construction of Muslim family laws.⁶

In short, these developments have brought women onto centre stage; from being the subjects of family law reforms they have become active participants in the production of religious knowledge and in the process of law making. At the same time, gender equality has become inherent to global conceptions of justice, acquiring a clear legal mandate through CEDAW, which every Muslim majority state (except Iran, Somalia and Sudan) has ratified — though in most cases subject to ‘Islamic reservations’.

In the new century, in the aftermath of the 11 September 2001 attacks in the USA, the politics and rhetoric of 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 double standards in promoting UN sanctions, showed that international human rights and feminist ideals, like the shari‘a and Islamic ideals, were open to manipulation. They also revealed the wide gap between the ideals and the practices of their respective proponents.

Many Muslim women scholars and activists now found themselves in the crossfire. On the one hand, Islamists were denying them equality in the name of shari‘a, and on the other, hegemonic global powers were pursuing a neo-colonial agenda in the name of feminism and human rights. The way out of this predicament, for some of us, was to bring Islamic and feminist frameworks together. In doing so, we were building on decades of tireless effort by scholars and activists in Muslim countries to reform discriminatory laws enacted in the name of Islam. The vast majority of women whose rights we championed were believers and wanted to live according to the teachings of Islam, thus effective change, we believed, could come only through a meaningful and constructive engagement with those teachings.

To do this, we needed firmly to reclaim the egalitarian ethics of Islam and to create a public voice for our vision of Islam. We faced two different forms of resistance. One is from religious establishments, leaders and groups who claim to know and speak for ‘authentic’

Islam. They view both international human rights law and feminism with suspicion, and refuse to engage meaningfully with their advocates. Their vision of Islam, not ours, is the one that reaches most women, who consequently do not share our quest for legal equality. The other form of resistance is from the vast majority of non-governmental organisations (NGOs) and activists promoting women's rights, who are reluctant to address religious perspectives on women's issues. For many of them, 'Islam' itself is the main obstacle in their struggle for equality; they work only within the human rights framework.

One of the few women's NGOs that are happy to identify as both Islamic and feminist is Sisters in Islam (SIS), which has since 1988 engaged Malaysian scholars and the media in a public debate on religion, women's rights and gender equality. In February 2007, Zainah Anwar, founder and director of SIS, took the initiative to organise a workshop in Istanbul that brought together a diverse group of women's activists and scholars from different countries.⁷ The meeting led to the formation of a planning committee, charged with the task of setting out the vision, principles and conceptual framework of the movement that we called Musawah, with the aim of forging a new strategy for reform. Inspired by the activism of Moroccan women, and their success in bringing radical reforms in Moroccan family law in 2004, we adopted their slogan 'Change is necessary and change is possible'. 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 aminawadud, Khaled Abou El Fadl and Muhammad Khalid Masud. We used them 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*, available in print and online, in Arabic, English, and French, and became the basis of a wider discussion with a larger group of scholars and activists.⁸ After two years of discussion and consultation, including further workshops in Cairo and London, followed by constant electronic communication among the members of the committee, we produced the *Musawah Framework for Action*.⁹

Drawing on the new wave of reformist thought and feminist scholarship in Islam, in *Framework for Action* we grounded 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 invoked two of its main distinctions.

The first distinction – which underlies the emergence of various schools of Islamic law and within them a multiplicity of positions and opinions – is between *shari‘a* and *fiqh* (the science of Islamic jurisprudence). *Shari‘a*, literally ‘the way’, is the ideal divine way, which in Muslim belief was revealed to the Prophet Muhammad. *Fiqh*, literally ‘understanding’, is the science of Islamic jurisprudence as developed by Muslim jurists to discern the *shari‘a*, through extracting 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); *fiqh* also denotes the ‘laws’ that result from this process. What we ‘know’ of ‘*shari‘a*’ is only an interpretation, an understanding. *Fiqh*, on the other hand, like any other system of jurisprudence and law, is human and mundane, temporal and local. Any claim that a specific law or legal rule is ‘God’s law’ is a claim to divine authority for something that is in fact a human interpretation.

The second distinction that we took from Islamic legal tradition is that between the two main categories of legal rulings (*ahkam*): between ‘*ibadat* (ritual/spiritual acts) and *mu‘amalat* (social/contractual acts). Rulings in the first category, ‘*ibadat*, regulate relations between God and the believer, where jurists contend there is limited scope for rationalisation, explanation and change, since they pertain to the spiritual realm and divine mysteries. This is not the case with *mu‘amalat* rulings, 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 gave us the language, the conceptual tools, to challenge patriarchy from within Muslim legal tradition. The genesis of the gender inequality that is integral to Islamic legal tradition, we argued, lies in a 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 norms and practices of Arab society and culture in the seventh century and the formative years of Islamic law. Patriarchal norms were assimilated into *fiqh* rulings through a set of theological, legal and social theories and assumptions that reflected the state of knowledge of the time, and were part of the fabric of society. This was done by the sanctification of existing marriage practices and gender ideologies and the exclusion of women from the production of religious knowledge.

In February 2009 Musawah went public with the *Framework for Action* at a launch in Kuala Lumpur. Since then, Musawah's work has focused on three interrelated areas: knowledge building, international activity, and outreach.¹⁰ Our main objective is to re-insert women's concerns and voices into the processes of the production of religious knowledge and law making. In 2010, under my direction, Musawah initiated a multifaceted project to rethink the notion of authority in Muslim tradition, focusing on two central concepts that – we argue – lie at the basis of the unequal construction of gender rights in Muslim family laws. These are *qiwamah* and *wilayah*, which, as understood and translated into legal rulings by Muslim scholars, place women under male control. *Qiwamah* denotes a husband's authority over his wife; *wilayah* 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.¹¹

The project has two interconnected elements. The first is the production of new feminist knowledge that critically engages with these two legal 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 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 *qiwamah* and *wilayah*, 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 took us to Qur'an Verse 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 *qawwamun* (protectors/maintainers) in relation to women, according to what God has favored some over others and according to what they spend from their wealth. Righteous women are *qanitat* (obedient) guarding the unseen according to what God has guarded. Those [women] whose *nushuz* (rebellion) you fear, admonish them, and abandon them in bed, and *adribuhunna* (strike them). If they obey you, do not pursue a strategy against them. Indeed, God is Exalted, Great.

This 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 terms that I have highlighted; Kecia Ali, from whom I have taken the translation of the verse, leaves these key terms untranslated, pointing out that any translation amounts to an interpretation.¹² I have inserted translations that approximate the consensus of classical Muslim jurists and are reflected in the rulings (*ahkam*) 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 *qiwamah* postulate – using ‘postulate’ in the sense defined by Japanese legal scholar Masaji Chiba: ‘A value system that simply exists in its own right’.¹³ 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. They defined marriage as a contract that automatically places a wife under her husband's *qiwamah* (authority), and presumes an exchange: the wife's obedience and submission (*tamkin*) in return for maintenance (*nafaqah*) by the husband.¹⁴

Yet the term *qawwamun*, from which the jurists derived the concept of *qiwamah*, appears only once in the Qur'an in reference to marital relations.¹⁵ The closely related term *wilayah* 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*.¹⁶ 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 terms appear numerous times: *ma'ruf* (that which is commonly known to be right) and *rahmah wamuwadah* (compassion and love) – terms that enable us to challenge and rethink the assumptions of the classical jurists.

One of our objectives is to bring insights from feminist theory and gender studies into the debates around Muslim family law, and to ask new questions. Why and how did verse 4:34, rather than other relevant Qur'anic verses, become the foundation for the legal construction of marriage? What does male guardianship, as translated in the concepts *qiwamah* and *wilayah*, entail in practice? How can we rethink and reconstruct them in line with

contemporary notions of justice? 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? How can we deal justly with differences between men and women? 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 the recent collected volume: *Men in Charge? Rethinking Authority in Muslim Legal Tradition*.¹⁷ Its main thesis is that the concepts of *qiwamah* and *wilayah* 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. The contributors to the book, who are scholars from different disciplines and backgrounds, use their expertise to demystify these terms and re-interpret them from within what they assert are the core theological and ethical principles of the Islamic tradition. The different chapters of the book provide alternative understandings of *qiwamah* and *wilayah*, drawing on Qur'anic concepts that are central to the theological principles guiding God-human relations, and a holistic feminist approach that links Muslim tradition to modern forms of learning, such as theories of knowledge, justice and equality. Above all, they ground these understandings in lived realities and women's experiences.

Two other outcomes of the project appeared in 2016. "Women's Stories, Women's Lives: Male Authority in Muslim Contexts," a report (300 pages) outlines the findings and selected stories from the second component of the project, in which researchers and activists documented the life stories of fifty-five Muslim Women in nine countries (Bangladesh, Canada, Egypt, Gambia, Indonesia, Iran, Malaysia, Nigeria, and the United Kingdom).¹⁸ "Musawah Vision for the Family," a position paper proposes a model of Muslim family relations that upholds equality and justice for all family members and promotes the well-being of families and society.¹⁹

Let me summarise my argument. First, one of the key issues that Muslim women have confronted in their struggle for equality is the linkage between the religious and political dimensions of identity in Muslim contexts. This linkage is not new—it has its roots in the colonial era—but it took on a more aggressive expression in the 1970s with the resurgence of Islam as a combined political and spiritual force. With the end of the colonial era, the rise of despotic regimes in Muslim countries, and their suppression of progressive forces left a vacuum that was filled by Islamist movements. Strengthened dramatically by the success of the Iranian Revolution of 1979, Islamists gained momentum with the subsequent perceived defeat of communism. With the US response to the events of 9/11—in particular

the invasions of Afghanistan in 2001 and Iraq in 2003—Muslim women found themselves in the crossfire.

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

NOTES

¹ An earlier version of this article appeared in *Tempo Brasileiro*, 204, Janeiro Março 2016, pp. 93-107

² For an analysis, see Mir-Hosseini (2009).

³ For an engaging and accessible account of this trend of reform thought, see Amirpur (2015).

⁴ See, for instance Badran (1995), Afary (1996).

⁵ Mir-Hosseini (1996). For a discussion, Badran (2002), Abou-Bakr (2001).

⁶ For example, Al-Hibri (1985), Hassan (1987), Mernissi (1991), Ahmed (1992), Wadud (1999), Webb (2000), Barlas (2002), Mir-Hosseini (2003), Shaikh (2004), Lamrabet (2007), Z. Ali (2012), Abou-Bakr (2013).

⁷ See Anwar (2013) for her own journey from the local politics of Islam and women in Malaysia to global politics.

⁸ Anwar, 2009; it is also available online <http://www.musawah.org/wantedequality-and-justice-muslim-family-english>

⁹ See *Framework for Action*, available in five languages at <http://www.musawah.org/about-musawah/framework-action>

¹⁰ For these areas of activities, see <http://www.musawah.org/what-we-do>

¹¹ The project builds 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 Mir-Hosseini et al. (2013).

¹² Kecia Ali, n.d.

¹³ Chiba (1986: 7).

¹⁴ For a discussion of construction of marriage in classical fiqh, see Mir-Hosseini (2003, 2009); Ali (2010).

¹⁵ *Qawwamun* appears in two other verses (4:135 and 5:8), where it has a very different, positive and gender-inclusive meaning. See Lamrabet (2015: 77-8).

¹⁶ *Wilayah* 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 *wilayah* 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 *wilayah* (Masud 2013: 132–3).

¹⁷ Mir-Hosseini et al. (2015).

¹⁸ <http://www.musawah.org/knowledge-building/global-life-stories-project>

¹⁹ <http://www.musawah.org/musawah-vision-family-0>

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