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An Introduction to Muslim Women's Rights

AZIZAH Y. AL-HIBRI

☞ The topic of Muslim women's rights is vast; Muslim jurists have been writing about it for centuries. Because jurists are partly the product of their societies and these societies were and continue to be highly patriarchal, Islamic literature has been saturated with a patriarchal perspective on women's rights. This perspective has become so entrenched that it has been rendered invisible. For most Muslims it no longer represents the *ijtihad* of individuals. Instead, it has come to be viewed by them as an "objective" reading of Qur'anic text.

Because of the complexity of the topic of Muslim women's rights, I limit this introduction to a select number of issues usually raised in connection with Islamic family law. Some of these issues have been raised in local and regional women's conferences, but the answers have not always been satisfactory. Furthermore, there has been no systematic reexamination of traditional Islamic jurisprudence on these and other issues from a woman's perspective. This chapter provides a step in that direction.

Tawhid and the Concept of Equality

Family law, like other branches of Islamic law, derives from the concept of *tawhid*, or the belief in a single God. *Tawhid* is the core principle of Islamic jurisprudence.¹ From it flow many secondary principles, including the one that asserts that God is the supreme being and that all human

1. See Faruqi 1981.

beings are creatures of God.³ Thus, the *lawbid* principle provides the basis for the fundamental metaphysical sameness of all humans as creatures of God.

The Qur'an then comments on further metaphysical similarities and empirical differences among humans. It states that human beings were all created from the same *nafs* (soul), thus reemphasizing their metaphysical sameness.⁴ It also states that God created humans from a male and female and made them into nations and tribes, so that they would get to know (appreciate, befriend) each other.⁵ The Qur'an then adds that the most honored humans in the sight of God are those who are the most pious.⁶ Thus, at the same time that the Qur'an points out empirical differences among humans, such as those of gender, race, and ethnicity, it asserts their natural equality. It bases any ranking among them on their individual moral choices. Consequently, from the perspective of these Qur'anic passages, no man is superior to a woman by virtue of his gender alone.⁶

2. "Say: He is God, the One and Only; God the Eternal, Absolute; He begetteth not; nor is He begotten; and there is none like unto Him" (Qur'an 112:1-4). See also, "I [God] have only created Jinn and men, that they may serve Me" (Qur'an 51:56). All English translations of Qur'anic verses used herein are based primarily on the translation provided by Ali 1991. This author has modified that translation at times for the sake of greater accuracy or clarity.

3. See, for example, Qur'an 4:1; 6:98; 7:189, and 39:6.

4. "O humankind! We created you from a single (pair), a male and a female, and made you into nations and tribes, that you may know each other (not that you may despise each other). Verily, the most honored of you in the sight of God is the one who is most righteous. God has full knowledge and is well acquainted (with all things)" (Qur'an 49:13).

5. Qur'an 49:13

6. Qur'an 49:13. See, also, the various Qur'anic passages that emphasize the common origin of both genders and, hence, their similar nature and status. For example: "O Human-kind! Reverence your God, who created you from a single soul, created from it its mate, and from them twain scattered (like seeds) countless men and women" (Qur'an 4:1). "It is God who has produced you from a single soul. Here is a place of sojourn and a place of departure. We detail Our signs for people who understand" (Qur'an 6:98). "Never will I suffer to be lost the work of any of you, be that person male or female. You are part of one another" (Qur'an 3:195). "Those who do righteous deeds, whether they are male or female, and have faith, shall enter heaven and not the least injustice will be done to them" (Qur'an 4:124). "Whoever works righteousness, whether male or female, and has faith, verily to them we give a new good and pure life, and we will bestow on them rewards in accordance with the best of their deeds" (Qur'an 16:97).

The Qur'an emphasizes this point through the story of the fall of Satan. Satan fell from God's grace because he refused to bow to Adam in direct contravention of a divine order. Satan's disobedience resulted from his arrogance, which was justified by a self-serving worldview. Satan believed that he was better than Adam because God created him from fire and Adam from clay.⁷ This mode of arrogant reasoning shall be referred to herein as "Satanic logic."⁸

Underlying Satan's self-serving belief was a subjective hierarchical worldview that ranked fire higher than clay. In upholding this hierarchical worldview and its ramifications, even in the face of a direct divine order, Satan committed the cardinal sin of *shirk*. *Shirk* is the opposite of *tawhid*. It occurs when someone regards another will, in this case Satan's, as equal or superior to that of God. Satan fell into *shirk* because of his arrogance.

Islamic family law must be based on divine logic as revealed in the Qur'an and not on some hierarchical worldview foreign to it. The Qur'an states that God created humans, male and female, from the same *nafs* so that they may find tranquility, mercy, and affection with each other.⁹ The Qur'an also states that male and female believers are each others' *walis* (protectors, guardians).¹⁰ These themes permeate the Qur'an and make it very clear that there is no metaphysical, ontological, religious, or ethical primacy for the male over the female. The Qur'an also makes it crystal clear that divine will contemplates a relationship of harmony, consultation, and cooperation, as opposed to conflict and domination, between the two genders.¹¹

Unaware that Satanic logic provided the underpinnings of a patriarchal world, most Muslim jurists (like their societies) uncritically upheld

7. "God said: What prevented thee from bowing down when I commanded thee? He said: I am better than he; thou did create me from fire, and him from clay" (Qur'an 7:12).

8. See, for example, al-Ghazali 1939, 3:338 (discussing the pitfalls of hierarchical logic).

9. "And among God's signs is this, that God created for you mates from among yourselves, that ye may dwell in tranquility with them, and God has put love and mercy between your (hearts): verily in that are signs for those who reflect" (Qur'an 30:21).

10. "The male believers and the female believers are each other's *walis*" (Qur'an 9:71).

11. Qur'an 30:21. In understanding male-female relations in Islam, it is significant to note that the Qur'an does not blame Eve for the "Fall of Adam" from God's grace. Rather, one is told, both participated equally in that decision (Qur'an 20:120-21). Muslims do not subscribe to the concept of "Original Sin" because God forgave Adam and tied the fate of each human being on earth to that individual's moral/spiritual choices (Qur'an 20:122ff.)

the central thesis of patriarchy, namely, that males were superior to females. This central patriarchal assumption distorted their understanding of Qur'anic text and led them to develop oppressive patriarchal jurisprudence. This patriarchal jurisprudence then became the basis of state laws that have oppressed women for centuries. Thus, oppression of women is the result of Satanic logic infiltrating Muslim laws and distorting Muslim beliefs. For this reason I find patriarchal interpretations (*ijtihad*s) unacceptable to the extent they are based on Satanic logic and conflict with *tawhid*. I also recognize that these *ijtihad*s were the product of their time and place (historical and cultural) and, hence, need to be reexamined in light of the change in human consciousness that has since occurred.

The Islamic Philosophy of Change

A proper understanding of Islam requires familiarity not only with its basic substantive principles but also with its philosophy of praxis. Central to the Islamic philosophy of praxis is the Islamic philosophy of change. With few important exceptions, the Islamic philosophy of change is one of gradualism."

The Islamic philosophy of change does not stand alone. It is an integral part of the Islamic worldview. It is, therefore, no surprise that this philosophy is closely linked to another fundamental Islamic principle, namely, that a society must conduct its affairs on the basis of *shura* (consultation).¹² This latter principle is so basic that it has been viewed as the constitutional cornerstone of any Muslim state.¹³ The Qur'anic philosophy of change is also linked to yet another important Qur'anic principle, namely, that there be no compulsion in matters of faith.¹⁴ All these specific principles can be partly subsumed under the overarching principle of freedom of thought. Because abrupt change usually requires coercive action and coercion is the antithesis of freedom, it stands to reason that the Islamic philosophy of change is necessarily one of gradualism.

This divine philosophy of change remains the most suitable for the

12. See the discussion on this point in al-Hibri 1992, 9-10.

13. See, generally, al-Hibri 1992.

14. Ibid.

15. Qur'an 2:256.

improvement of the status of Muslim women around the world. Although gradual change is frustrating, it is, nevertheless, more stable and less destructive of society than a radical coercive change. Coercive change, which reflects a patriarchal preference for the use of force, lasts for only as long as the source of the coercion continues to exist. It also leaves a great deal of violence and pain in its aftermath. Furthermore, gradual change need not be agonizingly slow. If Muslim women (and men) join efforts to dismantle patriarchal society, the objective could be achieved within our lifetime. To achieve that end we need to develop a clear agenda of our strategic goals and a definite program of action that prioritizes these goals. Such a program must take into account the differing needs and wishes of Muslim women in each country. It must demand the proper and equitable implementation of Islamic laws. It must also stress the Qur'anic foundation for our demands and, simultaneously, actively encourage Muslims to re-engage in the process of *ijtihad*.

It is from this vantage point of the Qur'anic aversion to coercion and the need to develop an indigenous Muslim women's movement that I reject all attempts to exercise hegemony over the Muslim World by forcing upon it, whether through the introduction of international legal instruments or otherwise, a certain model of gender relationships suitable primarily for some other country, belief system, or culture. I also reject all attempts to use the suffering of Muslim women for the furthering of such schemes and the fragmentation of Muslim societies. I call for the establishment of an International Muslim Women's Human Rights Commission which reviews human rights violations in Muslim countries and takes effective steps for their cessation.

This recommended course of action is based on the fact that religious people will always strive to follow Divine Will regardless of existing social or political trends. Consequently, to implement real change, we need to show these people that the new laws do not defy Divine Will. Rather, they are thoughtful attempts to serve it better. This is especially important in Islamic law, which prides itself on being based on the twin requirements of rationality and *maslaha* (public interest). If one can show that neither is served by an existing law, then the door for change is thrust wide open and opposition melts away without heightened conflict.

For example, an Islamic law is usually based on an *'illah* (justification

or reason).¹⁶ By agreement of scholars, when the *'illah* disappears, so must the law, unless there is another *'illah* for it.¹⁷ Much of our heritage of *ijtihad*, however, was formulated hundreds of years ago and has not been reexamined recently to determine whether the *'ilal* (plural of *'illah*) for the related laws are still in place. The latter observation is especially significant because systems of Islamic law have often incorporated customs of local communities within them, so long as such customs were not viewed as contradicting the Qur'an. This practice, incidentally, is part of the Qur'anic philosophy of celebrating, rather than obliterating or punishing, diversity. Yet, subsequent to that incorporation, many customs have disappeared in the Muslim world, but the laws that enshrine them have continued to exist.

Similarly, the concept of *maslaha* has played a major role in the development of Islamic law. The basic idea is that the Lawmaker's (God's) purpose in making divine laws is to advance public interest. Thus, jurisprudence based on *maslaha* analysis requires that in formulating our legal system, we must also ensure that this divine purpose is preserved. In other words, a system of Islamic laws must avoid harm and serve the public interest, which includes the interests of women.¹⁸ This basic jurisprudential requirement is a formidable one in reclaiming Muslim women's rights. In using it, we need to specify in the case of each controversial law the harm (if any) it inflicts upon women and any negative impact it may have on public interest as a whole. This way, the whole society would welcome rather than resist change.

In this study I focus on select issues that have affected Muslim women's rights in the area of family relations. These issues have been severely impacted over the centuries by controversial patriarchal *ijtihad* that remains enshrined until this day in the laws of various Muslim countries. I reexamine the issues in light of Qur'anic text, traditional nonpatriarchal

16. Traditional jurists agreed that *'illah* is basic to an interpretation. See Mahmssani 1962, 70-72.

17. See al-Zuhayli 1986, 1:662. For a detailed discussion of *'illah* jurisprudence, see al-Razi 1992, 5: esp. 207-16.

18. The Qur'an says in verse 2:185: "God intends every facility for you. God does not want to put you to difficulties." Many other verses illustrate God's preservation of public interest through divine laws. A famous *hadith* says: "No harm [is permitted] and no harming each other [is permitted either]" (Ibn Majah n.d., 2:784).

ijtihad, and my present state of knowledge and consciousness as a Muslim woman preparing to live in the twenty-first century.¹⁹

Marriage Relations in Islam

Historically, marriage has been an institution that favored men over women. Through this institution basic women's rights such as the right to education, financial independence, and freedom of self-fulfillment were usually denied.²⁰ A fulfilled woman was, in fact, viewed as one who married, served her husband well, and bore him children. This view, although less common today, continues to exist both in the West and in Muslim countries. Yet it is in total contradiction to the Islamic view of women and marriage.

Islam guarantees for women, among other things, the right to an education similar to that of the male, the right to financial independence, and even the right to engage in *ijtihad*.²¹ Islam also views marriage as an institution in which human beings find tranquility and affection with each other.²² It is for this reason that some prominent traditional Muslim scholars have argued that a woman is not required to serve her husband, prepare his food, or clean his house.²³ In fact, the husband is obligated to bring his wife prepared food, for example.²⁴ This assertion is based on the recognition that the Muslim wife is a companion to her husband and not a maid.²⁵ Many jurists also defined the purpose of the marriage institution in terms of sexual enjoyment (as distinguished from reproduction). They clearly

19. In studying traditional *ijtihad* one must be discerning in one's approach. Generally, traditional as well as modern *ijtihad* is patriarchal, but passages in various works, for a variety of reasons, question or reject some basic patriarchal assumptions. Consequently, traditional *ijtihad* should not be rejected uncritically. Rather, it should be studied carefully to discern religious from sociopatriarchal assumptions. Muslims are bound by the first but not the second.

20. See al-Hibri 1997.

21. See Ridha 1984, 7-20. See also, al-Hibri 1997, 6-7; and al-Dakhil 1989, 4:291-97.

22. Qur'an 30:21.

23. See Abu Zahrah 1957, 166. See, also, the valuable discussion by Bennani 1993, 143-46. Zaidan 1994, 7:302-8.

24. See n. 23, above.

25. Some jurists have even suggested that the wife is entitled to a maid to serve her if she is not accustomed to serving herself. See al-Bardisi 1986, 306-7. See, also, n. 23, above.

stated that a Muslim woman has a right to sexual enjoyment within the marriage.²⁶ This view has important consequences in areas such as contraception and divorce.

It is these rights and views, which are derived from the Qur'an and classical *ijtihad*, that we must actively reclaim to realign the Muslim marriage institution along *tauhidi* principles. So long as patriarchal (hierarchical/authoritarian) logic prevails, Muslim women will be denied their God-given rights. Qur'anic concepts of family relations must be more adequately recognized and enforced in Muslim countries and communities to abolish the authoritarian structure of the marriage institution.

In striving for this result we must recognize the fact that patriarchal logic is deeply entrenched in all societies and is quite resistant to being uprooted. If we, however, follow the Qur'anic approach to change, we will receive the support of many Muslim men and achieve a great measure of success without sacrificing the social cohesion of Muslim communities.

In fostering change the Qur'an resorts to what has been known recently in the West as affirmative action. In a patriarchal society even a general declaration of equal rights is not sufficient to protect women. Consequently, divine wisdom gave women further protections.²⁷ Paramount among these protections is the ability of the Muslim woman to negotiate her marriage contract and place in it any conditions that do not contradict its purpose.²⁸ For example, she could place in her marriage contract a condition forbidding her husband from moving her away from her own city or town.²⁹ She could also insert a condition requiring him to support her in the pursuit of her education after marriage. She could also use the marriage contract to ensure that her marriage would foster, rather than destroy, her financial independence. This goal is usually achieved by requiring a substantial *mahr*.³⁰

26. Al-Bardisi 1966, 39-40; Zaidan 1994, 7:239-40. See, also, al-'Asqalani 1986, 285-86.

27. Patriarchal jurisprudence managed to reinterpret these protections and transform them into limitations.

28. Maghniah 1960, 301-2. See, also, Abu Zahra 1957, 156-62.

29. Maghniah 1960, 301.

30. *Sadaq* is another term used interchangeably with *mahr* in the Arabic language. In the Middle East the term *mahr* is used more often than *sadaq*. *Sadaq*, however, is the Qur'anic term. "And give the women (upon marriage) their *sadaqat* freely as a gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with good cheer" (Qur'an 4:4).

The *Mahr* Requirement

Despite many patriarchal and Orientalist interpretations that have distorted and even damaged the Muslim woman's rights in this area, the law of *mahr* was made clear quite early. The *mahr* is a requirement imposed by God upon men entering marriage as a sign of their serious commitment and a gesture of goodwill, a matter of great concern to women living in this patriarchal world.³¹ In fact, the giving of *mahr* is not much different from the Western custom of giving an engagement ring to signal commitment. Islamic law, however, preserved for the prospective wife the right to specify to her prospective husband the type of *mahr* she prefers. One woman may prefer cash, another property, depending on her relative needs or even taste.³² A third woman may choose something intangible (nonmaterial) as her *mahr*, such as education. That is acceptable also. A woman of meager means may prefer to ask for capital that she could immediately invest in a business. In fact, she could even use that capital to start her own business. Her husband would have no access to either the capital or income from that business even if he were in need because legally, her *mahr* belongs to her alone.³³

It is for this reason that when the *khalifah* (caliph) 'Umar attempted to cap the amount of *mahr* sought by women in his time, a Muslim woman vehemently objected. This old, unknown woman publicly challenged 'Umar, telling him that he could not take from Muslim women their God-given right that was granted in the Qur'an. The *khalifah* then withdrew his proposal immediately.³⁴

31. Ibid. See, also, Abu Zahrah 1957, 169-70; Zaidan 1994, 7: 49-50, 52.

32. See, Abu Zahrah 1957, 173-81. See also, al-Bardisi 1966, 238-39; Zaidan 1994, 54-58. Jurists, however, have set a minimum amount acceptable for *mahr*. Many also argue that if the woman settles for a *mahr* that is below her station, her *wali* may interfere and ask for a proper amount. The reasoning underlying this view is that the woman's *mahr* reflects upon the status of her family (including her sisters who may be about to marry). It is also a protective measure for women who, it is argued, may be swept by emotion. These are clearly social and not religious considerations. For more on this and similar juristic views, see Abu Zahrah 1957, 172; al-Jaziri 1969, 4:49-50 (arguing the need for a *wali* because an emotional woman may marry beneath her, thus harming her family's status).

33. Mahmassani 1965, 494-95. For a discussion of the Muslim woman's financial rights and independence, see Zaidan 1994, 7:52; 10:333-38. See, also, Abu Zahrah 1957, 206-7.

34. See al-Jawzi 1985, 136-37. Ghandur 1972, 167-68. See, also, Zaidan 1994, 7:68, 71-77. Some Gulf states have recently passed laws capping the amount of *mahr*

Sometimes women resort to the custom of dividing the *mahr* into two amounts: advanced and deferred. The advanced *mahr* is usually small and merely symbolic. It is due by the time of the marriage ceremony. The deferred *mahr* is usually a substantial lump-sum payment. Unless otherwise specified, it becomes due only in case of death or divorce. If the husband dies, the deferred *mahr* becomes an outstanding senior debt against his estate (not to be confused with the woman's share/inheritance in the estate of her husband).³⁵ If the couple divorce, the husband must pay the deferred *mahr* at the dissolution of the marriage. Thus, the concept of deferred *mahr* is somewhat analogous to that of lump-sum alimony in the United States. The only instances in which the woman is not entitled to her *mahr* upon divorce are instances in which she is primarily at fault in the dissolution of the marriage.³⁶ (See section on "divorce.") Consequently, whether payable because of death or divorce, deferred *mahr* provides the wife with a measure of financial security.

Mahr, therefore, is not a "bride price" as some have erroneously described it. It is not money the woman pays to obtain a husband nor money the husband pays to obtain a wife. It is part of a civil contract that specifies the conditions under which a woman is willing to abandon her status as a single woman and its related opportunities in order to marry a prospective husband and start a family. Consequently, as in Western pre-nuptial and nuptial agreements, the contract addresses matters of concern to the prospective wife and provides her with financial and other assurances. In short, it is a vehicle for ensuring the continued well-being of women entering matrimonial life in a world of patriarchal injustice and inequality.

Guardianship

As stated earlier, Islam rejects the view that humans are organized in a hierarchy, whether that hierarchy is based on gender, race or class. As the Qur'an clearly states, the most favored individuals in the eyes of God are those who are most pious.³⁷ This statement articulates the basic Qur'anic

35. Mahmassani 1965, 495. See, also, Abu Zahrah 1957, 174.

36. Abu Zahrah 1957, 204-6; see, also, Zaidan 1994, 7:112-13.

37. Qur'an 49:13.

criterion for ranking humans, and it is a criterion based on one's individual moral choices.³⁸ But Islam was revealed in a world awash with authoritarian patriarchal structures. Consequently, and in accordance with the principle of gradualism discussed earlier, the Islamic solution was to put in place certain mechanisms that would help women navigate the treacherous waters of the world in which they live. One of these mechanisms was put in place through the introduction of the concept of *wilayah*.

While recognizing the woman's right to manage her own affairs in all spheres of life, Islam provided the young and inexperienced woman with an additional safeguard, namely, an automatic consultative mechanism by which she could solicit advice from her father (or one who has a similar relation) about a prospective husband. This mechanism is referred to as *wilayah*.³⁹ It is understood that the father (a seasoned male) is in a good position to enlighten his daughter, who may be very young and naïve about prospective husbands (other males). But in the end, according to one major school of thought (the Hanafis), the daughter is free to disregard the advice and to make her own decision, for, the father's role is, after all, merely advisory.⁴⁰

Yet even the Hanafis were swayed by the protective patriarchal winds of the time when they awarded the father the right to prevent his virgin (and, hence, innocent) daughter from marrying an ineligible prospective husband.⁴¹ They also defined the notion of "eligibility" in terms that recognized class and racial biases. Other jurists defined this notion in line with the Qur'anic verse that based it on piety, but then they went on to award the father authoritarian rather than consultative powers.⁴² In an Islamic society in which historically the Islamic process of political consultation

38. Individual choices are the prerequisite for personal responsibility. No such responsibility could justly exist if one's actions were not the result of one's free choice. The Qur'an emphasizes the doctrine of personal responsibility in various passages. For example, "Every soul draws the meed of its acts on none but itself; No bearer of burden can bear the burden of another" (Qur'an 6:164). This doctrine is also expressed in verses 17:15; 39:7; and 53:38, among others.

39. Abu Zahrah 1957, 132-34. See also, Maghniah 1960, 321; Zaidan 1994, 6:345.

40. Abu Zahrah 1957, 130; Zaidan 1994, 6:345.

41. Abu Zahrah 1957, 130, 136-46; Zaidan 1994, 6:345.

42. For an overview of the five Islamic schools of thought on this issue, see Maghniah 1960, 326.

and election was replaced by an authoritarian ruling process, it is not surprising that the family structure became infected with these same influences. Now, however, that citizens in the Muslim world are demanding the full measure of Islamic democracy to which they are entitled by divine revelation, women cannot be heard to demand less.

Family Planning

Another measure for guarding the interests of women in particular and the Muslim community in general is provided in the area of family planning. Islam values the family structure and, like Judaism and Christianity, encourages procreation. Islamic law, nevertheless, differs from both traditions in its liberal approach to family planning. It shares with some Judeo-Christian traditions the view that contraception is permissible. *Coitus interruptus* (*al-'azl*) was practiced by members of the Muslim community during the time of Prophet Muhammad. Indeed, the Prophet knew that some of his companions, including his cousin Ali, practiced it, yet he did not prohibit it.⁴³

Al-Ghazali, a prominent fifteenth-century jurist, argues that contraception is always permitted. He makes an analogy between intercourse and a contract. A contract consists of an offer and acceptance. So long as the offer has not been accepted, he notes, it can be withdrawn.⁴⁴ He even suggests that a woman can engage in contraception to preserve her beauty but adds that it is disliked (*makrouh*) if used to avoid female offspring.⁴⁵ Jurists have, however, conditioned the practice of *al-'azl* upon the consent of the wife. Some even argue that if the husband practices *al-'azl* without the wife's permission, he has to pay her a fine because he has detracted from her sexual enjoyment, her established right.⁴⁶

Until recently, the majority of traditional jurists have taken a relatively liberal view toward abortion that properly balances the rights of the mother and the rights of the child. They recognized a period of early pregnancy that could be terminated at will and a subsequent period in

43. Al-'Asqalani 1986, 285-86. For a detailed account on this matter, see al-Hibri 1993a.

44. See al-Ghazali 1939, 2:53. See also Mussallam 1983, 18.

45. Al-Ghazali 1939, 2:53-54. This position is based on such Qur'anic verses as Qur'an 16:58 and 81:8-9.

46. Omran 1992, 155-65. See also, Mussallam 1983, 32.

which the embryo became ensouled. The jurists argued that when the embryo became ensouled, increasingly stringent criteria should be used to justify abortion (such as the health of the mother). More recently, relying on medical data, jurists have adopted the view that the embryo is ensouled soon after conception. It is desirable that Muslim women physicians and jurists reexamine this recent conclusion to determine its validity.

Maintenance

Classical Islamic jurisprudence entitles the woman to maintenance by her husband. Even if fully financially independent, she is not required to spend any of her money except as she wishes.⁴⁷ Furthermore, the wife is under no duty to do any housework although she may engage in such work on a volunteer basis.⁴⁸ Some traditional jurists suggested that the wife was entitled to monetary compensation for her volunteer housework activity.⁴⁹

The law of maintenance is based on the Qur'an, but unfortunately it has been used to assert the general superiority of men over women. The relevant Qur'anic verse simply states that men may gain *qiwamah* (advisory, caretaking status) vis-à-vis women if only they satisfy two preconditions.⁵⁰

47. Al-Jaziri 1969, 4:563, 582, 584 (stating inter alia that if a husband is unable to maintain his wife, any amounts she spends from her own money for her maintenance becomes a debt of the husband, even if she is wealthy). See, also, Mahmassani 1965, 495. Zaidan 1994, 4:290-91, 297. Additionally, once the husband gives his wife her *nafaqah* (maintenance payments) for food or clothing, for example, she is free to spend the money as she likes and not necessarily on food or clothing, so long as she does not harm or weaken her health or detract from her appropriate dress (7:214-15).

48. See al-Bardisi 1966, 306-7; Bennani 1993, 143. See also Zaidan 1994, 7:302-8, for an overview of this matter.

49. See n. 48, above. See also, al-Sarkhasi 1986, 5:182-83; Bennani 1993, 165-66; Abu Zahrah 1957, 165-66. For contrary views see Bennani 1993, 144-45, Zaidan 1994, 7:302-8. In any case, the wife cannot be forced to cook (Zaidan 1994, 7:207).

50. The *ayah* states: "Men are *qawwamun* over women *hima* God has given the one more than the other and *hima* they spend of their own money (to support the other) (Qur'an 4:34). I have left the Arabic word in place where the translation was questionable. "*Qawwamun*" has usually been interpreted as "protectors," or even "bosses." See Zaidan 1994, 7:277 (*Qiwammah* of the man is one of disciplining and protecting the woman. He is *wali* of her affairs; he orders and enjoins, as *walis* do with their subjects. He is her boss, ruler and discipliner if she

First, the male must be the (financial) maintainer of the woman. In other words, if he is not carrying her financial responsibility, then he has no standing to interfere in her affairs by providing unsolicited advice. Second, the male must also possess qualities (such as financial acumen, real estate expertise, etc.) that the advised woman needs to reach a particular decision but lacks (at that point). Without these two qualifications (which, incidentally, may change from time to time and from one decision to another), men may not even presume to provide advice or be caretakers (*qawwamun*).⁵¹

Because the Qur'an was revealed in a world that was and continues to be highly patriarchal, it engaged in affirmative action to protect women. The revelation about maintenance provided women against poverty. It also made clear that maintenance alone does not suffice for a man to claim *qiwamah* over a woman. The second Qur'anic condition specifying who may provide women with advice or care was thus a limitation on then current practices and not a creation of any new rights. Some jurists must have intuitively understood that difference and attempted to circumvent it.

They argued that the second condition for *qiwamah* is always satisfied because God has favored men as a group over women in matters of physical strength and intelligence.⁵² Thus, men are always entitled to *qiwamah* over women. Furthermore, the jurists interpreted *qiwamah* in an authoritarian manner ("boss" or "head of the household"), in accordance with the spirit of their times.

strays). *Bima* has been interpreted as "because." Both these interpretations force a certain patriarchal meaning upon the verse. I have reexamined this verse in al-Hibri 1997 where I pointed out that the proper meaning of *bima*, as based on ancient Arabic language dictionaries, contains a sense of conditionality, temporal or otherwise. I pointed out, also, that the word *qawwamun* has a range of meanings, including that of a mere "adviser." I concluded that the role of a particular male as an adviser to a particular female is conditioned on (1) his having more than she does (in knowledge, money, power, or whatever is relevant to the issue at hand at that time so that he is in a better position to advise and help her) and on (2) his supporting her with his own funds. If any of these two conditions fail at any time, the man is not *qawwam* over that particular woman at that time. Indeed, as his *wali*, the woman may have an obligation to advise him. "The male believers and the female believers are each other's *wali*" (Qur'an 9:71).

51. Al-Hibri 1997, 26-34.

52. See Rida n.d., 2:380; 5:67-69. See, also, Zaidan 1994, 7:277-9.

I have argued so far that there is no basis in the Qur'an for the patriarchal assumption of superiority, or the authoritarian interpretation of *qiwamah*. My arguments, however, respond to the traditional assumptions about women and their role in the family. The neopatriarchal approach to this role is, unfortunately, even more disconcerting.

For example, the Draft Unified Arabic Personal Status Law (the "Draft Law") requires the prosperous wife to support her needy husband.⁵³ The new formulation goes outside the scope of what is advocated by most jurists insofar as it imposes upon women additional burdens. It also does not offer them any significant new benefits or guarantees in return. In a still highly patriarchal world, a woman legally required to share her wealth with her husband may wake up one day to find herself divorced or widowed with her personal wealth depleted. Under this scenario the woman would have no real possibility of either recouping or regenerating that spent wealth, especially in light of the legal and other obstacles facing women who seek jobs outside the home.

Despite all the rights and guarantees offered by Islam to women, most men still use women as uncompensated laborers in their households. Furthermore, they not only expect them to produce heirs but also to nurse these heirs. Witness, for example, the list of wifely duties provided in the Draft Law, which includes nursing her baby.⁵⁴ Yet most Muslim jurists do not require Muslim women to nurse their children except to save the life of the child.⁵⁵ Instead, the husband is required to hire a wet nurse (or buy milk formula) if the mother does not want to nurse. If the husband divorces the wife, and she nurses the child after the divorce, jurists agree that she is entitled to monetary compensation for that nursing.⁵⁶ Hence, while

53. "The Draft Unified Arabic Personal Status Law," ART. 52 (1985).

54. "The Draft Unified Arabic Personal Status Law," ART. 43 (1985).

55. See Abu Zahrah 1957, 403-5. See also, Zaidan 1994, 9:475-80, who details the various juristic views on this point. The Hanafi, Shafi'i, and Hanbali views state that the woman has a religious but no legal duty to nurse her child whether she is married to or divorced from his father. Her husband has no right to force her to nurse. The mother, however, is required to nurse if the child rejects all other substitutes or none are available. The Malikis require the mother to nurse *unless she is of a noble or educated family in which the likes of her do not nurse!*

56. See, Abu Zahrah 1957, 204-5. See, also, Zaidan 1994, 9:485-92. (This passage also states that, consistent with the Maliki position discussed in the previous note, Malikis argue

masquerading as Islamic family law, a significant amount of the present family law in Muslim countries is influenced by local custom and patriarchal tradition.

Polygyny

Western writers have treated polygyny as one of the most controversial Islamic practices. Thus, it may be surprising to discover that Qur'anic reasoning clearly favors monogamy. The major Qur'anic verses at issue are two. One *ayah* states: "If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; But if you fear that you shall not be able to deal justly [with them], then only one, or that which your right hand possesses. That will be more suitable to prevent you from doing injustice."⁵⁷ The other *ayah* states that men cannot deal justly with their wives when they marry more than one woman.⁵⁸

Some Muslim jurists have interpreted the first *ayah* to mean that a man has the right to marry up to four wives as long as he is equally just with each of them. In providing this interpretation, these jurists ignored the first part of the *ayah*, which conditions the permission upon a certain context that obtained at the time of its revelation, namely, one of justice and fairness concerning the treatment of orphaned wives.⁵⁹ Secondly, these jurists ignored the last part of the *ayah*, which states that (even in that context) justice considerations make it preferable to marry only one wife. Consequently, this highly conditional and fact-specific verse was interpreted as if it articulated a general rule. Of the two conditions, the first was ignored altogether, whereas the second was reduced to the duty of exercising fairness in treatment and maintenance among the wives. These same jurists also ignored the second *ayah*, which flatly states that men are incapable of satisfying the condition precedent for engaging in polygyny, namely, justice and fairness.

Other traditional jurists, however, concluded that the Qur'an is clear

that a noble mother who nurses her child is entitled to compensation although still married to the father [9:486].)

57. Qur'an 4:3.

58. "Ye are never able to be fair and just as between women, even if it is your ardent desire" (Qur'an 4:129).

59. Al-Bukhari n.d., 3:117.

in advocating monogamy as the general rule. They also added that insofar as polygyny causes the first wife harm, it is forbidden altogether (*haram*).⁶⁰ Several traditional jurists also recognized the right of the woman to place in the marriage contract a condition barring the prospective husband from additional (polygynous) marriages.⁶¹

Yet practices of polygyny continue in some Muslim societies as a sign of economic or sexual power. As such, they are similar to the Western practice of having concubines or extramarital lovers. It is part of patriarchal custom and not religion. But religious scholars who attempt to criticize the practice or change the law are criticized for succumbing to Western influences. Witness the attack on the Tunisian Personal Status Code.⁶²

Western neoorientalist critiques of Islam, thinly disguised as "feminist" critiques, have managed only to complicate the task of Muslim women. These critiques tend to be motivated more by a feeling of superiority and a desire for cultural hegemony than by a desire to help the female "Other" (in this case, the Muslim woman). The neoorientalist attitude is evidenced by the fact that only negative and distorted stereotypes of Muslim women are propagated in international fora. Furthermore, these Western "liberators" have taken it upon themselves to "explain" Islam, criticize the Qur'an, and redefine and prioritize the demands of Muslim women over these women's objections. This attack on Islam by unqualified biased commentators offends the religious sensibilities of all Muslims, male and female, regardless of their points of view.

Significantly, while Muslim women struggled repeatedly in international fora to raise basic issues of survival and development, such as hunger, water, war, and disease, patriarchal Western women have insisted on

60. See al-Bardisi 1966, 38. See also, Mahmassani 1965, 471 (arguing that the spirit of Islamic *shari'ah* is to limit the permissiveness of *jahliliyah* in the practice of polygyny and to warn against it. It placed conditions on the practice that are almost impossible to achieve. Consequently, Mahmassani notes, many jurists concluded that the better and safest [*al-ahwat*] course of action is to marry only one wife and that marrying more than one is *makrouh* [disliked].) See, also, Zaidan 1994, 6:287, 291-92, who discusses these views but argues in favor of polygyny.

61. See al-Jaziri 1969, 4:87-89. See, also, Zaidan 1994, 6:133, 292.

62. The Tunisian code derives its legitimacy from a modern interpretation of Islam. See Rahman 1980, 451.

making the veil, clitoridectomy, and polygyny their primary preoccupations instead. They have even selected and funded some secular "Muslim" women to act as spokeswomen for the rest of the Muslim women. Needless to say, this neoorientalist attack on Islam has adversely impacted the civil rights of Muslims in Western countries and has poisoned the well for Muslim women seeking to regain their God-given Islamic rights in their own societies. Unfortunately, this state of affairs has alienated many Muslim women from the Western feminist movement.

Marriage to Non-Muslims

In this ever-shrinking global village interfaith marriages have become a daily reality. Because Islam respects and recognizes the other two Abrahamic religions, Muslim interfaith marriages have not presented a problem except in cases where the Muslim party was a female.⁶³

Muslim jurists agree that a Muslim woman cannot marry a non-Muslim man in a valid Islamic marriage contract.⁶⁴ The Qur'anic pronouncement that marriage to "People of the Book" is permissible was interpreted narrowly by jurists to cover only Muslim men.⁶⁵ Other verses were used to bolster this view. Still, some other jurists disagreed and rested the prohibition of the marriage of Muslim women to non-Muslims on cultural grounds that recognized the patriarchal nature of societies.⁶⁶ The marriage institution, they argued, was no exception.

Muslim jurists recognized the patriarchal nature of the marriage institution and the fact that other religions prohibited interfaith marriages. They feared that these combined factors, in an interfaith marriage where the wife was Muslim, would result in the effective denial of the Muslim wife's right to the free exercise of her religion. For this reason they focused

63. "God does not forbid you, with respect to those who do not fight you for (your) faith nor drive you out of your homes, from dealing kindly and justly with them: for God loves those who are just" (Qur'an 60:8).

64. Al-Hibri 1993b, 16:66.

65. "The food of the People of the Book is lawful unto you, and yours is lawful unto them. (Lawful unto you in marriage) are (not only) chaste women who are believers, but chaste women among the People of the Book, revealed before your time" (Qur'an 5:5).

66. For more information, see Rida n.d., 351.

their protective attention on the Muslim woman, barring her from marrying non-Muslim men.⁶⁷

Under the minority view that this prohibition is not Qur'anic, The 'illabs for it then lies in the combined circumstances mentioned above. As a result, the prohibition may change when its 'illah ceases to exist.⁶⁸ In this case, the important question becomes: Has the 'illah for this law ceased to exist? I think not.

Muslim women may, nevertheless, resent this "protective" attitude of the jurists. Some may feel, in fact, that their own marriage will be different and more egalitarian than those of society at large. If these women take that approach, then they need to face the same considerations a man faces in an interfaith marriage, namely, the religious upbringing of the children. In Islam a parent is responsible toward God for the religious guidance of his or her issue until their majority. Many Muslims in interfaith marriages have been unable to fulfill this particular duty, especially when they live in a predominantly non-Muslim community. This fact is, therefore, a major consideration against interfaith marriages in such circumstances.

Additionally, new circumstances warrant a reexamination of the traditional juristic permission for the Muslim male to enter into interfaith marriages. American custody laws favor women. Many Muslim men have divorced their non-Muslim wives only to lose custody of the children and, hence, the ability to provide their own spiritual direction to them. It thus appears that Muslim men in American society have significant intermarriage problems and now deserve the protective attention of Muslim jurists.

Divorce

Divorce in Islam is relatively simple and is a consequence of the Qur'anic view that spouses should live together on equitable terms or leave each other with kindness.⁶⁹ Present legal practices, however, can tie up a

67. Al-Hibri 1993b. See, also, Zaidan 1994, 7:6-10, arguing that Qur'anic verse 2:221 prohibits the Muslim woman from marrying a non-Muslim regardless of his religion.

68. Al-Hibri 1993b, 66-67. See, also, Mahmassani 1965, 479, stating the traditional juristic principle that a *shari'ah* rule based on an 'illah follows the 'illah in its existence or absence.

69. "The parties should either hold together in kindness or separate charitably" (Qur'an 2:229).

woman in family courts for a decade before she is granted a divorce. This state of affairs is especially offensive in light of the fact that some traditional jurists gave women the right to seek judicial divorce if they had no conjugal relations with their husbands for more than four months.⁷⁰

There are many forms of divorce in Islam. The present standard marriage contract grants the male the right to an automatic divorce. Nevertheless, if properly informed, the prospective bride is entitled to negotiate with the prospective groom a marriage condition that gives her a similar right. Unfortunately, women have not been properly informed of this right. Furthermore, not every woman can successfully negotiate the marriage conditions she desires.

A woman who has not protected herself in the marriage contract can seek judicial divorce on a variety of grounds, including those of domestic violence and lack of support. As in the West, judges play a major role in determining the level of violent conduct by the husband that is deemed actionable. These levels vary from one country to another. In Yemen, for example, *karabia* (extreme dislike), without more, is one of the statutory grounds for judicial divorce or annulment (*faskh*).⁷¹ In Jordan and Kuwait, verbal abuse is also one of the statutory grounds for judicial divorce.⁷²

Additionally, a Muslim woman who has not retained for herself the right to divorce may do so using *khul'*. Under this form of divorce, the wife returns the *mahr* to her husband to end the marriage. This form is based

70. Abu Shaqqa 1990, 6:233, quoting Ibn Taymiyah as stating that some jurists view intercourse as the duty of the husband at least once every four months; others determine the period in accordance with the wife's need and the husband's capability. Ibn Taymiyah prefers the latter approach. The arguments usually used to impose such a duty on the husband derive from the fact that satisfying the wife's sexual needs facilitates her being chaste. This is why al-Ghazali recommends that the husband have intercourse with each wife once every four nights (assuming the husband has four wives) (2:52). Jurists also have given the wife the right for judicial divorce (*tafriq*) if her husband stops having intercourse with her for a time (Zaidan 1994 8:439).

71. Yemeni Presidential Order Promulgating Law no. 20 of the Year 1992 Pertaining to Personal Status Matters, bk. 2, chap. 1, ART. 54.

72. Jordanian Personal Status Code, Provisional Law no. 61 (1976), chap. 10, ART. 132. Kuwaiti Law no. 51 (1984) Regarding Personal Status, pt. 1, bk. 2, Title 3, ART. 126. Both codes further describe that harm as being of a kind "that makes it impossible for women of the wife's peers to continue the relationship."

on an incident that took place during the life of the Prophet.⁷³ Since then, however, most Muslim countries have required the husband's consent for the *khul'* to take effect.⁷⁴ The requirement has made this form of divorce quite expensive because many husbands bargain for their consent.

In short, Islamic jurisprudence and court practices in this area are biased in favor of the male and deserve close scrutiny and urgent reform.

Conclusion

The Creator is also the Lawgiver. God knowingly created all humans, males and females, nations and tribes, from the same soul to enjoy each other's company. But God evaluates us only in terms of our piety. In conducting our human relations, we (whether male or female) must, therefore, be guided by an attitude of piety. Domination is contrary to piety. It is the consequence of Satanic logic, not divine wisdom. Consequently, all laws that attempt to dominate women by denying them equal rights must be revised to reflect the fundamental Qur'anic principle of human equality. In this chapter I have highlighted and critiqued some patriarchal elements of family law. Many other important matters remain, however, within and outside family law, that demand urgent attention. Clearly, we need to devote a great deal more time and effort to critiquing various elements of our traditional jurisprudence that are based on domination and suppression. We also need to contribute to the evolution of a better Islamic jurisprudence based on divine logic.

73. The wife of Thabit bin Qays came to the Prophet and said: "O Prophet of God, I do not fault my husband's manners or piety, but I want to leave him because I fear the loss of my faith if I remain with him." [In another version of the story, she wanted divorce because she simply could not stand her husband.] The Prophet then asked her, "Would you return to him his garden [which the husband had given her as *mahr*]?" She said, "Yes" and returned the garden. The Prophet then ordered the husband to leave her (al-Bukhari n.d., 3:273).

74. Pakistani case law presents a salient exception. See Hodgkinson 1984, 271-96. Some countries, such as Yemen, permit judicial divorce or annulment (*qaskh*) for reasons of dislike without the need for the woman to resort to *khul'*. See n. 71 above.