FEMINIST NARRATIVES ON ISLAMIC LAW: ALTERNATIVE APPROACHES

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Abstract

The presence and participation of women as lawmakers, policymakers and narrators has often been limited by authoritarian institutions and frameworks who have not welcomed women into their realms. Islamic jurisprudence is no exception. As subjects of the law Muslim women have seldom had the opportunity to provide their own understanding of what the law *is* and what it *ought* to be. Facing the challenges of a long-established legal framework with its systems of hierarchy and power Muslim Feminists are challenging the status quo by providing their own alternative narratives of what the law *ought* to be with regards to women. Their readings and narratives of the socio-historical development of Islamic jurisprudence, its norms and its laws, provides an alternative framework to existing practices of Islamic law. These feminist narratives of the law serve as an authoritative and authentic means towards changing the norms and practices of Islamic law to make it more meaningful, relevant and most importantly more cognizant of women's needs, roles and aspirations. As a divine system of laws Islamic jurisprudence establishes justice and egalitarianism as the building blocks of its foundations. It is the hope of feminist Muslim scholars to make these foundational aspirations real in the frameworks of an egalitarian and gender-sensitive Islamic jurisprudence.

Acknowledgments

I have been on an intellectual and personal journey in the hope of finding a meaningful and authentic solution for establishing a women's rights framework in Islam for quite some time. This dissertation has allowed me to explore my horizons and expand the boundaries of how I see law's interaction or lack thereof with women, their rights and their needs. I am grateful to the intellectual and emotional support of many who have helped me grow the seeds of my curiosity throughout the years.

I would first like to thank the members of my advising committee for their tireless efforts in guiding the direction of this research and for their very helpful insights, comments and questions. I wish to thank Prof. Obiora Okafor, my dissertation advisor for steering me through the complexities of the dissertation by supporting my thoughts and helping me see outside the prism of my own writing. His tireless intellectual and administrative support has made the completion of this dissertation possible. I thank Prof. Susan Drummond and Prof. Annie Bunting of my advising committee for asking serious questions during the course of the project, which greatly helped guide the writing of this dissertation. I thank all three for their untiring intellectual and emotional support. I also thank my external examiner Prof. Mehdi Noorbakhsh for accepting this role and for his very insightful comments.

My family has been a great source of inspiration and support throughout the years. I wish to thank Maman, Baba, Alireza and Mahdi for first supporting me on this journey and by being there for me emotionally and intellectually. I wish to thank Mehdi my husband for supporting me throughout the years in all his capacity and most importantly for believing in me, and sharing my hopes and aspirations. I thank friends and family in Iran, Toronto, New York and Houston for their unending support.

Last but not least, I am indebted and thankful to the intellectual aspirations and works of many Muslim women scholars and activists who throughout the years have provided fuel for my thoughts and inspired me to take action through writing. My thoughts were not born in a vacuum, rather, they were inspired by the curiosity, questions and concerns of many other Muslim women who have been puzzled by the complexities of the Islamic legal framework. I will forever be indebted to Muslim women pioneers who paved the way for Muslim women like me.

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Introduction

I. Objective of Research

The relationship between women and the "law" is rather complex and challenging. As subjects of the law, women have not always been treated with fairness and equality. The "gendered" aspect of the law has been highlighted by feminist scholars, activists and politicians who have been seeking to make the law more gender-neutral and gender-sensitive.[1] Essentializing "women" into a homogenous category overlooks their vast differences, nevertheless women across the world experience discrimination, inequality and patriarchy through laws, social norms, public policies, and cultural and religious traditions. In this vein, despite their differences one can say that they tend to share the same broad goal of wanting to change norms and reform laws to reflect more egalitarian and gender sensitive values.

Studying women's rights under any form of legal system cannot take place without considering the context of the law, its history, and the influence of politics, economics, religion and cultural orientations. The "woman question" and the concept of patriarchy continue to be critical issues to address for academics, politicians, activists and ordinary women in different parts of the world. The struggle against inequality becomes ever more difficult when women are challenging laws and norms that are deeply rooted within the psyche of their societies. In this event, women not only have to learn the language of the law but they must also change the minds and hearts of lawmakers,

[1] *See* for example, Catherine MacKinnon, *Feminism Unmodified: Discourses on Law and Life* (Cambridge, MA: Harvard University Press 1987).

politicians, judges and everyday people in order to prove that traditions and norms ought to change so as to transcend discrimination and inequality.

The objective of this dissertation is to ask whether a new narrative on women's rights under Islamic is in the making. Looking at Islamic law as a legal system, which has been constructed through human endeavor over time, this thesis considers the role that power and authority play in constructing the law, and posits that Muslim feminists are currently engaged in producing alternative narratives of what Islamic laws and norms ought to be with regards to women. These alternative feminist narratives can be as authoritative and valid as long-established male narratives. Islamic Law, similar to any legal system, can be subject to critical inquiry and new knowledgeable, legitimate authorities can produce alternative theories of the law and introduce new practices that can specifically be gender sensitive and egalitarian.

This research lies at the intersection of women's rights and the power of law in limiting and expanding the extent of those rights. Studying women's rights under Islamic law ought not to be that different from studying women's rights under any other legal framework. My goal is to bring the study of women's rights under Islamic law into the mainstream of women's studies, to make it part of the discourse, not only because Islamic law influences the daily lives of thousands of women around the world, but also because, the administration of Islamic law is gendered and influenced by patriarchy, power, politics, and culture as well. Hence, the nature of my research is interdisciplinary infusing different disciplines to analyze whether a new narrative on the rights of women under Islamic law is in the making, and if so what are the characteristics of this narrative? Is it empowering to women? Is it accessible and possible to incorporate within the methods of

Islamic jurisprudence? And most importantly how can this new narrative be operationalized into new norms and laws?

Approaching the issue of women's rights has many different levels and facets of which one needs to be keenly aware of As an aspiring scholar I am aware of the complexity of the research at hand, the historical, political, religious, cultural, legal, economic and social aspects of researching women's rights under Islamic law and the role that a feminist narrative might have on impeding change or producing change Perhaps this is not a novel project as many before me have addressed the issue However, one of the aims of this research is to shed light on recent activity and scholarship that has been produced, and argue that perhaps this new trend of scholarship and activism particularly by Muslim women can lend itself to the production of a new narrative which is conscious of the role of history, society, power and politics, the role of authority, judges and the state and most importantly the role of women as agents of change

II: Sources of Inspiration

Research for this project and the approach that I take in studying the discourse and analyzing it using a particular methodology was mainly inspired by Robert Cover's article "Nomos and Narrative"[2] Cover uses the concept of narrative as a new way of looking at the production, interpretation and administration of the law According to Cover "once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live,"[3] a world where our normative values guide our legal reasoning and the creation of laws "In this normative world," Cover explains, "law and narrative are inseparably related And

[2] Robert Cover, "Forward Nomos and Narrative" 97 Harv L Rev 4 (1983-1988)
[3] *Ibid* at 5

every narrative is insistent in its demand for its prescriptive point, its moral "[4] Treating law as narrative allows for a more holistic understanding of the production, interpretation and application of the law This means

> looking at facts more than rules, forms as much as substance, the language used as much as the idea expressed It means examining not simply how law is found but how it is made, not simply what judges command but how the commands are constructed and framed It understands legal decision-making as transactional—as not just a directive but an activity involving audiences as well as sovereigns [5]

The concept of narrative has mostly been used in the context of law and literature and critical legal theory,[6] examining the stories that law tells In this research narrative is used to analyze how and under what circumstances these stories are made and perhaps, how they can be retold in a different way In the context of feminist research, Claire Hemmings argues that "which stories predominate or are precluded or marginalized is always a question of power and authority "[7] Hence, it is not only a question of which stories become dominant, but also who the narrators are and how do they gain the authority to make some stories, norms and values dominate over others

The sources that I have chosen to serve as data for this research are the academic work of scholars writing on women's rights in Islam I study the academic scholarship of Leila Ahmed, Fatima Mernissi, Ziba Mir Hosseini, Amina Wadud and Azizah Al-Hibri Through their work, these scholars are providing an internal critique of the place of gender in Islamic law In other words, they are engaging with Islamic jurisprudence from within and offering their own narrative and analysis of how to reconstruct the Islamic law

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[4] *Id*
[5] Peter Brooks and Paul Gewirtz, *Law s Stories Narrative and Rhetoric in Law* (New Haven, CT Yale University Press, 1996) 3
[6] *See* for example, Richard Delgado, "Storytelling for Oppositionists and Others A Plea for Narrative" 87 Mich L R No 8 2411 (August 1989)
[7] Claire Hemmings, "Telling Feminist Stories" 6 Feminist Theory No 2 118 (2005)

from a feminist point of view. By choosing to study the academic work of these scholars I not only question what kind of narrative has been produced and what can be produced, but I also question the power and authority of the narrator, the role of interpretation, and the influence of politics and culture on the production of narrative. I ask, what if new narrators gain the power and authority to narrate and re-interpret the laws and norms in a more gender-sensitive manner? The most important challenge is how can their narrative gain power and establish authenticity in its approach and its narration such that it would gain acceptance within the context of mainstream Islamic jurisprudence.

III. Background Information and Literature Review

That women have rights under Islamic law is a rather contested issue. This however, ought not to be, because, under God's law all must be treated with justice and equality. Nevertheless, it seems that Muslim women are engaged in an endless struggle against the monster of what the law ought to be regarding their rights and status. Since the time of the Prophet, women have been actively involved in the establishment and evolution of the Muslim community. Women such as Khadija, Fatima, Aisha, Umm Salama, Zainab, Umm Omara, Al-Khansa and more animate the history of Islam;[8] women whose bravery, wisdom and actions can serve as examples to be followed by Muslim women in every time and place. However, despite the presence of such women in Islamic history, Muslim women continue to struggle with the normative and legal meaning of what it means to be a woman under Islamic law. Hence, the quest continues as activists, academics and everyday women seek to challenge the dominant narratives that control their lives.

[8] *See* for example, Jennifer Heath, *The Scimitar and the Veil: Extraordinary Women of Islam* (Hidden Spring: Mahwah, NJ. 2004).

Before reviewing some of the main discussions presented by academics on women's rights in Islam it is important to take a couple of issues into consideration. There are four aspects of Islamic law that need initial elaboration. First, Islamic law is not a monolithic body of law that is interpreted and applied uniformly across the Muslim world.[9] In fact, Islamic law has developed over a period of time in the evolving contexts of specific Muslim societies and their political regimes.[10] As a result, "its jurisprudence accommodates a pluralistic interpretation of its sources, which does produce differences in juristic opinions that can be quite significant in a comparative legal analysis."[11] Indeed, the existence of different schools of jurisprudence, four in the *Sunni* sect and three in the *Shi'a* sect of Islam, speaks to this diversity.[12] It must be noted that the "differences of the jurists and schools of Islamic jurisprudence represent "different manifestations of the same divine will" and are considered "diversity within a unity."[13] Second, Islamic law commonly referred to as the *Shari'a* is not wholly divine and immutable. The sources of the *Shari'a* include the Quran (the revealed text) and the Hadith (the explicit and tacit statements of the Prophet). These two sources are considered divine and hence speak with absolute authority on legal matters. The juristic methodology for interpreting these sources into tangible laws is known as *figh* (jurisprudence).

The Quran and *hadith* essentially contain the principles of Islamic law. Hence, in the absence of an explicitly defined law, jurists and legal scholars use different

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[9] Note The Muslim world is a broad term including peoples and states all over the world who are adherents of Islam

[10] M Cherif Bassiouni & Gamal M. Badr, "The Shari'a: Sources, Interpretation and Rule Making" 1 UCLA J Islamic & Near E L 135 (2002) 135.

[11] Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford; New York. Oxford University Press 2003) 32

[12] The main legal schools or Madhabs in the Sunni Tradition are Hanbali, Shafi'i, Maliki and Hanafi. In the Shi'a tradition the main schools of thought are: Jaafari, Ismaeli and Zaydi.

[13] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society 1991) 169

techniques of legal reasoning to interpret the sources such as *ijma* (consensus), *qiyas* (anaology), *urf* (custom), *maslaha* (consideration of the public good), *istihsan* (the best outcome in a given case), and *dharura* (necessity) to establish law [14] *Ijma* is considered consensus in the Muslim community on some point of law in a condition where the Quran or Hadith have not clarified an aspect of the law *Qiyas* essentially means "to use human reason to compare an existing situation with one from which legislation already exists "[15] These methods of interpretations are widely used by jurists in clarifying and establishing law As a result, the law as we know it today is the interpretation of divine sources (Quran and Hadith) by jurists and legal scholars The impunity and divinity of the sources are never questioned, rather, the authority and authenticity of the human interpretation of these sources that compile to make Islamic law or *Shari'a*, as immutable law, are the subject of speculation and debate among Muslims

Third, the Shari'a is considered to be "jurists' law" which implies that only "jurists are in a position to discover the law, and having discovered it, to state authoritatively what the Law is "[16] The importance of this method of law making is that, in principle the State has no legislative power The Islamic State upholds the Law and enforces it, but has no right to make or interpret law [17] Independence from the political establishment for interpreting and establishing the law was an important aspect of classical or traditional Islamic practice However, with the emergence of the modern nation state, legislating and administering the law has become one of the main functions of government As a result, for states that claim to uphold and implement Islamic law, the

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[14] *Supra* note 13 at 136
[15] Seyyed Hossein Nasr, *Ideals and Realities of Islam* (Boston Beacon Press 1966) 100-101
[16] Bernard Weiss, ' Interpretation in Islamic Law" 26 Am J Comp L 199 (1977-1978) 201
[17] *Id*

question arises as to just how independent from political ideology is the process of law making in their nations? As politics and ideology come to imbue the process of law-making, the independence of the judiciary in the Islamic context is also undergoing change. In addition, it must be noted that in the past decades Islam has been used as a political tool to impose a certain ideology on the population in the pursuit of certain state interests. Hence, it can be argued that although the interpretation and application of Islamic law, in theory, ought to be in the hands of jurists free from the influence of political interests, Islam, as a religion has been and continues to be used as a means by the state to maintain its power and control over the population. Tabatha El-Haj argues that, "[T]he Shari'a can better be characterized as a type of "total" discourse, wherein "all kinds of institutions find simultaneous expression: religious, legal, moral and economic." "Political" should be added to this list, for the Shari'a also provided the basic idiom of pre-nationalist political expression" [18]

Fourth, "the law" was and continues to be the defining characteristic of Muslim societies. Islamic law, it is argued, "is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself. It is impossible to understand Islam without understanding Islamic law."[19] It can be argued that Islamic law has not only defined the Muslim way of life, but also the entire culture and psyche of Muslims throughout centuries.[20] Indeed, it is the idea of the Shari'a as a common system of law shared by Muslims around the world, albeit with differences, that has arguably allowed for the creation of a Muslim identity and Muslim way of thought.

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[18] Tabatha Abu-El Haj, Book Review of Brinkley Massik, *The Calligraphic State Textual Domination and History in a Muslim Society* 16 The Int'l J. of Semiotics of Law No 4 (2003) 445.
[19] Joseph Schacht, *An Introduction to Islamic Law* (Oxford Clarendon Press 1964) 1.
[20] Wael B Hallaq, "'Muslim Rage' " and "'Islamic Law'" 54 Hastings L J. 1705 (2002-2003) 1707

It must be noted however, that in different parts of the world, Muslims interpret and practice Islamic laws and norms differently. Culture and politics influence the way a particular community of Muslims choose to apply Islamic laws and norms to their everyday life. Hence, there is a diversity of Muslims with different degrees of adherence to the laws of Islam. Despite variations, however, it can still be argued, that there are many common norms and values that connect the different interpretations of Islam across the Muslim world, and it is these similarities that allow for unity, and the possibility of the acceptance and application of the laws and norms of Islam around the world

Noting some of the main characteristics of Islamic law, its divine origins and the important role that it plays in the daily life of Muslims around the world and the politics of its administration, it can be argued that addressing any form of critique or desire for re-interpretation and innovation especially in the field of family law, not only has legal consequences but is politically sensitive as well.[21] The activists and academics who have taken it upon themselves to closely analyze the verses, *hadiths* and opinions of the jurists on issues concerning women all believe that "at the core of Islam lies a gender-neutral belief system that has been obscured by a centuries-long tradition of male-dominated interpretation."[22] The concept of the existence of an ethical core is rather vague and very sensitive. However, it implies that the existing Islamic legal framework does not represent the principles of this ethical core, namely justice and equality for all under the law. As such, feminist scholars in particular, seek to give voice to this ethical core by

[21] In Iran, a country that incorporates the Shari'a according to Shiite doctrine in its laws women have raised a campaign for equality which address some of the discriminatory laws against women. Their efforts have been curtailed by the government by arresting and imprisoning many of its activists and threatening others. See, www.onemillionsignaturecampaign.com

[22] Mohammad Fadel, "Two Women, One Man Knowledge, Power, and Gender in Medieval Sunni Legal Thought" 29 Int'l J Middle East Stud 185 (1997) 185.

producing gender-neutral, egalitarian interpretations of Quranic verses and *hadiths* that establish equality between men and women and women's empowerment

Leila Ahmed argues that "the unmistakable presence of an ethical egalitarianism explains why Muslim women hear and read in the sacred text, justly and legitimately, a different message from that heard by the makers and enforcers of orthodox, androcentric Islam "[23] Given the vast differences that exist among women, Kecia Ali reminds us that differences in class, geography, culture and even time period makes any attempt to discuss "the Muslim woman" or "sex in Islam" suspect However, she argues, "there is a relationship between ideal and reality and there is a certain coherence to pre-modern perspective models of Muslim womanhood and sexual relations "[24] It is precisely in the arena of sexual ethics she argues, that normative Islamic texts and thought have been and continue to be, most influential [25] What Ali points out is the role and authority of texts and textual interpretation, which have and continue to shape and define womanhood in Muslim societies Ahmed argues, "'textual Islam has historically been the province of male elite, and does not accurately represent the understandings of Islam embedded in the experiences of many Muslims, especially women "[26] As a result this search for the ethics and spirit of equality and egalitarianism has ignited a great movement by women scholars and activists to search for the truth that they believe exists within Islamic jurisprudence, but which has been misinterpreted and fogged by patriarchy

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[23] Leila Ahmed, *Women and Gender in Islam Historical Roots of a Modern Debate* (New Haven, CT Yale University Pres 1992) 66

[24] Kecia Ali, *Sexual Ethics in Islam Feminist Reflections on Quran Hadith and Jurisprudence* (Oxford One World Publications, 2006) xix

[25] *Id*

[26] *Supra* note 24 at ix

It is important to note that scholars like Kecia Ali and Leila Ahmed start from the premise of (a) accepting and believing in the Quran as the word of God revealed to Prophet Mohammad (pbuh) through different intervals, sometimes in response to questions raised by his followers; (b) recognizing the Hadith as a collection of statements by the Prophet and of his actions; and (c) that the Islamic legal tradition which has culminated over the years as a result of the interpretation of the Quran and *hadiths* by scholars and jurists in different times periods throughout the Muslim world are "worth studying because of their methodological sophistication, acceptance of divergent perspectives, and their diligence in the pursuit of understanding the divine will."[27] In other words, the issue that most Muslim feminist scholars take with laws produced through interpretation of these original texts is patriarchal bias and neglect of considering the context of revelation, interpretation and application. Ali delineates that the goal of her research is to "demonstrate that constructive and critical engagement with the Islamic intellectual heritage can be important in providing a framework for renewed invigorated Muslim ethical thought."[28] As such, my research will focus on the research and analysis of academics mainly located in the Western hemisphere who write on women's rights under Islamic law with a vision towards reform, pluralism and upholding women's rights and equality under the law. The goal of my research is to study the vast literature on the subject of women and Islam and determine whether the readings, interpretations and proposals of the academics under study lead to the creation of a new narrative on the rights and status of women under Islamic law.

[27] *Supra* note 24 at xx.
[28] *Id.*

One of the most important aspects of studying women's rights and role in Islam is noting the claim that Islam as a religion has been a "liberating and empowering force for women "[29] Many have argued that Islam has raised the status of women from what it used to be in pre-Islamic Arabia to one that protects women's rights and interests in marriage, allows for financial independence, encourages education and social participation and most importantly recognizes women as active members of society [30]

The challenge of analyzing and critiquing Islamic laws and norms concerning women lies in the perception that if you criticize one set of norms then you no longer believe in Islam and its principles anymore. This proves to be a challenge for many of the scholars, academics and activist who critique Islamic laws and norms concerning women, and while they subtly imply that the norms and laws are gendered, they hesitate to say so out loud for fear of being called heretics by their peers or members of their community So, whether one believes that the laws are inherently gendered and unequal or rather it is their interpretation and application that are gendered and discriminatory it is a challenge to change a system of laws and norms that are not only religiously important but are politically powerful as well

IV. Methodology

"We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void " [31]

1. Critical Discourse Analysis

[29] *See* for example, Rebecca Foley, "Muslim Women's Challenges to Islamic Law" 61 International Feminist Journal of Politics No 1 (2004)
[30] *See* for example, Adila Abusharaf, "Women in Islamic Communities The Quest for Gender Justice Research" 28 Hum Rts Q 714 (2006)
[31] *Supra* note 2 Robert Cover, "Forward Nomos and Narrative" 97 Harv L Rev 4 (1983-1988) 4

Textual analysis will play a predominant role in shaping and guiding the direction of this research. Whether I analyze the research of academics writing on women's rights in Islam, or study the discussions and documents produced in US court cases or in the Shari'a Ontario debate, it involves the study of a written text (the Quran, opinions of judges, court documents) from which norms and laws are produced. As a result, employing a methodology that raises awareness about the importance of the use of language, textual analysis and the effect that it has on the relationship between people, especially between men and women is very important. Hence, I use discourse analysis as a tool to establish the framework for critique, observation, deconstruction and innovation.

To provide a concrete definition of discourse analysis proves rather challenging because discourse analysis is rather vast and diffuse. But first it is important to define what is meant by discourse. Philips and Hardy define discourse as "an interrelated set of texts, and the practices of their production, dissemination, and reception that brings an object into being."[32] Discourses are embodied in texts which take a variety of forms such as written texts, spoken words, pictures, symbols, artifacts, and so forth. In other words, a discourse is a combination of texts and the meanings they convey to readers through the use of language.[33] A discourse is then a set of ideas, categories, theories and meanings about a particular subject which exists in different forms.

Discourse analysis has its intellectual roots not only in linguistics, but in philosophy, sociology and literary review.[34] Discourse analysis is both multi and interdisciplinary with dimensions of analysis that include "orientations towards language

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[32] Nelson Phillips and Cynthia Hardy, *Discourse Analysis Investigating Processes of Social Construction* (Thousand Oaks, California: Sage Publications Inc 2002) 3
[33] Ruth Wodak, "What is CDA about?" in Ruth Wodak and Michel Meyer, eds , *Methods of Critical Discourse Analysis (Introducing Qualitative Methods Series)* (London: Sage Publications Inc 2001) 2
[34] *Id.*

as action and topic, the definition of terms, the nature and role of theory, the nature of research questions, the sorts of data that are analyzed, the conceptualization and treatment of context, data collection, sampling, transcription, categorizations, levels of analysis, quantification, the warranting of claims, and the writing of reports "[35] These different levels of analysis all involve the study of language, as words, sentences and utterances, and their use in written and oral form not only as a form of communication, but also as mode of producing meaning and action Schiffrin argues that language is "used by its speakers for a tremendous amount of social work Not only is language used for referential function (to transmit information around the world), but it is used as a social function (to establish, maintain, and adjust relationships with others), and an expressive function (to display various selves and their attendant feelings, orientations and statuses) " [36]

Although much of discourse analysis is linguistic analysis of texts and statements, the relevance of discourse analysis is studying the social and political impact of the use of language and discourse in everyday life Critical linguistics (CL) or critical discourse analysis (CDA) regards language as a social practice and takes particular interest in the relation between language and power [37] Wodak argues that CDA is used nowadays "to refer more specifically to the critical linguistic approach of scholars who find the larger discursive unit of text to be the basic unit of communication This research specifically considers institutional, political, gender and media discourses which testify to more or

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[35] Linda A Wood and Rolf O Kroger, eds , *Doing Discourse Analysis Methods for Studying Action in Talk and Text* (Thousand Oaks, California Sage Publications Inc 2000) 18

[36] Deborah Schiffrin, *Discourse Makers Studies in Interactional Sociolinguistics* (Cambridge University Press 1988) 12

[37] *Supra* note 33 at 2

less overt relations of struggle and conflict."[38] More specifically CDA focuses on the role of discourse "in the (re) production of and challenge of dominance."[39] Defining dominance as the exercise of social power by elites, institutions, or groups that result in inequality, Van Djik argues that critical discourse analysts want to know "what structures, strategies, or other properties of talk, text, verbal interaction or communicative events play a role in the mode of these reproductions." [40] Hence, CDA can best be defined as a methodology that is interested in the social processes and structures that give rise to the production of texts, the meanings they create, and the interaction of different social groups with those meanings and texts. In this regard, Wodak argues that three concepts are essential in differentiating CDA from other types of discourse analysis, and that is concern with: the concept of power, the concept of history, and the concept of ideology.[41] These concepts become ever more relevant in analyzing the relationship of women to legal discourses, especially the relationship of Muslim women to the formation and implementation of Islamic law.

In the context of legal research and analysis, CDA proves to be a useful methodological tool for analysis as it encourages the researcher to consider the historical and political context of the production, dissemination and interpretation of a particular text. Given that "legal discourse is an essential tool in implementing and applying the law, to the point that – when taken as a whole – it might plausibly be argued that legal reasoning is primarily a question of semantics, semiotics and language interpretation. Thus the technical application of ordinary language – be it 'use' or 'abuse' – is highly

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[38] *Id.*
[39] Tuen A. Van Dijk, "Principles of Critical Discourse Analysis"4 Discourse and Society (1993) 249.
[40] *Ibid* at 250.
[41] *Supra* note 33 at 3.

visible in the various domains of legal discourse."[42] As a result, understanding the basic premises and goals of critical discourse analysis enables one to deconstruct the existing discriminatory elements of the discourse on women's rights under Islamic law, and provides greater tools to analyze the existing texts, norms and laws.

Considering the definition of discourse and the important socio-political role that different discourses play in our daily lives, it becomes apparent that in order to understand, deconstruct and change an existing discourse one must first have access to its elemental components. In other words, one must have access to the knowledge and information that creates a discourse. Van Djik argues that a parallelism exists between social power and discourse access where, "the more discourse genres, contexts, participants, audience, scope and text characteristics they (may) actively control or influence, the more powerful social groups, institutions or elites are. Indeed, for each group, position or institution, we may spell out a 'discourse access profile'".[43] In other words, it is through the active control of a discourse that power is influenced by one group over the other. In the context of law, as Cover would argue, it is the judge who determines which discourse or narration ought to dominate over others.[44] In other words, powerful individuals within society be they judges, jurists, politicians or lawmakers, manage discourse access and reveal dimensions of dominance where they determine what is allowed to be said/written/heard and read.[45] In this same context Foucault points out that:

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[42] Anne Wagner, "Introduction: The (Ab)Use of Language in Legal Discourse" 15 Int'l J. for the Semiotics of Law No. 4 232 (2002) 232.
[43] *Ibid.* at 256.
[44] *Supra* note 2 at 60.
[45] *Supra* note 33 at 257.

> The question posed by language analysis of some discursive fact or other is always according to what rules has a particular statement been made, and consequently according to what rules could other similar rules be made? The description of the events of discourse poses a quite different question how is it that one particular statement appeared rather than another?[46]

Hence access to language, knowledge and interpretation are all matters of power-relations In explaining theories of power, Foucault argues that "in order to understand what power relations are about, perhaps we should investigate the forms of resistance and attempts made to dissociate those relations "[47] In other words, it is not only important to realize the objects of power but to also consider the subjects of resistance Noting that there is a form of power which makes individuals subjects Foucault explains, that there are "two meanings of the word "subject" subject to someone else by control and dependence, and tied to his own identity by a conscience or self-knowledge Both meanings suggest a form of power which subjugates and makes subject to "[48] In the context of my research, women as subjects of the law have historically been excluded from the realm of law making Hence, noting the relationship between law, use of language, and the power of establishing and maintaining a discourse dominant proves instructive when analyzing the possibility of the creation of a new narrative which seeks to empower women and establish their agency

Monique Deveaux points out that addressing women's freedom "involves recognizing certain experiences as ongoing expressions of resistance to power—"power to give voice to one's aspiration to be heard is not so much the removal of an external

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[46] Michel Foucault, *Archeology of Knowledge*, trans Alan Sheridan (London Tavistock 1972) 30
[47] Michel Foucault, "The Subject and Power" in James D Faubion, ed , *Michel Foucault Vol III Power* (New York The New York Press 2000) 329
[48] *Ibid* at 12

impediment as the beginning of an internal empowerment.'"[49] So, in essence the act of women's inclusion in the process of redefining norms and laws is in fact an exercise in power. Women's empowerment manifests itself in different ways; from the creation of a separate normative, legal system such as the women's human rights framework to interpreting religious laws and norms from a gender-sensitive perspective. These feminist engagements with law and power are acts of resistance that challenge the frameworks of existing legal systems.

While women as authors, narrators, and law-makers is empowering and reveals that women are not only gaining access to previously male spheres, such as textual analysis (such as women re-interpreting the verses of the Quran) however, questions about the authority and authenticity of their narration and norm-setting remain. In other words, even if we have gender-conscious narrations of existing laws produced by women or feminist male scholars, how do you establish the authenticity of their claim and accept the authority of their narration. Most importantly does this new narration have the capacity to be jurisgenerative? In other words, how does this alternative narration of the law become part of mainstream Islamic jurisprudence and change the system from within towards establishing gender-sensitive laws. This is perhaps the most important and challenging aspect of feminist engagement with Islamic laws.

Other than discussing the concept of "narrative" as a new way of looking and producing law, Cover also argues that "when groups generate their own articulate normative orders concerning the world as they would transform it, as well as mode of

[49] Monique Deveaux, "Feminism and Empowerment: A Critical Reading of Foucault" 20 Feminist Studies No. 2 (Summer 1994) 232.

transformation and their place within the world, the situation is different—a new nomos with its attendant claims to autonomy and respect is created " [50] For Cover, a nomos as a

> world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures A nomos is a present world constituted by a system of tension between reality and vision [51]

This tension between reality and vision is best characterized by what the law *is* and what the law *ought to be*, especially by some members of society who are in a state of resistance to what the law is Narrative plays a pivotal role in the establishment and existence of a nomos, because "the very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative "[52] In essence it is the act of interpreting values, morals and codes to create a narrative that gives life to a nomos, a world guided by narrative and regulated through law

For Cover, it is not only judges and law-makers that create and maintain a nomos, but "each community of interpretation that has achieved "law" has its own nomos—narratives, experiences, and visions to which the norm articulated is the right response "[53] The significance of this community of meaning "lies in the group's creation of a jurisprudence that orders the forms and occasions of confrontation, a jurisprudence of resistance that is necessary also one of accommodation " [54] The importance of realizing the creation of a new narrative or nomos through a community of meaning, or an epistemic community, lies in the fact that perhaps through their new narrations they can produce new laws and norms that will lead to changing existing laws and norms Hass defines an epistemic community as "a network of professionals with recognized expertise

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[50] *Supra* note 2 at 34
[51] *Ibid* at 9
[52] *Ibid* at 10
[53] *Ibid* at 42
[54] *Ibid* at 52

and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area."[55] Using the concept of epistemic community is helpful is seeing whether the narration, interpretation and proposals that the academics and activists are writing make for the creation of an epistemic community which has the power to produce new meaning, norms and possibly laws. This would be a helpful tool in approaching the topic of women's rights under Islamic law, because, as more and more academics write about the topic it will be interesting to see if you can combine their analysis and suggestions to operationalize them into laws. It must be noted however, that there is a difference in the way Hass and Cover view the function of epistemic communities. Hass views epistemic communities providing information and policy options, while Cover sees communities of meaning as resisting a dominant narrative and providing alternative narratives to that of the state for example. In the context of my research, it is helpful to use the concept of epistemic community as defined by Hass but include the fact that women are seeking empowerment through resisting laws and norms that discriminate against them.

The challenge of law-making within the context of Islamic jurisprudence is that the methods of Islamic jurisprudence are very complex, having different criteria in the different schools of thought, but also given that the administration of family law is controlled by the state, each Muslim state has its own imposed political and religious ideology. However, given the ardent desire for reform and change of family law within Islamic states, Hass's argument that members of epistemic communities can provide the

[55] Peter Hass, "Introduction: Epistemic Communities and International Policy Coordination" 46 Int'l Or. No. 1 (Winter 1992) 3.

information needed for change by illuminating salient dimensions of the issues at hand,[56] and provide proposals that can ultimately in our case benefit and empower woman proves useful.

The goal of my research is to see how Muslim feminist scholars writing mainly in English are creating a new narrative on women's rights under Islamic law. The goal is to study the contours of this new narrative, while employing the tools of critical discourse analysis and question how can this alternative narrative become authoritative and authentic to influence tangible change among Muslim women and men in North America, and around the world.

2. Chapter Outlines

Following this introduction, this dissertation is organized such that we move from the development and evolution of Islamic law to the construction of authorities, to the creation of alternative feminist narratives in scholarship and law, to progressive narratives of the law. This dissertation is designed to reveal that despite the determination of some traditionalist scholars and jurists, Islamic law is a living legal system, ever expanding and changing.

Chapter One provides a brief historical survey of the development and evolution of Islamic law by studying the divine sources of the law, and the expansion of the law from simple practices among a small community in Medina to the development of a complex corpus of laws. The expansion and evolution of the legal systems reveals times of great diversity and at times rigidity in interpretation of the sources.

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[56] *Ibid* at 5.

Chapter two follows the discussion by studying the role of power in the construction of authority and hierarchy in Islamic legal practice. The scholars, jurists, Hadith specialists and ultimately the *mujtahids* have different degrees of power, and these roles were constructed over time as the Islamic community and Empire expanded its reach around the world.

Mindful of the history and politics of the formation and evolution of Islamic norms and practices; chapter three is an in-depth study of an alternative Muslim feminist narrative of the production and expansion of Islamic law. The scholarly works of Leila Ahmed, Fatima Mernissi and Ziba Mir-Hosseini, each speaking from a different geographic context, narrate developments in Islamic legal history from a Muslim feminist perspective. Ahmed and Mernissi go back in time, to the time of the Prophet and study the history and context of specific verses and *hadiths* that have become so fundamental to describing women's rights in Islamic law. Their work reveals the many socio-cultural biases that have made their way into interpreting texts and establishing laws. Mir-Hosseini provides in-depth analysis into the issue of marriage and divorce in Iran and Morocco, discussing how women struggle with the law, seeking to their rights. Chapter four continues by studying the scholarship of Amina Wadud and Azizah Al-Hibri, two feminist scholar-activists who provide an in-depth study and analysis of the Quran in-depth. These two have taken it upon themselves to reach out to Muslim women in the United States. Both scholars, through academic work and activism seek to establish an alternative narrative and image of how Muslim ought to be. All five scholars are "internal" critics of Islamic jurisprudence and are challenging the biases of Islamic law as believing Muslims who believe the law ought to be different with regards to women.

Chapter five discusses the encounter of Islamic family law with US and Canadian family law values. As immigrants to North America, Muslims are under the jurisdiction of two very different sets of family law, and this chapter analyzes case studies where American judges have had to decide how to interpret Islamic marriage contracts. In the Canadian context, the proposed Shari'a Arbitration panels raised a lot of discussion imbued both with fear and optimism for Muslim immigrants, about the possibility of officially applying Islamic law in Canada.

Chapter six provides insight into ideas and proposals by progressive and reformist scholars and jurists who in the past decades have made an effort in providing an alternative reading of Islamic jurisprudence. Scholars such as Tariq Ramadan and Abdullahi An'naim propose change and reform in Islamic law to make it more accessible and relatable to a new generation of Muslims. A conclusion follows reviewing the main points raised throughout and suggestions for future research.

Chapter 1
The Expansion and Contraction of Islamic Law

"Every Rule of Law is from God"
(La Hukma illa min Allah)

I. Introduction: Why is Law Important in Islam?

Law is an integral component of the spiritual and practical life of Muslims around the world. Islam is a holistic religion, which seeks to guide and regulate every aspect of a Muslim's public and private life. As a result, Islamic law addresses both the temporal and spiritual aspects of life through theology and law. The two cannot be separated from one another. Law and theology are intertwined and together they create what is holistically known as the *Shari'a.*[57] In archaic Arabic the term *Shari'a* means "path to the water hole," and when we consider the importance of a well-trodden path to a source of water for man or beast in the arid desert environment, we can readily appreciate why this term in Muslim usage should have become a metaphor for a whole way of life ordained by God. [58] The *Shari'a*, as a whole system of laws and norms guides and regulates a Muslim's relationship with God and with humanity. *Ibadaat* include the series of rituals and laws pertaining to acts one is responsible to God such as the ritual prayer, pilgrimage, fasting, etc. *Muamelat* pertain to rules that regulate human interaction in society which include criminal law, commercial law, family law and more. The Shari'a seeks to guide a Muslim towards the "straight path" a path that will lead the believer to prosperity and peace both with God and with her society.

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[57] Ahmed Souaiaia, On The Sources of Islamic Law, 20 J. L. & Religion 123 (2005) 123.
[58] Bernard G. Weiss, *The Spirit of Islamic Law* (Athens, GA: University of Georgia Press 2006) 17.

This chapter will study the sources and methodologies of Islamic law, from the time the Quran was revealed, to the collection of the first *hadith* books. In addition, this chapter will discuss the formation of the science of *fiqh* and the different methodologies developed by jurists over time, and the formation of the *madhahib* and the differences among them. Mindful that the sources of Islamic law are divine and are (considered by Muslims) indeed the words of God, it is important to consider the influence of human ingenuity and creativity in establishing a vast legal system that has more than one billion followers around the world. As a result, it is important to note that the formation of Islamic law goes through periods of creativity and diversity before solidifying into textual doctrine and dogmatic jurisprudence. In this regard, it is also important to note the role of the authorities that have played a powerful role in constructing the methodologies of Islamic jurisprudence.

The sources of the Shari'a include the immutable words of God manifested in the Holy Quran, the statements and actions of the Prophet known as *Hadith* or *Sunnah,* and the laws discovered by jurists and scholars through specific methodologies called *fiqh* and *ilm usul-fiqh.* What is most important to note regarding Islamic jurisprudence is that there "is a virtually unquestioned assumption in modern Islam that theology and legal reasoning in Islam are permissible only to ascertain God's will expressed in the Quran and the *Sunnah*. It is also widely accepted that no human jurisprudential innovation that explicitly *contradicts* the Qur'ān and the *Sunnah* has ever managed to be incorporated into the body of literature that governs Muslim's practices and worship."[59] Throughout

[59] *Supra* note 57 at 123.

this paper the expression "Islamic law" refers to the *Shari'a.*[60] The divine sources of the law include the Quran and *hadith. Fiqh* is the law expounded or discovered by jurists and scholars throughout centuries. As a result, throughout this paper, the sources of Islamic law are considered to be divine. However, this does note mean that the whole corpus of Islamic law is divine. In other words, one needs to separate the sources of the law from the laws themselves, and consider that Islamic laws and norms as they exist today have been the result of human exegesis of the divine sources. Therefore, critique or analysis of the laws in no way implies disbelief in the divinity of the sources of the law. [61]

The study of the formation of Islamic law requires one to be an observant student of history and consider the role that power, politics, and human will has had in the formation and evolution of a legal system that is based on divine sources but is essentially the creation of human endeavors. Islamic laws and norms burgeoned during the time of the Prophet (pbuh) when the Quran was revealed and his actions were set as an example for the Muslim community. In the aftermath of the Prophet's death in 632 C.E. the Muslims began to fill the void of his absence by selecting the closest companions of the Prophet as leaders of the Community. The *Rashidun*, or "Rightly Guided" leaders were the foremost leaders of the Muslim *Ummah* (community) and were closest to the Prophet during his life. Abu-Bakr, Omar, Uthman and Ali ruled until the birth of the Ummayyad Dynasty in (661-750 C.E) followed by the Abbasid Dynasty in (721-1258), and finally the Ottoman Empire (1293-1923). The Caliph was the leader of the Muslim *Ummah* and ruler of the dynasty. It must be noted that even as the empire

[60] Note The Shari'a is commonly used to mean Islamic law However, it is important to separate the sources that inform the law from laws explored by jurists and scholars

[61] Modernist Muslim scholars such as Abdullahi An'naim, Aziz Al Azmeh, and Fazlur Rahman argue that the Shari'a as it stands today is not divine law This means that although the sources are divine, laws derived by jurists through interpretation of the sources are not divine and can be subject to criticism.

expanded different dynasties sprung in different parts of the Muslim world, which competed for power and legitimacy. Examples include the Fatimids in Egypt, the Buyids, Seljuk's and Safavids in Iran, the Zaydis in Yemen, the Almoravids in Spain and many more. As such, the history of the formation and evolution of Islamic laws must consider the political and cultural contexts for which laws were formed, practiced and transformed.

II. Primary Sources of Islamic Law

1. The Quran

Muslims believe that the Quran is the miracle of Prophet Mohammad[62] (pbuh) revealed to him through *vahy* (revelation) by the Angel Gabriel starting in 610 C.E. for a period of twenty-three years. The word "Quran" itself means "that which is read." For Muslims the Quran both functions as a written text (*al-Mushaf*) and an oral one (*al-Quran*). [63] The most fundamental aspect of the Quran lies in the belief that the Quran is *the* word of God. As a result, there is no dispute among Muslims as to the divinity of the text and the eternity of its message. The Quran is the ethical, moral and legal authority that guides Muslims and informs Islamic laws. The power of the Quran and the eternity of its message to humans is enunciated in the following verse which reads:

> Had We sent down this **Quran** on a mountain, you would certainly have seen it falling down, splitting asunder because of the fear of Allah, and We set forth these parables to men that they may reflect. (59·21)

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[62] It is believed that every Prophet of God had a miracle that set him apart from the rest of humanity and indicated that he was chosen by God Moses parted the Sea with his cane, Jesus was born of a Virgin Mother and, Abraham was thrown in the fire and survived *See* for example, 10 37 which reads "This Quran is not such as can be produced by other than Allah, on the contrary it is a confirmation of (revelations) that went before it, and a fuller explanation of the Book--wherein there is no doubt--from the Lord of the worlds "

[63] Farid Esack, *The Quran A User's Guide* (London OneWorld Publications 2007)

Muslims believe that the Quran was revealed to the Prophet in different stages sometimes in response to specific questions that would arise within the community. It is composed of 114 chapters or *Surahs* each composed of *ayas* (signs) or verses. As the Quran was revealed to the Prophet it was memorized by his companions, as a result it existed in oral format in the memory of Muslims. It was compiled as a text in three different stages: first, during the time of the Prophet, and then during the reign Abu Bakr (d. 13/634) the first Caliph, and finally it was gathered in the form commonly known as *Uthman Taha* during the reign of the third Caliph Uthman ibn Affan (d. 35/656).[64]

The message of the Quran is both descriptive and prescriptive. The Quran both describes the power, majesty, mercy and wrath of God and also tells the story of past Prophets and civilizations. There are numerous verses describing the Glory of God's creation such as the heavens, the sky, the seas and even the creation of humans from a single drop of blood. In this, the goal is to remind the believers and the readers of the text of the power and bounty of God.

> And He it is Who sends down water from the cloud, then We bring forth with it buds of all (plants), then We bring forth from it green (foliage) from which We produce grain piled up (in the ear); and of the palm-tree, of the sheaths of it, come forth clusters (of dates) within reach, and gardens of grapes and olives and pomegranates, alike and unlike; behold the fruit of it when it yields the fruit and the ripening of it; most surely there are signs in this for a people who believe. (6:99)

The primary verses of the Quran are prescriptive where the "content of its message and the power of the form in which it is conveyed are designed not so much as to "inform" men in any ordinary sense of the word as to change their character." [65] It can be said that the prescriptive verses include the social, moral and legal messages of the

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[64] *Supra* note 63 at 90.
[65] Fazlur Rahman, *Major Themes of the Quran* (Chicago: The University of Chicago Press 1980, 1989, 2009) 25.

Quran, which seek to guide the believers to follow and abide by God's laws. These prescriptive verses include those verses that establish laws. There are only about 500 legal verses out of more than 6,239 verses in the Quran [66] Although these verses are limited and at times very specific they are considered laws established by God that ought to be followed. In considering the legal verses of the Quran it is interesting to note a distinction between *Meccan Surahs* and *Medinan Surahs*. The *Surahs* that were revealed in Mecca "deal primarily with theological and ethical issues (e.g. the oneness of God, reward and punishment in the Hereafter, and the last judgment).[67] For example:

> Your God is one God: as those who believe not in the Hereafter, their hearts refuse to know, and they are arrogant. 16· 22

The Medinan verses were revealed to the Prophet after his *Hijra* or migration from Mecca to Medina in 622 C.E. after being persecuted by the Meccan "pagans". In Medina the Prophet became "the head of a religiopolitical community that accepted God and his Prophet as the ultimate source of authority not only for human belief, but also for human action."[68] The Medinan chapters are more prescriptive and legal and include verses addressing criminal law, marriage and divorce, alms giving, inheritance, commerce and more. These verses set the legal norms that a Muslim society ought to live by. The Quran aims to establish a just, egalitarian and viable social order in the Muslim community. As a result, both the normative and legal verses establish the principles of this social order.

> That which ye lay out for increase through the property of (other) people, will

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[66] *See* for example, M Cherif Bassion and Gamal M Badr, "The Sharia, Sources and Interpretation, and Rule Making" 1 UCLA J. Islamic & Near E L 135 (2002) 140. There are 70 verses on family law and inheritance law, 70 verses on obligations and contracts, 30 verses on criminal law, and 20 verses on procedure.

[67] Mohammad Khalid Masoud, Rudolph Peters and David S Powers, eds , *Dispensing Justice in Islam Qadis and their Courts A Historical Survey* (Boston: Brill 2006) 5

[68] *Id.* at 7

have no increase with Allah but that which ye lay out for charity, seeking the Countenance of Allah, (will increase) it is these who will get a recompense multiplied 30 39 Meccan

Alms are for the poor and the needy, and those employed to administer the (funds), for those whose hearts have been (recently) reconciled (to Truth), for those in bondage and in debt, in the cause of Allah, and for the wayfarer (thus is it) ordained by Allah, and Allah is full of knowledge and wisdom 9 60 Medinan

They ask thee concerning wine and gambling Say "In them is great sin, and some profit, for men, but the sin is greater than the profit " They ask thee how much they are to spend, Say "What is beyond your needs " Thus doth Allah Make clear to you His Signs In order that ye may consider 2 219 Medinan

O ye who believe! the law of equality is prescribed to you in cases of murder the free for the free, the slave for the slave, the woman for the woman But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude, this is a concession and a Mercy from your Lord After this whoever exceeds the limits shall be in grave penalty 2 178 Medinan

The woman and the man guilty of adultery or fornication--flog each of them with a hundred stripes let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day and let a party of the Believers witness their punishment 24 2 Medinan

One of the most important aspects of reading the Quran is understanding the goal that its verses seek to establish A cursory read of the Quran reveals that it is not a book of laws The Quran was revealed in Arabic in a language that to many of the 1 billion Muslims around the world is foreign As a result one cannot simply read the Quran and fully understand what the verses mean Hence, the science of *Tafsir* (interpretation) comes into play There are numerous *Tafsir* books by both Sunni and Shiite scholars discussing and analyzing the verses of the Quran in great detail [69] *Tafsir* becomes particularly important when one encounters verses with a legal imperative In his seminal book, Rahman points out that every verse (in this case every legal verse) has a *ratio legis*

[69] *See* for example, Muhmmad ibn Jarir Al-Tabari *Al bayān an ta'wīl āy al Qur'ān* popularly known as *Tafsir Tabari See* also, Feras Hamza, Sajjad Rizvi and Farhana Mayer, eds *An Anthology of Quranic Commentaries Volume I On the Nature of the Divine* (Oxford University Press NY 2008)

> To understand a ratio legis fully, an understanding of sociohistorical background (what the Qur'anic commentators call "occasions of revelations") is necessary The *ratio legis* is the essence of the matter, the actual legislation being its embodiment so long as it faithfully and correctly realizes the *ratio*, if it does not, the law has to be changed When the situation so changes that the law fails to reflect the ratio, the law must change [70]

The occasions of revelation or *asbab al-nuzul* refer to the time and circumstances that a particular verse was revealed [71] The importance of asbab al-nuzul comes into play when exegesis is provided for a particular verse and when one considers whether the *ratio* is fulfilled in current times or not What Rahman proposes is quite radical and to many traditionalists not acceptable This is because it goes contrary to the belief that the Quran is a book for all times and for all places However, particularly in the field of women's rights, many scholars have taken to discussing whether the *ratio* of the verse is served by following the law of that verse or whether it is time for a new law to serve the ethical ratio of that verse For example, the following verses read

> Divorced women shall wait concerning themselves for three monthly periods Nor is it lawful for them to hide what Allah Hath created in their wombs, if they have faith in Allah and the Last Day And their husbands have the better right to take them back in that period, if they wish for reconciliation And women shall have rights similar to the rights against them, according to what is equitable, but men have a degree (of advantage) over them And Allah is Exalted in Power, Wise 2 228

> Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what Allah would have them guard As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (Next), refuse to share their beds, (And last) beat them (lightly), but if they return to obedience, seek not against them Means (of annoyance) For Allah is Most High, great (above you all) 4 34

The word that stands out in these verses in this version of the translation is "men have a degree over them" which a cursory read implies an established dominance of men over women in Islam However, the more detailed interpretation of this verse explains the

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[70] *Supra* note 65 at 48
[71] *Supra* note 63 at 124

second part as men are responsible to spend of their wealth on women and it is if and only if men are the providers of women that they have a degree over them In other words, men maintain women and if the situation changes then the equilibrium no longer applies [72] The interpretation of the Quran is one of the most important and at times complicated endeavors This is so, because of the belief that the word of God as revealed in the Quran is applicable for all times and for all places This becomes even more complex in discussing legal verses that prescribe a set of actions that may not be accepted in modern times This issue will discussed in greater detail in the following chapters

It is important to note here that there is no concept of predetermination in Islam and that according to the "Quran when God creates a thing, He at the same time puts into its nature, its potentialities "[73] In other words, humans are created with the potential to either believe in God or not to, and so they are endowed with the will to choose the path of their lives Humans are the only creations of God that have been endowed with reason and free-will and this is an important point to note as the formation and evolution of Islamic laws are discussed, as reason and rationality play an important role in accepting a law as is or seeking to change or revise it [74] The Quran is the divine guide that all Muslims seek to abide by Muslims go to the Quran for spiritual, moral and legal guidance The eternity and power of its message is apparent to believers however, the object and purpose of some of its verses are still obscure What we understand from reading the Quran is that humans have been endowed with reason and they ought to apply

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[72] *See* for example, Azizah Al-Hibri, "Introduction to Women and Islam" in Gisella Webb, ed , *Windows of Faith Muslim Women Scholar Activists in North America* (New York Syracuse University Press 2000)
[73] *Supra* note 65 at 23
[74] For modernist approaches to the Quran *see* for example, Suha Taji-Farouki ed , *Modern Muslim Intellectuals and the Quran* (Oxford University Press London 2004) and Gabriel Said Reynolds ed , *The Quran in its Historical Context* (Rutledge New York 2008)

that to laws that ought to uphold the spirit of justice and equality through all echelons of society.

2. Hadith

"O you believers! Obey God and obey the Messenger and those of you who are in charge of affairs. If you have a dispute concerning any matter, refer it to God and to the Messenger"

4: 58-59

The statements and actions of the Prophet (pbuh) either tacit or verbal comprise a narrative known as *hadith* (plural *ahadith*) or *sunnah* which means a clear path but also implies normative practice, or an established course of conduct. [75] An important aspect of the *hadith* is that during the time of the Prophet he prohibited his statements to be written to avoid confusion with the revealed verses of the Quran. However, because the Prophet was *the* central figure of Islamic history emulating his actions and words became central to the development and expansion of normative behavior into law.

As the community expanded into different cities, each city developed its own method of identifying a *hadith* to be correct and relative to their life. Hallaq notes that, "each locale, from Syria to Iraq to the Hejaz, established its own legal practices on the basis of what was regarded as the *sunnah* of their forefathers, be they the Companions or the Prophet, although the latter more often than not merely sanctioned the ancient Arabian peninsula."[76] In other words, each city accepted a series of *hadith* to be authentic and relevant to their daily lives based on their customs and traditions. Hence, there was competition between formal *hadith* and practice-based *sunnan*. This competition came to an end with the "emergence of a mobile class of traditionalists whose main occupation

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[75] Mohammad Hashim, Kamali, *Principles of Islamic Jurisprudence* 3rd. Ed. (Islamic Texts Society 2005) 47.

[76] Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge, UK: Cambridge University Press 2005) 103.

was the collection and reproduction of Prophetic narrative, the formal, literary transmission of *hadith* quickly gained the upper hand over *sunnaic* practice "[77] It was during the second half of the second/eighth century where *hadith* gained greater authority and importance to be included as the second primary source of law in later centuries

As more and more *hadith* were compiled the risk for faulty *ahadith* increased As a result, a whole science was developed to study and verify *sahih* (sound) *ahadith* from false ones The first aspect of identifying a *hadith* is by considering the list of names appended to the document, listing the number of people who have heard the statement or seen the action from the earliest to the latest narrator "This chain of 'guarantors' by whom the document has been handed down from generation to generation is known as the *isnad*, literally the 'support' on which the document rests " [78]

For example

> Yahya related to me from Malik from Amr ibn Yahya al-Mazini that his father said that he had heard Abu Said al-Khudri say that the Messenger of Allah, may Allah bless him and grant him peace, said, "There is no zakat on less than five camels, there is no zakat on less than five awaq (two hundred dirhams of pure silver) and there is no zakat on less than five awsuq (three hundred sa) "[79]

> Narrated by Aisha
> (the mother of the faithful believers) Al-Harith bin Hisham asked Allah's Apostle "O Allah's Apostle! How is the Divine Inspiration revealed to you?" Allah's Apostle replied, "Sometimes it is (revealed) like the ringing of a bell, this form of Inspiration is the hardest of all and then this state passes ' off after I have grasped what is inspired Sometimes the Angel comes in the form of a man and talks to me and I grasp whatever he says " 'Aisha added Verily I saw the Prophet being inspired Divinely on a very cold day and noticed the Sweat dropping from his forehead (as the Inspiration was over) [80]

When one can trace the chain of transmitters to the Prophet and verify that the transmitters have lived at the same time and in the same region, and that it was possible

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[77] *Id* at 108
[78] John Burton, *An Introduction to Hadith Studies* (Edinburgh Edinburgh University Press 1994) ix
[79] *The Muwatta a of Malik* Book 17 1 1
[80] *Sahih Al-Bukhari*, Book 1 Number 2

for them to be in communication with one another, then that *hadith* is considered *sahih* or authentic. The narrators of a *sahih hadith* are considered to be "upright persons who also possess retentive memories and whose narration is free both of obvious and of subtle defects." [81] The narrators of a *hasan hadith* are considered to be truthful yet their transmission is considered susceptible to error, and so a *hasan hadith* is weaker than a *sahih hadith.*[82] A *hadith* classified as *daif* or weak is one whose narrators do not possess the required qualities or that the content of the *hadith* is questionable. It is either that the narrator is not pious or has bad memory or the content of the *hadith* contradicts of the Quran or other established and accepted *hadith*.

In addition, a *hadith* may address non-legal matter such as ritual practice of the Prophet, how he ate, slept, dressed, how long he kept his beard, how he treated his wives. Although these *ahadith* highlight the personal preferences of the Prophet, they nevertheless also set the example of "right conduct" in the Muslim community. Legal *hadith* on the other hand address rules of the Shari'a and are statements and actions of the Prophet in his capacity as Prophet, Leader of the community, or Commander of the Military. The legal *hadith* establish rules of conduct. For example:

> Narrated Ibn 'Abbas:
> The delegates of the tribe of 'Abdul-Qais came and said, "O Allah's Apostle! We are from the tribe of Rabi'a, and there is the infidels of the tribe of Mudar intervening between you and us, so we cannot come to you except in the Sacred Months. So please order us some instructions that we may apply it to ourselves and also invite our people whom we left behind us to observe as well." The Prophet said, "I order you (to do) four (things) and forbid you (to do) four: I order you to believe in Allah, that is, to testify that None has the right to be worshipped but Allah (the Prophet pointed with his hand); to offer prayers perfectly; to pay Zakat; to fast the month of Ramadan, and to pay the Khumus (i.e. one-fifth) of the war booty to Allah and I forbid you to use Ad-dubba', An-Naqir, Al-Hantam and Al-Muzaffat (i.e. utensils used for preparing alcoholic drinks).[83]

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[81] Siba'a, *Al-Sunnah* 94.
[82] *Id.*
[83] *Sahih Al-Bukhari*, Volume 4, Book 35, Number 327.

There are two different ways of identifying a *hadith*. Hadith *muwattar* is a "continuously recurrent" *hadith*. It has been "reported by an indefinite number of people and related in such a way as to preclude the possibility of their agreement to perpetuate a lie. Such a possibility is inconceivable owing to their large number, diversity of residence, and reliability."[84] The contents of a *muwattar* hadith are rationally sound and enough sources have cited this *hadith* to give weight to the authenticity of the hadith.

A *mashhur hadith* is "well-known" and has been originally reported by the Companions of the Prophet, and it has become well known and transmitted by an indefinite number of people.[85] An *ahad* or "solitary" *hadith* on the other hand is one that is reported by a single individual or a number of individuals from the Prophet.

There are six major Sunni collections:

Sahih al-Bukhari of Muhammad al-Bukhari
Sahih Muslim of Muslim ibn al-Hajjaj
Sunan Abu Dawud of Abu Dawood
Sunan al-Tirmidhi of Al-Tirmidhi
Sunan Ibn Majah of Ibn Majah
Al-Muwatta of Malik ibn Anas
Musnad Ahmad ibn Hanbal of Ahmad ibn Hanbal

For the Shiite the only a*hadith* that are accepted are those narrated by the Prophet and the *Imams* who were the direct descendants of the Prophet and his family. As a result, the requirement for a link or bond with the family of the Prophet has led the Shiites to have their own *hadith* books which include:

Al-Kafi of Abu Ja`far Muhammad b. Ya`qub b. Ishaq al-Kulayni
Tahdib Al-Ahkam of Muhmmad ibn Hasan Al-Tusi
Bihar al-Anvar of Muhammad Taqi Majlesi
*Wasa'il al-Shi`ah* of al-Shaykh Muhammad ibn Hasan al-Hurr al-`Amili

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[84] Abu-Zahra, *Usul al Fiqh,* (Dar al-Fikr al-Arabi: Cairo 1958) 84.
[85] *Id.*

All of the *hadith* books contain *ahadith* that address matters of revelation, Prophethood and address different rituals such as prayers and fasting. In addition, there are *hadith* concerning marriage, *zakat*, hajj, transactions and more. Hadith became part of the Islamic legal canon in the later years of the first /seventh century. Before then, there was relative regional flexibility in accepting a *hadith* to be *sahih* and relevant.

What is also important to note about *hadith* and its transmission, is that unlike other areas of law the transmission of *hadith* by women such as the wives of the Prophet were accepted. This could be because of the belief that the wives of the Prophet were "Um ul-Moimeneen" (the mother of the believers) and hence, their authority on the transmission of *hadith* was accepted by the community.[86] Although the Quran and the *hadith* serve as the primary sources of Islamic law, Quranic rulings and injunctions supersede that of *hadith*. In other words, the authority and authenticity of the Quran is paramount to that of *hadith* and there are "very rare cases in which the *sunnah* provides for a different rule from the one contained in the Quran."[87] What is important in considering the role of the divine sources of the law, namely the Quran and *hadith* is that while as sources of law and knowledge about the religion they are accessible to all Muslims, nevertheless their interpretation and application as law is only within the purview of the jurist. As such, the development of methods of jurisprudence and interpretation of divine text signify what Cover calls the creation of a nomos. This nomos can be called Islamic Jurisprudence or Shari'a which is a world of law created through the interpretation of divine sources by Muslim jurists throughout the centuries.

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[86] *See* for example, Omaima Abu-Bakr, Teaching the Words of the Prophet: Women Instructors of the Hadith, 1 Hawwa, No. 3 (2003).
[87] *Supra* note 66 at 141.

III. Secondary Sources of the Law

1. *Ahl al-Ray* vs. *Ahl Al-Hadith* and the Event of the *Mihna*

One of the most interesting and perhaps controversial events that took place in the early years of Islam was the event of the *Mihna* where traditionalist's known by many scholars as *ahl al-hadith* (people of *hadith*) and the rationalists *ahl al-ra'y* (people of opinion) debated whether the Quran was created or was it the speech of God. "The textualists or traditionalists advocated the preeminence of the authority of the Quran and traditions, while the "people of opinion" gave wider scope to human legal reasoning, experience, and common sense." [88] The *Mihna* (inquisition or tribunal), which was pursued, by the Abbasid Caliph Al-Mamum (r. 812-833) and the rationalists took place between 218/833 and 234/838. Hallaq notes that, "up to the middle of the second/eight century, *ra'y* was the driving trend in legal reasoning--in effect, the standard. The traditionalists began to assert themselves after this period, becoming a force to contend with by the end of the century. By the middle of the third/ninth century *hadith* had won the war against *ra'y*."[89]

There were two contending parties in the *Mihna.* The Caliph and the Mu'tazila[90] supported the notion that the Quran was created. The traditionalists and *hadith* specialists one the other hand, insisted that the Quran was and would forever would be the divine word of God. Ibn-Hanhbal, a *hadith* specialist emerged as the champion of the *Mihna.* After being imprisoned and even flogged in public, he wrote a letter to the Caliph al-Mutawakkil affirming, "the Quran is part of the knowledge (ilm) of God and such

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[88] Peter Berman, Rudolph Peters, and Frank E. Vogel, *The Islamic School of Law: Evolution, Devolution and Progress* (Cambridge, MA: Harvard University Press 2005) x.
[89] *Supra* note 76 at 124.
[90] The Mu'tazila are a group of rationalists who believe that human reason is more reliable than tradition.

uncreated " [91] He wrote in his "Refutation of the Zandqiyya and Gahmiyya" that he maintains "that name Allah in the Quran is uncreated, since its creation would entail that God was originally ignorant "[92] In effect, this clash between the traditionalists and rationalists was a battle of hermeneutics and the limits of involving human reason in religious debate

It's interesting to note that before the *Mihna* when leading traditionalists of Baghdad were asked by the governor of Baghdad about their doctrine concerning the Quran, all of them including Ibn Hanbal would say that it is the speech of God, without adding "uncreated " Hence, it was after the *Mihna* and only when the rationalists (specifically the Mu'tazila with the support of the Caliph) wanted to impose their ideas on the population that the scholars reacted and charged the rationalists with lying and heresy [93] For Hallaq, the *Mihna* revealed that the Muslim populace was neither for extreme rationalism or extreme traditionalism He argues, that after the *Mihna* a happy synthesis between rationalism and traditionalism emerged which would not be questioned until the middle of the nineteenth century [94] This means, that although during the early years of Islamic legal development there was a number of competing narratives and positions on the divinity of the sources, after the *Mihna*, the discussion about the createdness of the Quran was moot, and this is because the narrative of the traditionalists emerged victorious and dominant However, it's important to consider the diversity and fluidity of ideas and opinions that existed in the early centuries of the formation of Islamic laws and norms Whether it was accepting *ahadith* and *sunnan* from different

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[91] Wilfred Madelung, ed "The Controversy over the Creation of the Koran" in *Religious Schools and Sects in Medieval Islam* (London Variorum Reprints 1985) 515
[92] *Ibid* quoting W M Patton, *Ahmad ibn Hanbal and the Mihna* (Leiden 1897) 90
[93] *Supra* note 91 at 522
[94] *Supra* note 76 at 125

regions and being able to discuss theological and hermeneutical concepts such as the createdness of the Quran and the eternity of the Quran reveals a degree of freedom of thought that has animated the formation of Islamic legal practices.

2. *Fiqh*

The Quran and the *hadith* are considered the divine sources of the Shari'a. However, as the Islamic community expanded, new issues arose that created a need for laws specific to those circumstances. As a result, over the centuries Muslim jurists and scholars have developed and agreed upon other mechanisms to "discover" new laws based on the principles and precepts set out in the Quran and *hadith*. The development of these supplemental sources of law was in response to the need for further interpretation and expansion of the law, and they were to be "applied when the two primary sources were silent on a given question or when they were, or appeared to be, ambiguous or inconsistent."[95] These secondary sources or methodologies comprise *fiqh*. Bernard Weiss defines *fiqh* as "the discipline concerned with the articulation of actual rules of law." Calling it "practical jurisprudence."[96] *Usul al-fiqh*, on the other hand, is concerned with questions having to do with the theory of law and with the methodological principles governing the formulation of rules of law." This he calls "theoretical jurisprudence." [97] *Fiqh* and *usul al-fiqh* are complicated juristic techniques developed by jurists to develop rules of law that would be the closest approximation to what God's law ought to be. *Fiqh* is the law itself and *usul al-fiqh* is the methodology used for discovering the law from its

[95] *Supra* note 66 at 138.
[96] *Supra* note 2 at x.
[97] *Supra* note 2 at xi.

sources The methodologies of *fiqh* are considered the secondary sources of Islamic law Bassioni and Badr note that

> Usul al-fiqh is to a large extent, a road map of what the law is, how it is to applied and where necessary, how law can be discovered But it is also a method by which all of the above can be justified, in that respect, there is no external mechanism of checks and balances on whatever has been agreed upon by the community of legal scholars [98]

These secondary methodologies include

1 *Ijma* (consensus of opinion of the learned scholars--the Mujtahids)
2 *Qiyas* (analogy by reference to the Quran and the *hadith*)
3 *Maslaha* or *Istihsan* (consideration of the public good)
4 *Urf* (custom)
5 *Ijtihad* (independent legal reasoning by a Mujtahid)
6 *Fatwa*
7 *Reason*

"My community will never agree on an error" is a Prophetic *hadith* which establishes the premises for *Ijma* or consensus which is the first supplemental source of law During the first centuries of the Islamic legal development consensus "implied the agreement of scholars based on the continuous practice that was, in turn, based on the consensus of the Companions " [99] This is so because they believed the Companions of the Prophet could not unanimously agree on a matter that the Prophet would have rejected or prohibited In later times, consensus was based on the unanimous agreement of jurists and *mujtahids* on a principle of law [100] Consensus is accepted as a source of law by both Sunni and Shiite scholars There are two variations of consensus active and passive Active consensus implies that all the qualified jurists who participate in the discussion express the same opinion Passive consensus means when some qualified jurists express an opinion on an issue, and the others, while being aware of it do not dissent or disagree

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[98] *Supra* note 66 at 136
[99] *Supra* note 76 at 111
[100] Hallaq discusses how there was discussion on which region should have the authority to declare that a consensus has been reached *Supra* note 76 at 112

[101] A consensus is needed when the Quran and *hadith* are silent on a matter or when a new situation appears where a legal response is needed.

Qiyas or analogy is the second supplementary source of law and it is based on the use of reason to conclude that an existing law applies to a new situation. *Qiyas* is based on finding the raison d'être behind the existing rule called *illa* (rationale) and determining whether it can be applied to the new situation. However, it is more specific and technical than finding the *illa* in the new circumstance. "In legal analogy, the major premise contains the *illa* of the known rule of law. This is repeated in the minor premise describing the new situation for which a rule is sought. It is the presence of the *illa* in the minor premise that allows the application of the existing rule to the new situation.[102] For example, an argument used by the scholars to explain analogy follows as such: Alcohol is prohibited or *haram* because it is intoxicating (major premise); narcotic drugs are intoxicating (minor premise). The conclusion is that narcotic drugs are prohibited as well. *Qiyas* is accepted by the four major Sunni schools and not accepted as a source of law by the Shiites. What is important to consider is that "qiyas does not itself generate rules or legal norms; it merely discovers them from, or brings them out of, the language of the revealed text." [103]

Urf or custom is the established practices of a group of people which can be based on different ethnic or regional practices. For example, rules regarding the payment of the dowry before or during the marriage differs based on the customs of that community. A

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[101] *Supra* note 66 at 141.
[102] *Ibid.* at 142.
[103] *Supra* note 76 at 118.

custom becomes part of law so long as it does not contradict any of the established rules in the Quran and *hadith*. [104]

When a new rule is needed and the other sources such as *ijma*, *qiyas* or *urf* cannot be used, jurists resort to *maslaha* or the common good, which is that which will benefit society. It is an expression of public policy.[105] For example, the great Muslim scholar Al-Ghazali argues that in a battlefield if a group of Muslims are taken hostage and if victory necessitates their death then Al-Ghazali permits this in the name of *maslaha*.[106] In other words, the best outcome for the community outweighs the death of a few in a difficult situation. In general though, the *maghasid al-Sharia* or the goals of the *Shariah* ought to protect five basic values. These values relate to the individual's faith, his life, his intellect, his progeny, and his wealth. Any rule of law that protects and promotes these five values is valid under the Shari'a.

Ijtihad or independent legal reasoning is one of the most innovate and controversial tools at the disposal of a *mujtahid*. It can only be exercised by a Mujtahid who is a Muslim jurist who has reached the level of ijtihad.

> "Being a derivation from the root word *jahada*, ijtihad literally means striving, or self-exertion in any activity which entails a measure of hardship. Juridically, *ijtihad*, mainly consists not of physical, but of intellectual exertion on the part of the jurist. *Ijtihad* is defined as the total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of Shari'ah from their detailed evidence in the sources."[107]

Ijtihad is employed only when the *mujtahid*[108] or *faqhih* does not find the answer to the question or situation in any of the other methods. *Ijtihad* is only applied to practical

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[104] *Supra* note 75 at 254.
[105] *Supra* note 66 at 142.
[106] *Supra* note 75 at 241.
[107] *Id.* at 315.
[108] A *mujtahid* is the highest level of knowledge that a scholar can reach where he can practice *ijtihad* or independent legal reasoning. One must be a *mujtahid* to practice *ijtihad* and to issue *fatwas* or legal

matters of the law and cannot address theoretical questions such as the creation of the universe, the existence of the creator or more. In addition, the question that requires *ijtihad* must be about a real situation and not about a hypothetical one. When exercising *ijtihad* the *mujtahid* generally cites other similar laws and rules applying the other techniques of law. *Ijtihad* is a very functional tool, which can help in progressing the limits of the law. However, as will be discussed shortly the use of ijtihad at all times is the subject of great debate. Both Shiite and Sunni schools of law employ ijtihad.

Fatwa is the personal legal opinion of the mujtahid, arrived through personal reasoning or ijtihad, which can lead to disagreement (*ikhtilaf*), and eventually to consensus, through the instrumentality of debate (*munazara*). Fatwa is a tool at the disposal of the mujtahid used when new situations arise that there is no legal precedent for.[109] Makdisi posits, that "the highest function of a juriconsult was to issue legal opinions, *fatawa* (p. *fatwa*), and he did so according to his own lights, knowing all the while that his legal opinions had to confront other legal opinions of other juriconsults."[110] A fatwa is issued in response to a specific question asked by one who follows the doctrines of a *mujtahid* and it is only binding on the *mughallid.*[111] Sazegara points out that a "*fatwa* is a rational speculation on the part of the mujtahid. The method for giving and seeking a fatwa is human, not divine. It is not meant for the general community." [112] However, when a "*fatwa* becomes applicable to the general public, it changes names and

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opinions Not every Muslim scholar can become a mujtahid A mujtahid must follow his own ijtihad and cannot follow the rules of any other Muslim scholar

[109] *See* for example, Muhammad Khalid Masud, Brinkley Messick and David S Powers, eds *Islamic Legal Interpretation Muftis and Their Fatwas* (Cambridge, USA Harvard University Press 1996)

[110] George Makdisi, "The Significance of the Sunni Schools of Law in Islamic Religious History" 10 Int'l J. Middle East Stud (1979) 2

[111] A *mughallid* is one who follows the *ijtihad* of a certain *mujtahid* A *mughallid* engages in *taghleed* which means to follow Every Muslim who is not a *mujtahid* is a *mughallid*

[112] Sayyid Mohsen Sazegara, "Fiqh and Fiqhahat" 1 UCLA J Islamic & Near E L 239 (2002) 233

transforms into a ruling or *hukm*."[113] A *hukm* is applicable to the Muslim community. *Ijtihad* and *fatwa* are methods at the disposal of mujtahids to issue new rulings and to make the law responsive to the needs of the community. These were innovative tools developed by the jurists in order to comply with the concept that "Islam is the religion of all times and places." However, it remains to be seen how these useful methods have been used by the jurists.

IV. The *Madhhab*

The term '*madhhab*,' literally means "a way, course, mode, or manner, of acting or conduct or the like. It came to be used, via a lexical development that includes a "doctrine, tenet or opinion with regard to a particular case," as a technical term it means "school of law." [114] Hallaq describes a *madhhab* as a "group of jurists and legists who are strictly loyal to a distinct, integral and, most importantly, collective legal doctrine attributed to an eponym, a master-jurist, so to speak, after whom the school is known to acquire particular, distinctive characteristics."[115] As discussed earlier, after the death of the Prophet, as the Islamic community expanded and searched for leaders to guide the community of believers, there was a need for scholars of law to guide people towards the right path. The event of the *Mihna* marked a dispute between the traditionalists and the rationalists, and already by the middle of the second/eighth century A.H., jurists had begun to develop their scholarly circles and sharpened their methodologies. The science of *fiqh* was developed over time through the debates that teachers and students held in these scholarly circles.

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[113] *Id.*
[114] Peri Berman, Rudolph Peters, and Frank E. Vogel eds., *The Islamic School of Law: Evolution, Devolution and Progress* (Cambridge, MA: Harvard University Press 2005) vii.
[115] *Supra* note 76 at 152.

During the second/eighth century A.H there were scholarly circles all around the Muslim empire, mostly composed of jurists, students and judges who had adopted the doctrines of a leading jurist. According to Schacht the most important of these "ancient schools of law were located in Kufa and Basra in Iraq, Medina and Mecca in the Hijaz[116] and Syria.[117] These schools were later transformed to "personal schools" where the doctrine of the master jurist was adopted and followed by the disciples. "Those who adopted or followed the doctrines of a particular jurist's doctrine were known as *mughallid*, or associates, namely, those who studied with or were scholarly companions of the jurist." [118] It's interesting to note that following the doctrines of a certain jurist did not dictate complete loyalty to his doctrine. It was common practice to follow the doctrine of multiple jurists.

By the middle of the third/ninth century there were numerous jurists who had established themselves as leaders in the field, issuing *fatwas* and debating doctrine, having gained personal followings. The personal schools later transformed to doctrinal schools which "possessed a cumulative doctrine of positive law in which the legal opinions of the leading jurist, now the supposed "founder" of the school, were, at best, *primi inter pares*, and at least equal to the rest of the opinions and doctrines held by various other jurists, also considered leaders within the school."[119]Of the numerous personal schools that emerged throughout the centuries four schools emerged as the main doctrinal schools of Sunni Islam.[120] These doctrinal schools were the schools of Abu-

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[116] Modern day Saudi Arabia
[117] Joseph Schacht, *An Introduction to Islamic Law* (Oxford University Press 1983) 30
[118] *Supra* note 76 at 154
[119] *Ibid* at 156
[120] For an interesting perspective on why some schools did not survive see, Steven C Judd, "Al-Awazi and Sufyan Al-Thawri The Ummayad Madhhab" in *Supra* note 58 at 11-25.

Hanifa (80/699-148/765), Malik ibn Anas (93/711 -179/ 795), ash-Shafi'i (767- 820) and Ahmad Ibn-Hanbal (241/855-290/903). Although some of these schools were founded and solidified after the death of their "founders" nevertheless, these individuals were considered the leading jurists of that *madhhab*, and thus they became "the axis of authority construction; and as bearers of this authority he was called the imam, and characterized as the absolute *mujtahid* who presumably forged for the school its methodology on the basis which the positive legal principles and substantive law were constructed." [121] The process of giving authority to the eponyms of the school is important to note as many of their doctrines and opinions were not solely theirs as they were the compilation of doctrines of other teachers and students.

The process of constructing the authority of the "founder" allowed for a gradual attribution to the leaders of the accomplishments of past successors and even transfer of doctrine to them. As a result, we see an organic process whereby these leaders gain authority among their students and followers to the point that what others have said are recorded as their statements. For example, Ahmad Ibn-Hanbal was the founder of the Hanbali School. He was a well-known *hadith* scholar with a *hadith* collection entitled the *Musnad*.[122] Ibn Hanbal is also the famous jurist who emerged as the winner of the *Mihna* consolidating the position of *hadith* in Islamic legal methodology. A distinguished Hanbalite jurist Najm al-Din al-Tufi (d. 716/1316) acknowledges that "Ibn Hanbal did not transmit legal doctrine, for his entire concern was with *hadith* and its collection." [123] In fact as Hallaq notes, it was less than a century after his death that Ibn Hanbal emerges

[121] *Supra* note 76 at 157
[122] Christopher Melchert, "The Musnad of ibn Hanbal: How it was Composed and What Distinguishes It from the Six Books" 82 *Der* Islam Vol. 1 32 (2005).
[123] Najm al-Din al-Tufi quoted in *Supra* note 76 at 159

as the founder of a *madhhab* thanks partly to the efforts Abu Bakr al-Khalal (d 311/923) who had brought together the dispersed opinions of his teacher Hence, it was through the activities of Khalal and the other *ashab* of Ibn Hanbal that his legal opinions emerged as the founding doctrines of the Hanbali school

The Hanafi school of law was founded nearly one hundred and fifty years after the death of Abu-Hanifa It arose as a distinctive juristic school in the first half of the eighth century and emerged as one of the largest schools spreading throughout the Islamic world Among the other famous well-known scholars that contributed to the Hanafi doctrine are Abu Yusuf (d 182/798), al-Shaybani (d. 189/805) and Zufar b. al-Hudhayl (d 158/775) In the span of two centuries legal manuals and commentaries were written, the first book of general principles and policies implicit in the Hanafi tradition (qawa'id) was deduced, the first literature on *usul al-fiqh* was written, and jurists began to discuss how to apply Hanafi doctrine to legal By the tenth century Hanafi doctrine was standardized as positive law and jurists began to label themselves as Hanafi mujtahids What is interesting to note is that these *madhhabs* have gradually developed over time absorbing the customs and traditions of the locales that they were active in and also influenced by the political circumstances of their time. For example, Hanafi scholars in Baghdad (the center of Iraq and the capital of the Caliphate), in Balkh (the capital of Khurasan in northeast Persia), and in Bukhara (in Transoxania) had different academic networks and different legal opinions and doctrines [124] This reflects the diversity of thoughts and doctrines that existed even within one *madhhab*

[124] Eyyup Said Kaya, "Continuity and Change in Islamic Law The Concept of Madhhab and the Dimensions of Legal Disagreement in Hanafi Scholarship of the Tenth Century in The Islamic School of Law" in *Supra* note 114 at 27-35

Another characteristic of the formation and survival of the *madhhab* was the role of political support. For example, the Hanafite school survived mainly due to the support of the Abbasid's and the later adoption of the *madhhab* as official state religion of the Ottoman Empire. The Maliki school was on the other hand founded by Anas ibn-Malik another *hadith* specialist whose *hadith* collection the Muwatta'a is one of the six authoritative *hadith* books was supported by the Spanish Umayyads.[125] The Maliki School first flourished in Medina (where Malik was from) and in Baghdad the center of the Caliphate. However, it later spread west towards Egypt and the Maghreb.

Muhammad Ibn Idris Al-Shafei is considered by many as the father of Islamic jurisprudence and the founder of *usul al-fiqh*. Author of *al-Risala*[126] it was the first text written on Islamic legal theory and jurisprudence. "Shafei was mainly concerned with articulating the theoretical principles of *usul al-fiqh* without necessarily attempting to relate these to the *fiqh* itself. "As a methodologist par excellence, he enacted a set of standard criteria which he expected to be followed in the detailed formulation of the rules of fiqh."[127] However, Hallaq argues that the *Risala* went unnoticed simply because it was a rudimentary account of *usul al-fiqh* with the exception that it had the "ultimate goal of establishing the Prophetic traditions, together with the Qur'an, as the exclusive material sources of the law."[128] The final version of the *Risala* was written in Egypt during the ninth century and what is significant about it, as Hallaq notes, is that Shafei's "thesis is an achievement if we are to consider with the benefit of hindsight, that it was an

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[125] *Supra* note 76 at 169-170.
[126] *See* for example, *Al-Shafi'i's Risala: Treatise on the Foundations of Islamic Jurisprudence* trans. Majid Khadduri (Cambridge, UK: Johns Hopkins Press 1961).
[127] Supra note 75 at 16, 17.
[128] Wael B. Hallaq, "Was Shafe'i the Master Architect of Islamic Law?" 25 Int'l J. of Middle E. St. (Nov. 1993) 587.

unprecedented synthesis between the rationalists, who were reluctant to accept Prophetic traditions, and the traditionalists who spurned all human reasoning in religious matters."[129]

While emphasizing the need to take God and the Prophet as sources of law, Shafei' is known to have had *Mutazila* mentors who preached rationalism and the use of reason. So he emerges as an interesting synthesis of traditionalism and rationalism, perhaps, seeking to maintain a balance. Shafei's teachings and doctrines were spread and taught by "Abu al-'Abbas Ibn Surayj (d. 918), who without exaggeration the most significant jurist in the Shafi'ite school after Shafei' himself. He also is said to have been the first to teach juridical dialectic and to combine a superior knowledge of *hadith* and *fiqh*."[130] He continued Shafei's method of combining positive doctrinal law with Kalam.[131]

A cursory review of the formation, growth and evolution of the four major Sunni *madhhabs* reveal that these doctrinal schools were developed through the efforts of many scholars, jurists, judges and students; that the doctrines were formulated and solidified over a period of time and that a diversity of thoughts and opinions were discussed until a consensus was reached throughout the years. While these schools were forming other doctrinal and personal schools flourished as well. However, the reason why these four schools survived throughout the years largely depends on the construction of authority around the founders and the role that politics played in the survival and prominence of some legal schools and the extinction of others. Today the Hanafi *madhhab* is dominant

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[129] *Id* at 593.
[130] *Id* at 595
[131] Kalam theology is mainly concerned with questions about the existence of God *See* for example, Weiss supra note 2, *The Spirit of Islamic Law*, 25-32

in Central Asia, Afghanistan, Pakistan, Turkey, and others. The Hanbali *madhhab* is mainly practiced by Muslims in the Persian Gulf states such as Saudi Arabia, Qatar, UAE and also in Pakistan. The Maliki *madhhab* is practiced in North and West Africa. The Shafei *madhhab* is popular in Indonesia, Malaysia, Palestine, Syria, Lebanon, Egypt and others.

V. Shiism

> The Messenger of Allah - may Allah bestow peace and benedictions upon him and his Progeny - said: "Verily, I am leaving behind two precious things (*thaqalayn*) among you: the Book of God and my kindred (*`itrah*), my household (*Ahl al-Bayt*), for indeed, the two will never separate until they come back to me by the Pond (of *al-Kawthar* on the Judgment's Day).[132]

The above *hadith* is famously known as *hadith Thaqalayn* that established the theological foundations of Shiism, the other branch or sect within Islam. It is believed that the Prophet (pbuh) stated this *hadith* on his way back to Medina from his last pilgrimage. In a place named *Ghadeerh Khum* the Prophet has mentioned that he is leaving behind the Quran and his family and then he raised the hand of Ali, his cousin and son-in-law, and declared him as his successor. [133] The *Shi'atu Ali*, meaning the followers of Ali insist that it was Ali who was supposed to be the rightful successor of the Prophet, since he is from the Family of the Prophet. However, after the Prophet's death, the Muslim Community chose Abu Bakr, one of the senior Companions of the Prophet, as the Leader of the Community.

The *Shi'atu Ali*, follow the doctrine of *Imamat* which espouses the idea that "God has bestowed upon the Holy Community the gift of an infallible guide at all times, a

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[132] Hadith Thaqalayn.
[133] Seyyed Hossein Nasr, Hamid Dabashi, and Seyyed Vali Reza Nasr, *Shiism* (New York: State University of New York Press 1968).

guide who is to govern all affairs in the temporal realm."[134] These guides, who are the *Imams*[135] are descendants of the Household of the Prophet, the children and grandchildren of the Fatima (the daughter of the Prophet) and Ali. In addition to *Imamat,* the Shia' also believe that the twelfth Imam, Muhammad ibn Hasan al-Mahdi (b.255/869) was the last Imam who is currently alive and is in occultation or hiding. Imam Mahdi, also called *Imam e-Zaman* (the Imam of the Time) is believed to have gone into his major occultation in 329-939. Imam Al-Mahdi will re-appear before the Day of Judgment and bring peace to the earth. With regards to Mahdi's occultation the Prophet has said:

> If there were to remain in the life of the world but one day, God would prolong that day until He sends in it a man from my community and my household. His name will be the same as my name. He will fill the earth will equity and justice as it was filled with oppression and tyranny.[136]

The Sunni also believe in the appearance of Mahdi as well, however, the concept is not part of their theological doctrine. The twin concepts of *Imamat* and Mahdism are politically and historically important because not only do they distinguish theological and jurisprudential differences between the Shia' and the Sunni, but they also influence the construction of authority in Shia' political thought.

In terms of jurisprudence, similar to the Sunni branch of Islam, the Shia' consider the Quran and *hadith* as the divine sources of law, with the exception that for the Shia' the only *hadith* that is accepted is that which is narrated either by the Prophet or by any of the twelve Imams. In addition to *Ijma* (consensus) among Shi 'ei scholars, *Ijtihad* and *fatwa* the Shia' include reason as a fourth leg of Islamic jurisprudence. There is a principle in Shi 'ei *usul al-fiqh* which states "that whatever is ordered by reason, is also

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[134] Muhammad H. Al-Tabataba'i, and Seyyed Hossein Nasr, eds., *Shiite Islam* (State University of New York 1979) 2.
[135] For the Shia', the term Imam designates any of the twelve descendants of Fatima and Ali. For the Sunni, the term Imam designates any prayer leader.
[136] *Supra* note 134 at 8.

ordered by religion. In accordance with this principle, which is known as the 'rule of correlation', religious rules may be inferred from the sole verdict of reason." [137] However, it is important to note that Shia' jurists and scholars define "reason" and the limits thereof. The active involvement of reason in jurisprudence leads many jurists to claim that Shiite jurisprudence is *fiqh-e pouya* (dynamic jurisprudence), which means it is always searching for new meanings and answers. As such, the Shiite claim that Shiite jurisprudence, unlike Sunni jurisprudence is aware of the need for continuity and change.

There are three main branches of Shiism. The first is Twelver Shiism or Jaafari established into a doctrine by the sixth Imam, Imam Jaafar ibn Sadegh. The Jaafari's compose the majority of the Shia' population who are located mainly in Iran, Iraq, Lebanon and in parts of Afghanistan, Pakistan, Bahrain and Saudi Arabia. The Ismaili's or Sevener's believe that the son, not the brother of Jaafar ibn Sadegh, Ismail was the rightful Imam. As a result, they follow the lineage of Ismail (who is not recognized as an Imam by the twelvers). The Ismaili's account for the second largest group of the Shi'is. The Agha Khan is the living Imam of the Ismaeli's.[138] The Zaidi's are a smaller branch of Shiism, who only believe in the first three Imams (Ali, and his two sons Hasan and Hussein). They are a small group, and are mainly located in Yemen. Similar to Sunni jurisprudence and the development of the four different *madhhabs* Shiite jurisprudence has also developed over a long period of time from the time of Ali the first Imam to the occultation of the twelfth Imam. The role of the *mujtahid* and *marja'* will be explained in further detail in the following chapter.

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[137] *Supra* note 133 at 68.
[138] *See* for example, The Agha Khan Foundation: www.akdn.org

Conclusion: Creativity and Rigidity

A review of the divine sources and the methodologies devised to interpret, understand and apply them to new situations in Islamic law reveals that Islamic legal norms and practices are as much divine as they are human made. In other words, scholars, students, jurists and judges from a diversity of backgrounds in myriad regions of the world have discussed and argued on how best they can decipher laws and norms from the divine sources that would best represent the "Law of God." In this process, individual opinions and preferences merged with cultural norms and political influences that gave birth to doctrinal schools of law that continue to influence the daily lives of many Muslims today. The importance of understanding the formation and evolution of the methodologies of Islamic jurisprudence makes us aware that this legal system draws its legitimacy, power and authority from the authors who have constructed it, namely the jurists and the *mujtahids*. Although these jurists base their doctrines and findings on divine sources, nevertheless, it is their access to the sources and their determination and decision of when and how to use *Ijtihad* and *fatwa* that has maintained the legal framework of Islamic law intact. In other words, the foundations of Islamic jurisprudence was established through the activities of an elite number of male jurists who determined what the law is and ought to be for Muslims at all time. As such the nomos of Islamic law, the Shari'a, was constructed through the interpretation of divine sources that chose a certain narrative to dominate over others. Analyzing the development and evolution of Islamic law both employing the views of both Critical Discourse Analysts and Robert Cover reveals that jurists and scholars as interpreters of texts and founders of legal schools had a significant amount of power in determining the course of the law, and that

politics influenced the flourishing and survival of one school over others. As such, the interplay of power, knowledge, interpretation and violence (in choosing one narrative dominant over the other) have had a significant effect on the formation and evolution of Islamic jurisprudence.

Noting the periods of creativity and rigidity that animate the history of the formation of Islamic legal methodologies, the next chapter will focus on the role of judges, jurists and *mujtahids* as the founders and maintainers of this legal framework. It is they who have and continue to have the power to establish what the narrative of Islamic law is going to be.

Chapter 2
Narrative, Authority and Power

The history of Islamic law "is often presented as a narrative of development and discontinuity,"[139] of creativity, exploration and rigidity. Given that Islamic law is grounded in textual sources which require interpretation, explanation and narration by jurists and scholars, it is at once normative and legal. Having studied the divine sources that compose Islamic law and noting the different methodologies that Muslim scholars and jurists have developed to discover and extract laws and norms from the sources, it becomes imperative to contemplate how this legal framework is held together through the different processes that give it meaning, authority and continuity. Like other legal systems, secular or religious, the Islamic legal framework has been constructed through human wisdom and decision-making over the centuries. In this process, judges, jurists and *mujtahids* have played a pivotal role in interpreting texts and creating new laws based on the needs of the community. As such, the authorities of Islamic law-making have been male jurists and scholars who have had access to the sources of knowledge and influenced by politics, history and regional and cultural practices have created certain narrations of the law which now constitute the numerous laws and norms that exist in the corpus of Islamic jurisprudence.

Chapter one discussed the sources of Islamic law, the gradual use of *hadith*, the formation of the secondary methodologies of Islamic law, and the development of the *madhhab*. This chapter will discuss the role of judges in dispensing justice in Islamic communities and the power and authority of jurists and *Mujtahids* in discovering and

[139] Anver Emon, "Techniques and Limits of Legal Reasoning in Shari'a Today" 2 Berkley J. Middle Eastern & Islamic L. 1 101 (2009) 101.

explaining Islamic laws and norms. This chapter seeks to explore the role of authorities in the Islamic legal framework in establishing the narratives of what law ought to be, and explore how new narratives can thrive and gain power in an ever changing and growing discourse on what the law ought to be.

I. Nomos and Narrative

In a seminal article entitled "Nomos and Narrative" Robert Cover[140] describes legal frameworks as separate worlds of legal meaning where "law and narrative are inseparably related. And every narrative is insistent in its demand for its prescriptive point, its moral."[141] As a result, we live in a world described through a particular narrative and regulated by legal authorities such as judges, lawyers, jurists, politicians and even everyday people. Cover terms this legal/normative universe "*nomos*." A nomos, "as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures. A nomos is a present world constituted by a system of tension between reality and vision."[142] Narrative plays a pivotal role in the establishment and existence of a nomos, because "the very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative."[143] In essence it is the act of interpreting values, morals and codes to create a narrative that gives life to a nomos, a world guided by narrative and regulated through law.

The conceptual idea of a nomos expands the universe and power of law into one that not only regulates our actions but also maintains a narrative, a set of beliefs, doctrines and codes. "A legal tradition is hence part and parcel of a complex normative

[140] Robert Cover, Professor of Law and Legal History at Yale University (1972-1986).
[141] Supra note 2, Robert Cover, "Foreword: Nomos and Narrative," 97 Harv. L. Rev. 4 (1983-1984) 6.
[142] *Supra* note 2 at 9.
[143] *Supra* note 2 at 10.

world. The tradition includes not only a *corpus juris*, but also a language and mythos—narratives in which the *corpus juris* is located by those whose wills act upon it."[144] The conceptual relevance of "nomos" to our understanding of different legal systems is that each is grounded in and guided by a narrative which has a history, ethos and value system of its own. Cover explains that a nomos, as a world of law, stands as a bridge between the vision or what law "ought to be" and reality or what the law "is."

Treating law as narrative allows for a more holistic understanding of the production, interpretation and application of the law. This means:

> looking at facts more than rules, forms as much as substance, the language used as much as the idea expressed. It means examining not simply how law is found but how it is made, not simply what judges command but how the commands are constructed and framed. It understands legal decision-making as transactional—as not just a directive but an activity involving audiences as well as sovereigns.[145]

A legal tradition is not simply influenced by a single narrative as there are multiple narratives, stories, histories, values and norms that exist within any given society. What is important for legal meaning is to see which narrative influences and guides the operating law of that system. In other words, which narrative becomes dominant and who are the authors of that narrative. The concept of narrative has mostly been used in the context of law and literature and critical legal theory,[146] examining the stories that law tells. In the context of feminist research, Claire Hemmings argues that "which stories predominate or are precluded or marginalized is always a question of power and authority."[147] However, it is not only a question of which stories become

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[144] *Ibid* at 9.
[145] Peter Brooks and Paul Gewirtz, *Law's Stories Narrative and Rhetoric in Law* (New Haven, CT Yale University Press, 1996) 3.
[146] *See* for example, Richard Delgado, "Storytelling for Oppositionists and Others A Plea for Narrative" 87 Mich. L. R No 8 2411 (August 1989)
[147] Claire Hemmings, "Telling Feminist Stories" 6 Feminist Theory No 2 115 (2005) 118

dominant, but also who the narrators are and how do they gain the authority to make some stories, norms and values dominate over others.

Cover discusses authority in the realm of making constitutional law and deems judges and the state as the authorities in creating and imposing narratives as law. In so doing, the judges commit an act of violence because the narrative they choose over others favors their particular ideologies.[148] In essence, their choice of narrative silences the power of other narratives simply because they have the power and authority to do so. He points out that in their capacities as apparatus' of power, courts "choose between two or more laws, to impose upon laws a hierarchy."[149] In addition, judges commit acts of violence by aligning themselves with the state's interpretation of what the law ought to be and how it should be practiced. The judge's commitment Cover explains, "are supposed to be to the structure of authority."[150] In essence, this act of violence is inevitable in order to maintain the integrity, continuity and authority of the legal system.

Although Cover discusses the issue of narrative within the context of constitutional law, narrative, authority and violence exist within the context of any law, especially religious law which has high stakes in holding a particular narrative dominant. Cover explains that "[L]aw as Torah is pedagogic. It requires both the discipline of study and the projection of understanding onto the future that is interpretation."[151] The same

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[148] In another important article entitled, "Violence and the Word" 95 The Yale L J 1601 (1986) Cover argues: "Legal Interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence upon others. A judge articulates her understanding of a text, and as a result, somebody loves his freedom, his property, his children, even his life Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur " 1601

[149] *Supra* note 2 at 40

[150] *Ibid* at 58

[151] *Supra* note 2 at 13.

can be said about the Quran, since it serves as the main "source"[152] of law in Islam The precepts and rules of the Quran have been read and interpreted by jurists who throughout centuries have made the cannons of Islamic law Law explains Weiss

> is integral to monotheistic religion The world's sole creator is necessarily by rights its sole ultimate ruler, legislator, and judge All law worthy of the name must therefore originate with him The human lawgiver is, despite his exalted position within the monotheistic scheme of things, only the mediator of the divine law to mankind [153]

The jurist as mediator and interpreter is also a narrator of the law This makes his role integral to the formation, implementation and evolution of the law The Shari'a is considered to be "jurists' law" which implies that only "jurists are in a position to discover the law, and having discovered it, to state authoritatively what the Law is "[154] Joseph Schacht one of the earliest Western scholars of Islam refers to Islamic law as jurist's law and a type of sacred law "In order to understand how Islamic law could be both of these, it is important to understand that the authority of jurists in Islam is an exclusively declarative authority, an authority to declare God's law on the basis of an intentionalist[155] interpretation of foundational texts " [156]

II. The Authorities

But no, by the Lord, they can have no (real) Faith, until they make thee judge in all disputes between them, and find in their souls no resistance against Thy decisions, but accept them with the fullest conviction
Holy Quran 4 65

Islamic legal thought and practice has been constructed throughout centuries through the power and authority of those discovering and narrating the laws Judges,

[152] Fazlur Rahman notes that the Muslim legal tradition went so palpably wrong, "when it essentially regarded the Quran as a law book and not the religious source of the law " in *Major Themes of the Quran*, (Minneapolis, MN Bibliotheca Islamica 1980) 47
[153] Bernard Weiss, *The Spirit of Islamic Law*, (Georgia University of Georgia Press, New Ed 2006) 1
[154] Bernard Weiss, "Interpretation in Islamic Law" 26 Am J Comp L 199 (1977-1978) 201
[155] By intentionalist Weiss implies the specific interpretation of a jurist of a text within a certain social and cultural context
[156] *Supra* note 153 at 113

jurists, scholars and mujtahids are the authorities who have discovered and narrated norms and principles into binding laws within their books of *fiqh* and *usul al-fiqh* It is the jurists who have created the nomos of Islamic law, namely the Shari'a There are multiple levels of authority within the Islamic legal framework including the power of the *qadi* (judge), the founder of the *madhhab*, the *ulema* (jurists), the *musannif* (author-jurist), and finally the highest ranking authority the *mujtahid* or *mufti* (juriconsult) the highest rank a jurist can reach Noting the different levels of authority that exist, the formation of the judiciary, the interdependence that existed between the judiciary and the scholars, and the role of the Caliph and the State will shine light on the power dynamics that existed between the founding authorities of the Islamic legal framework and the modern authorities of the law

As the boundaries of the Islamic community expanded the need for disseminating Islamic norms and traditions to the new territories also increased Other than the Caliphs and governors of cities, emissaries were sent to new towns to teach the new converts the message of the Quran and to establish an Islamic ethic [157] Hallaq points out that during the first century of Islam the proto-*qadi*'s were the main representatives of the law [158] The "jurisdiction of the *qadi's* was limited to the garrison towns and to the resolution of disputes among Arab tribesman and their families and clients, it did not yet extend to the surrounding countryside or to the towns and cities inhabited by Christians, Zoroastrians, Jews and others "[159] Indeed, the *qadi's* were not necessarily trained judges, but were

[157] Wael B Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge, UK Cambridge University Press 2005)29-34
[158] Wael B Hallaq, *Sharia Theory Practice Transformations* (Cambridge, UK Cambridge University Press 2009) 126
[159] Muhammad Khalid Masoud, Rudolph Powers, and David S Powers "Qadi's and their Courts An Historical Survery" in *Dispensing Justice in Islam Qadi s and their Judgments*, eds Muhammad Khalid Masoud, Rudolph Powers, and David S Powers (Leiden, The Netherlands Brill 2006) 8

rather experienced arbitrators (*hukkam* sing. *hakam*). Sometimes they were even illiterate, and sometimes their responsibilities included military, financial and administrative tasks. It is also important to note that although the *qadi's* were sent to disseminate Islamic norms and values, they were instructed to assure the conquered population that they "were to continue living according their laws."[160] This policy implies that during the first century, although the *qadi's* were to educate the population about the Quran and the Prophet, they were not there to fundamentally change the livelihood of the conquered people, but rather to infuse new practices and values with their every day lives.

It was during the second/eight century, after the Muslims had settled into the garrison towns, under the reign of Mu'awiyya the first Caliph of the Ummayad Dynasty (661-750 C.E) that the first *qadi* Sulayn b. Itr, the *qadi* of Fustat was charged among other things with the responsibility of adjudicating criminal cases.[161] It is during this time that greater weight is given to judgeship (*qada'*) and the seeds of a professional office is laid. The early *qadi's* "possessed reasonable knowledge of the Quran and rudimentary knowledge of the socio-religious values of the new religion."[162] In addition, as Hallaq notes, a significant function of the early qadi's was story-telling."[163] The qadi's foretold the stories of previous Prophets mentioned in the Quran and stories about Prophet Muhammad and his life. Special interest in telling stories about the Prophet, his mannerisms, his actions and his behavior with his wives was the subject of many stories and narrations, which in later centuries led to the development of *hadith*.

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[160] *Supra* note 157 at 36.
[161] *Ibid* at 38.
[162] *Id.*
[163] *Supra* note 157 at 39.

As the judiciary developed it is also important to note the changing role of the state and especially that of the Caliphate. During the first/seventh century the Caliph considered himself the subject of the law and the proto-qadi's had relative judicial independence not only because "social, customary and evolving religious values governed all, but were no more known to, or incumbent upon, the caliph than his judges." [164] However, as the legal system developed and the Caliphate gained greater strength the Caliph who saw himself as "God's Deputy on Earth" also became more interested in the regulation of justice.[165] As such, the first Caliphs would act as *qadi's* themselves relying on the Quran, *hadith* and their own personal reasoning. Hallaq notes that it was not uncommon for a *qadi* to write letters seeking the opinion of the Caliph on specific cases. [166] It was during the reign of the Abbasid Caliph Al-Mahdi (r. 775-85) where the *mazalim* or courts came into being where the Caliph would arrange for regular hearings of complaints and petitions from the people.[167] These courts were composed of a *qadi*, guards, jurists, scribes and notaries. There was also witness examiners (*ashab al-masa'il*) people appointed to investigate the character and integrity of the witnesses before the court. It's interesting to note that the name of the certified witnesses were entered into court records. Court witnesses (*shuhud'adl*) were an important part of the court, as all oral transmissions had to be written by the scribe and validated by at least two witnesses.[168] Another important aspect of the court that developed later during the second century is the establishment of the *diwan* which "represented the totality of the records (*sijillat*) kept by a judge, and these were normally filed in a bookcase termed the

[164] *Supra* note 158 at 128.
[165] *Supra* note 157 at 43.
[166] *Supra* note 158 at 44.
[167] *Supra* note 159 at 11.
[168] *Supra* note 157 at 85-90.

qimatr "[169] The diwan served as the "legal backbone" of a judge's court where he could review the cases that had come to his court and the decisions that were made It was custom for an outgoing judge to hand over his *diwan* to the incoming judge [170] As such the legal tradition continued to grow and reproduce itself conscious of the needs of the time

The political dimension of the development of the judiciary include the role of the Caliphate in creating the office of the *qadi al-qada* or chief *qadi* in the second/eighth century during the reign of Harun al-Rashid (r 786-809 C E) [171] The Caliphate sought to reign its powers and demand loyalty from the appointed judges However, the relationship between the judges, jurists and the Caliphate was at best tense and sometimes characterized by adversity This is because by the end of the first century the emergence of a new legal ethic among the legists "insisted upon ideal human conduct driven by piety" which was seen as antithetical to the demands and actions of the Caliphate In addition, "there was resistance to the increasing power and institutionalization of the ruling elite, who began to depart from the egalitarian forms of tribal leadership known to the early caliphs " [172] Hallaq notes, this tense and often adverserial relationship between the judges, jurists and the Caliphate did not stop jurists from taking judgeships for it was clear to the ruling elite that

> legal authority in as much as it was epistemically grounded, was largely divorced from political authority Religion and by definition, legal knowledge had now become the exclusive domain of the jurist, the private scholar It is precisely because of this

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[169] *Ibid* at 92
[170] *Id* at 94-98 Hallaq notes that, ' [i]t was access to the diwans that allowed judicial review in Islam to take on a meaningful role, a role that was, to some limited extent, equivalent to appeal in western judicial systems " 96
[171] *Supra* note 159 at 12
[172] *Supra* note 158 at 129

> essentially epistemic quality that the ruling elite needed the legists to fulfill the Empire's legal needs.[173]

In fact, from the second century onward not only were judges appointed by the Caliph, there were always a jurist or two present in the royal courts who not only helped legitimize the caliph, but also discussed matters of religion, law, literature and also held scholarly disputations (*munzara*) among master-jurists.[174] In other words, these two different authorities, the Caliph and the jurists both depended on each other for maintaining power and legitimacy within the community, although they relationship was at times tense. However, as Hallaq notes, religious authority rested in the hands of jurists. In other words, even the Caliph was under the jurisdiction of the jurist because it was the jurist how understood God's law and interpreted it for the Caliph and the rest of the Muslim community. Hence, similar to the role of judges in interpreting the Constitution as Cover explains, by the second century onward the role of the jurist as the sole authority responsible for interpreting the divine texts was established and accepted by all. This is an important element in the development of Islamic jurisprudence, because, we have the consolidation of all religious power and knowledge in the milieu of an elite. It was this elite who from then on decided the direction of the law and interpreted God's law.

In the early years of the development of the judiciary *qadi's* usually had local jurisdiction. However, by the middle of the third/ninth century *qadi's* were "people of high standing at the Abbasid court without ties to the towns over which they were

[173] *Ibid.* at 130.
[174] *Id.* at 133

appointed."[175] For example, the "city of Baghdad was divided into three jurisdictions, and although one *qadi* was appointed for each jurisdiction it did happen that one *qadi* was put in charge of two or all three jurisdictions."[176] In addition to the greater input of the Caliphate in placing *qadi's* across the empire, the development of the *madhab's* in fourth/tenth century also impacted the work of the judiciary, in so far as the diversity of laws and doctrines created some dilemma in terms of which school doctrine would be applied and whether the Caliphate had any say in it. Abou El-Fadl notes, that "when the Abbasid Caliph al-Mansur (d. 158/775) offered to adopt al-Muwatta' of al-Imam Malik ibn Anas (d.179/796) as the uniform law of the land, Malik refused, arguing that there were many established juristic practices in different areas of the Muslim world and there was no legitimate reason to impose legal uniformity upon the territories." [177] As a result, the four different doctrines of Shafei', Maliki, Hanafi and Hanbali were applied across the board, until different areas came to adopt a school doctrine dominant and applicable uniformly across their territories. For example the Ottomans applied Hanafi law, and the Safavid's made the bold move of separating themselves from the Ottoman Caliphate by establishing Shiism as the dominant doctrine of the land in the sixteenth century. However, diversity of legal doctrine did not affect the *qadi* system that was developed by the Abbasid, and the system continued to operate under the "Moghuls in India (1526-1858), the Safavids in Iran (1501-1722), and the Ottomans in the Middle East (1512-1918)." [178]

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[175] *Supra* note 159 at 13
[176] Nurit Tsafrir, *The History of an Islamic School of Law The Early Spread of Hanafism* (Cambridge, MA Islamic Legal Studies Program Harvard Law School 2004) 40-41.
[177] Khaled Abou El-Fadl, *Speaking in God's Name Islamic Law, Authority and Women* (Oxford, UK OneWorld Publications 2005) 10
[178] *Supra* note 159 at 15

The fall of the Ottoman Empire in 1922, the emergence of the modern nation state and Muslim independence from colonial influence[179] changed the judicial system in newly independent Muslim states. Some of the salient features of these changes include:

1. The abolition of *siyasa* or discretionary criminal justice--in the interest of the state and public order--and the promotion of respect for the rule of law.

2. Bureaucratization of the Shari'a courts

3. Codification of the Shari'a

4. The emergence, in most countries of a dual judiciary composed of (a) secular, national courts that apply Western-style legal codes; and (b) Shari'a' courts that apply Islamic legal doctrine in fields such as family relations and inheritance;

5. The gradual integration of the Shari'a court system in the national court system.[180]

The emergence of independent Muslim nation states in the 19th and 20th century,[181] each with a constitution and re-organized judiciary raised ample questions about the influence and role of the Shari'a in law, politics and governance. Although nation states such as Egypt, Morocco, Iran, Saudi Arabia and others establish Islam as the religion of the state and the Shari'a as the guiding principle of the state, modern influences in the judicial system such as the inclusion of Swiss and French codes, the existence of different normative/legal systems in states such as India, Indonesia and Malaysia, and changing economic and political policies all pose challenges to the authority of the Shari'a.[182] Hallaq notes, "if both Islamic law and the nation-state were constituted as governing organs that by necessity were lawgivers, they fundamentally

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[179] For example, Morocco and Tunisia gained independence from France in 1956, Egypt gained independence from the British in 1953, Indonesia achieved independence in 1949 from the Netherlands.
[180] *Supra* note 159 at 32-33
[181] *See* for example, Fred Donner, "The Formation of the Islamic State" 106 J. American Oriental Soc. No 2 (April-June 1986).
[182] *See* for example, Chibli Mallat, "Constitutionalism" in *Middle Eastern Law* (Oxford, UK, Oxford University Press 2007) 129-179

differed in the articulation of their *modus operandi* and ultimate objectives As universal lawgivers, they were mutually exclusive "[183] Reconciling differences between the secular institutions of the nation state and that of the universe of the Shari'a has been difficult to reach, and often times, nation states have chosen to reform their economic, political, educational and to a certain extent legal systems in order to gain greater flexibility with the demands of the twentieth century In other words, although the Shari'a continues to play a powerful normative role in the everyday life of Muslims in Muslim countries, the Shari'a has little influence on public policy in many Islamic countries Except for states such as Iran, Pakistan, Saudi Arabia that claim to uphold the Shari'a in all aspects of public life, very few states incorporate the Shari'a in their law-making process [184]

While it is does not fit within the scope of this paper to discuss the different legal and political systems that guide the policies of different Muslim states, there is one area of law, namely Islamic family law, where the jurists and the state agree on the application of Islamic laws and norms developed by the jurists Despite differences between Sunni and Shiite jurisprudence, and the diversity of legal opinion that exist among the different *maddhab's*, a strange and perplexing uniformity of laws and norms exist in the area of family law, or Personal Status laws [185] This issue will be explored and discussed in greater detail in the next chapter, suffice it to say here, that despite differences in political systems and religious narrations, Muslim women around the world continue to be at the

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[183] *Supra* note 158 at 367

[184] Although, Muslim nation states still insist on the application of the Shari'a when it comes to political issues such as human rights or the rights of minorities *See* for example, Ziba Mir-Hosseini, "How the Door of Ijtihad was Opened and Closed A Comparative Analysis of Recent Family Law Reforms in Iran and Morocco" 64 Wash &Lee L Rev 1499 (Fall 2007)

[185] *See* for example, Abdullahi Ahmed An'naim, *Islamic Family Law in a Changing World* (London Zed Books 2002), Leila Abu Lughod, "Modernizing Muslim Family Law The Case of Egypt" 37 Vand J Transt'l L 1043 (October 2004)

mercy of the State and religious authorities to realize the demand for equality both in the public and private realm.

III. The Mujtahid

> "If the mujtahid is correct in his ijtihad he receives two bounties, and if he is wrong he receives one." [186]

Political authority, judicial authority and religious authority are the triad of forces that characterize the Islamic judicial system from its nascent days until today. The development of the judiciary and the role of the Caliphate and later the modern state have been briefly discussed. However, the most important element of the judicial system is the influence and power of the mufti/mujtahid who issues *fatwas* by engaging in *ijtihad.* "From its earliest stages, the Islamic legal tradition has insisted on the presence of mufti's, at times described as "the people of knowledge" (*ahl al-ilm*), in the courts of law, both as advisors for the *qadi* on difficult points of law and as overseers-cum witnesses of court proceedings." [187] The development of the *madhab's* and the consolidation of school doctrines were due to the hard work of prominent jurists and their students who throughout the years had extracted laws from the divine sources, and established through *ijma* and *qiyas* what the law said with regards to specific situations.[188] However, another tool at the disposal of the jurists was *ijtihad* or independent legal reasoning which only the highest ranking jurists namely the *mujtahid* or *mufti* could use in cases where the law was silent or vague on an issue. Hence, the necessity of the presence of a mufti in a court of law for the *qadi* to consult with.

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[186] Prophetic Hadith cited in Al-Bukhari and Sahih Muslim.
[187] *Supra* note 158 at 177.

In this context, on can say that not only does authority lie with the jurists who said what the law is, but ultimate power and authority for continuity and change lie in the hands of the mujtahid/mufti who can say what the law can be or ought to be in new situations. The rhetorical and moral power of Muslims jurists "was grounded in the fact they could plausibly argue that ruler and ruled are normatively bound by God's law." [189] Although the jurists had the power to interpret law, El-Fadl notes that "Muslim jurists did not make a direct claim to power despite their position as the representatives of the Divine Law. They argued that rulers should consult with and rely on jurists as they formulated and executed the law, but did not claim that they (the jurists) should govern or rule society directly." [190] However, it can be argued that the jurists set the narrative of how and by what laws society ought to be governed, indirectly, not at as rulers but as authors of social norms and laws. As narrators of the law they established the framework for the Islamic legal nomos, and as such their power and authority was firmly established in Islamic societies. It is the jurist that gives direction and meaning to verses and *hadiths* and determines the norms of a Muslim society.

The highest ranking jurist, namely the *mufti* or *mujtahid* (juriconsult) was not only able to engage in ijtihad or independent legal reasoning which "entailed a search for the underlying rationales of the law" [191] but also issue *fatwa's*. A *fatwa* consists of a question (*su'al, istifta'*) addressed to the mufti, together with an answer (*jawab*). "When the question becomes drafted on a piece of paper--following the general practice--the paper

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[189] *Supra* note 177 at 13.
[190] *Ibid.* at 15
[191] Bernard Weiss, "The Madhhab in Islamic Legal Theory" in Peri Berman, Rudolph Peters and Frank E. Vogel, eds., *The Islamic School of Law: Evolution, Devolution and Progress* (Cambridge, MA: Islamic Legal Studies Program, Harvard Law School 2005) 3.

becomes known as *ruq'at al-istifta*' "[192] Fatwa's are juristic responses to questions arising from within the community and are in response to very specific real situations, as they cannot address hypothetical situations Hallaq notes that, "the bulk of fatwa literature at our disposal attests to the now well-established fact that fatwas were requested by judged from mufti's who, at times, lived hundreds of miles away The great majority of fatwas thus originated in the actualities of social and economic practices, even when they were not solicited by the court " [193] *Fatwa's* are usually supplemented by additional commentary by the mufti and often include relevant *hadith* "Once the fatwa, consisting of a rule based on concrete social reality was issued, it was often incorporated into works of positive law (*furu*) Technically, these works constituted the highest authority as compilations of the law " [194] For example the following fatwa reads

> Is Zakat obligatory on the wealth of the orphan and the insane?
>
> Answer
>
> Zakat is obligatory on the wealth of each of them, if the person is a free Muslim who has complete ownership of his wealth This is due to what Ad-Daraqutni narrated that was reported as a statement of the Prophet (Sallallaahu alayhi wasallam) "Whoever is made the guardian over the wealth of an orphan, let him do business with it and he should not leave it to be devoured by charity i e, Zakat) " [Ad-Daraqutni 2 109 no 1951]
>
> This is due to what Malik narrated in Al-Muwatta' from 'Abdur-Rahman bin Al- Qasim from his father, that he said "A'isha used to keep me and my brother as two orphans in her apartment, and she used to pay Zakat from our wealth "
>
> The view that Zakat is obligatory upon the wealth of each of them (the orphan and the insane person)was held by 'Ali, Ibn 'Umar, Jabir, A'shah and Al-Hasan bin 'Ali Ibn Al-Mundhir related this from them [195]

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[197] Wael B Hallaq, *Authority Continuity and Change in Islamic Law* (Cambridge, UK Cambridge University Press 2001) 174

[193] *Supra* note 158 at 177 178

[194] *Supra* note 191 at 180

[195] Fatawa Islamiyah, Darussalam, Vol 3, Page Nos 157 158 cited from www fatwaislam com
Note A fatwa becomes binding only on the person asking the question unless it is a fatwa that has a public aspect and affects the interest of the community Zakat or "alms giving" is a charitable donation which a Muslim pays at the end of the year on surplus wealth' or wealth that is not in circulation for his everyday needs

The most important aspect of the *fatwa* in the development of law is that through *ijtihad* the *mujtahid* was able to expand the boundaries of the law and allow the law to progress with the changing needs of society. This means that "[m]uslim jurists were acutely aware of both the occurrence of, and the need for, change in the law, and they articulated this awareness through such maxims as "the fatwa changes with changing times." (*taghayyur al-fatwa bi-taghayyyur al-azman*) or the explicit notion that the law is subject to modification according to the "changing of the times or the changing conditions of society." [196] As such, the fatwa was and continues to be the most important legal tool at the disposal of *mujtahids* to respond to the changing legal needs of their community. Therefore, the conservative argument that came about in the third/tenth century commonly known as "the closing of the gates of *ijtihad*" is antithetical to the evolutionary and progressive development of the law. Weiss notes, "the explanation given by Islamicists is that a point has been reached at which all essential questions of law had been thoroughly discussed, and further deliberation was deemed unnecessary, if not disruptive. Consequently, Islamic law congealed into a rigid, inflexible system that was regarded as being capable of meeting the basic need of all future generations." [197] There is a lot of controversy regarding the theory of the closing of the gates of ijtihad and the stagnation of the development of Islamic law.[198] The first issue to consider is that *fatwa's* were and continue to be issued by mufti's in response to questions arising within different communities. Second, there have been other prominent jurists since the third

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[196] *Supra* note 192 at 166.
[197] Bernard Weiss, "Interpretation in Islamic Law: The Theory of Ijtihad" 26 Am. J. Comp. L 20 (1977-1978) 208.
[198] *See* for example, Shaista P. Karam Ali and Fiona Dunne "The Ijtihad Controversy" 9 Arab L. Qt. No. 3 238 (1994).

century who have risen to the ranks of mufti[199] and have gained popularity within their communities. In addition, for the Shiite's this closure has never occurred and in fact ijtihad is a fundamental aspect of Shiite jurisprudence. Hence, while there is reason to believe that innovation and development of Islamic law was very vibrant during the early centuries it is false to assume that the law has not expanded to respond to new circumstances.

The shift to *taghlid* can be an accident of history, or as Hallaq notes, "the increasing abandonment of ubiquitous plurality in favor of the search for authoritative opinions amounted to a transition from what may be called the age of ijtihad to that of *taghlid*. Taghlid was symptomatic of the rise of the schools as authoritative entities, that is, as objects of constructed authority."[200] Since not everyone can engage in ijtihad, one has to follow the legal reasoning of one who has the knowledge and expertise to do so. In this regard, the Muslim population can be divided into two groups: that of the mujtahid vs. non-mujtahid or *mughallid* (one who engages in *taghlid*). "A common definition of taghlid is acting in accordance with the declaration of another without consideration of a *hujja* (sources). It is, in other words hujja-less authority." [201] This means, that if you are a non-mujtahid than you must follow the scholarship and rulings of one who is, because as a *mughallid* one is not knowledgeable and trained enough to go the sources and decipher the laws on one's own. "This means that the few who are mujtahids are very few indeed, thus heightening the rarity of ijtihad in Muslim society and tightening the economy of

[199] For example a list of the Grand Mufti's of Al-Azhar the premier religious institution of the Sunni world. www.sunnah.org
[200] *Supra* note 192 at 238.
[201] *Supra* note 191 at 3.

scholarly expertise." [202] This need for expertise creates a power hierarchy between the mujtahid and the *mughallid.* Most importantly this authority arises from "his mastery of the scholarly skills necessary for attaining an understanding of the law. Only what the *mujtahid* thinks to be the law of God carries authority." [203] The level of expertise of the jurist and the exclusivity of his realm of work leads one to think more about the notion of violence that Cover refers to. He discusses the violence of the judge in establishing one narrative of the law as dominant and in effect silencing alternative narratives. With regard to the jurist and his work, one can arguably say that in choosing a certain interpretation of the divine text as dominant he too commits an act of violence. But then again, his position is deemed so high in society and his knowledge so exclusive that his authority is rarely challenged. In essence, it is difficult to challenge the narration of a jurist if one is not a jurist.

Having studied the divine sources of Islamic law, one is cognizant of the fact that God, his book (the Quran), and the Prophet are the absolute authorities in Islam, and the *mujtahid* is subject to the absolute authority of the sources. The *mughallid* on the other hand is subject to relative authority which reside in the declarations of the *mujtahids.* Noting the power that they have, Fadel reminds us that the jurists "did not contend that they were God's chosen agents, but they did argue that they were the party qualified to understand God's instructions." [204] Hence, the mujtahid plays the role of mediator and most importantly that of interpreter of God's laws to the rest of society.

As narrators and interpreters of the law jurists have played a pivotal role in the creation, expansion and even evolution of Islamic law. And, although historically, they

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[202] *Ibid.* at 4.
[203] *Id.*
[204] *Supra* note 177 at 27.

have been the male elite who have had access to the sources of the law, and had the opportunity to be trained in *madrasas* and *hawza's* in different parts of the Muslim world, the twentieth century has witnessed the burgeoning of a new class of narrators and interpreters of Islamic laws and norms. "Mass higher education and the impact of print and other media have made deep inroads into the *ulama's*' privileged access to authoritative religious knowledge, even as the "reflexivity" of modernity, that is the need to constantly adapt existing forms of knowledge, institutions, and social relations to relentless flows of information, poses severe challenges to the credibility of their discourses." [205] Although the role of the *ulama*, jurists and scholars still remain relevant, nevertheless, the new class of narrators, namely modernist scholars and reformist intellectuals who are not classically trained like the jurists, but are passionate about their religion, offer a new narrative of what Islamic laws and norms can be. [206] In the words of Cover, these new narrators of the law are challenging the authority of the jurists by producing alternative narratives of the law that challenge the status quo. Their new narratives compete for power and recognition within the Muslim community and it remains to be seen how successful these alternatives narratives can be in changing the frameworks of the law.

IV. The Muslim Reformers

The reformist or revivalist movement in Islamic law and theology took place as a result of Western influence in the Muslim world either through benign interaction such as

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[205] Muhammad Qasim Zaman, *The Ulema in Contemporary Islam Custodians of Change* (Princeton, NJ: Princeton University Press 2002) 1.

[206] *See* for example, Aziz Al-Azmeh, *Islams and Modernities* 3rd. Ed (London, UK. Verso 2009); Sir Mohammad Iqbal; *The Reconstruction of Religious Thought in Islam* 4th Ed (Kitab Bhavan 1990), Fazlur Rahman, *Islam and Modernity Transformations of an Intellectual Tradition* (Chicago The University of Chicago Press 1984)

trade or through the force of colonialism and occupation starting in the 19th century.[207] In reaction to modern, at times argued Western-Christian notions about the individual human being and the political and social institutions of the modern West, we have witnessed the rise of new Islamic discourses by scholars and individuals who can be categorized as tradition-sensitive reformists (modernist), apologetic assimilationists, and fundamentalist Islamists (rejectionist). What ties these together is that they consciously wanted to make Islam relevant to contemporary life. In other words, they tried to see whether it is possible to be Muslim and modern, rational and spiritual at the same time.

It is interesting to note that both the reformist and fundamentalist Muslim scholars and activists were 'rationally' seeking ways to better understand and apply Islam in the modern world. According to Al-Azmeh, two different approaches to modern knowledge have been adopted by modern Muslim theorists: a) that Muslims without fear acquire not only western technology but also intellectualism, since no type of knowledge can be harmful, and b) that the acquisition of modern knowledge be limited to the practical technological spheres since at the level of pure thought Muslims do not need Western intellectual products. Indeed, some argue that these should be avoided, since they might create doubt and disruption in the Muslim mind.[208] Thus, the tradition-sensitive modernists can be placed in the first category and the Islamists placed in the second category.

It is important to emphasize that "every critique or modification of a tradition involves a consciousness of what is being criticized or rejected and hence, to that extent,

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[207] The first official efforts at modernization occurred during the reign of the Ottoman Sultans Mahmud II and Abdulmecid that began in 1839. One of the most significant changes that the Tanzimat Era reforms accomplished was the equal application of the law to Muslim and non-Muslim, and the exertion of government control over religious schools

[208] Fazlur Rahman, *supra 65* note at 50

self-awareness " In view of some of the revolutionary changes wrought by some men in their traditions, it is therefore not proper to say that "the self-awareness of the individual is only a flickering in the closed circuits of historical life "[209] The Muslim response to modernity, how best to preserve "Muslimness" and how to accommodate, learn or even assimilate to modern times implies a process of self-reflection and redefinition of values which open the doors to further inquiry and innovation While, the Muslim World is very diverse and fractured, nevertheless both the reformists and fundamentalists have sought to make Islamic norms and ethos relevant to modern life, each with a rationality and methodology of its own which have been welcomed and rejected by different Muslim societies

The tradition-sensitive reformists, who in many texts are also called 'modernist' Muslims, are those who openly embraced the social theories of modernity and called for the application of the scientific process of modernization For the modernists "modernity with its attendant goals of progress, autonomy, freedom, education, and justice, was quite simply reread as always already a part of true Islam "[210] The development of the modernist discourse has not been continuous There is no one single era that one can highlight as the glorious days of Islamic reformism Since the latter years of the nineteenth century to the present, the Muslim response to current events have oscillated with the modernist discourse gaining momentum over the rejectionist camp, and vice versa Tradition sensitive reformist (modernist) Muslim theologians, scholars and activists such as Jamal al-Din Al-Afghani and Mohammad Abduh in Egypt and others,

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[209] Hans Georg Gadamer, *Truth and Method* (Seabury Press, 1975) xxi cited in Rahman, *supra* note 65 at 10

[210] Zohreh T Sullivan, "Eluding the Feminist, Overthrowing the Modern?" in Lila Abu Lughod, ed , *Remaking Women Feminism and Modernity in the Middle East* (Princeton Princeton University Press 1997) 216

sought to bridge Islam and modernity, enhancing understanding and communication between the two discourses "These scholars critically examined the classical conceptions and methods of jurisprudence and devised a new approach to Islamic theology and Quranic exegesis The central theological problem that engaged these thinkers revolved around the question of the validity of knowledge derived from sources external to Islam [211] Writing in the latter years of the nineteenth century, Mohammad Abduh, who was trained at Al-Azhar University (Cairo), the premier theological university in the Muslim World, argued that "[I]slam itself is consonant with reason and that reason in the end has a religious orientation " The main reason why Muslim civilization declined, according to Abduh, was the fact that Muslims stopped taking their lead from reason and followed doctrines and practices simply because they were sanctioned by authority Abduh insisted on the need for rational education on all levels, which stimulate people to act rationally instead of merely obeying the authority of others or by following tradition Abduh rationalized Islam for the sake of social reforms which he saw as an indispensable in the modern age [212] The discussions introduced and carried on by Abduh's students are important to emphasize, as they gave rise to a movement in the Muslim World, which allowed Muslims to critique and discuss religious injunctions without fear of being called a heretic In fact, in the tradition of Al-Afghani and Abduh, Muslim modernists in later years attempted to rationally observe Islamic laws and norms, in the sprit of making Islam relevant to modern demands One can argue that these early modernists broke the taboo that was placed on critiquing religion In this regard, they gave birth to a movement

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[211] Mansoor Moaddel and Kamran Talattof, eds , *Contemporary Debates in Islam an Anthology of Modernist and Fundamentalist Thought* (New York St Martin's Press 2000) 1

[212] Jacques Waardenburg, "Some Thoughts on Modernity and Modern Thinking in Islam" in *Islam and the Challenge of Modernity Historical and Contemporary Contexts* (International Institute of Islamic Thought and Civilization) 330-331

where non-apologetic scholars and activists in the Muslim World, who were either authentic adherents to Islam or culturally Muslim, were able to propose changes to religious 'traditions' without the intention of undermining or deprecating the religion itself.

In contrast to the tradition-sensitive modernist response to modernity, the secularists (assimilationist) reacted to the innovations and progress of the modern West with great admiration, and saw a thoroughgoing Westernization as the best way to 'catch up.' In this regard, they not only advocated a change in the political and social institutions of society, but also called for secularization. They ascribed a private, personal status to religion, with little or no manifestation or influence on social and political life. According to the secularists, Western societies had progressed because they had separated religion from the institution of the state, and that it was only in a secular society that modernization would succeed.[213] According to Haddad, "the secularists were ready to surrender to Western influences and comprise with Western ideology.[214] The difference between the modernists and the secularists was one of focus. The secularists were concerned with the influence of religion on the political structure; hence, they ascribed a preservative function to religion that continued to maintain obsolete, decadent, or oppressive institutions. Their primary concern was with 'appearance,' and, so the changes that some of the secularist statesmen such as Ataturk in Turkey, Reza Shah in Iran, and Mohammad Ali in Egypt, introduced were superficial changes that influenced the surface/exterior presentation of society, without really changing long held norms and beliefs. "They did not hesitate to relinquish the 'old' in favor of what was new or

[213] Yvonne Yazbeck Haddad, *Contemporary Islam and the Challenge of History* (Albany: State University of New York Press 1982) 9.
[214] *Ibid.* at 9.

fashionable. They appropriated Western methodology or technology for its own sake, rather for its proven efficacy"[215] in society. They were apologetic Muslims, as they saw their Islamic mode of life inferior to that of modern Europe.

The fundamentalist or Islamist Muslim scholars and activists on the other hand, are those who find the authority of the past valid for the present and the future. They refuse any compromise on changing religious laws and norms. For the fundamentalist the past is ideal, and if Islam were to re-appropriate it, it would regain its ascendancy to the world.[216] In essence, for the Islamist-minded Muslim, Islam as it is understood and practiced today has been corrupted by Muslim leaders and non-Muslim imperialists, who have sought to deprecate the glory of Islam by making it "Western." In other words, they see that the purity of religion has been violated and they seek to redeem it by going 'back to the roots.' The Islamists saw the answer to modernizing or catching up with the West only by relying on Islam and its methodologies. They saw the salvation of the Islamic society in upholding the laws of the Shari'a and by instituting an Islamic state. Indeed, they are modern in their rational approach to religious interpretation; in that they claim that Islam is compatible with modern demands. But their insistence on observing the Shari'a wholeheartedly limits the scope of their communication and interaction with those who do not dogmatically follow the Shari'a. However, it must be noted, that they have no problem with adopting modern technology to improve life economically and scientifically. But they reject any form of modern political and social changes. Abu-Lughud argues that the Islamists of today are often branded as "medieval" by their opponents. Though, they invoke the past and self-righteously denounce certain versions

[215] *Ibid.* at 10.
[216] *Ibid.* at 9.

of modernity; yet they are very much a part and product of modernity and are best seen as striving—like all contemporaneous social movements—for an alternative modernity.[217] We can see the manifestation of these modern fundamentalist readings of Islam in the goals aspired to by the Muslim Brotherhood in Egypt and the (later) revolutionaries in Iran. Islamists see any nuance in religious practice as Western infiltration, deemed at corrupting the purity of the faith. Many argue that the fundamentalists have politicized Islam in that they are using religion as a tool to establish states with strict political codes sanctified by religious injunctions. One can almost see the religious social and political agenda of the Islamists as a rational approach in the interpretation and application of religion, in order to establish it as a new all-encompassing social, political, and economic system that will influence all aspects of daily life for people living under Muslim laws.

In the spirit of revival and reform, the contributions of modernists, secularists and Islamists are important to take into consideration as their thoughts have come to influence the position of women in different Muslim societies. Either by calling for changes in the educational system and advocating education for women like Abduh who argued that: "We wish that our daughters should be educated. For Allah the Almighty... to them are due to same goods that we expect from them," [218] and later by Qasim Amin. Just as the modernists and Islamists initiated the task of re-reading and re-interpreting the Quran and the *hadith*, Muslim women have also taken it upon themselves to read the Quran from a woman's point of view and rationally analyze and interpret the laws on marriage, divorce, child custody, inheritance, and the concept of *hijab* arguing for change and improvement in a spirit that would uphold the individuality, freedom and dignity of

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[217] Lila Abu-Lughod, "Feminist Longings and Post-Colonial Conditions" in *supra* note 210 at 4
[218] Leila Ahmed, "Egyptian Women and Reformism" in Abida Samiuddin and R Khanam, eds , *Muslim Feminism and Feminist Movement* (Delhi: India Global Vision Publishing House 2002) 145

women living in Muslim countries The rational approach of women, in claiming that religion constitutes *an* aspect of their selfhood and that it should not limit their participation in public political and social life can be seen as a new extension to the earlier male modernist approach to interpreting Islam

Conclusion: Law, Power and Authority

Cover reminds us that we live in a nomos--a normative world, which is "held together by the force of interpretive commitments--some small and private, others immense and public These commitments--of officials and of others--do determine what law means and what law shall be "[219] He also remind us that "interpretation suggests a social construction of an interpersonal reality through language" [220] and that the authorities have the power to engage in the social construction of meaning, and choose a narrative to be dominant from the rest of the other narratives that exist within society Although, Cover refers to this exercise of power in legal interpretation and legal imposition as an act of violence, it is perhaps a necessary violence in order to guarantee the continued life and order of society

However, in the violent imposition of one narrative dominant over the other, Cover also reminds us that alternative narratives also exist and thrive in their struggle to keep their nomos alive He discusses the struggle of the Amish in establishing a legal world of their own separate from the influence and jurisdiction of the dominant state Cover argues

> The point that is relevant here is not only that private lawmaking takes place through religious authority, contract, property, and corporate law (and of course through all private associational activity), but also from time to time various groups use these universally accepted and well-understood devices to create an entire *nomos*--an integrated

[219] *Supra* note 2 at 7
[220] *Supra* note 148 at 1602

> world of obligation and reality from which the rest of the world is perceived At that point of radical transformation of perspective, the boundary rule--whether it be contract, free exercise of religion, property, or corporation law--becomes more than a rule It becomes constitutive of a world A world is turned inside out, a wall begins to form, and its shape differs depending upon which side of the wall our narratives place us on [221]

In this world of competing narratives and competing worlds of law, Cover's argument that there are always alternative worlds of meaning and alternative visions in the making, is instructive in situating the development and evolution of the Islamic legal framework and the alternative narratives that have been developed by reformist men and women about Islamic laws and norms Cover notes that "[W]hen groups generate their own articulate normative orders concerning the world as they would transform it, as well as the mode of transformation and their own place within the world, the situation is different--a new nomos, with its attendant claims to autonomy and respect is created " [222] This new nomos which comprises new narratives and experiences serves as an alternative world of legal meaning

The importance of considering these narratives and discourses as new worlds of law is to consider their power to transform and restructure existing legal frameworks, especially when they concern the rights and dignity of people A brief glimpse at the construction of authority in Islamic legal history, and the narratives that they have chosen to represent Islamic norms reveals that they had committed an act of violence by deeming one narrative, one set of norms and values as dominant and instructive to the rest of the community, most especially in the area of women's rights The issue is not that there is violence in the work of the jurists, but that they are an exclusive and powerful group of interpreters who give meaning to the text and devise laws there from As such, the lack of

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[221] *Supra* note 2 at 31
[222] *Ibid* at 34

participation of women as authors, or authorities, is important to consider. Although it is clear that women have been active participants in the history of Islam, nevertheless, their voices and opinions have not been taken into consideration and certainly they have never been included in their capacity as interpreters and narrators of the law.

However, in tandem with the reformist movement that has animated Islamic history since the nineteenth century, women scholars and activists have also taken it upon themselves to narrate what the law ought to be from a Muslim feminist perspective. Their narrations and proposals will be discussed and explored in the following chapters. Considering the history of the formation of Islamic laws and norms, and the construction of voices of authority we will have to explore how the Muslim feminists' new narrative can constitute an authoritative *nomos,* capable of changing laws and social traditions for Muslim men and women around the world.

Chapter 3
Muslim Feminist Narratives (I)

I. Introduction

The boundaries of law are constantly challenged by groups of people whose alternative narratives lie outside the borders of the law. These groups seek recognition of their realities and demand for the inclusion of their voices and visions within the corpus of mainstream jurisprudence. Muslim women hold a precarious place within Islamic jurisprudence both as insiders (as subjects of the law), and as outsiders (as persons whose realities and needs often conflict with what the law currently is). As outsiders, their narratives of what the law ought to be lie outside the nomos of Islamic law. As such, by producing alternative narratives they not only challenge the frameworks of Islamic jurisprudence but they also challenge the dominant narratives of male jurists. In doing so they create their own nomos—or world of law, which incorporates their narratives and definitions of what the law ought to be.

However, since the early days of Islam women have been active participants in the formation and evolution of the Islamic community.[223] The women of early Islamic history were conscious of the potential transformative power that Islamic norms and laws had and were adamant about the recognition of their different needs. In fact they succeeded in this project by having chapter four of the Quran *Surah Al-Nisa* (the women) addressed to them. While, the success of recognition as separate entities in the Quran and Prophetic action have been quite helpful in elevating the status of women in Islam, nevertheless, women have seldom been authors of Islamic laws and norms. This

[223] *See* for example, Guity Neshat and Judith Tucker, eds., *Women in the Middle East (Restoring Women to History)* (Bloomington, Indiana: Indiana University Press 1999).

exclusion from the realm of law-making and norm-setting has granted male jurists near exclusive power in determining the legal fate of women in matters of marriage, divorce, child custody, inheritance, witness testimony, and criminal procedure.

The emergence of women's activism and "Islamic Feminism" in the early years of the twentieth century has given birth to the scholarship and activism of Muslim feminists who are producing their own narratives of what Islamic laws and norms *ought to be* with regards to women's rights. These authors and narrators are critical of Islamic legal systems and their normative frameworks, and seek reform and change in the hopes of achieving gender equality and empowerment within Islam. There are many feminist scholars and activists writing from within Islamic countries and scholars writing in the West. Both group of scholars, writing from inside and outside Muslim borders are conscious of the possible backlash that their scholarship and activism might invite from conservative forces. However, it is arguably correct to note that writing within the confines of Western academia, while conscious of the religious sensitivity of the matter, gives scholars greater freedom of expression and greater freedom to critique and analyze the Islamic discourse for what it is and what it ought to be.

This chapter will closely study the work of three feminist Muslim scholars who mainly write in English and whose works are widely published in the United States. These female scholars are among many scholars and activists who are producing new narratives on Islam and Islamic law. This chapter will study the work of these scholars on two different levels. First, through the lens of critical discourse analysis it will analyze how these women are deconstructing the language of the law and most importantly the influence that politics and patriarchal thought have had in constructing the law. Second,

by using Cover's notion of nomos, it will see whether these feminist Muslims are producing a new narrative; that is if they are creating a new nomos which incorporates their interpretations and meanings of the law. It is important to note that these feminist Muslims, are among a group of scholars and activists who call themselves "progressive Muslims" and are seeking to find new discourses within Islamic intellectual thought. As such, the scholars that this chapter studies are not producing their work within a vacuum rather, they are influenced both by feminist scholarship and progressive Islamic intellectualism that has given birth to Islamic feminist thought. Each of these scholars has been influenced by their upbringing, and the history and politics of their geographic location affects the way they study and think about Islam.

Leila Ahmed is the first appointed professor of religion and women's studies at Harvard's Divinity School. She was born and raised in Egypt and studied at Cambridge, England. Fatima Mernissi is a Moroccan sociologist who was born and raised in Morocco, studied in Paris and still teaches and lives in Morocco. Ziba Mir-Hosseini was born and raised in Iran and studied in England. Her work is primarily focused on women's rights under the Islamic Republic of Iran's family law system. The work of these scholars is characterized by the diversity of their approaches and the extent of their scholarship. Studying the different works of these scholars allows one to follow their train of thought and the changes they have undergone throughout the years. Their work provides a critique of the Islamic legal framework and establishes the contours of a possible new narrative in Islamic law, which is feminist, Muslim and authoritative. These three scholars address different aspects of Muslim women's lives such as marriage, divorce, child custody, and general social attitudes towards women. As such, to avoid

repetition I have selected a couple of arguments from each author to discuss and analyze

It is important to note that although the academic work of these scholars provides a new narrative and reading of what women's rights can be under the rubric of Islamic law, nevertheless, none of these scholars employ the tools of *ijtihad* or *fatwa* in their proposals for change, which highlights the greatest challenge that exists According to Islamic law only male jurists have the right to use *ijtihad* and *fatwa* to change existing laws This shows the limitations of narrative or interpretative approaches Nevertheless, alternative narratives must exist in order to challenge existing laws and push the authorities to produce new laws

II. Islamic Feminism

With the emergence of a Muslim reformist-revivalist movement in countries such as Egypt, Syria, Turkey and India in the twentieth century—which had been subject to European colonialism—a wave of feminist movements burgeoned as well [224] Hadad notes that "[F]or many Muslim women from nations that achieved independence from Western colonialism, the twentieth century has been a time of struggle both against colonial occupation and for what has been termed "the liberation of women "[225] Countries such as Iran, Turkey and Egypt in particular have very well documented women's movements[226] which highlight the participation of women in nationalist movements as citizens demanding recognition of women's unique social, political and economic needs

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[224] *See* for example, Nikkie Keddie, *Women in the Middle East Past and Present* (Princeton, NJ Princeton University Press 2006), Deniz Kandioti, Ed *Women Islam and the State (Women in the Political Economy)* (Philadelphia Temple University Press 1991)

[225] Yvonne Yazbeck Haddad, Jane I Smith and Kathleen M Moore, *Muslim Women in America The Challenge of Islamic Identity Today* (New York Oxford University Press 2006) 143

[276] *See* for example, Leila Ahmed, "Women and the Advent of Islam" 11 Signs No 4 665 (Summer 1986)

The activism of women in Muslim countries includes the added complexity of working through religious narratives and laws unraveling the influence of centuries of patriarchy in interpreting religious texts and establishing institutions exclusive of women's voice Spellberg notes

> The medieval male conversation about women, often brilliantly argued, utilize the Quran and its interpretation, along with the prophetic utterances and actions found in *hadith*, but often takes these precedents into new venues and refines them with distinct authorial intent and inter-textual results Through interpretation, selectivity, and embellishment, the feminine is derived by male authors from the female, whether symbolic or historically attested Ostensibly religious sources become the basis for larger often vexed social issues of political polemic and communal identity, sacred biology and female sexuality, and the problematic of idealized or exemplary women [227]

Hence, engagement with religious narrative and text becomes the first and most important step in demanding change in laws, norms and narratives for women living under Islamic laws As such we have the birth of Islamic feminism, where "feminist activity asserts itself in the Islamic sphere, and we find ourselves re-examining these old patriarchal interpretations and shaking them at the root"[228] Islamic feminism can be defined as the search for gender justice and equality within the discourse of Islamic law For Cooke, Islamic feminism is an invitation to consider "what it means to have a double commitment to a faith position on the one hand, and to women's rights"[229] Being an Islamic feminist involves a "complex self-positioning that celebrates multiple belongings To call oneself an Islamic feminist is not to describe a fixed identity but to create a new, contingent subject position This location confirms belonging in a religious community

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[227] Denise A Spellberg "History Then, History Now The Role of Medieval Islamic Religio-Political Sources in Shaping the Modern Debate on Gender" in Amira El-Azhary Sonbol, ed *Beyond the Exotic Women s Histories in Islamic Societies* (New York Syracuse University Press 2005) 4

[228] Azizah Al-Hibri, An Introduction to Muslim Women's Rights in Gisela Webb, ed *Windows of Faith* (New York Syracuse University Press 2001) 60

[229] Miriam Cooke, "Multiple Critiques Islamic Feminist Rhetorical Strategies' 1 Nepantla Views from South 1 (2000) 93

while allowing for activism on behalf of and with other women "[230] To link these seemingly mutually exclusive identities appears to be an anomaly to many outside observers, but it can also be "a radical act of subversion "[231] The most important aspect of this merger is that Islamic feminists refuse and resist the existing boundaries that others (read male) have drawn around them

Muslim feminists, whether religious or secular "see in Islam something quite different from the patriarchal Islamists and patriarchal religious scholars who want to impose their narrow version of religion upon people "[232] Badron reminds us that religion is not bad per se for women, and a close examination of the discourse produced by Muslim feminists reveals this search for the egalitarian aspects of religious norms and practices Muslim feminists, as Cooke points out, "are claiming that Islam is not necessarily more traditional or authentic than any other identification nor is it any more violent or patriarchal than any other religion They are claiming their right to be strong women within this tradition, to act as feminists without fear "[233]

However, it is important to note that while Muslim feminists have a legitimate claim in seeking to use religious norms and methodology in seeking equality and freedoms, there is a rather complex relationship between Islam and feminism Saba Mahmoud rightly points out that "women's active support for socio-religious movements that sustain principles of female subordination poses a dilemma for feminist analysts On the one hand, women are seen to assert their presence in previously male-defined spheres, while, on the other hand, the very idioms, they use to enter these arenas are grounded in

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[230] *Id*
[231] *Id*
[232] Margot Badron, "Understanding Islam Islamism and Feminism" 13 J Women's History No 1 47 (Spring 2001) 51
[233] *Supra* note 229 at 94

discourses that have historically secured their subordination to male authority."[234] This seeming problematic relationship between Islam and feminism reveals two important dimensions about the work of Muslim feminists. First, feminist activists in Muslim countries are well aware that Islam is beyond religious laws and norms and has deep roots in cultural traditions and political interests. As a result, in order to improve women's rights feminist activists must speak and understand the language of Islamic law. Second, feminist agency within the patriarchal Islamic framework serves to disrupt the system from within using its own language and methodology. This act of resistance reveals awareness of the power and politics of the religious framework and empowers the female agents to take strategic action against its discriminatory laws and narratives. As a result, Islamic feminism can be seen as a holy alliance between a political platform for gender equality and freedom, and the religious notion of human dignity and egalitarianism.

The activism and scholarship of Muslim feminists all around the world has produced a new body of knowledge, which provides an alternative narrative of what Islamic laws and norms can be. "The female silence of the medieval male master narrative has been challenged in the modern period, most strikingly, by Muslim women who have begun to overwrite centuries of gendered silence. The Quran has new contemporary female interpreters."[235] As such, a new era of activism has dawned in the history of political Islam, where feminist Muslims have taken it upon themselves to make

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[234] Saba Mahmood, *Politics of Piety the Islamic Revival of the Feminist Subject* (Princeton University Press 2005) 5-6

[235] Denise A Spellberg, "History Then, History Now The Role of Medieval Islamic Religio-Political Sources in Shaping the Modern Debate on Gender" in Amira El-Azhary Sonbol, ed *Beyond the Exotic Women's Histories in Islamic Societies* (New York: Syracuse University Press 2005) 14

Islamic laws and norms not only relatable to their daily lives but also acceptable and believable as a source of good for many women in their societies.

III. The Scholars and Their Works

1. Leila Ahmed

Leila Ahmed is Victor S. Thomas Professor of Women's Studies in Religion at Harvard Divinity School. She was the first appointed professor of women's studies at Harvard's Divinity School. Prior to joining Harvard she was the director of the Women's Studies Program at the University of Massachusetts-Amherst from 1992 to 1995. She has received her B.A, M.A and PhD in Near Eastern Studies from the University of Cambridge, UK. She was born and raised in Egypt and is an Egyptian-American scholar. Leila Ahmed is one of the most renowned feminist Muslim scholars on women and Islam and is often considered one of the founders of the Islamic Feminist discourse in the West.

Ahmed was born in Heliolopolis, Egypt in 1940 to an upper-Middle class family. She was brought up in a secular family where her father, a civil engineer, considered himself a modern Egyptian man, who sent his children abroad for college. Although she did not experience the restrictions of patriarchal Islam, nevertheless she notes: "[I]t is easy to see now that our lives in the Alexandria house, and even at Zatoun, were lived in women's time, women's space. And in women's culture. And the women had, too, I now believe, their own understanding of Islam, an understanding that was different from men's Islam, of "official" Islam."[236] In her family, it was only her grandmother who performed the daily prayers and it was through her that Ahmed learned about Islam. However she argues, "for all the women of the house, religion was an essential part of

[236] Leila Ahmed, *A Border Passage: From Cairo to America A Woman's Journey* (New York: Penguin Books 2000) 120.

how they made sense of and understood their own lives. It was through religion that one pondered the things that happened, why they had happened, and what one should make of them, how one should take them." [237]

Ahmed grew up in a household where religion was about private inner feelings and the outward signs of religion--namely praying, fasting or wearing the *hijab*--were mere representations of religiosity not necessarily piety. In fact the only religious dictum that her mother insisted on throughout her upbringing was quoting a verse from the Quran which reads: "He who kills one being [*nafs*, self, from the root *nafas*, breath] kills all of humanity, and he who revives, or gives life to, one being revives all of humanity." [238] Although, Ahmed grew up in a house where women and men were not strictly separated, nevertheless, from a young age she was aware of different narratives that existed between the world of women and the realm of men, and their understandings of Islam. She notes, "Generations of astute, thoughtful women, listening to the Quran, understood perfectly well its essential themes and its faith. And looking around them, they understood perfectly well, too, what a travesty men had made of it."[239] As such, she said the women around her weren't interested in listening to the sermon of sheikhs, because they "didn't believe that the sheikhs had an understanding of Islam superior to theirs."[240] However, as she progresses to different decades, she realizes a change in attitudes and perceptions towards Islam. With the rise of Pan-Arabism and Nasserism in Egypt and the birth of the Muslim Brotherhood, Ahmed states: "[W]e seem to be living in an era of progressive, seemingly inexorable erasure of the oral traditions of lived Islam

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[237] *Ibid.* at 121.
[238] Supra note 236 at 122.
[239] *Ibid.* at 127.
[240] *Ibid.* at 124.

and, simultaneously, of the ever-greater dissemination of written Islam, textual 'men's' Islam as *the* authoritative Islam." [241] This other Islam to Ahmed, is the "Islam of texts, is a quite different, quiet other Islam: it is the Islam of the arcane, mostly medieval written heritage in which sheikhs are trained, and it is "men's" Islam."[242] This "textual-male-authoritative" version of Islam is not only foreign to Ahmed's upbringing, but it at times it also becomes problematic to understand and believe in for Ahmed. As such, she sets out to discover the foundational discourses that have influenced the development of authoritative "male" Islam.

Ahmed's most important work seeks to discover the variety of discourses that have affected the lives of Middle Eastern women. In *Women and Gender in Islam: Historical Roots of a Modern Debate*,[243] Ahmed observes that:

> [D]iscourses shape and are shaped by specific moments in specific societies. The investigation of the discourses on women and gender in Islamic Middle Eastern societies entails studying the societies in which they are rooted, and in particular, the way in which gender is articulated socially, institutionally, and verbally in these societies.[244]

One of the most important aspects of Islam that Ahmed reminds us of is the ease to which Islam absorbed and assimilated into the cultural and religious practices that existed before its birth. Islam claims to be the last of the monotheistic, Abrahamic traditions. As such, "once Islam had conquered the adjacent territories, the assimilation of the scriptural and social traditions of their Christian and Jewish populations into the corpus of Islamic life and thought occurred easily and seamlessly."[245] Ahmed traces mores establishing the seclusion of women from the rest of society and veiling women to practices among the

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[241] *Ibid.* at 128.
[242] *Ibid.* at 125.
[243] Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven, CT: Yale University Pres 1992).
[244] *Supra* note 243 at 2.
[245] *Ibid.* at 243 at 3.

Zoroastrians, Christians and Jews in the Middle East and Mesopotamia before the dawn of Islam. Zoroastrianism was the official religion of the Sasanian Dynasty (224-651 C.E), which encompassed modern day Afghanistan, Iran, Iraq, Syria and the Caucuses. According to Zoroastrian practices, the wife was totally obedient to the husband and upon marriage was required to declare: "I will never cease, all my life, to obey my husband."[246] The value of a woman in Zoroastrian society was solely to produce children, mainly boys, as heirs.

From Ahmed's account's women had no right over their own being, and could be traded or loaned to other men for the sole purpose of reproduction without having any decision-making power. Ahmed notes that in Zoroastrian Persia, women were "notionally somewhere between personhood and thingness—as evidenced by wives being legally loaned for sexual and other services."[247] Women were not only sexually controlled but they had little or no rights in their marriage, and lost their property to their husbands upon marriage. With the dawn of Christianity in the region, many men and women converted to Christianity at the expense of being persecuted by the Zoroastrian elites. However, it's interesting to note that women converted to Christianity because they vowed celibacy and stated that they were now married to Christ. This not only challenged the authority of the Zoroastrian priests and male dominance but it established that contrary to established law, women were now in charge of their own bodies. As a result, a number of women were martyred in this way.[248]

The rise of Islam in Arabia in the seventh century brought about new changes to the practices of the Arab tribes living on the peninsula. Islam put an end to female

[246] *Ibid.* at 243 at 19.
[247] *Ibid.* at 243 at 21.
[248] *Ibid.* at 243 at 24.

infanticide, made women subjects of the marriage contract, established the *mahr* (dower or wedding gift) to be given to the woman directly (instead of her father), limited the number of wives a man could have at any given time and established the right to inheritance and property rights for women. Despite the many changes, Ahmed argues that the situation of women was different from community to community and in some instances women enjoyed greater sexual autonomy in the *jahilia* in marriage. In addition, women were active participants as leaders in a wide range of community activities, including religion and warfare. "Their autonomy and participation were curtailed with the establishment of Islam, its institutions of patrilineal, patriarchal marriage as solely legitimate, and the social transformation that ensued."[249] To further iterate her point, Ahmed compares the marriage of the Prophet to Khadija his first and only wife until her death. Khadija was the product of *jahilyya* culture. She was married twice before and was an independent and wealthy businesswoman. It was Khadija who hired Muhammad to conduct business for her, and it was she who proposed to a young Muhammad (twenty-five) at the age of forty. On the other hand, Ahmed discusses the marriage of the Prophet to Aisha the daughter of Abu Bakr during the transition period, where the Muslims were just forming their community. Aisha "was born to Muslim parents, married Muhammad when she was nine or ten, and soon thereafter, along with her co-wives, began to observe the new customs of veiling and seclusion."[250]

Ahmed is similarly critical of the laws of marriage and divorce that Islam established and argues "the type of marriage that Islam legitimized, like its monotheism, was deeply consonant with the socio-cultural systems already in place throughout the

[249] *Ibid.* at 243 at 42.
[250] *Ibid.* at 243 at 43.

Middle East "[251] In other words, although women became parties of their marriage contract and their consent was an important condition of the contract, nevertheless the need for male guardianship in case of virginity and the emphasis on paternity "reformulated the nexus of sexuality and power between men and women "[252] However, in discussing the institution of polygamy and the Prophet's marriage to Hafsa, a war widow, three months after marrying Aisha, she indicates the need of the new community to support its widows and orphans In addition, the right of women to inherit property was a novel idea that was apparently uncongenial and the men of both Medina and Mecca were not happy with the decree Hence, there were changes in customs and laws that did in fact seek to protect and provide for women under different circumstances

In tandem with her critiques, Ahmed discusses the institution of the veil and the seclusion of women, which, were first addressed to the wives of the Prophet There are a couple of verses that specifically address the issue of *hijab* for women and they are as follows

> Ye who believe! Enter not the dwellings of the Prophet for a meal without waiting for the proper time, unless permission be granted you But if ye are invited, enter, and, when your meal is ended, then disperse Linger not for conversation Lo! that would cause annoyance to the Prophet, and he would be shy of (asking) you (to go), but Allah is not shy of the truth And when ye ask of them (the wives of the Prophet) anything, ask it of them from behind a curtain That is purer for your hearts and for their hearts And it is not for you to cause annoyance to the messenger of Allah, nor that ye should ever marry his wives after him Lo! that in Allah s sight would be an enormity 33 53

> O Prophet! Tell thy wives and thy daughters and the women of the believers to draw their cloaks close round them (when they go abroad) That will be better, so that they may be recognized and not annoyed Allah is ever Forgiving, Merciful 33 59

These verses were revealed during the Prophet's wedding ceremony with Zeinab bint Jahsh Some of the guests of the Prophet had stayed long after the ceremony was over

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[251] *Ibid* at 243 at 45
[252] *Id*

and the Prophet wanted to be alone with his new wife, however, he was too considerate to tell his guests to leave According to Ibn-Saad author of *Tabaqat al-Kabir* (The Book of Major Classes) during this ceremony at one point Umar's hand touched Aisha's [253] In addition, there are statements from Aisha confirming the notion that Umar had urged the Prophet to seclude his wives to guard them against the insults of the hypocrites [254] As such, these verses first targeted the wives of the Prophet, which Ahmed argues was in effect "creating in non-architectural terms the forms of segregation—the gynaceum, the harem quarters—already firmly established in such neighboring patriarchal societies as Byzantium and Iran." [255]

In addition to seclusion, veiling was another issue that is part of the Islamic heritage. Verse 30-31 of Chapter 24 *Al-Noor* (The Light) read

> Tell the believing men to lower their gaze and be modest That is purer for them Lo! Allah is aware of what they do
>
> And tell the believing women to lower their gaze and be modest, and to display of their adornment only that which is apparent, and to draw their veils over their bosoms, and not to reveal their adornment save to their own husbands or fathers or husbands' fathers, or their sons or their husbands' sons, or their brothers or their brothers' sons or sisters' sons, or their women, or their slaves, or male attendants who lack vigour, or children who know naught of women's nakedness And let them not stamp their feet so as to reveal what they hide of their adornment And turn unto Allah together, O believers, in order that ye may succeed

Veiling was commonplace practice among the upper-class women of the Sassanid dynasty, and for women in Syria and Palestine Ahmed argues, that throughout the Prophet's lifetime "veiling, like seclusion was observed only by the wives of the Prophet."[256] However, after the death of the Prophet and the conquest of Muslims around

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[253] *Supra* note 243 at 54 Ibn-Saad 8 126
[254] *Ibid* at 54
[255] *Ibid* at 55
[256] *Ibid* at 56

the world, the customs and practices of different locales were adopted and in fact assimilated to become part of Islamic civilization

By deconstructing the language of specific verses, Ahmed believes that the establishment of certain laws and norms during the time of the Prophet doesn't indicate an inherent theory of female inferiority in Islam Rather, she believes that the "[E]galitarian conception of gender inhering in the ethical vision of Islam existed in tension with the hierarchical relation between the sexes encoded in the marriage structure instituted by Islam "[257] There is ambivalence in Islamic norms and practices for Ahmed For although women and men are spiritually equal in the eyes of God, nevertheless Ahmed believes that there "are two distinct voices within Islam, and two competing understandings of gender, one expressed in the pragmatic regulations for society, the other in the articulation of an ethical vision "[258] According to Ahmed throughout history, it is the pragmatic regulations that have gained power and control over the lives of women at the expense of silencing the ethical vision of Islam Therefore, there exists an unmistakable belief "in the presence of an ethical egalitarianism that explains why Muslim women frequently insist, often inexplicably to non-Muslims, that Islam is not sexist They hear and read in its sacred text, justly and legitimately, a different message from that heard by the makers and enforcers of orthodox, androcentric Islam "[259] For Ahmed, the practices established under the leadership of the Prophet were "enunciated in a context with far more positive attitudes towards women"[260] than in the following Islamic dynasties The wives of the Prophets were not only very vocal towards him, but

[257] *Ibid* at 64
[258] *Ibid* at 66
[259] *Ibid* at 66
[260] *Ibid* at 67

they were transmitters of Hadith and were a primary source for Muslims in the nascent years of Islam The very notion that they had the authority to be contributors to this tradition shows the openness of that society to accept narrations from women such as Aisha, Umm Salama, Hafsa and Zeinab, the wives of the Prophet

Most importantly Ahmed argues, "the decision to regard androcentric positions on marriage as intended to be binding for all time was itself an interpretive decision, reflecting the interests and perspective of those in power "[261] Transition from the leadership and guidance of the Prophet, to the first four Caliphs and then to the Ummayad and Abbasid dynasties brought about changing attitudes towards women which changed "everything from the acceptability of marrying non-virgins, such as widows and divorcees—to women's legitimate expectations from marriage "[262] Having expanded the boundaries of the Islamic dynasty beyond the boundaries of Arabia, the Muslim conquerors picked up mores and practices from the Zoroastrian and Byzantine elites, adopting the notion of secluding women, having large harems with many wives and concubines, and curtailing women's rights to insert conditions in their marriage contracts These adaptations were not necessarily Islamic as Ahmed argues, rather they became part of the Islamic discourse as the influence of other cultures became permanent As such, the Abbasid caliph "al-Mutawakkil (r 847-861) had four thousand concubines, and Harun al-Rashid (r 786-809) hundreds "[263] So, while the Prophet had many wives who were mainly widows and needed his protection, the latter Caliphs amassed enormous harems exhibiting their power and prestige and desire for different women

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[261] *Id*
[262] *Ibid* at 75
[263] *Ibid* at 83

Having studied the mores and patriarchal practices in the region before the rise of Islam and studying the laws that Islam established, Ahmed argues that the Quran, the main source for ethical and legal formulations "raises many problems as a legislative document, it by no means provides a simple and straightforward code of law."[264] As such, for Ahmed it is not necessarily the verses of the Quran that are problematic but the interpretations that have ensued and been codified as law particularly during the Abbasid period that are responsible for unjust laws towards women For example, she argues, "[T]he legal base of marriage and of polygamy would be profoundly different according to whether the ethical injunction to treat wives impartially was judged to be a matter of legislation or one to be left purely to the individual man's conscience."[265] This is important to consider, given that many of the legal verses were revealed in response to specific situations and many of the verses that are addressed to women's issue all emphasize dealing justly and equitably towards women In addition, there are the actions of the Prophet that lend themselves to this ethical and egalitarian vision By deconstructing the existing discourse, Ahmed reveals the patriarchal narrative that dominates Islamic laws and norms She sees an inherent conflict between the ethical narrative that the Quran and Prophet sought to establish, and the legal narrative that was constructed throughout the centuries by male jurists and scholars

With the establishment of the *madhhabs* and the codification of Islamic laws by the tenth century the notion of the closing of the gate of *ijtihad* ensued Many scholars and jurists believe that it was during this period that exegesis and interpretation of the sources were exhausted and all laws were final now In other words, "the duty of jurists

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[264] *Ibid* at 88
[265] Id

thencefoith was to imitate his piedecessois, not to originate doctiine In effect the law as it had evolved over the fiist Islamic centuiies was consecrated as the complete and infallible expression of divine law "[266] In othei words, only a set numbei of interpretations aie authoritative and valid and the iest is void and in fact declaied heretical For Ahmed, this is the most problematic aspect of Islamic jurisprudence because the influence of the Abbasid elite and their patriarchal notions can be traced in the laws that we have today "To question whether the body of consecrated Islamic law does in fact iepresent the only possible legal interpietation of the Islamic vision is surrounded with awesome interdictions"[267] she aigues Howevei, given the discussions in the previous chapter about the role of authority in Islam, "this is undeistandable, because, the authority and powei of orthodox religion, whose interests weie closely bound up in the Abbasid period with those of the ruling elite, and the state, depended on its claiming a monopoly of truth and on its declaring its version of Islam to be absolute and all other interpretations heresies "[268] However, despite an oithodox grip on Islamic legal and normative interpietation, theie have been many attempts throughout history by both women and men to revive and re-interpiet Islamic texts in search of greater equity and justice for women in Muslim societies

While the laws of marriage, divorce, veiling and seclusion were not conducive to women's rights, nevertheless their right to inherit and independently own property, allowed women throughout the centuries to engage in business transactions and invest in properties Ahmed notes, that wealthy women invested in the spice trade or even the slave trade from the eleventh century onward Women also invested in real estate and

[266] *Ibid* at 90
[267] *Ibid* at 94
[268] *Id*

many of them established *waqfhs* or endowments in their names, which were later invested into building schools, mosques or even orphanages. The evidence from women's endowment activities in sixteenth century urban Turkey, or eighteenth century Aleppo, "attests that Muslim women were not, after all, the passive creatures, wholly without material resources or legal rights."[269] However, it must be noted that they were "active within the very limited parameters permitted by their society"[270]. For example, Ahmed notes, "they were limited to acquiring property essentially though gift or inheritance."[271]

Other than owning property or engaging in business (albeit in limited spheres), perhaps the most important activity that women engaged in, and which, continues to be a site of struggle to this day, is access to education. Women's education is the most important aspect of their empowerment and liberation, and during the medieval period a limited number of women were able to read the Quran and studied *hadith*, *tafsir*, and *fiqh*. Many of these women were the daughters of noted scholars and sheikhs who also trained their daughters in religious studies. Ahmed provides many examples of such women. For example, she mentions Khadija bint Muhammad (d. 1389) who had extensive knowledge of the *hadith* collection of Al-Bukhari. She also notes, that Princess Tadkharay established a convent for Zeinab bint Abu'l-Barakat, and her women, who were elite scholars of the Quran. These female scholars often taught women only, but some like Bay Khatun (d. 1391) taught both men and women in Syria and Egypt.[272] Women's education and liberation also became an issue in the encounter of the Muslim world with European colonizers. Ahmed notes, that for "women in general the effects of European and cultural

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[269] *Ibid.* at 111.
[270] *Id.*
[271] *Ibid.* at 112.
[272] *Ibid.* at 114.

encroachment were complicated and, in certain respects dividedly negative Nonetheless, in crucial ways the outcome of the process of change that the encroachment set in motion was broadly positive "[273] This is so because, the social institutions of seclusion and control of women were gradually dismantled Ahmed argues that the social system that existed "had combined the worst features of a Mediterranean and Middle Eastern misogyny with an Islam interpreted in the most negative way possible for women, and Middle Eastern women have no cause to regret its passing "[274] Jamal al-din Afghani (1839-97) and Muhammad Abdu (1849-1905) were two of the most important reformers of this period who urged education as a means towards upward mobility Egypt was one of the first countries to establish government-funded schools for girls By 1875 notes Ahmed, "out of 5, 362 students some 890 were girls "[275] In 1892 Hind Nufal published the first magazine for women entitled *Al-fatat* (the young woman) [276] Ahmed provides numerous examples of women writing in journals and newspapers on issues concerning women in Egypt during the late nineteenth century

Encounter with the West brought about change in the discourse on women, which as Ahmed noted were negative and positive at the same time The publication of Qasim Amin's *Tahrir al-Mar'a* (The Liberation of Women) in 1899 caused a great debate about women's education and veiling, the remnants of which continue to this day Unlike Abdu and Afghani's who advocated reviving Islam to meet the demands of the Modern West by educating both men and women and changing divorce laws, Amin's book proved very controversial because he advocated for removing the veil, an issue that had religious and

[273] *Ibid* at 127
[274] *Ibid* at 128
[275] *Ibid* at 137
[276] *Ibid* at 141

cultural ramifications. Ahmed argues that Amin's book advocated for women's rights in light of the colonial ideas of Lord Cromer and the missionaries who occupied Egypt from 1882 to 1922. "The peculiar practices of Islam with respect to women had always formed part of the Western narrative of the quintessential otherness and inferiority of Islam"[277] notes Ahmed. As such, Amin (a French-educated upper-middle-class lawyer) advocated for the Muslim society to abandon its backward ways and follow the Western path to success. After critiquing the laziness of the Egyptian woman who does not even do housework and doesn't comb her hair, Amin says that it is necessary to educate woman so as to "enable them to fulfill their function and duty in life as wives."[278] Amin wanted educated wives to run the household, to plan its budget and to make their husbands feel comfortable!

With regards to veiling he argued that secluding girls from the age or twelve or fourteen was depriving them of developing their talents and skills. "Girls needed to mix freely with men, for learning came from such mixing."[279] For Ahmed, Amin's book "marks the entry of the colonial narrative of women and Islam—in which the veil and the treatment of women epitomized Islamic inferiority—into mainstream Arabic discourse."[280] However, she notes these early discourses have led to a narrative of resistance[281] where the dignity and validity of all native cultures were asserted against colonial narratives of inferiority.

Women's participation in the nationalist movement against British colonialism in Egypt brought about the establishment of a visible and vocal feminist movement headed

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[277] *Ibid.* at 149.
[278] *Ibid.* at 159.
[279] Ahmed citing Amin (55-56) *Supra* note 243 at 160.
[280] *Id.*
[281] *Ibid.* at 165.

by two different groups. The secular, Western-oriented Huda Sharawi founded the Egyptian Feminist Union (1923) and upon returning from the International Women's Alliance Conference in Rome (1923) she removed her veil in a symbolic act of liberation. On the other hand, there was Malak Hinfi Nassef who was opposed to unveiling and "searched for a way to articulate female subjectivity and affirmation with native, vernacular, Islamic discourse."[282] Although these women had divergent views and methodologies nevertheless, they both heavily pushed for women's education, reform of marriage and divorce laws and an end to polygamy. Ahmed also cites the activities of women such as Zeinab al-Ghazali who founded the Muslim Woman's Association. Al-Ghazali was an Islamicist and helped woman study Islam, ran an orphanage and eventually made a pact with Hasan al-Banna the founder of the Muslim Brotherhood in Egypt. She believed that Islam provided women with everything including economic, political and social freedoms. What is important to consider is that there were divergent and diverse voices informing the feminist movement within Egypt a country that mirrored developments in the rest of the Arab world.

Having traced a diversity of Islamic discourses before the dawn of Islam to the twentieth century, to the acts of both by removing the veil (as a sign of liberation) and re-veiling (by university students in the late 1990's in Cairo and Alexandria), Ahmed reminds us that looking at laws and norms affecting woman requires a deep understanding of the socio-historical and political context of issues. She notes the Islamist position of returning to "authentic" Islam, the Islam of the Prophet's time is problematic because, it is flawed to assume that the "meaning of gender informing the first Islamic society is reducible to a single, simple, unconflicted meaning, as well as to

[282] *Ibid.* at 174.

assume that the correct interpretation was the one captured in the corpus of Muslim thought and writing constituting the heritage of establishment Islam." [283] For Ahmed, there has been resistance to dominant views on two different levels in the twentieth century by reformers. On the one hand there is resistance to the legacy of Western colonialism and notions that Islam is inferior, and on the other there is resistance to the meaning of gender that "establishment Islam" has offered up until now. Her analysis of the historical and political narrative of Islam reveals the multiple narratives that have intertwined to make one authoritative (read patriarchal) Islamic narrative on the rights and duties of Muslim women dominant. By deconstructing the existing framework into different pieces, she is also establishing her own narrative of what the law ought to be regarding women. She believes that the ethical vision of Islam as embodied in the verses of the Quran and Prophetic action speak of a more just and egalitarian relationship between men and women in Muslim societies.

Resisting the dominant narrative is the task at hand for Muslim women whether they are combating the discriminatory and dominant narratives of Islamic law or "men's Islam", or whether they are resisting dominant Western, feminist narratives that see the Muslim woman as the "other." For Ahmed, this was a personal journey that she went through, moving from Egypt, to Cambridge, England and eventually coming to the United States. She quotes Simone De Beauvoir: "One is not born a woman but rather becomes one" in her memoirs and says, "I obviously was not born but became black when I went to England. Similarly, of course, I was not born but became a woman of color when I went to America."[284] For Ahmed it was not only the Western colonizers that

[283] *Ibid.* at 239.
[284] *Supra* note 14 at 238.

made the native culture and religion sound backward, but Western feminism also struggled to communicate with the feminism of Muslim women She notes her transition to America was not easy, and it was certainly not easy to transition to women's studies She attended conferences in the early 1980's and she notes that Muslim panelists "could not pursue the investigation of our heritage, traditions, religion in the way that white women were investigating and rethinking theirs "[285] In reading through women's studies materials and attending conferences Ahmed states

> I wasn't a "Third World woman," or didn't count—was invisible Third World women ' I came to understand could mean one of three things first, it could mean minority women in the United States, second, it could mean Puerto Rican or African women (but with an excluding notion of Africa, a funny-shaped shrunken continent- no Egypt, Morocco, Sudan), third, it could mean a Third World that had achieved visibility through revolution, as in China or Cuba [286]

In her first encounters with feminism in Western academia Ahmed had noticed that not only were Muslim women invisible but they were also the "other " Although, she notes there are many similarities in the patriarchal vision of Islam, Judaism and Christianity, Ahmed notes that in those early days instead of analyzing that which was problematic we ended up defending what our audience considered indefensible Thus Ahmed notes, "[I]n contrast to their situation, our salvation entailed not arguing with and working to change our traditions but giving up our cultures, religions, and traditions and adopting others "[287] Although much has changed since then, and Western feminism has encountered her Muslim sister, and her mode of feminism has become part of the women's studies programs as well Nevertheless misperceptions about Muslim women still prevail in the West

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[285] *Supra* note 14 at 292
[286] Leila Ahmed, "Encounter with Feminism A Muslim Woman's View of Two Conferences" 25 Women's St Q No 1/2 268 (Spring-Summer 1987) 269
[287] *Supra* note 236 at 292

In discussing the situation of Muslim women on American Public Media show "Speaking of Faith"[288] Ahmed seeks to dispel some of the misperceptions about Muslim women in a post 9-11 world Ahmed talks about how history repeats itself where the war on Afghanistan was also shrouded in the notion that the Americans were going to liberate Afghan women from the Taliban Afghan women removing their veils or *burgha's* resonates with what Lord Cromer said in Egypt, that Muslim women had to throw off their veils so that Muslim men could now be civilized She draws a parallel between the colonial British policies in Egypt and current views on Muslim women with Laura Bush claiming to liberate Afghan women is a way to politically manipulate the goals of the intruders, argues Ahmed She notes that all these discourses disguised in the symbolism of the veil and liberation of women is a way of putting down Islam and dismissing it as all bad

Ahmed notes that the "Quran says justice is foundational to society, so the notion of justice changes with the society that we live in"[289] Going back to the power of interpretation Ahmed is cognizant of the fact that ethical norms and religious practices can have different meanings and interpretations to different generations of Muslims For example, she discusses her own reaction to veiling or wearing the *hijab* Having grown up in Egypt at a time where no one, other than her grandmother, would wear a scarf, Ahmed is honest in pointing out that her first reaction was not very positive to young women wearing the *hijab* in 1990's Egypt However, she says that the *hijab* can have

[288] Leila Ahmed ' Muslim Women and Other Misunderstandings" ABC News Transcript December 7, 2006 http //religionandpluralism org/MediaSummary/PDFs/Dec1Dec312006/Quoted/MuslimWomenAndOtherMisunderstandings120706 pdf

[289] ' Islamic Feminism" http //www npr org/templates/story/story php?storyId 1474694

different meanings to different groups of people, and it can be a way of asserting one's identity as young Muslim women veiling in Egypt or in the United States.[290]

Resisting the dominant narrative, whether it is the textual-authoritative-male version of Islam, Western Colonialism or dominant feminist discourses, Ahmed constantly seeks to fit the "other's" point of view in mainstream discourse. She emphasizes the importance of ethical Islam in interpreting the sources of law, and tries to dispel the notion that the native culture is inferior. In her introduction to feminist discourse, she has tried to establish a place for Muslim feminist narrative, to establish it as valid and indeed authentically feminist in its search for gender equality. While celebrating the ethical vision and voice of Islam either through Prophetic action or the actions of Muslim women themselves, Ahmed does not shy away from criticizing the patriarchy that exists within Islamic mores. She stands against all Muslim apologists that say Islam is the best thing that has happened to women. As such, throughout her work, Ahmed makes us aware of the dominant discourse (male, colonialism, feminism) and the particularized powerless alternative narrative (Muslim and woman) that is seeking to break barriers and gain recognition of its existence. Thus, Ahmed represents a new generation of Muslim feminist scholar-activists, in that they believe in the good of their religion, but also want to change that which is patriarchal and not in sync with the spirit of egalitarianism that religious norms ought to prescribe. Fatima Mernissi is another pioneer feminist scholar whose academic work will continue to influence a generation of Muslim women.

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[290] *Id.*

2. Fatima Mernissi

Fatima Mernissi is a Moroccan sociologist and professor at Mohammad V University in Rabat, Morocco. She is a prolific author whose works outline the historical and political dimension of women's status and rights in Islamic history. Mernissi studied Political Science at the University of Rabat, the Sorbonne in Paris and earned her PhD from Brandeis University (Massachusetts).[291] She lives and writes from Morocco and her works are mainly written in English, French and Arabic. They have become central to our understanding of the complex relationship between women and Islam.

Mernissi was born in a harem in Fez, a ninth-century Moroccan city in 1940.[292] In her autobiography entitled, *Dreams of Trespass: Tales of a Harem Girlhood*, she notes that she was born in the "midst of chaos, since neither Christians nor women accepted the frontiers. The problems start, said Father, with women, when the *hudud*, or sacred frontier is not respected."[293] Having grown up in a harem, where boundaries separated the lives that women and men lived, Mernissi grows up trying to explore the meaning and consequences of the laws and norms of *hudud*. Through the characters that she portrays and stories she tells, however, Mernissi emphasizes that, "women have "dreamed of trespassing all the time. The world beyond the gate was their obsession. They fantasized all day long about parading in unfamiliar streets."[294] Through her work and intellectual ruminations, Mernissi becomes the female heroine of her own tale as she trespasses many forbidden frontiers to conquer territories where knowledge, narrative and law become the cornerstone of her intellectual and spiritual freedom. She is no longer bound to frontiers

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[291] www.oxfordislamicstudies.com
[292] Fatima Mernissi, *Dreams of Trespass Tales of a Harem Girlhood* (Reading, MA: Addison-Wesley Publishing Company 1994) 1.
[293] *Id.*
[294] *Id.*

ordained sacred or profane by the male elite. In fact, she takes us readers on an intellectual journey with her as she wrestles to break the legal and normative boundaries that have imprisoned women for centuries. She deconstructs existing frameworks and provides her own alternative narrative of Islamic legal history.

A recurring theme that Mernissi follows in her different books and articles is the division of space between the feminine and the masculine both literally and figuratively. She highlights the different narratives that exist between women's understanding of and interaction with Islam, and that of the official male version of Islam and its laws. Having grown up in a harem where strict laws regulated the relationship between the male and female members of the household, Mernissi is well aware of the boundaries of *hudud* or the frontier, manifested physically in the form of the house gate and more comically the frontier of chewing gum and smoking cigarettes, which only the male members of the family were allowed to do. However, the existence of a frontier doesn't translate to complete submission. In fact, boundaries are broken and encouraged by the female members of the household! In a discussion that Mernissi has with her mother, her mother argues "the reason why men kept women in harems was to prevent them from becoming too smart."[295] Mernissi notes that if you move around, your mind works faster, because you are constantly seeing new things that you have to respond to. Her Mother contends, "both smoking cigarettes and chewing gum were silly activities, but men opposed them because they gave women opportunities to make decisions on their own, decision which were unregulated by either tradition or authority. "So you see" said Mother, "a woman who chews gum is in fact making a revolutionary gesture. Not because she chews gum

[295] *Id.* at 186

per se, but because chewing gum is not prescribed by the code "[296] It is in exploration of this code of conduct and the authority that it has on the daily lives of men and women that Mernissi seeks to explore in her work

In *Beyond the Veil Male-Female Dynamics in Modern Muslim Society*, Mernissi explores how modern Moroccan women, and women in other Muslim countries, are challenging the traditional boundaries separating women and men She emphasizes that *Beyond the Veil* is a book about "sexual space boundaries," highlighting an aspect of religion (in this case Islam), which is often ignored, namely the way Islam uses space for sexual control and divide In commenting on the contribution of her book, Mernissi argues that *Beyond the Veil* "addresses an ageless problem that is the way societies manage space to construct hierarchies and allot privileges "[297] *Beyond the Veil* was first published in 1975 and since then has been translated into French, Dutch, German and Urdu Similar to her autobiography Mernissi explores the theme of women and space, and identifies Islam, "one of the modern political forces competing for power around the globe"[298] as the raison d'être of this divide

She situates the changing relationship between private women and public men in the post-colonial era where two different groups—fundamentalist males and unveiled women have emerged with "definite and disturbing claims and aspirations "[299] For Mernissi, the most important event affecting Muslim women since 1975 (which is when *Beyond the Veil* was first published) is "the politicization of Muslim women and the new perceptions they have gained of their problems Muslim women, illiterate and educated

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[296] *Id* 187
[297] Fatima Mernissi, *Beyond the Veil Male Female Dynamics in Modern Muslim Society* (Revised Edition, Bloomington Indiana University Press 1987) xvi
[298] *Ibid* at x
[299] *Ibid* at xi

alike, are coming to diagnose and verbalize their problems—previously identified and labeled as being emotional—as being essentially political "[300] Hence, the motto the personal is political has moved across geographic boundaries of the West to Muslim territories where women are politicizing and challenging the *hudud*

A battle seems to be taking place at the frontiers in Muslim lands between the threatened fundamentalists who call on women to wear the veil and go back to the harems and between the veiled and unveiled educated women who want more access in the public sphere "What dismays the fundamentalists is that the era of independence did not create an all-male class Women are taking part in the public feast And that is a definite revolution in the Islamic concept of both the state's traditional relation to women and women's relation to the institutionalized distribution of knowledge "[301] Situating the female activist in front of the male fundamentalist whose status quo is challenged, Mernissi's main contention is that "[W]hat was, and is still, at issue in Morocco and other Muslim societies is not an ideology of female inferiority, but rather a set of laws and customs that ensure that women's status remains one of subjugation "[302] She notes that because the family structure that the Prophet established was so revolutionary everything had to be codified in great detail In this lieu,

> [S]ex is one of the instincts whose satisfaction was regulated at length by religious law during the first years of Islam The link in the Muslim mind between sexuality and the Shari'a shaped the legal and ideological history of the Muslim family structure and consequently of relations between the sexes One of the most enduring characteristics of this history is that the family structure is assumed to be unchangeable, for it is considered divine [303]

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[300] *Ibid* at xiii
[301] *Ibid* at xxviii
[302] *Ibid* at 11
[303] *Ibid* at 20

Hence there is an inherent conflict between traditionalists who believe Islam prohibits any change in sex roles, and between modernists who believe in sexual equality and the liberation of women. [304] The goal of Mernissi is to demonstrate "that there is a fundamental contradiction between Islam as interpreted in official policy and equality between the sexes. Sexual equality violates Islam's premises, actualized in its laws, that heterosexual love is dangerous to Allah's order."[305] Mernissi argues, that unlike in the West where the presumed biological inferiority of women was the basis of the regime of sexual inequality, there is no ideology of female inferiority in Islamic texts. In fact men and women are equal before God as believers and members of the faithful. So what is the ideology that has led to the structural segregation and legal subordination of women in Islamic societies? Mernissi argues: "the whole system is based on the assumption that women are powerful and dangerous beings. All sexual institutions (polygamy, repudiation, sexual segregation, etc.) can be perceived as a strategy for containing their power." [306] Hence, according to Mernissi it is fear of female sexuality and the power it has to create *fitna* [307] in society that has led to the sexual segregation of society, and the resulting female inferiority.

Mernissi pursues this thesis of "fear of female sexuality" by exploring discussions about female sexuality in the works of Imam Abu Hamed Al-Ghazali, one of the greatest jurists and philosophers in Islamic history. She explores his chapter on Marriage in Ghazali's most notable work the *Revival of the Religious Sciences* (*Iha Ulum al-Din*). In this section Al-Ghazali outlines the etiquette's and rules regarding marriage and describes

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[304] *Ibid.* at 18.
[305] *Ibid.* at 19.
[306] *Id.*
[307] Note: *fitna* means discord.

the ideal relationship between the husband and the wife [308] Although he outlines the rights and responsibilities of both spouses in marriage, his general outlook towards women according to Mernissi is that "he sees civilization as struggling to contain women's destructive, all-absorbing power Women must be controlled to prevent men from being distracted from their social and religious duties Society can survive only by creating institutions that foster male dominance through sexual segregation and polygamy for believers "[309] In his chapter, on the Etiquette of Marriage, Al-Ghazali outlines what constitutes etiquette for women He notes,

> Without going into lengthy details, a summary of what constitutes etiquette for the woman is the following She should remain in the inner sanctum of her house and tend to her spin-ning, she should not enter and exit excessively, she should speak infrequently with her neighbors and visit them only when the situation requires it, she should safeguard her husband in his absence and in his presence, she should seek his pleasure in all affairs and refrain from betraying him through herself or his possessions, she should not leave his home without his permission if she goes out with his permission, she should conceal herself in worn-out clothes and choose the less-frequented places rather than the main avenues and market places, being careful that no stranger hear her voice or recognize her personally, she should be content with the means that God has provided her husband, she should place his rights before hers and before the rights of his relatives, she should always observe the rules of personal hygiene, and be ready at all times for him to enjoy her whenever he wishes, she should be affectionate toward her children, zealous to protect them, refraining from uttering profane words against them and from talking back to her husband [310]

Reading through the chapter it becomes evident that although Ghazali recognizes certain rights for women in marriage and obligations of the husband for the happiness of his wife, nevertheless, the ideas of this great scholar and theologian which continues to be used today is not very favorable towards woman Mernissi notes, "The implicit theory of female sexuality, as seen in Imam Ghazali's interpretation of the Quran, casts the woman as the hunter and the man as the passive victim The two theories have one component in

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[308] *See* for example, Abu Hamed Al-Ghazali, *Iha Ulum al-Din* www ghazali org/works/marriage
[309] *Supra* note 297 at 32
[310] Abu Hamed Ghazali, *Iha Ulum al-Din*, Second Quarter Norms of Daily Life Book 12 "On the Etiquette of Marriage" transl Farah M Shah www ghazali org/works/marriage

common, the woman's *qaid* power ('the power to deceive and defeat men, not by force, but by cunning and intrigue') [311]

Having discussed one of the main theoreticians of Islamic philosophy, Mernissi notes that during the *jahilliya*[312] sexuality and promiscuity were lax and most importantly the familial system was matrilineal, where children stayed with their mothers and women did not leave their clans to join their husbands However, with the arrival of Islam, sexuality was civilized, especially, women's sexuality But male sexuality she notes, "is promiscuous (by virtue of polygamy) and lax (by virtue of repudiation),"[313] the *idda* (mandatory waiting period for women after divorce to determine paternity) She is clearly frustrated by the institution of polygamy and the unequivocal right of men to divorce, and contends that the sexual division of space that has ensued is due to fear of female sexual self-determination and power

For Mernissi, the existence of strict sexual boundaries divides "[M]uslim society into two sub-universes the universe of men (the *umma*, the world religion and power) and the universe of women, the domestic world of sexuality and the family "[314] A power hierarchy ensues where men have power and women obey [315] However, women in modern Muslim societies are challenging this dynamic by going to university and entering the workforce This invasion of male space by women is happening all over the Muslim world where economic and educational changes have invited women into universities and into the workforce Mernissi argues that "[P]eople tend to perceive

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[311] *Supra* note 297 at 34
[312] Translated as "time of ignorance " Muslims contend that before the birth of Islam the Arabs on the Peninsula followed traditions that were evil and corrupt
[313] *Supra* note 297 at 46
[314] *Ibid* at 138
[315] *Ibid* at 139

women's liberation as a spiritual and not a material problem. Liberation is a costly affair for any society, and women's liberation is primarily a question of the allocation of resources." [316] In societies with weak economies to pay women for their work implies taking that job away from a man, a head of the household, a person whose honor rests on providing for and protecting his family. Hence, women's liberation comes at a high price for both men and women, where not only are sexual boundaries challenged but perceptions of male control and power are put to the test.

In "Virginity and Patriarchy"[317] Mernissi observes the phenomenon of hymen reconstruction by women who are no longer virgins but pretend to be on their wedding night. Curiously, then, virginity is a matter between men in which women merely play the role of silent intermediaries. "Like honor, virginity is the manifestation of a purely male preoccupation in societies where inequality, scarcity, and the degrading subjection of some people to others deprive the community as a whole of the only true human strength: self- confidence." [318] This is a symptom of the inequality that exists in male perceptions. Despite institutional and legal changes encouraging women to seek individual goals and be productive members of society, there are consequences when the *hudud* is violated. In this case, there is an unfair demand on women to remain chaste until marriage while men can be as promiscuous as they want. These are consequences of a modern society, which is trying to adjust its norms and expectations to its new circumstances. For Mernissi, the tensions caused between men and women in modern Muslim societies can be resolved when the "the family is based on the unfragmented wholeness of the woman. Allegiance and involvement with an unfragmented woman do

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[316] *Ibid* at 165
[317] Fatima Mernissi, "Virginity and Patriarchy" 5 Women's Studies Int'l Forum No 2 183 (1982)
[318] *Ibid.* at 183.

not distract men from their social duties, because the woman is not a marginal tabooed individual; rather, she is the centre, the source, the generator of order and life."[319] Ultimately, she believes that Muslim women will seek more than just equality with men, and will work towards uprooting established patterns of sexual discrimination and degradation of women, when they are able to change existing narratives and laws to their advantage. .

In *Beyond the Veil* Mernissi is quite critical of the patriarchal impositions of Islam on women. However, in *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam*[320] she seems to have a change of heart and in fact talks of women's liberation and the Prophet's struggle to establish freedoms and rights for women. In fact she argues: "[W]e Muslim women can walk into the modern world with pride, knowing that the quest for dignity, democracy and human rights, for full participation in the political and social affairs of our country, stems from no imported Western values, but is a true part of Muslim traditions."[321] Her methodology is to go back in time, to the early days of Islam and explore Prophetic action and behavior, and analyze the circumstances that gave birth to specific legal injunctions within Islam. She is adamant that neither the Quran nor the Prophet were discriminatory towards woman and is adamant that the "elite" of the early days of Islam and the "elite" of modern society are "trying to convince us that their egotistic, highly subjective, and mediocre view of culture and society has a sacred basis. But if there is one thing that the women and men of the late twentieth century who have an awareness and enjoyment of history can be sure of, it

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[319] *Supra* note 297 at 175
[320] Fatima Mernissi, *The Veil and the Male Elite A Feminist Interpretation of Women's Rights in Islam*, Trans Mary Jo Lakeland (Cambridge, Massachusetts Perseus Books 1991).
[321] *Supra* note 297 at viii

is that Islam was not sent from heaven to foster egotism and mediocrity." [322] Like Ahmed, she is well aware of the role of history, politics and power of an elite few who can mingle with definitions of the sacred and establish that which interests them as fact. As such, she notes her book is intended to be a narrative of recollection, "gliding toward the areas where memory breaks down, dates get mixed up, and events softly blur together, as in the dreams from which we draw our strength."[323] She is convinced that Muslim women and men need not look at the achievements of the West, but rather, they need to look at their own history and find the seeds for gender equality and democracy in the egalitarian message of Islam.

One of the main issues that Mernissi discusses in this book are the challenges the Prophet (pbuh) faced from the elites of Mecca and Medina in changing ways of being. Mernissi notes, that upon the death of the Prophet (pbuh) in 632 A.D Abu-Bakr (the first Caliph) and Umar ibn al-Khattab (the second caliph) were at the Prophet's bedside when they heard the Ansar (those who helped the Prophet when he came to Medina) and Muhajeroon (those who immigrated with him from Mecca to Medina) were holding separate meetings in choosing a successor for the Prophet (pbuh) who was not buried yet. However, Umar and Abu-Bakr who were two of the closest companions of the Prophet wanted someone from the Quraish tribe (the clan of the Prophet) to succeed. When news spread that Umar had pledged his allegiance to Abu Bakr, a powerful and senior leader of the Quraish, everyone rushed to pledge his allegiance to him. Contrary to Prophetic action who sought to end tribal allegiances and territorial fiefdoms a Caliph was chosen by the elite who would continue to rule for centuries to come. This incident marks the

[322] *Ibid.* at ix.
[323] *Ibid.* at 10.

beginning of Islam after the death of the Prophet, which was characterized by personal interests. If the death of the Prophet marked an end to his ideals, one can only imagine what he was up against when he introduced revolutionary changes to the status of women.

Mernissi re-tells the story of the Prophet's marriage to Umm Salama in year 4 of the Hijra (626 A.D). She was a beautiful woman with "very sound judgment, and an unparalleled ability to formulate correct opinions."[324] Umm Salma belonged to the Quraish aristocracy and was the widowed mother of four. She was the person who famously asked the Prophet (pbuh) "Why are men mentioned in the Quran and why are we not?" [325] This is the question that promoted the revelation of 33:35 which reads:

> Lo! men who surrender unto Allah, and women who surrender, and men who believe and women who believe, and men who obey and women who obey, and men who speak the truth and women who speak the truth, and men who persevere (in righteousness) and women who persevere, and men who are humble and women who are humble, and men who give alms and women who give alms, and men who fast and women who fast, and men who guard their modesty and women who guard (their modesty), and men who remember Allah much and women who remember - Allah hath prepared for them forgiveness and a vast reward.[326]

Mernissi notes that: [T]he answer of the Muslim God to Umm Salama was very clear: Allah spoke of the two sexes in terms of total equality as believers, that is, members of the community." [327] It is noted that the question that Umm Salama asked was raised among the women of the community through the wives of the Prophet (pbuh). In addition to being addressed in the Quran in equal spiritual terms as men, other revolutionary verses were revealed through Chapter 4 Surah *Al-Nisa* (the women). One of the most important changes was the right of women to inherit from their fathers and husbands

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[324] *Supra* note 320 at 115.
[325] *Ibid.* at 115 quoting: Tabari, *Tafsir*, Vol. 22, pg. 10
[326] Pickthal Translation of the Holy Quran 33:35.
[327] *Supra* note 320 at 119.

instead of being inherited as property after the death of their husbands

> Unto the men (of a family) belongeth a share of that which parents and near kindred leave, and unto the women a share of that which parents and near kindred leave, whether it be little or much - a legal share [328]

Mernissi argues that this verse had the effect of a "bombshell among the male population of Medina, who found themselves for the first time in direct, personal conflict with the Muslim God." [329] Before the revelation of this verse, when a man died his widow could be inherited either by his son (stepson to a widow) or his brother In essence she had no meaningful existence. As far as the men were concerned Mernissi contends, "the new regulations on inheritance tampered with matters in which Islam should not intervene—their relations with women."[330] Verse 19 of Surah *al-Nisa* sealed the deal regarding inheriting women when it said:

> O ye who believe! It is not lawful for you forcibly to inherit the women (of your deceased kinsmen), nor (that) ye should put constraint upon them that ye may take away a part of that which ye have given them, unless they be guilty of flagrant lewdness But consort with them in kindness, for if ye hate them it may happen that ye hate a thing wherein Allah hath placed much good.[331]

Despite many protests to the Prophet about these changes, the Prophet maintained his position that God has made this decision. Inheritance laws, which establish a woman to inherit half than a man's share, are outlined in great detail in the Quran [332] These laws are currently under review and critique by Muslim feminists who call for greater equality in inheritance laws. Nevertheless, seeing the revolutionary change that the law produced in Arabia fourteen centuries ago one can only understand why the laws were revealed as such at a time when women were seen as mere chattel. Mernissi's description of the

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[328] Holy Quran 4 7
[329] *Supra* note 320 at 120
[330] *Ibid* at 120
[331] Holy Quran 4 19
[332] Holy Quran 4 7-14

historical and political situation of the time reveals the animosity that existed among the elite in changing women's status in society. However, similar to Ahmed's methodology her goal is to deconstruct the existing narrative and reveal the patriarchal bias that the interpretation of the male elite exudes.

In describing the changes that the Prophet was seeking to establish Mernissi highlights a particular incident where the Muslim had defeated a clan at Tai'f near Mecca in year 8 (630 A.D) of Hijra. The challenge came upon distribution of war booty, which was one of the main ways of gaining wealth at the time. However, along with the animals and riches there were many women and children captives of war. It was during a Friday Prayer sermon where the Prophet mentioned that he was willing to forego of all of his share of booty. This meant freeing the captives as well. In a sense he was encouraging his soldiers to do the same, especially with regards to the captives, to let them free. The Prophet had advised the captives to embrace Islam to avoid slavery. However, this intervention and his refusal to divide the booty resulted in a conflict where his soldiers pulled off his cloak and said: "We will not let you go until you make the distribution." [333] Before this event the woman had raised the question of also gaining booty from wars, and Mernissi notes, that the Prophet as a military leader needed his soldiers to succeed in establishing the roots of Islam in Arabia. As such, when faced with a difficult choice "equality of the sexes or the survival of Islam—the genius of Muhammad and the greatness of his God shows in the fact that at least in the beginning of the seventh century the question was posed and the community was thinking about it. It is a debate that fifteen centuries later politicians are calling alien to the culture, and alien to the

[333] *Supra* note 320 at 130.

sunna "[334] Mernissi's analysis reflects upon the challenges the Prophet was facing when he introduced new norms and practices that not only upset the status quo, but also established that violating the new laws amounted to violating God's law

Mernissi juxtaposes gains for women's equality versus the survival of Islam This is because the new religion needed the support of the male elites to survive and gain strength in other areas around Arabia One curious example is the actions of Umar the second Caliph and a convert to Islam He was known to be a zealot Muslim and the Prophet loved him for his critical spirit [335] However, he was one of the elites who was adamantly against changing pre-Islamic laws regarding women "For him, as for the many Companions that he represented, the changes Islam was introducing should be limited to public life and spiritual life " [336] As such, when an argument ensued between him and his wife, his wife did not bow her head, but rather she responded to him in the same tone of voice and told him "You reproach me for answering you! Well, by God, the wives of the Prophet answer him, and one of them ran away from him until nightfall "[337] Fearing the rebellion affecting the other women, Omar asked his daughter Hafsa (who was married to the Prophet) and Umm Salama who were two of the rebellious wives of the Prophet if this was true In response to his outrage as to why they had dared speak back to the Prophet, Umm Salama replied

> Why are you interfering in the Prophet's private life? If he wanted to give us such advice, he could do it himself He is quite capable of doing it If not to the Prophet, then to whom are we supposed to address our requests? Do we meddle in what goes on between you and your wives?[338]

This is significant given the intransigence that the women had shown to Umar and his

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[334] *Ibid* at 139
[335] *Ibid* at 141
[336] *Ibid* at 142
[337] *Ibid* at 143 quoting Bukhari *Sahih* Vo 3 Pg 258
[338] *Ibid* at 144 quoting Ibn Sa d, *Tabaqat* Vol 8 140

like-minded companions who saw the women as insolent and uncontrollable.

Mernissi recalls the significance of another incident where a man from the Ansar (one of the tribes in Medina) hit his wife. The wife ran to the Prophet and asked him to be the arbitrator (*hakam*). The Prophet wanted to make a decision favoring the wife when the problematic verse on *nushuz* (rebellion) was revealed. The verse reads:

> Men are in charge of women, because Allah hath made the one of them to excel the other, and because they spend of their property (for the support of women). So good women are the obedient, guarding in secret that which Allah hath guarded. As for those from whom ye fear rebellion, admonish them and banish them to beds apart, and scourge them. Then if they obey you, seek not a way against them. Lo! Allah is ever High, Exalted, Great.[339]

For Mernissi this verse indicates that the Prophet wanted one outcome and God wanted another, and in this case God sided with the men. According to Al-Tabari, one of the most important scholars of Islamic jurisprudence (838-923 C.E) "*al-nushuz* means that the wife treats her husband with arrogance, refuses to join him in the marital bed; it is an obvious expression of disobedience." [340] However, it was known that not only did the Prophet never raised his hands against any of his wives or any other person for that matter, in an incident where his wives rebelled against him he chose to leave his home for 29 days. This incident is mentioned in the Quran[341] as well. When a couple of the wives of the Prophet went back on their word to him and told a secret to the other wives he became very upset with them and vowed to never return home. As such his response to their rebellion was very different from what the verse says, and of course the verse can be subject to much interpretation in the methods that are proposed by the other scholars. Most importantly it is important to consider what "disobedient" means. In the context of Mernissi's research and looking at the work of Tabari, refusing sexual intercourse with

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[339] Holy Quran 4:34
[340] *Supra* note 98 at 156 Quoting Tabari, *Tafsir*, Vol. 8 288.
[341] Holy Quran 33: 30-34.

the husband amounts to being *nashazah*. But, modern jurists have offered their own definitions. Nevertheless, Mernissi emphasizes that according to many *hadiths*, the Prophet always opposed beating women and said: "only the worst ones among you will have recourse to such methods."[342] In essence, her view of this verse in tandem with Prophetic action is similar to what Ahmed discusses as the ethical vision of Islam. In other words, both Mernissi and Ahmed see beyond established norms and laws and see the possibility of an alternative vision or narrative of Islam that is closer to Prophetic action, which upholds the principles of egalitarianism.

For Mernissi and scholars like her, Prophetic action speaks volume about the ideal behavior of men towards women in an Islamic society. In a society where women were literally considered the property of men, there comes a Prophet that treats women with kindness, dignity and respect. Although the Prophet had many wives, he recognized their needs and heard their voices and sought to establish a model of good behavior for women. However, not many of us are aware of the political and military situation that influenced the actions of the Prophet. In the face of establishing an *umma* the Prophet needed the allegiance and support of the elite males of Mecca and Medina. Introducing a new faith with laws and norms can challenge the status quo to a limited extent. As such, for Mernissi the battle between the Prophet and elites such as Umar and other patriarchal men was a matter of life and death for the survival of Islam. In this battle, the men of Mecca and Medina succeeded in maintaining certain privileges, but none that the Prophet's actions and statements approve of.

As a staunch feminist and observant sociologist Mernissi not only looks into the actions of the women of early Islam but also analyzes the situation of women in her own

[342] *Supra* note 320 at 177, Quoting Ibn Sa'd, *Tabaqat* Vol. 8 204.

society and compares it with others. She notes,

> [O]ne of the steps necessary for intellectual women to share their privileged access to knowledge and higher consciousness is to try to decipher women's refutation of patriarchy when voiced in languages other than their own. One such endeavor is to grasp and decode illiterate women's rebellion, whether voiced in oral culture or in specifically dissenting practices considered marginal, criminal or erratic.[343]

She does this by discussing how observant women in Morocco seek refuge at the sanctuary of Saints in Morocco. Generally sanctuaries or mausoleums are built for people who were considered very pious and noble with their communities. She argues: "At bottom, women in an unflinchingly patriarchal society seek through the saint's mediation a bigger share of power, of control. One area in which they seek almost total control is reproduction and sexuality, the central notions of any patriarchal system's definition of women, classical orthodox Islam included."[344] It is within the confines of these sanctuaries that women establish their own space and pray for that which society does not afford them. Women all across the Muslim world go to sanctuaries praying for their problems to go away or for God to give them the power to survive them. Mernissi contends that "[S]aints give women vital help that modern public health services cannot give. They embody the refusal to accept arrogant expertise, to submit blindly to authority, to be treated as subordinate."[345] Going to a masoleum or sanctuary means that a woman has been pro-active and taken action, that she has decided to do something about the situation without the help of the authorities. It is perhaps the only space that she can ask for whatever she wants without hearing direct words of denial.

Most importantly women going to sanctuaries do not threaten the world of men and

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[343] Fatima Mernissi, "Writing is Better than a Face-Lift!" in *Women's Rebellion and Islamic Memory*, Fatima Mernissi, transl. Emily Agar (Zed Books Ltd 1996) 5.
[344] Fatima Mernissi, "Women, Saints and Sanctuaries" 3 Signs No 1 Women and National Development: The Complexities of Change (Autumn 1977) 7
[345] *Ibid* at 8.

the boundaries they have put in place there. So it is far safer for women to go and pray to a Saint than to take off her veil, which the fundamentalists see as a threat to Islam and family values. Going back to the concept of *hudud*, or boundaries Mernissi argues that in Muslim societies today "[W]henever an innovation has to do with free choice of the partners involved, the social fabric seems to suffer some terrible tear. Women's unveiling seems to belong to this realm. For the last one hundred years, whenever women tried or wanted to discard the veil, some men, always holding up the sacred as a justification, screamed that it was unbearable, that the society's fabric would dissolve if the mask is dropped." [346] She says: "I do not believe that men, Muslims or not, scream unless they are hurt. Those calling for the re-imposition of the veil surely have a reason. What is it that Muslim society needs to mask so badly?" [347] For Mernissi, these *hudud*, established by men is to "protect the city from individualism, the source of all trouble."[348] Especially with regards to the *hijab*, she notes, "the *hijab* is a metaphor for the *hudud*, the boundaries that separate and create order and stand for all others, especially those that delimit *dar al-Islam*, the land of Islam, and protect it from the rest of the world."[349]

However, she believes that the situation will not remain as such and in fact, radical changes will take place soon mainly at the hands of women. "The Arab world is about to take off." She argues, and this "is not a prophecy. It is a woman's intuition, and God, who knows everything, knows that women's intuition is rarely wrong. It is going to take off for the simple reason that everybody, with the fundamentalists in the lead, wants

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[346] Fatima Mernissi, "Women and Fundamentalism" 153 MERIP Islam and the State (Jul-Aug 1988) 10
[347] Id
[348] Fatima Mernissi, *Islam and Democracy Fear of the Modern World*, Transl. Mary Jo Lakeland (Reading, Massachusetts: Addison-Wesley Publishing Company 1992) 8.
[349] *Id*

change."[350] But this time women will not follow the head of fundamentalist men, because, they have "decided to listen no longer to *khutba* (sermons) they have not had a hand in writing. They are ready for takeoff. They have always known that the future rests on the abolition of boundaries, that the individual is born to be respected, that difference is enriching."[351] In modern day Muslim countries, women are university educated and work on their own. They no longer need the advice of men to guide them through their life. And most importantly, they "never let themselves be tamed. Men believed that a person could become accustomed to confinement. But women were waiting for the right moment, the moment of difference with dignity, of participation and dialogue, and that moment has arrived."[352] Mernissi, is very optimistic and hopeful, that the nuances of modernity, accesses to higher education and employment will break the sexual boundaries that have existed for years and finally allow women to speak, write, work, produced and protest as vocal members of society.

Mernissi is well aware of the looming backlash of the fundamentalist men (and women) who oppose women's newfound sense of self and identity through access to work and education. For the fundamentalists, women's presence in the public sphere is the initial step towards breaking boundaries and violating the *hudud.* The problem with fundamentalists argues Mernissi, is that "they act with the complicity of the state, while women struggle alone, with no protection even from the divine—for the fundamentalists claim a monopoly on speaking in the name of God."[353] However, there are very religious women are who are also reinterpreting texts and re-reading the "Muslim heritage as a

[350] *Ibid.* at 149.
[351] *Ibid.* at 152.
[352] *Ibid.* at 151.
[353] *Ibid.* at 160.

necessary ingredient of our modernity."[354] Therefore, argues Mernissi, the "mosque and the Quran belong to women as much as do the heavenly bodies. We have a right to all of that, to all its riches for constructing our modern identity." [355] Mernissi believes that women can be narrators of their own lives and most importantly official narrators of their religious doctrine because that is how they can get ahead. Just like Yasmina (Mernissi's grandmother) said: "To be happy, a woman has to think hard, during long silent hours, about how to make each small step forward. Figuring out who has *sulta* (authority) over you is the first step." [356] In modern times, I believe it is Mernissi's hope and aspiration that neither male or female have authority over one another, but rather they become equal partners and companions in their journey through life. Through her scholarly work, Mernissi has stepped beyond the frontier of Islamic jurisprudence and has shed light on the patriarchal narratives that animates the Islamic legal framework. By doing so, she is producing her own feminist narrative, which emphasizes women's emancipation through education, access to the public sphere and most importantly the authority to narrate Islamic laws and norms. Similar to Ahmed's project her goal is to deconstruct existing injustices in Islamic law and show that the law can be egalitarian and gender-neutral if it is interpreted as such. Ziba Mir-Hosseini is an Iranian scholar who embarks on a similar project albeit in a different realm.

3. *Ziba Mir-Hosseini*

Ziba Mir-Hosseini is an Iranian legal anthropologist and a Senior Research Associate at the Center for Islamic and Middle Eastern Law (CIMEL) at the School of

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[354] *Id.*
[355] *Ibid.* at 161.
[356] *Supra* note 292 at 153.

Oriental and African Studies (SOAS), University of London [357] She was also a Fellow at the NYU Hauser Global Law School Program (2002, 2004, and 2006) She is a well-known Islamic Feminist and best known not only for her scholarly work, but her documentary films *Divorce Iranian Style* (1998) and *Runaway* (2001) Mir-Hosseini received her B A in social anthropology from Tehran University (1974) and her Ph D in Social anthropology from the University of Cambridge, UK (1980) She is well versed in both Shiite and Sunni *fiqh* rulings on women and her research provides opportunities to compare differences and find similarities between the different legal schools

In an interview conducted with an online site called CounterCurrents she describes the emergence of Islamic feminism as the "unwanted child of political Islam "[358] The rise of political Islam meant going back to the Shari'a, back to the roots "Translated into practice, law and public policy," notes Mir-Hosseini "meant going back to pre-modern interpretations of Shari'a, with all their restrictive laws about and for women It was this that led, as a reaction, to the emergence of Islamic feminism, critiquing the Islamists for conflating Islam and the Shari'a with undistilled patriarchy and for claiming that patriarchal rule was divinely mandated " [359] Describing the diversity of opinions that exist among Islamic feminists and the challenges they face both in confronting patriarchal Islamicists and feminists in establishing the validity of their narrative she notes "[I]slamic feminism is thus reacting to these discourses all at the same time So, in a sense, it is an apologetic or reactive discourse, directed against those

[357] www wisemuslimwoman org
[358] Yoginder Sikandar Understanding Islamic Feminism Interview with Ziba Mir-Hosseini ' http //www countercurrents org/sikand070210 htm Feb 07 2010
[359] *Id*

who claim that Islam does not countenance gender justice and equality."[360] However, one of the most important points she makes in this interview and is repeated throughout her work is her separation of *Shari'a* from *fiqh*. She notes, "[T]he *Shari'a* (Revealed Law) denotes what Muslims believe to be the divine path, while *fiqh* (jurisprudence) represents the historical tradition of human attempts to discern the mandate of the Shari'a in different situations. Now, while the two are very distinct, the former is considered to be divine and, hence, unchangeable, the latter being historically created or determined, and hence not sacrosanct and, therefore, amenable to change." [361] Like many progressive Muslim scholars, Mir-Hosseini believes that the current codified Islamic laws that exist are not divine, but man-made and based on the interpretation of male jurists. As such, reform in the structure of family law specifically does not entail undermining the principals of the *Shari'a*; rather, it means changing existing laws to meet the demands of our modern conditions. Throughout her work, Mir-Hosseini is well aware of the ethical and egalitarian message of Islam and the patriarchal laws that have come about through the methodologies of *fiqh*. Like Ahmed and Mernissi she is in search of an Islamic narrative on women's rights that is conscious of the egalitarian ethos of Islam.

In conducting her research specifically on marriage and divorce laws in Iran and Morocco, Mir-Hosseini notes that "[I]n classical *fiqh* texts, gender inequality is taken for granted, a priori, as a principle. In classical *fiqh* texts women are depicted as sexual beings not as social beings, and their rights are discussed only in the context of family law."[362] Most importantly she notes despite the diversity of opinions among the five

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[360] *Id.*
[361] *Id.*
[362] Ziba Mir-Hosseini, "The Construction of Gender in Islamic Legal Thought" 1 Hawwa (2003) 3, 4.

major *madhhabs*, "they all share the same inner logic and conception on the family."[363] The marriage contract is perhaps the most fundamental aspect of an Islamic marriage, without which a marriage is void. "Classical *fiqh* texts define marriage (*nikah*) as a contract of exchange with fixed terms and uniform legal effect."[364] The process includes an offer (*ijab*) by the woman or her guardian (*waly*), the acceptance (*qabul*) by the man, and determination of a dower (*mahr*) that is either given to the woman upon consummation of marriage in lump sum, or a piece of property that is put in her name. The dower is essentially the gift of the husband to the wife. However, Mir-Hosseini notes that in classical *fiqh* jurists have drawn analogies between a marriage contract and contract of sale (*bay'*), which although misleading, suggests that "the logic of sale that underlies the *fiqh* conception of women's rights, in which a woman's sexuality, if not she herself, is treated as a commodity—as an object of exchange in the marriage."[365] This has serious implications for women's rights in the marriage, where the man is obligated to provide food, clothing and shelter in the form of maintenance (*nafaqheh*) for his wife and the wife ought to provide sexual access to him at all times. This is embodied in the legal term *tamkin* or submission. The failure of the woman to submit, categorizes a woman in some instances as *nashizah*, which literally means rebellious, disobedient or abandoning marital duties.

For Mir-Hosseini the *fiqh* notion of the marriage contract "is rooted in a type of marriage agreement predominant in pre-Islamic Arabia. Known as 'marriage of dominion', this agreement closely resembled a sale through which a woman became the

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[363] *Id.*
[364] *Id.*
[365] *Supra* note 362 at 6.

property of her husband " [366] Although the Quran condemns subjugation, nevertheless she notes the jurists have modified the contours of the 'marriage of dominion' to include woman as parties, not subjects of the contract, recipients of the *mahr* (instead of their fathers or guardians), and able to stipulate conditions in their marriage contract before the marriage is consummated, i e including the right to divorce, to education, to work and etc Scholars such as Mir-Hosseini and Mernissi see the framework of the *nikah* contract as full of contradictions, where rights are granted in face of obligations that completely undermine woman's choice She notes that the "philosophical/metaphysical thesis that underlies *nikah* and other *fiqh* rulings on gender rights is that

> women are created of and for men " The moral and social rational for this subjugation is found in the theory of difference which follows God gave women greater sexual desire than men, but this is mitigated by two factors, men's *ghira* (sexual honor and jealousy) and women's *haya* (modestly, shyness) What is concluded from this theory is that women's sexuality if left uncontrolled by men, runs havoc, and is a real threat to social order [367]

Whereas the conditions of the marriage contract itself are problematic, the breakdown of the marriage creates even more hurdles for women, which they cannot avoid The most powerful tool at the disposal of men is their exclusive right to divorce through *talaq* (repudiation of the wife) Mir-Hosseini describes it as "the sword of Damocles in men's hands, which tilts the balance of power in marital relations in favor of the husband and ensures that women are kept in a state of limbo and disempowerment "[368] The right of a woman to divorce is unequivocal only if she can prove to the judge that her husband is a drug addict, beats her, does not pay maintenance, is sexually incapacitated or has a disease Otherwise she can stipulate in her marriage contract that she has the right to

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[366] *Ibid* at 9
[367] *Ibid* at 10
[368] Ziba Mir-Hosseini, "A Woman's Right to Terminate the Marriage Contract The Case of Iran" in Asifa Quraishi, ed , *The Islamic Marriage Contract Case Studies in Islamic Family Law* (Cambridge MA, Islamic Legal Studies Program, Harvard University 2009) 215

divorce. This is known as *talaq al-tafwid.* Other than under these two conditions, a woman can initiate divorce through *khul* known as "divorce by mutual consent," where with the husband's consent the wife agrees to compensate him for his loss, forgives her dower (however much was still owed to her) and free herself from the marriage.[369] In this situation, if the husband refrains from consenting, the court may intervene and the judge can compel the husband to pronounce *talaq* or will pronounce it on his behalf. The most defining aspect of divorce is who has access to it, what happens with the dower, and child custody in case of existing children. Divorce is without doubt the most challenging situation for a Muslim woman to go through given the disadvantageous situation they are placed in. Even in the case of delegated divorce Mir-Hosseini notes, "it is neither common nor easy for a woman to acquire the delegated right to divorce. She (or her agent) must negotiate this at the time of marriage, when the parties are less likely to think of, and make provisions for its breakdown."[370] Insertion of a stipulation she argues: "is, thus, at best a half-solution, and at worst no solution at all. It can be effective only if it is compulsory, that is, if it is automatically inserted in every marriage contract, and then only if it is unconditional. To my knowledge no Muslim country has done this, and none is likely to do so."[371]

However despite the herculean obstacles ahead, Muslim women do at times succeed in getting a divorce and some even gain custody of their children. In *Marriage on Trial: A Study of Islamic Family Law*[372] Mir-Hosseini looks at divorce cases in

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[369] In Farsi there is an expression that says Mehram halal joonam azad which means I forego my *mahr* to gain my freedom!
[370] *Supra* note 368 at 216
[371] *Supra* note 368 at 216
[372] Ziba Mir-Hosseini, *Marriage on Trial A Study of Islamic Family Law*, Revised Edition (London I.B Tauris & Co Ltd. 2000)

Morocco and Iran two countries that are legally and culturally quite different. Morocco follows the Maleki school of *fiqh* and the Twelver Shiite school is followed in Iran. Her goal in this book was to "shift the focus away from the ways in which Islamic rules oppress women to the ways in which women can find the contradictions embedded in these rules empowering."[373] She notes witnessing court cases in both countries where "many women were aware of these contradictions and manipulated them in order to renegotiate, and at times rewrite, the terms of their marriages."[374] Her book offers invaluable information to the causes of breakdown in a marriage and the way divorce proceedings take place in the courtrooms of Iran and Morocco.

She makes a very important point regarding the emergence of the modern nation state and the take over of the Shari'a by state authorities. Traditionally the Shari'a was interpreted and administered through the *ulema* (religious scholars and jurists) and was considered sacrosanct and above state politics. However, the creation of the modern state has resulted in "the creation of a hybrid family law, which is neither the *Shari'a* nor Western."[375] This has not only disrupted the traditional equilibrium between the *Shari'a* and state-administered law, but for the first time in history the Shari'a has definite legal force.[376] Despite reforms in other areas of *Shari'a* law, its family law component has gone through very little reform, partly because it is the last bastion of sacredness of *Shari'a* law and is deemed not open to change. However, in her work Mir-Hosseini attempts to study court cases as the prism through which she can examine and understand the *Shari'a*. This is an attempt that was considered futile by some of the Iranian court

[373] *Ibid* at vi
[374] *Ibid* at vii-viii
[375] *Ibid* at 11
[376] *Ibid* at 12

judges who see the study of the Islamic texts as the best way to learn about the Shari'a In a sense, both in this book and her documentary, Mir-Hosseini is trying to analyze the *Shari'a* in action

Mir-Hosseini describes the structure of each court in both countries In Iran, the Special Civil Courts (*dadgah-i madani-yi khass*) are presided over by Islamic judges (*hakim-i shar'*), who are empowered to deal with the whole range of familial disputes, including marriage, divorce, annulment of marriage, *mahr* (dower), maintenance of wife and other dependents, custody of children, and inheritance [377] Two officers sit in a court a judge who is trained in an Islamic seminary college (*hawza-yi 'ilmiyya*), and a clerk who is a graduate of the secular law school Each court also has a secretariat (*daftar*) [378] Mir-Hosseini makes an interesting observation that while visiting the courts in 1980 (a year after the 1979 Revolution) a secular judge would sit beside the religious judge and they would make joint decisions However, going back to the courts in 1985, she notes, the secular judge was replaced by a secular clerk with much less power [379]

Moroccan family law known as *Mudawwanat al-ahwal al-shakhsiyya* or the Code of Personal Status (MCPS) was codified between 1957 and 1958 The history of the formation and reform of the *Mudawwana* is even more radical than the changes that the Iranian Civil Code[380] underwent first in 1967 (during the reign of Mohammad Reza Shah Pahlavi) and thereafter following the Revolution of 1979 Family disputes are taken to the Chamber of Personal Status (*Ghurfat al-ahwal al-shakhsiyya*) of the Court of First Instance (Al-*Mahkama al-Ibtida'iyaa*) Unlike in Iran, this Chamber is essentially a civil

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[377] *Ibid* at 25
[378] *Ibid* at 25
[379] *Ibid* at 26
[380] Currently the Civil Code of the Islamic Republic of Iran (1989)
www alavidandassociates com/documents/civilcode pdf

court, presided over by judges who have graduated from secular law schools or from the Legal Institute, attached to the Ministry of justice Each Chamber has its own secretariat (*daftar dabt*), which is responsible for receiving applications and for other administrative duites Moroccan judges apply the rules of the *Mudawwana* to all familial disputes [381]

Both the ICC and the MCPS are in "effect eclectic translations of dominant opinions on *ahkam al-zawaj* (legal effects of marriage) within Shia'a and Maliki jurisprudence respectively "[382] As such, argues Mir-Hosseini, the lines between moral and legal obligations are vague and blurry, because a marriage, "like any contract, can best be understood by the rights and obligations that it creates between the contracting parties " [383] Mir-Hosseini notes two basic attributes of marriage that both legal codes establish First is the "non-reciprocal and unequal emphasis in the rights and obligations of spouses Each spouse has a separate sphere of duties and obligations " [384] The second attribute is "the absence of any kind of matrimonial regime There is no common ownership of marital goods What a woman brings into a marriage remains hers and she has no right over the wealth accumulated during the marriage "[385] However, the husband "is still responsible to provide for his wife and children regardless of his or her financial circumstances "[386] Mir-Hosseini argues that these two attributes are based on the legal assumptions of the Shari'a where "women render their sexual favors, and in return they gain the right to maintenance "[387] On the other hand, the moral obligations of the spouses as stated in the Quran is to live a joint life based on cooperation, mutual respect, kindness

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[381] *Supra* note 372 at 27
[382] *Ibid* at 33
[383] *Ibid* at 33
[384] *Ibid* at 35
[385] *Id*
[386] *Ibid* at 35
[387] *Ibid* at 36

and love towards one another.

In studying numerous court cases in Iran and Morocco, Mir-Hosseini notes the different categories for which cases are brought to court by women and men including: registering divorce, requesting maintenance, child custody, return of trousseau, and request for *mahr*. She notes, that in both "countries, women constitute the majority of petitioners, but by a much greater margin in Morocco than in Iran. Secondly, in Iran, men and women appear to seek similar solutions to marital conflicts: both are more likely to ask for divorce. This is not the case in Morocco where women's demand overwhelmingly centers on *nafaqaa*"[388] or payment of maintenance. Having outlined some of the legal similarities and differences she notes that in both countries going to the court is the last resort by both parties, because of the cultural stigma that is attached to discussing private affairs in a public milieu.

Looking at divorce cases in Morocco for the year 1987, Mir-Hosseini notes that although men have the right to divorce their wives without their consent and without going to court, nevertheless he still has to go to court as the marital relations still exists; whether the divorce is revocable (*raj'i*) or irrevocable (*talaq thalat*). In most cases men still owe women *mut'a* (literally consolation gift), the rest of their *mahr*, *nafaqat al-idda* (waiting period maintenance), *nafaqat al-awlad* (children's maintenance), *nafaqat al-mahal al-sukna* (place of residence maintenance).[389] In most cases the husbands try to convince the court that the wife has been responsible for the dissolution of the marriage and that they cannot afford to maintain them. (Similar arguments are made in divorce cases in Iran.) Mir-Hosseini notes however, that the court

[388] *Ibid.* at 45.
[389] *Ibid.* at 88.

> pays little attention to the arguments of each party, which are always diametrically opposite; and it does not concern itself with establishing the truth of these claims. What appear to influence the court's decision are the financial situation of each party, the duration of marriage and the possibility of the woman's remarriage.[390]

In this context, there are a number of ways for women to get a divorce albeit with many hurdles ahead. Mir-Hosseini discusses the case of Huria, a government employee, born in 1956 married a man with her and family's agreement in 1980. Her *saddagh* (or *mahr*) was 10,000 dirham (roughly $1200 USD). The trousseau she brought with herself was much higher in value than the *saddagh* she was given. Nevertheless, they moved in with Salim (her husband) who lived in an older house with his mother. Huria was not happy with the living conditions, and left Salim a couple of times to go to her parent's house. Salim was not only mean but Huria also had to pay the bills. In 1983, she left him and applied for divorce. The court rejected the petition but established maintenance of 300 dirham per month to be paid to her. Huria agreed to return to living with Salim through the intervention of their parents only if the lived in separate houses. They never moved into a separate apartment and during the two years they lived together she had two abortions, both with his consent. After petitioning the court again she was able to get 4000 dirham of *nafaqaa* that was promised to her since 1985. However, she had to resort to the authorities to bring Salim to court. After receiving the *nafaqaa* in 1986 she petitioned for a *khul* divorce where she agreed to forego her *sadaaqh*. But he refused. She then petitioned for divorce on grounds of Neglect of Family (*ihmal al-'usra*). The court ignored this petition and instead established the payment of *nafaqaa* again. In 1987 she petitioned for divorce on grounds of harm and non-support. In court Salim was able to produce receipts of paid *nafaqaa*, and so the judge told Huria that she had no grounds if

[390] *Ibid.* at 91.

nafaqaa was paid. But a change in circumstances finally enabled her to get a divorce after six years. One day Huria went to Salim's house with policeman to execute the new *nafaqaa* order, when a young woman opened the door. Upon his arrival home, the policeman arrested Salim on charges of adultery (*khiyanat al-zawjiyya*). After spending two months in jail and adamantly refusing to divorce Huria. In her final petition, Huria cited harm as her reason for divorce. Her divorce was finally registered in 1989. [391] This rather long and exhausting example reveals the importance of the concept of rights and obligations in marriage. Meaning, so long as minimal obligations are upheld and the woman's life is not in danger, than she must adapt to the conditions. In this case, Salim was willing to show up in court and after many court orders to pay *nafaqaa*. Mir-Hosseini notes, "that with the exception of cases of extreme violence, the court requires concrete proof which is not easy to supply."[392] In both Iran and Morocco men do not have to present grounds for divorce. This starkly unfair advantage makes it very difficult to attain divorce by women, even if their grounds for divorce are "reasonable" and fair.

In the documentary *Divorce Iranian Style* one witnesses the tears and triumphant smiles of women who have been able to negotiate with the judge and convince him that they have been wronged. In this documentary, Mir-Hosseini follows a few couples as they go through their divorce proceedings. In one situation the husband has come to divorce his wife and the wife agrees to the divorce as well. However, the judge is not quick to administer a ruling and sends them for mediation. This is in tune with the norm that although divorce is allowed, it is frowned upon. In another case, Ziba (16 years old) has been married for less than a year to Bahman. Her marriage was arranged when she

[391] *Ibid.* at 109-111
[392] *Id.*

was 15 years old She is unhappy and wants a divorce but has no legitimate ground She tries to prove that he is "insane" as grounds for her divorce She complains that he has lied about his age "He told me he is 27 but he is really 36" she says She claims, that he is violent and brings his friends over for drinks In this case the judge is trying hard to reconcile the situation and have the husband agree to behave and treat her with respect But this young woman is very fired up and is adamant on divorce Bahman is very quiet Since she has failed to come up with a reason for divorce she tries to petition him to divorce her based on mutual consent She claims that he has beaten her and threatened to kill her Bahman surprisingly says, why are you lying? And she smiles back and says just agree and I will withdraw my petition!

Finally the judge agrees to divorce by mutual consent but he sends them for arbitration before a final decision is made In the arbitration session where Ziba and Bahman's fathers and uncles are present a heated debate takes place over the dower which is for $5000 00 and 14 gold coins Ziba wants her full dower paid to her He insists that he "has no money" but he is willing to help her succeed! Ziba said she will continue to fight for her dower until its paid in full [393]

In another case, Masi comes to court citing her husband's inability to father a child She asks the court to summon her husband to court She notes that she has been married for five years and still has no children The husband has refused to come to court and has issued a statement that his wife has not fulfilled her marital duties However, the court has ordered him to go for some testing, which he also refused When he finally shows up in court, he tries to delay the process to avoid paying her dower Since it is the wife who is demanding a divorce, he claims that she has been unruly and disrespectful

[393] Ziba Mir-Hosseini and Kim Longinotto *Divorce Iranian Style* (1998)

and if she wants a divorce then he should not be liable to pay her dower. However, he also refuses to get tested to establish fertility. Finally, as he is about to step out the courtroom, the woman breaks down and says he has STD's and that they have never been together. She says: "I have hid this from everyone, but I can no longer live with this man." This is another "rightful" ground for divorce according to Iranian law. Finally she breaks down and a fight ensues. After a couple of weeks walking down the hallways of the courtroom she decides to give up her right to her dower and gain her husband's consent to a divorce. Her case is indicative of the difficulties of divorce for women. Even when their rights are enumerated and conditions for their divorce are clearly stated they still have to fight against the notion that they have been "disobedient" women.

The Court does prove fruitful, however, for a woman who brings her husband to court to file a complaint against him for not paying maintenance, failing to work and assaulting his wife and children. She even brings a copy of a police report where he had slapped his son and had to compensate him. He signs the papers and promises to work and come home every night. The wife retracts the complaint once he signs the documents. She leaves the courtroom very happy and satisfied!

With regards to child custody, Moroccan laws are more generous towards women. In Morocco a divorced mother has custody of her son until puberty, and until re-marriage for her daughter. In Iran on the other hand, a divorced mother has custody of her son until the age of 2 and of her daughter until 7. She forfeits her right to custody if she remarries, however if the court finds the father incapable of taking care of the child he may give custody to the mother.[394] Mir-Hosseini notes that in *Sharia*, custody has two separate yet interrelated components: *hadana,* which literally means nurturing or nursing, determines

[394] Country Legal Profiles www.emory.edu/ifl/legal

who will take care of the children and where they will reside. *Wilaya*, means power, authority and supervision. This concept deals with supervising the child's education and upbringing as a Muslim. To be a child's *waly* or guardian also includes providing for the child's maintenance.[395] With regards to *hadana* Mir-Hosseini notes, that Maliki law "has a distinctly matrifocal bias. It gives priority to the mother, and the in case of her absence or disqualification, to the females in her line."[396] Although the mother gains custody of the child, nevertheless, "her share of custody is subordinated to that of the father."[397] This is embodied in the concept of *ujrat al-hidana,* which means wages for taking care of the child. This implies, according to Mir-Hosseini, that "the woman's motherly duties are also in the domain of male control"[398] Which means that even in this very private realm of female activity male jurists dictate how women should behave.

Citing a custody case in Sale, Morocco, Mir-Hosseini re-tells the case of Malika, a 36 year old women who works as a maid for a French family. Malika married Aziz a man 30 years older than her when she was 20. Aziz was already married when he met Malika at a wedding and started pursuing her until she finally married him. She lived in a separate apartment. But Aziz was very controlling and would not allow Malika's mother and sisters to visit and would lock the door after he would leave. Malika first left Aziz after the birth of their first daughter. He came after her. She returned and left again after the birth of their second daughter. This time she lived with her sister for a while, then rented an apartment and started working. A year after leaving Aziz she petitioned the court demanding maintenance for herself and her children. The petition was accepted and

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[395] *Supra* note 372 at 146.
[396] *Ibid.* at 146
[397] *Ibid.* at 147
[398] *Id.*

Aziz was required to pay 150 dirham a month to her. However, Aziz also made a counter-claim that she had left the marital home. She ignored the court order to return to her home. Through her numerous petitions she succeeded in getting lump sum payments as maintenance for her two daughters. However, she hasn't petitioned for divorce yet. This is so because; Aziz has said he will divorce her only if she renounces her right to custody of the girls. Thus far, she has not initiated divorce by *khul* and continues to receive maintenance only when she peitions through the court.[399]

What is interesting about this case is that Malika automatically had the custody of her children and the court did not seek to take them away. Rather, the court determined that the father is responsible for financially maintaining them. Although, Malika herself is still not divorced, her situation reflects a rather odd predicament, where her divorce would be conditional upon releasing custody of the children. Although, as Mir-Hosseini points out, child custody and a *khul* divorce are technically irrelevant to one another, nevertheless, Aziz still has the power to keep Malika in limbo neither married nor divorced and not able to have another relationship in the meantime. Most importantly Mir-Hosseini points out, "in order to remove the husband's legal authority over the children" she needs to get a divorce. However, it would have to be a divorce initiated by Aziz, where he would have to pay the divorce dues and her dowry. This case is a grim example of the complexity of divorce and child custody even when to a certain extent the law is favorable to the woman. But it reveals that in Islamic family law a woman seldom receives what is rightfully hers because the law does not recognize her needs and vulnerabilities.

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[399] *Ibid.* at 148-150.

The examples cited by Mir-Hosseini in *Marriage on Trial* reveal the difficulties modern couples in Iran and Morocco face. While the economic and social conditions of both societies have changed dramatically in the twentieth century, the norms that guide family law in both countries are, simply put, arcane and not reflective of the modern conditions of marriage and divorce in Iran and Morocco. "The *Shari'a* model is based on an ideology of male dominance, expressed and sustained through the rules regulating marriage and its dissolution,"[400] argues Mir-Hosseini. Although, marriage is deemed as a religious activity, nevertheless, "in its legal structure, marriage is a civil contract with defined terms and consequences."[401] While the line between the religious and the secular are blurred, it allows for sustaining the patriarchal ideology informing these rules, but, at the same time it also allows for some room to maneuver and manipulate existing rules in the hopes of achieving a more just result. The dominance of patriarchal ideology either in the structure of Islamic family law or in Civil codes reveals what Cover refers to as law's violence. In other words, with regards to marriage and divorce laws, which are regulated, by both secular and religious laws it is the patriarchal bias of male jurists and judges that dominate the narrative of the law. The examples that Mir-Hosseini cites are the best representative of this injustice in the choice of dominant ideology and narrative and the challenges it can create for the everyday life of women. In other words, the cases that Mir-Hosseini describes are real life examples of women grappling with law's violence and male narratives of the law.

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[400] *Ibid.* at 192
[401] *Id.*

In *Islam and Gender: The Religious Debate in Contemporary Iran*[402] Mir-Hosseini embarks on another interesting piece of fieldwork, this time exploring the debates taking place in Qom, Iran one of the main centers for Shiite jurisprudence. In this book she tries to explore the alternative narrations of gender and Islam within the sphere of clerics in the most religious city in Iran. Mir-Hosseini notes that most Iranians are now born after the 1979 Revolution and "increasingly expect their religious leaders to articulate and justify their beliefs and are more aware of alternative and competing interpretations of Islamic beliefs and practice."[403] This search for new meaning is especially resonant in the women's movement, which gained greater presence with the publication of journals such as *Zanan* (Women)[404] and *Payam e-Zan* (Woman's Message) and *Farazaneh*[405]. In addition, there has been a very vibrant and active women's movement in Iran since the 1911 Constitutional Revolution where women became politically active. Since the 1979 Islamic Revolution, Iranian women have entered the work force and gained great presence at universities. However, despite success in certain areas of public life, Iranian women are still not equal citizens in any shape or form. This is so not only in the political and economic realm where women are underrepresented and underpaid but in a court of law a woman's testimony is worth half that of a man's. This reveals the root ideology behind the unjust and unequal laws and norms towards women.

Exploring contemporary debates about women and Islam in Iran Mir-Hosseini's project sought to explore the "relationship between official (state) and unofficial

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[402] Ziba Mir-Hosseini, *Islam and Gender: The Religious Debate in Contemporary Iran* (New Jersey. Princeton University Press 1999)

[403] *Ibid.* at ix.

[404] *Zanan* was an Islamic Feminist journal published in Iran starting in 1992. The editor in chief was Shahla Sherkat a very active and vocal feminist *Zanan* provided feminist narrations of Shari'a rules and advocated reform The government shut down its operations in 2008 *See* for example, Roza Eftekhari, "Zanan. The Trials and Successes of a Feminist Magazine in Iran" at www.drsoroush.com

[405] *See* for example, www.farzanehjournal.com

(women's own) discourses on women's rights."[406] This book reveals the different narratives that are taking place in seminaries, among clerics and most importantly among women themselves. It is important to consider the context in which Mir-Hosseini is conducing her work, a post-revolution Iran, where the concept of *velayat-e faghih* (rule by jurist) has become solidified and the power of the Supreme Leader or *rahbar* (currently Ayatollah Khamenie) draws its legitimacy more from government than from religious standing. In this context, the notion of authority is not only contested but also, bought under great scrutiny by those who disagree with a top-down approach to administering religious norms and values to regulate society. As such, Mir-Hosseini is writing from a milieu where religious authority is still highly respected. Nevertheless, there is criticism from different reformist movements (including the women's rights movement) of certain government action, and there is movement towards reforming religious narrative towards women not only by women, but also by some of the religious authorities themselves.

To begin with Mir-Hosseini discusses the beliefs of traditionalist clerics who "consider the pronounced patriarchal bias of Shari'a legal Rulings to be immutable."[407] Inequality between the sexes, notes Mir-Hosseini, "they take for granted: it is rooted in sacred tradition, but it also makes sense to them intellectually."[408] For example, she notes the work of Ayatallah Azari-Qomi, a neo-traditionalist and one of the most influential clerics of the first decade of the Islamic Republic. His general view on women is as follows:

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[406] *Supra* note 402 at xv.
[407] *Ibid.* at 23.
[408] I*d.*

> In the perspective of the Prophets, a woman, like a man, through struggle and endeavor, can preserve her piety and chastity and reach the highest state of perfection in the realm of God's guidance Islam mentions two defects in women, one of which is their love of luxury and display, and the other is the lack of knowledge and strong reasoning [capacity], and both defects can be remedied If a woman gives her allegiance to religious leaders and accepts their rule and guardianship, she will become higher than an angel and superior to a man [409]

Although Azari is living in the twentieth century and is well aware of the social, economic and political changes that Iranian society has undergo, nevertheless, his general attitude towards women is that she is a sexual being who yearns for luxury and attention, as such she should be controlled and covered Mir-Hosseini covers a wide range of questions addressed to Azari by students and from ordinary people who seek guidance from him In analyzing the questions and answers, Mir-Hosseini notes, the "questioner cleverly draws Azari into a debate, implicitly suggesting that these Rulings have less to do with men's and women's natures, as he claims, than social definitions of gender, and that the former too are socially defined and changing, whether he likes it or not "[410] This means that the new generations of Muslims are constantly looking for new answers and alternative interpretations that would suit their modern lifestyles

Mir-Hosseini has a series of conversations with the editors of *Payam-e Zan* (Women's Message) a monthly journal published by clerics in Qom The editors of *Payam-e Zan* "defend the gender model in shari'a law as immutable, however, they openly recognize the influence of time and place, and readily admit the need for changes "[411] The first question Mir-Hosseini asked the editor Zia Mortazavi (a cleric in his 30's) was "Why is Payam-e Zan, a woman's journal run by men?" [412] Mortazavi

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[409] *Ibid* at 57, Mir-Hosseini quoting Ayatollah Azari Qomi, *Sima ye Zan dar Nezam-e Eslami* (Women's Image in the Islamic Order) (Autumn 1993) pages 32 34
[410] *Supra* note 402 at 72
[411] *Ibid* at 83
[412] *Ibid* at 87

replies "ideally, women should produce such a journal, but men must do it for the simple reason that there are no women in the *Houzeh* (religious seminary) who can assume the task."[413] Saadi, the assistant editor adds "We consider the question of women important and find it imperative to address it within the *Houzeh* framework, the nature of the relationship between men and women is such that, if it is unregulated, women will lose and continue to be oppressed."[414] The importance of this initial discussion is the recognition that women's issues have a religious dimension in Iran, and that any legal solution to their social, political or economic problems must come from within the framework of the Shari'a Mir-Hosseini discusses a wide range of issues affecting women in Iran, such as compulsory veiling, unequal marriage and divorce laws, women's working conditions and more What is striking about these discussions is the awareness of the editors of the changing social and political conditions of men and women in society and the need to reform laws or even re-phrase laws to be in sync with current attitudes towards gender in society

Mir-Hosseini asks the editors

> What is your journal's perspective on gender equality? I find two distinctive gender perspectives The first, represented by Zanan, argues for gender equality and symmetry, and holds that equality between men and women is a primary principle in Islam On the other hand, we say that in Islam the family is the most important institution and Islam wants to preserve it, but men have the unequivocal right to divorce Do you hold that men and women should have unequal rights in the family? Should men have the right to divorce and women should not?[415]

The editors' reply is as follows

> You say there's inequality in the law Well—we don't consider the principle of equality to be applicable to all the rights of men and women First, let me say that, in our opinion, what's important is balance of rights between the sexes I must say that in Islam, in

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[413] *Id*
[414] Id
[415] *Ibid* at 100

> constitutional laws, I don't remember them one by one, but on the whole equality you talked about exists Men and women have the same freedom to chose, to vote, [416]

Continuing with their meeting at another session, Saeedi further discusses the concept of balance by stating

> when two people want to share life together, their rights might be totally equal but sometimes we see that this equality isn't just Why? Because rights must be proportional to duties, that's to say, we must divide the rights of individuals by their duties, and established equality in the results, in clearer terms This is how we define "balance," and this rule is found in every equitable contract [417]

Two different meanings of equality emerge from these discussions The first is Mir-Hosseini's definition of equality, which is unconditional equality between men and women both in the public and private spheres of life The young male clerics on the hand, discuss equality while balancing rights and duties towards one another They insist on an equation that implies "separate but equal " In other words, despite knowledge about the inequalities and injustices that ensue from this interpretation of "equality" they still adhere to the established narrative about compatibility and equity between men and women in Islam and deny the application of absolute equality in Islam

Mir-Hosseini discusses the issue of maintenance with the editors As already discussed, the Quran designates men as "maintainers" of women, in that they are responsible for providing for their wife and children This role has translated as "head of family" in Iranian family law Mir-Hosseini asks

> So all privileges here go to the man with financial means—since his power is premised on providing? In that case, only men who are capable of providing can have authority over their wives So, a man who can't provide shouldn't have the right to headship [418]

They reply to this argument with a strong No! saying

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[416] *Ibid* at 101
[417] *Ibid* at 117
[418] *Ibid* at 127

> No! This has nothing to do with whether he actually pays, but with his duty to pay. If he doesn't provide, his wife can't say that the rights he has over her are removed. She must go to the court to secure her right to maintenance, but she can't say that, because he hasn't provided, then he has no right to headship.[419]

In other words, the husband remains the head of the family even if he fails to uphold his duty as husband and father. What is evident in this discussion is that the premise is set on women being under the guardianship and power of men in private and public life. Although the editors of *Payam-e Zan* agree on legal limits on men's guardianship (Mir-Hosseini denotes guardianship as authority) and even though they agree to a woman's right to education, work and participation in public life, nevertheless, they don't digress much from basic *fiqh* notions about the relationship between men and women. In addition to talking with these editors Mir-Hosseini also talks with Ayatollah Yusuf Sanei' who is one of the most progressive Mujtahid and his views on gender relations in society. His ideas will be discussed in another chapter. Needless to say, Mir-Hosseini talks with Ayatollah Jannati, an advocate like Ayatollah Sanei' and the editors of *Payam-e Zan* who advocate Dynamic Jurisprudence (*feqheh pouya*).[420] Ayatollah Jannati believes that "Shari'a and its Rulings are immutable, but that there is a constant need to interpret these Rulings as new circumstances emerge."[421] For Ayatollah Jannati, "when there is a change, either internal or external, in the subject of the Shari'a Ruling, naturally a different ruling will be needed. this does not mean a change in the divine laws as such, but merely a change in the nature of the subject which gave rise to that Ruling in the first

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[419] *Id*

[420] Dynamic Jurisprudence is a concept that has gained credence in the late 90's in the Houzeh (seminary) in Iran. The basis for it is that the Shari'a Rulings need to adjust with the demands of time and place. *See* for example, Sayyid Mohsen Saidzadeh, "Fiqh and Fiqahat" 1 UCLA J. Islamic & Near Eastern L. (Spring-Summer 2002)

[421] *Supra* note 402 at 113

place" [422] Although, this novel approach can be beneficial in reforming laws, nevertheless, the debate continues whether the subject of the Ruling actually changes, if the basis of shari'a law is equity and not equality between men and women

Mir-Hosseini has many fruitful discussions with Hossein Saiedzadeh who is a progressive cleric and Ayatollah Sanei Their views will be discussed in the final chapter One of the most important issues that Mir-Hosseini points to after her very informative sessions with clerics who are passionate about women's rights, but really cannot escape the borders of classical fiqh rulings on women, is that in some of the discussions "she was in no position to offer an opinion" and this is because she wasn't a female cleric As such, she is correct to argue, that "this monopoly must be broken, this can be done only when Muslim women participate in the production of knowledge, when they are able to ask new and daring questions It is then that "Revelation can speak to us, and "show us its secrets "[423] In other words, it is only when women are official narrators of the law, that perhaps the nature of the subject of the ruling can change, and women can gain the rights they fully deserve Hence, it is only when women's alternative narrations of the law gain the power and authority to break through the barriers of the Islamic legal framework and establish themselves as members of the community of meaning that we can move towards achieving gender equality in Islamic jurisprudence

A vivid and rather funny example of this inequality was highlighted in the awareness the young daughter of the court's secretary had in the movie *Divorce Iranian Style* The young girl had been part of the court's daily life since she was two months old and the judge treats her like his own daughter Although the whole scene is very

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[422] *Id*

[423] Ziba Mir-Hosseini, "The Construction of Gender in Islamic Legal Thought" 1 Hawwa (2003) 26

humorous she is talking with the judge, who asks: "so do you still want to get married? You used to tell me you have to guide me when I get married so I don't marry a man who would beat me or divorce me." The young girl thinks for a bit and then says: "ever since I came to this court and saw what happens I knew that I should never get married at all."[424]

Conclusion

While these three scholars are Muslim and feminist, nevertheless, this search for the egalitarian dimension of Islam has left them all wondering why should this be? In other words, why should the Islamic laws and norms we have today be so patriarchal and gender biased when the central ethos of our religion calls for justice and equality for all. Ahmed discusses this divide in terms of the historic power that practical Islam has had over ethical Islam. Her look back at the historic development of the Islamic community and the influence of powerful patriarchal institutions such as seclusion and polygamy has allowed for a culture of misogyny to flourish contradicting the ethical voice of Islam. Mernissi, also situates *hadith* and verses in their historical context and deliberates that it has been the deliberation of the male elite since the death of the Prophet that has allowed for patriarchal interpretations of Quranic text. She believes the male elite continue to marginalize women by imposing the *hijab* and creating harem frontiers. Mir-Hosseini's look at divorce cases in Iran and Morocco sheds greater light on the impact of patriarchal interpretation on the daily lives of Muslim women, as they walk through the corridors of court rooms seeking to find a loophole where they could finally prove that their claim to divorce is reasonable and justifiable. Her discussions with progressive jurists reveals that

[424] *Supra* note 171.

even the traditionalist jurists have noticed the changing role of women in Iranian society and the need for changes in the legal system. As Mir-Hosseini points out the number of jurists that take a progressive stance on women's issues are few, nevertheless, the slightest cooperation from the clergy can effectively help in changing the narrative of the law on women's rights, their duties and obligations.

In their narrations Ahmed, Mernissi and Mir-Hosseini are all well aware of the complexities of *fiqh* and the diversity of interpretations that exist. However, what makes their scholarship so interesting and important is that each of them writes from a particular geographic context. Ahmed reminisces about her life growing up in Egypt and the social, cultural and political changes that the country and its women have gone through over the last century. Mernissi tells the story of her childhood and her efforts to cross the *hudud* and explore new boundaries by studying and writing about women and Islam throughout Islamic history, and in Morocco. Mir-Hosseini takes us the reader to the hallways of family courts in Morocco and Iran re-telling the story of women struggling with the law and seeking their rights. The context of each author's work is different; nevertheless, the issues they address are the same. The work of these scholars makes us aware of the complex relationship that women have had with Islamic law throughout the years and the necessity to understand the layers of meaning, context, history and politics that affects that relationship. As such, they do not reach their conclusions lightly. Active women's participation in writing the law requires the cooperation of women, men, jurists, *mujtahids*, academics, politicians and historians. They all have to come together with the goal of righting the wrong or the violence that the law commits. Their feminist narratives of Islamic legal history shows that it is possible to see the development and evolution of

the law in a different manner and that it is possible to move beyond patriarchal interpretations of religious texts in order to reach gender equality and empowerment. By choosing to work through the texts and discussing the need to transform the law from within they are seeking to inject their feminist narratives into the framework of Islamic jurisprudence. The challenge that they face however is whether their alternative feminist narrative will be accepted by the male elite as authentic and authoritative. Despite the challenges and possible backlash to their alternative narratives, nevertheless their work is very important for the continued relevance of Islamic law for Muslim women. The alternative narratives of Islamic law that Ahmed, Mernissi and Mir-Hosseini propose reveals the possibility to understand and interpret religious texts such that they uphold the principles and equality and gender-sensitivity. In other words, it is possible to continue to the revolution that began in Mecca during the Prophet's time and extend its life to the twenty-first century by including feminist interpretive approaches to the law. The next chapter will discuss the work of two other Muslim feminist scholars and their pioneering work in producing an alternative feminist narrative in Islamic jurisprudence.

Chapter 4
Muslim Feminist Narratives (II)

I. Islamic Feminism in the West

While Islamic feminism is not a new phenomenon, and has been "a modus operandi in action since the nineteenth century in the various women's movements in Muslim countries,"[425] nevertheless, it has gained momentum and appeared as a tangible concept only in the twentieth century. [426] Women have been writing critical articles and books about the status of women's rights in Islam since the early years of the twentieth century.[427] However, with the immigration of Muslims to the United States in the latter years of the twentieth century a "new genre of writing about Muslim women began to develop in American campuses."[428] Hadad notes, that for the most part these scholars were the "products of the nationalist-socialist discourses taking place in their home countries after the demise of colonialism and were influenced by the modernization paradigm then in the vogue among social scientists in the United States."[429] Along with the post-colonial experience, Iranians fleeing from the radical changes of the Islamic Republic also started their own discourse and observation on the role of political Islam and feminism.[430] As such, a number of divergent views have emerged since the 1970's

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[425] Shahrzad Mojab, "Theorizing the Politics of Islamic Feminism," 69. Fem. R (Winter 2001) 124.
[426] *Id*
[427] Some of the earliest critical works written by women include Bibi Astar Abadi, *Vices of Men* (Iran 1894), Nazira Zain El-Din, "Removing the Veil and Veiling" (Beirut 1928) republished in 5 Women's St Int' Forum No 2 (1982)
[428] Yvonne Yazbeck Hadad, "Islam, Women, and the Struggle for Identity in North America" in Rosemary Skinner Kelly and Rosemary Radford Reuther, Eds., *Encyclopedia of Women and Religion in North America Vol II* (Bloomington Indiana University Press 2006) 601
[429] Yvonne Yazbeck Hadad, "The Study of Women and Islam in the West: A Select Bibliography" 3 Hawwa No. 1 (2005) 115.
[430] *See* for example, Nayereh Tohidi, "Women's Rights in the Muslim World: The Universal-Particular Interplay" 1 Hawwa No. 2 (2003)

about the role of Islam both as a force for repression and exclusion and as a potential realm for liberation and equality The discourse is divided, and especially with regards to Islamic feminism, there are those who vehemently object to any good that can come from Islamic laws for women,[431] and others who on the contrary think Islam in and of itself is not the problem for women However, as Hadad notes,

> [I]slamic feminist discourse, whatever its form, is formulated as a response both to Islamic traditionalism and to the West, its norms, its different kinds of feminism, and its social problems It represents a century of encounter with colonialism, Christian exceptionalism, and the projection into the international context of what are perceived in the West to be universal models of womanhood as developed by the feminist movement in the United States [432]

This group of politically and historically conscious feminist Muslim woman have been seeking to establish Islamic feminism not only relevant to feminist discourse but have also been pursuing the goal of authenticating this discourse in the corpus of Islamic jurisprudence Bazarangi notes, "[F]eminist studies and Islam struggle with and against each other in the that both are oriented toward a better future for the female by rejecting the notion of human hierarchy "[433] Scholars such as Riffat Hasan, Leila Ahmed, Amina Wadud, Amira Al-Azhari Sonbol, Ghada Karmi, Lila Abu-Lughod, Azizah Al-Hibri, Kecia Ali and many others hold prominent positions in American universities and have been writing on women's rights and issues within Islam from within the borders of the United States

In analyzing the work of these scholars, Gisela Webb designates their contributions as "*scholarship-activism* because it originates in the conviction that to look at women's issues *from within* the Islamic perspective must include, and indeed unite, issues of

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[431] *Supra* note 428 at 602
[432] *Ibid* at 603
[433] Nimat Hafez Bazarangi, "Muslim Women's Islamic Higher Learning as Human Right' in Gisela Webb Ed , *Windows of Faith Muslim Woman Scholar Activist in North America* (Syracuse Syracuse University Press 2000) 46

theory and practice. This means that any considerations of "practical" solutions to problems and injustices faced by women must have sound theological grounding in the Quranic worldview."[434] In other words, to find tangible and authentic proposals that utilize legal methodologies such as *tafsir*, *ijtihad* and the issuance of *fatwa* to change laws concerning women. The use of the word "scholarship-activism" proves instructive in characterizing the work of these feminist scholars because, as will be discussed in greater detail these scholars are not simply analyzing an existing situation—namely discrimination against women in the name of religion—but they truly believe that change and reform is possible if the narratives behind the laws change.

However, writing (or publishing) in the West produces its own challenges and opportunities. On the one hand, the work of many Muslim women in the West is clearly the "result of immersion in a new context influenced by liberationist discourse and by postmodernist analysis. Muslim women feel and exercise the freedom to analyze and critique texts and traditions in ways not possible in most Muslim societies."[435] On the other hand, writing from the "outside" especially as a "feminist" risks being labeled as Western, secular, un-Islamic and most importantly as *un-authentic*. This is perhaps the most important challenge posed to Muslim feminist scholars writing in the West. Authenticity and authority are key concepts that affect the work of any scholarship with regards to Islam. This is because only an elite group of male jurists have historically been identified as the authorities of the law who have the power to produce authentic laws and norms. As such the work of feminist scholars not only challenges the boundaries of

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[434] Gisela Webb, "May Muslim Women Speak for Themselves, Please?" in Gisela Webb, ed., *Windows of Faith Muslim Women Scholar-Activists in North America* (New York: Syracuse University Press 2000) xi
[435] Yvonne Yazbeck Hadad, "Islam, Women, and the Struggle for Identity in North America" in Rosemary Skinner Kelly and Rosemary Radford Reuther, Eds , *Encyclopedia of Women and Religion in North America Vol II* (Bloomington Indiana University Press 2006) 603

existing laws but also claims that their proposals are just as authentic and authoritative as existing jurisprudence

Despite the challenges, it is important to note, "whatever kind of Islamic feminism is adopted, the tendency is to posit in as clearly different from "Western feminism " Western feminism is used as a kind of foil or antithesis of both Islamism and Orientalism, allowing for the creation of "new" space for Muslim women not completely identified with any of those "[436] The feminist scholars that we will study in this chapter are trying to break away from years of textual interpretation by male jurists, dogmatic legal frameworks, and oriental projections of female oppression in Islam They are trying to create new narratives of texts and laws that speak of equality, rights and dignity for Muslim women who feel that religious laws and norms do not celebrate and respect their personhood These feminist scholars are fully aware of the role of history, power and politics in prescribing a certain position for women in Islamic laws As such, they are establishing female agency in the interpretation of texts, re-evaluate narratives behind existing *hadiths*, and propose the use of *ijtihad* for women by women to affect change In effect, they are creating a new frontier in Islamic jurisprudence where women's narrative on what the law ought to be will hold its own place as authentic narrative speaking with authority to the Islamic legal system In essence, they are re-affirming the existence of their alternative nomos—world of law which exists outside the nomos of Islamic law—the Shari'a—and they are seeking for ways to establish their alternative world of meaning to gain power and recognition not only by male jurists but the Muslim community as well

[436] *Ibid* at 605

Following the methodology of the previous chapter, this chapter will study and analyze the scholarship of Amina Wadud and Azizah Al-Hibri. Amina Wadud is a scholar on the Quran and former professor of Islamic Studies at Virginia Commonwealth University. She is a convert to Islam and continues to be active in her community through her scholarly work and activism. Azizah Al-Hibri is Professor of Law at the T.C. Williams School of Law at University of Richmond and founder of KARAMAH: Muslim Women Lawyers for Human Rights.[437] She writes on women's rights on Islam from a global perspective with a particular emphasis on Muslim women's rights in North America. Wadud and Al-Hibri are well versed in Islamic jurisprudence and are scholar-activists in the United States. They write and work in the American context, hence, their experiences and even goals are at times different from the three scholars studied in the previous chapter. Wadud and Al-Hibri strive towards raising awareness about rights and re-interpretive possibilities among Muslim women in the United States. In addition, their activist-scholarly work seeks to include discussions about Muslim women and the issues affecting this population in mainstream discussions both in academia and in society. Although their work is not exclusively useful for Muslims living in North America, nevertheless, they approach the issue conscious of the importance of educating Muslim women in America about their rights. As such, they are creating a new narrative in a new site of resistance. Namely, their geographic location and the women they write about allows them to focus on Muslim women's discourse in North America and in so doing they are not only producing an alternative narrative but they are also raising the possibility that it is possible to talk about Muslim women and their rights outside the Muslim world. In other words, it is possible to produce an alternative feminist narrative

[437] www.karamah.org

in Islamic law in a new geographic location, namely North America which can be just as authentic and authoritative as any other narrative of Islamic law

1. Amina Wadud

On March 18, 2005 Prof Amina Wadud of Virginia Commonwealth University took the bold and historic action of leading Friday prayers at the Episcopal Cathedral of St John the Divine in NY, where men and women prayed side by side following a woman imam [438] Her actions have raised great debate among scholars,[439] activists and Muslims (both male and female) worldwide about the appropriateness of her actions and the consequences thereof During her sermon she said

> The issue of gender equality is a very important one in Islam, and Muslims have unfortunately used highly restrictive interpretations of history to move backward, with this prayer service we are moving forward This single act is symbolic of the possibilities within Islam [440]

Although Wadud's act was symbolic, nevertheless, it was an act of rebellion that challenged an age-old boundary and practice in Islam where women have prayed behind men in a congregation This simple act was enough to upset the status quo and raise important questions about how far can one go in questioning a norm, a law and a tradition that a people view as the sacred embodiment of the word of God Amina Wadud claims that she is engaged in "gender jihad" which she defines as a "struggle to establish gender justice in Muslim thought and praxis "[441] At its simplest level, she notes, "gender justice is gender mainstreaming—the inclusion of women in all aspects of Muslim practice,

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[438] Information retrieved from online source www muslimwakeup com
[439] Leila Ahmed and Ibrahim Moosa supported her actions
[440] BBC World News, "Woman Leads US Muslims to Prayer" (online at http //news bbc co uk/2/hi/americas/4361931 stm, March 18, 2005)
[441] Amina Wadud, *Inside the Gender Jihad Women s Reform in Islam* (Oxford, England OneWorld Publications 2006) 10

performance, policy construction, and in both political and religious leadership" [442] Wadud takes an interpretive approach and re-reads the foundational source of Islamic law—the Quran—and seeks to establish a "Quranic hermenuatics that is inclusive of the female experiences and of the female voice that could yield greater gender justice to Islamic thought and contribute toward the achievement of that justice in Islamic praxis "[443] Her search for gender justice comes from her intellectual query to understand what Islam really has to offer humanity Wadud officially converted to Islam on Thanksgiving Day, 1972 and states that she owes "her full embrace of Islam to the Quran " [444]

Wadud has embraced Islam based on her free will and understanding that Islam would be the perfect guide to a fulfilling life of spirituality and intellectual growth However, she notes, "the more years I have lived as a Muslim woman, the more inequality I have discovered between women and men My initial theoretical concern was to determine if the cause of women's inequality was because of "Islam" itself."[445] It did not take long she notes, "to identify how certain definitions of Islam were condoned or condensed exclusively by male authority, by various ideologies, as well as by culture, history, and by the sheer privilege of presumption—even up to the present time " [446] These questions and concerns have taken Wadud on a life-long journey in search of answers to the enigma of women's inequality in Islam

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[442] *Id*
[443] Amina Wadud, Quran and Women Rereading the Sacred Text from a Woman's Perspective (New York Oxford University Press 1999) x
[444] *Supra* note 441 at 9
[445] *Ibid* at 21
[446] Id

Amina Wadud is now a former Professor of Islamic Studies at Virginia Commonwealth University. She received her M.A and PhD in Near Eastern and Arabic Studies from University of Michigan. Upon receiving her PhD, she taught at the International Islamic University in Malaysia. She has also studied Arabic at the American University in Cairo and taken courses on Islamic philosophy at Al-Azhar University (Cairo, Egypt),[447] the oldest institution of higher learning in the Muslim world.

Wadud, who claims to be a "pro-faith, pro-feminist Muslim woman,"[448] has devised a particular methodology that seeks to decipher the hidden meaning of words and phrases that have become so fundamental to our understanding of Islam and its norms. To begin with, Wadud redefines the notion of agency in the word "Islam" itself. Unlike traditional interpretations, which designate Islam as "surrender to God's will," Wadud interprets Islam as "engaged surrender." She notes,

> no definition has been as significant to my identity and work as a Muslim woman in the gender jihad as has Islam as "engaged surrender." The combination implies the acknowledgment of some standard idea that includes Allah's power over His creation with simultaneous free will in the human response. Surrender is mutually accepting human volition while recognizing Allah's authority.[449]

In tandem with the concept of engaged surrender, Wadud also re-examines the word *khalifah*, in the story of the creation of Adam where God says: "Verily, I will create a *khalifah* on the earth." [450] Traditionally *khalifah* has been translated as vicegerent on earth. However, Wadud argues for "[A] modern equivalent for *khalifah* to be "trustee" or "moral agent."[451] Her interpretation gives greater weight to the relationship that exists

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[447] www.en.academic.ru
[448] *Supra* note 441 at 4.
[449] *Ibid* at 23-24.
[450] The Holy Quran 2:30.
[451] *Supra* note 441 at 33.

between human and God, not simply as trustees of God on earth, but rather as responsible human beings who have to strive towards establishing social justice on earth, "as representative of the divine will or cosmic harmony." [452] For Wadud, there is nothing in the Quran or *sunnah* "that restricts or limits agency—in the sense of full moral responsibility to obey the will of Allah." [453] As such, her work similar to Ahmed, Mernissi and Mir-Hosseini, aims at deconstructing the normative assumptions that limit women's agency in Islam.

One of the most important arguments she makes is that throughout the development of Islamic intellectual and legal history (with the exception of transmission of *hadith*) "women did not participate in Islam's paradigmatic foundations. Put another way, not only did men, men's experiences of the world—including their experiences with women—and men's ideas and imagination determine how Islam is defined for themselves, they also defined Islam for women." [454] This speaks of the violence committed by the male elite who systematically excluded women from any legal and normative activity. As such, she like many others is going back to the primary sources of Islam and revisiting the intellectual history of Islamic thought to decipher where these oppressive and at times unjust practices have come about.

Quran and Woman: Re-reading the Sacred Text from a Woman's Perspective[455] is Amina Wadud's most important work. Her goal in this book is to develop a female-inclusive exegesis of the Quran that will eventually be incorporated into mainstream Quranic exegesis. She provides a Quranic hermeneutics from a gender perspective to

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[452] *Ibid* at 35.
[453] *Ibid.* at 37.
[454] *Ibid.* at 96.
[455] *Supra* note 441 at xiii.

serve as an alternative to the mainstream interpretations of the Quran by men She notes "[M]ore female-inclusive interpretations raise the legitimacy of women's claims to authority within the intellectual tradition and bear upon the practical implementation of that tradition [456] As such, she proposes to reread the Quran by employing a hermeneutical methodology "A hermeneutical model is concerned with three aspects of the text, in order to support its conclusions

1 The context in which the text was written (in the case of the Quran in which it was revealed)
2 The grammatical composition of the text (how it says what it says) and
3 The whole text, its *Weltanschauung* or world-view "[457]

Although her methodology is not unique, nevertheless its undertaking by a female scholar who has not been trained in an Islamic seminary is One can argue that this book is the physical manifestation of her gender jihad. Although it was published before she coined the term, nevertheless, she was and continues to be in search of gender justice in the words and between the lines of the verses in the Quran. She notes, "because women are not deemed as important as men in most Muslim majority or minority communities, Muslim women do not enjoy a status equal to men If the definitive basis for what Islam means is determined by what Muslims do, then women and men are not equal "[458] However, this inequality is not in-sync with the spirit of justice and egalitarianism that Islam proposes through the Quran and Prophetic action She says, "I reasoned that only explicit Quranic indication that women and men were not co-equals could require acceptance of this inequality as a basis of faithfulness to Islam."[459] An important issue that she raises is to discover not only "*what* the Quran says, *how* it says it, what is said

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[456] *Ibid* at 7
[457] *Supra* note 443 at 3
[458] *Ibid* at ix
[459] *Ibid* at ix

about the Quran, and *who* is doing the saying,"[460] but to also consider what is left unsaid: the ellipses and silences.

Although she does not claim to be a progressive Muslim, and does not direct any criticisms to Shari'a or *fiqh* rulings, nevertheless she does argue that this new reading of the Quran be should be regarded as establishing precedent for continual development and renewal of the laws towards a just social order. "A comprehensive just social order" she notes, "not only emphasizes fair treatment of women, but also includes women as agents, responsible for contributing to all matters of relevance to human society. Despite so much Quranic evidence about the significance of women, gender reform in Muslim society has been most stubbornly resisted. [461] This is perhaps the most puzzling issue for her and for many feminist scholars like her, seeing that the Quran not only addresses women directly but also enumerates rights when none had existed before raises the question of why are women still marginalized in Islamic societies legally, socially, religiously and politically.

For Wadud the question that arises is: "[H]ow could the Islamic intellectual ethos develop without giving clear and resounding attention to the female voice, both as a part of the text and in response to it?" Perhaps she notes, "it was the absence of this resounding attention, historically, that resulted not only in negating the significance of this voice but also deeming it to the be *awrah*, or taboo. I consider this negation a violation of the very dignity of woman as a human being and as *khalifah*, or trustee before Allah. It makes little difference if it was not intended to marginalize her, it was still a violation."[462] However, Wadud is determined to change that by lending her voice to interpreting the Quran based on a methodology that has legitimacy within the Islamic

[460] *Ibid.* at xiii.
[461] *Ibid.* at xiii.
[462] *Ibid.* at x.

tradition She is well aware of the issue of legitimacy and argues that, "[B]efore new ideas can be accepted, their legitimacy within Islam must be clearly established Establishing legitimacy is most often achieved by drawing an analogy between the new idea and the preserved tradition as exemplified in cultural practices, Shari'a law, or text "[463] Here, Wadud is conscious of the influence of historical and geographic context on the interpretation of the narrator She notes, the "textual method is vicarious and haphazard because similar passages can yield divergent conclusion—depending on the point of view of the reader "[464] The point of view of the reader-narrator and more specifically the gender of the narrator also influence the interpretation of the text As such, the text can mean different things to different people if a certain methodology is not followed But more importantly it's the ideology the guides that narrator that allows the text to speak in different voices While Wadud doesn't state this very clearly, but her concerns are similar to Ahmed, Mernissi and Mir-Hosseini in that the guiding ideology behind current interpretations of Islamic laws has been patriarchy and male dominance We would have had very different laws had women been a part of this narrative What all of these scholars are trying to reach is the inclusion of their alternative feminist narratives in the corpus of Islamic jurisprudence

In discussing the success of her book and critiques that some conservative Muslims have directed towards her she notes

> I often feel that although I entered the tradition whose holy Prophet required Muslim males and females to seek knowledge until the grave, that as a woman, of African origin, and an American convert to Islam, I was not supposed to seek beyond what others hand down to me I am chastised as a heretic such that I must be fearful of my life, but I do

[46] *Ibid* at xi
[464] *Ibid* at xi

> find that disagreement with status quo is treated as though it were disagreement with Islam.[465]

Perhaps one of the most controversial claims that she makes in her book which, is central to her re-interpretation of the Quran, is that the Quran is a moral history and proposes moral values that are 'extrahistorical' and 'transcendental' in nature.[466] These eternal values ought to apply to all times and places. This means that in reading verses of Quran that were revealed in response to specific situations then if "the 'reason' for a verse is a specific incident, then the universal 'extrahistorical' nature of the Quran is removed."[467] Her line of reasoning is very similar to that of Fazlur Rahman[468], and the Sudanese scholar Mahmoud Mohammad Taha,[469] who proposed that Muslims today should pay more attention to the Meccan verses in the Quran, which are universal in their messages of justice and equality. Wadud insists on considering the universal aspect of the Quran in interpreting even the context-specific verses of the Quran. As such, it "was not the text that restricted women, but the interpretations of that text which have come to be held in greater importance than the text itself. In other religions, feminists have had to insert woman into the discourse in order attain legitimacy. The Muslim woman has only to read the text—unconstrained by exclusive and restrictive interpretations—to gain an undeniable liberation."[470] Hence, her objective was to make "reading" the Quran meaningful and relevant to women living in the modern era.[471]

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[465] *Ibid* at xviii
[466] *Ibid* at 30
[467] *Id.*
[468] Fazlur Rahman, *Major Themes in the Quran* (Second Edition, Chicago: The University of Chicago Press 2009).
[469] Mahmoud Mohammad Taha was a Sudanese scholar, political activist and engineer. His proposition that Muslims should only focus on the Meccan verses resulted in his execution by the Sudanese government in 1985 on charges of apostasy He was the late teacher of human rights scholar Prof. Abdullahi Ahmed An'naim www alafrika org
[470] *Supra* note 443 at xxi-xxii
[471] *Ibid.* at 1

In an effort to read the Quran in a holistic manner, mindful of the universal norms that the Quran emphasizes and the moral principles that guide it, Wadud discusses the general circumstances where women are mentioned in the Quran. Except for Mary the mother of Jesus, "references to female characters in the Quran use an important cultural idiosyncrasy which demonstrates respect for women."[472] So, for example verses address the wives (*azwaj*) of the Prophet, or the wife (*zawj*) of Adam and Imran, the mother of Moses (*umm* Musa). As such the Quran does not address women in an individual basis but "centers on her relationship to the group i.e. as a member of the social system."[473] It does however address women individually when it comes to spiritual matters. Verse 33:35 reads:

> Lo! men who surrender unto Allah, and women who surrender, and men who believe and women who believe, and men who obey and women who obey, and men who speak the truth and women who speak the truth, and men who persevere (in righteousness) and women who persevere, and men who are humble and women who are humble, and men who give alms and women who give alms, and men who fast and women who fast, and men who guard their modesty and women who guard (their modesty), and men who remember Allah much and women who remember - Allah hath prepared for them forgiveness and a vast reward.

Wadud argues that with "regards to spirituality, there are no rights of women distinct from men."[474] However, she argues, "when different social systems determine differences between men and women, they conclude these differences as indications of different values as well."[475] She emphasizes that the Quran looks at individuals as having equal value with one another, and the only distinction that is made is between those who have more *taqwa* or piety as opposed to others. The scale of *taqwa* is perhaps the clearest

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[472] *Ibid.* at 32.
[473] *Ibid.* at 33.
[474] *Ibid.* at 34.
[475] *Ibid.* at 35.

indicator as to who is closer to God and is favored by him Verse 49 13 of the Quran reads

> O mankind! Lo! We have created you male and female, and have made you nations and tribes that ye may know one another Lo! the noblest of you, in the sight of Allah, is the best in conduct Lo! Allah is Knower, Aware

Taqwa in action and attitude is the only distinguishing factor that establishes hierarchy among individuals before God, regardless of sex, ethnicity, age, color or nationality.

A common question that arises when considering that women and men are equal before they eyes of God spiritually, is then why were women not chosen as Prophets or leaders In this lieu, Wadud addresses the significance of Mary mother of Jesus who is the only women to be named in the Quran and has a chapter in her name [476] Mary holds a distinct position through the birth of Jesus, the son of Mary who was born through divine decree.

> Then We sent unto her Our Spirit and it assumed for her the likeness of a perfect man
> She said Lo! I seek refuge in the Beneficent One from thee, if thou art Allah-fearing
> He said I am only a messenger of thy Lord, that I may bestow on thee a faultless son
> She said How can I have a son when no mortal hath touched me, neither have I been unchaste?
> He said So (it will be) Thy Lord saith It is easy for Me And (it will be) that We may make of him a revelation for mankind and a mercy from Us, and it is a thing ordained
> And she conceived him, and she withdrew with him to a far place [477]

Wadud also discusses Bilqis, commonly known as the Queen of Sheba "Despite the fact that she ruled over a nation, most Muslims hold leadership as improper for a woman " However, the "Quran uses no terms that imply that the position of ruler is inappropriate for women."[478]

> But he was not long in coming, and he said I have found out (a thing) that thou apprehendest not, and I come unto thee from Sheba with sure tidings
> Lo! I found a woman ruling over them, and she hath been given (abundance) of all things,

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[476] Chapter 19 is entitled *Maryam* (or Mary)
[477] *Id* 19 17-21
[478] *Supra* note 443 at 40

> and hers is a mighty throne
> I found her and her people worshipping the sun instead of Allah, and Satan maketh their works fair seeming unto them, and debarreth them from the way (of Truth), so that they go not aright [479]

Then the story goes that Solomon sends a letter to *Bilqis* stating "In the Name of Allah" inviting her to submit to and worship Allah

> The Queen of Sheba) said (when she received the letter) O chieftains! Lo! there hath been thrown unto me a noble letter
> Lo! it is from Solomon, and lo! it is In the name of Allah, the Beneficent, the Merciful,
> Exalt not yourselves against me, but come unto me as those who surrender
> She said O chieftains! Pronounce for me in my case I decide no case till ye are present with me
> They said We are lords of might and lords of great prowess, but it is for thee to command, so consider what thou wilt command

She sends him gifts of gold in response, however Solomon sends them back and says he is in no need of such things So then she decides to pay him a visit, as she is curious to find out more about Solomon and his faith While she is planning to visit Solomon has her throne transported to his palace When she comes she is amazed at this event finding her throne there and believes in Allah The fact that there are verses that indicate the power she had over her advisors, and her independence in decision-making shows that there is no limitation on women accepting leadership roles In this lieu, Wadud states that she connects "her independent political decision—despite the norms of the existing (male) rulers—with her independent acceptance of the true faith (Islam), despite the norms of her people "[480] Considering spiritual equality, special mention in the Quran and the right to assume leadership roles its important to consider some very specific verses whose interpretation have led to discriminatory behavior towards women

The word *darajah* means "step, degree or level " The term *darajah* has been

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[479] Holy Quran 27 22-24
[480] *Supra* note 443 at 41

repeatedly mentioned in the Quran (20 75, 6 132, 46 19) and is obtained by doing a variety of 'good deeds ' It can be linked to the previously discussed term *taqwa* Meaning those having *darajah* are those who have more *taqwa* and so they are worthy of their exalted position [481] "Although the Quran distinguishes on the basis of deeds, it does not set value for different particular deeds This leaves each social system to determine the value of different kinds of deeds at will "[482] The problem with this situation is that often women and men's work are valued differently

> And covet not the thing in which Allah hath made some of you excel others Unto men a fortune from that which they have earned, and unto women a fortune from that which they have earned (Envy not one another) but ask Allah of His bounty Lo! Allah is ever Knower of all things [483]

This verse clearly doesn't attribute any higher status to men or women but simply states that each sex has rights over what they earn or inherit for that matter However, the word *darajah* is used in 4 34 in a different context

> Women who are divorced shall wait, keeping themselves apart, three (monthly) courses And it is not lawful for them that they should conceal that which Allah hath created in their wombs if they are believers in Allah and the Last Day And their husbands would do better to take them back in that case if they desire a reconciliation And they (women) have rights similar to those (of men) over them in kindness, and men are a degree above them Allah is Mighty, Wise [484]

This verse has been interpreted to universally imply that men have a degree over women in every context However, Wadud correctly points out that the context of this verse is very specific divorce In divorce, "men have an advantage over women In the Quran the advantage men have is that of being individually able to pronounce divorce against their wives without arbitration or assistance "[485] While divorce is granted to women only

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[481] *Ibid* at 66
[482] *Id*
[483] Holy Quran 4 32
[484] Holy Quran 2 228 Pickthal translation
[485] *Supra* note 443 at 68

before a judge and only if she can provide reasonable grounds for divorce. Wadud also notes the mention of word *maruf* or kindness before *daraja*. She notes that root of *maruf* is *arf* 'to know,' and it is mentioned in other instances with regard to the treatment of women. So, with regards to treating women Wadud notes it also has dimensions of equitable, courteous, and beneficial.[486] Hence, this verse does not indicate universal dominance or preference; it is only in the dimension of divorce that men have this right. The choice of the narrator to limit the interpretation of the verse to a specific situation while not novel, is quite significant because it allows the believers to understand the story behind that verse's revelation and to apply it correctly. In other words, had this feminist interpretation of the above verse prevailed throughout the Muslim world then we would seldom have men declaring themselves superior to women.

Since divorce is one of the most important and perhaps controversial legal aspects of the Quran, Wadud notes that verses concerning divorce were revealed in Medina in response to specific situations. She indicates, like Mernissi, that although reform was the intention of Islam, nevertheless there were limits to how much reform could be achieved for women in seventh-century Arabia. In addition, Wadud considers the evolution in marriage with the advent of Islam, in that "women were no longer the subjects of marriage, but full, willing partners," Hence, this shifts our focus "to the broader Quranic wisdom which aims at harmonious reconciliation" [487] Verse 4:128 to 130 reads:

> If a woman feareth ill treatment from her husband, or desertion, it is no sin for them twain if they make terms of peace between themselves. Peace is better. But greed hath been made present in the minds (of men). If ye do good and keep from evil, lo! Allah is ever Informed of what ye do.
> Ye will not be able to deal equally between (your) wives, however much ye wish (to do so). But turn not altogether away (from one), leaving her as in suspense. If ye do good

[486] *Ibid.* at 69.
[487] *Ibid.* at 80.

> and keep from evil, lo! Allah is ever Forgiving, Merciful
> But if they separate, Allah will compensate each out of His abundance Allah is ever All-Embracing, All-Knowing

This verse indicates good will on behalf of both partners, the possibility of reconciliation, and the need for peaceful separation In other words, divorce is not meant to hurt either party There are two points that Wadud elaborates which is important to consider. First, she argues, "there is no indication that the unilateral right to repudiation needs to be continued, or if continued, that it need be only for the husband "[488] Second, since there has been no mention of women's rights to repudiation this does not mean that women don't have this right. As discussed earlier, before the advent of Islam a woman would turn the entrance to her tent the other way to indicate to her husband that she has divorced him. Wadud argues that there is "no indication in the Quran that all power of repudiation must be removed from women "[489] This is an important factor to consider, because, as noted earlier the Quran is not a book of rules rather it establishes standards for moral behavior. Hence, if the Quran is silent on some manners it does not mean that it would disapprove of them, i.e women's unconditional right to divorce Divorce laws in Islamic countries are based on the verses of the Quran, which mainly address men as their audience.

> When ye have divorced women, and they have reached their term, then retain them in kindness or release them in kindness Retain them not to their hurt so that ye transgress (the limits) He who doeth that hath wronged his soul Make not the revelations of Allah a laughing-stock (by your behaviour), but remember Allah's grace upon you and that which He hath revealed unto you of the Scripture and of wisdom, whereby He doth exhort you Observe your duty to Allah and know that Allah is Aware of all things
> And when ye have divorced women and they reach their term, place not difficulties in the way of their marrying their husbands if it is agreed between them in kindness This is an admonition for him among you who believeth in Allah and the Last Day That is more virtuous for you, and cleaner Allah knoweth, ye know not [490]

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[488] *Ibid* at 80
[489] *Id*
[490] Holy Quran 2 231-232

The Quran emphasizes good behavior towards women who men are divorcing and this can be taken as a measure to curtail the violent and unjust behavior of men before Islam who would not only divorce women, but keep in limbo and say "you are like my mother now" creating a situation where she could not leave her husband's home or marry another man Hence, perhaps the reason why men were addressed in the verses concerning divorce is that their behavior and actions were the ones that needed to be reformed

In this context, the verse concerning polygamy is an indicator of reforming men's behavior and also placing limitations on the number of wives men could take One of the greatest misperceptions about polygamy is that all Muslim men have the unconditional right to have four wives This is a stark misinterpretation As Wadud note, in the first instance this verse is about just treatment toward orphans "Some make guardians, responsible for managing the wealth of orphaned female children, were unable to refrain from unjust management of that wealth " [491] As such the following verses 4 2-3 address the issue by stating

> Give unto orphans their wealth Exchange not the good for the bad (in your management thereof) nor absorb their wealth into your own wealth Lo! that would be a great sin
> And if ye fear that ye will not deal fairly by the orphans marry of the women, who seem good to you, two or three or four, and if ye fear that ye cannot do justice (to so many) then one (only) or (the captives) that your right hands possess Thus it is more likely that ye will not do injustice

These two verses were revealed in Medina after the Muslims were defeated in the Battle of Uhud (3 AH/625 CE) This war left many women widowed and children orphaned Marriage was one of the best ways women were ensured protection For Wadud, this verse is clearly concerned with justice "dealing justly, managing funds justly, justice to

[491] *Supra* note 443 at 83

the orphans, and justice to the wives "[497] In addition, verse 4 3 not only limits the number of wives a man could have at any given time but it also states that if you fear you cannot do justice then take only one It must be noted that before the advent of Islam the men of the region often had more than four wives or concubines This verse puts a limit on that Having more than wife and the challenges of equality is followed by 4 129 which states

> Ye will not be able to deal equally between (your) wives, however much ye wish (to do so) But turn not altogether away (from one), leaving her as in suspense If ye do good and keep from evil, lo! Allah is ever Forgiving, Merciful

The emphasis on treating one's wives with equality highlights the challenge of this notion Hence, monogamy is the preferred route and polygamy becomes an option only if much good ensues

Wadud also addresses the issue of female witnesses in Islamic practice 2 282 is the only verse that addresses this issue and reads

> O ye who believe! When ye contract a debt for a fixed term, record it in writing Let a scribe record it in writing between you in (terms of) equity No scribe should refuse to write as Allah hath taught him, so let him write, and let him who incurreth the debt dictate, and let him observe his duty to Allah his Lord, and diminish naught thereof But if he who oweth the debt is of low understanding, or weak, or unable himself to dictate, then let the guardian of his interests dictate in (terms of) equity And call to witness, from among your men, two witnesses And if two men be not (at hand) then a man and two women, of such as ye approve as witnesses, so that if the one erreth (through forgetfulness) the other will remember And the witnesses must not refuse when they are summoned Be not averse to writing down (the contract) whether it be small or great, with (record of) the term thereof That is more equitable in the sight of Allah and more sure for testimony, and the best way of avoiding doubt between you, save only in the case when it is actual merchandise which ye transfer among yourselves from hand to hand In that case it is no sin for you if ye write it not And have witnesses when ye sell one to another, and let no harm be done to scribe or witness If ye do (harm to them) lo! it is a sin in you Observe your duty to Allah Allah is teaching you And Allah is knower of all things

This verse does mention if you can't find another male witness then bring two female witnesses, so that if one forgets the other can remind her In current Muslim understanding, application of this verse means that the testimony of a woman is half that

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[497] *Id*

of a man. As such, women's testimony does not account to much and can be interpreted as women being worth half than a man! Wadud however argues, that "both women are not called as witnesses." That in fact, "one woman is designated to 'remind' the other: she acts as corroborator. Although the women are two, they each function differently."[493] Reading the verse from this perspective establishes a very different world-view, where giving women distinct functions "not only gives each woman significant individual worth, but also forms a united front against the other witnesses."[494] In addition, Wadud emphasizes that this verse limited to financial transactions and does not apply to other matters. Wadud's re-reading of this verse does not only shed light on the more specific meaning and context of the verse but also dispels centuries of misinterpretation and misapplication of this verse which incorrectly established the inherent inequality of men and women.

For Wadud, gender jihad does not end with interpreting the Quran from a female inclusive view. She seeks to situate her concepts and interpretations in a broader venue where she can search for social justice and gender justice in the Quran as part of a larger project. One of her main goals is to work towards incorporating female inclusive interpretations of the Quran in line with mainstream male interpretations of the Quran. As she notes, "the existence of so many exegetical works (*tafasir*) indicates that, with regard to the Quran, the interpretation process has existed, and will probably continue to exist, in a variety of forms."[495] As such, for her, it is important for women to become official interpreters of the Quran (*mofasser*) as well. It is by becoming part of this cadre of specialists that Wadud proposes to establish female-inclusive readings of the Quran as

[493] *Ibid.* at 85.
[494] *Ibid.* at 86.
[495] *Ibid.* at 94.

valid and authoritative. It is part of the larger project of becoming official narrators of the law and being recognized as such.

In addition, to gender mainstreaming in the realm of *tafsir* or Quranic exegesis, Wadud also wants to include studies of "gender and Islam" within mainstream feminist and religious studies departments. As an academic she has experienced first hand the lack of knowledge and at times resistance towards studying both gender and religion from an alternative point of view. As such, she notes, "adequate knowledge of Islam is a prerequisite to formulating adequate analysis in Muslim women's studies. The Islamic intellectual discourse is as essential to understanding Islam and Muslims (women and men) as it is to understanding any number of topics related to them."[496] Mainstreaming Islamic studies and Muslim women's studies is part of her vision of creating an Islamic gender theory where a framework and methodology of analysis is established, and similar to other branches of feminist theory it is incorporated into textbooks and classroom discussions. She argues, "[C]onstructing an organized and organic sub-discipline in academia with Muslim women's studies as the focus is a reasonably tenable idea."[497] This would allow for a careful examination of the two disciplines, Islamic studies and gender studies and allow for cross-disciplinary exchange and understanding. This development can lead to "[R]emoving patriarchal biases from Islamic studies as a whole by integrating gender as a category of thought."[498] This can be one of the most "significant means for expanding the interdisciplinary component," and for establishing gender and its study as fixed and important category of study in Islamic studies.

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[496] *Supra* note 441 at 72.
[497] *Ibid.* at 84.
[498] *Ibid.* at 85.

Wadud is the complete embodiment of the scholar-activist where both through her academic work and interaction with NGO's such as "Sister's in Islam" she applies theories of justice to text and praxis in search of gender justice and equality. Her narration of the Quran, experience in academia, groundwork in organizations, and her role as mother and member of an Islamic community have all enabled her to seek normative and practical ways towards ending gender bias in Islamic thought and practice. Like many other scholars, she does not want her thoughts and ideas to remain within the confines of academia, but she wants to take them to the field, to the trenches of classrooms and to mosques and courtrooms in order to challenge the existing discrimination against Muslim women and their being. In *Gender Jihad* she notes, "I wrestle the hegemony of male privilege in Islamic interpretation ("master's tool") as patriarchal interpretation, which continually leaves a mark on Islamic praxis and thought." [499] But it is exactly that hegemony and privilege that she is penetrating and challenging through her thoughts and actions.

2. Azizah al-Hibri

Described as "a Renaissance woman,"[500] Azizah al-Hibri is professor of Law at T.C. Williams School of Law at University of Richmond in Virginia. She is also the founder and President of KARAMAH: Muslim Women Lawyers for Human Rights.[501] Azizah al-Hibri is one of the most prolific scholars writing on a number of issues including Islam and democracy, women's rights, human rights and Islam. She teaches securities and constitutional law at University of Richmond and is founding editor of

[499] *Supra* note 441 at 81.
[500] Interview with Bill Moyer http://www.pbs.org/now/transcript/transcript_alhibri.html 2.15.2002
[501] *See* for example: www.karamah.org

Hypatia A Journal of Feminist Philosophy Al-Hibri received her J D and Ph D in Philosophy from the University of Pennsylvania She has traveled extensively throughout the Muslim world in support of Muslim women's rights She was also a Fulbright scholar and served as Visiting Scholar at the Harvard Divinity School, and was professor of Philosophy at Texas A&M University and Washington University in St Louis [502] Azizah Al-Hibri was born in Beirut, Lebanon and is the granddaughter of Sheikh Toufik El-Hibri founder of the Scout Movement in Lebanon

In her numerous articles and chapters, Prof al-Hibri addresses a number of issues affecting the current situation of Muslim women around the world Unlike some of the previous scholars she does not address women's issues within a particular geographic location, but addresses certain misinterpretations and misconceptions that broadly influence Muslim women's rights around the world She emphasizes Islamic reformation and revival and is adamant on the compatibility of Islam with democratic norms and human rights values She takes a pluralist approach towards religion and seeks to establish dialogue between Islam, human rights, feminism and democracy

In discussing the founding of KARAMAH in the early 1990's she says, "it became clear that we need reformation and renewal in Islam and it has to come from inside It has to have integrity and has to be honest "[503] She emphasizes the need for Muslim women to speak on their own, "first because they know their situation better than anyone else, second, they would know the solution better, third, you can't be liberated from someone from the outside "[504] In addressing a group of students attending KARAMAH's Law and

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[502] http //www loc gov/bicentennial/bios/democracy/bios_al Hibri html
[503] Azizah al Hibri, On the History of KARAMAH" December 19 2009 Karamah1420's Channel http //www youtube com/watch?v 7bmRZ4ELbp4
[504] *Id*

Leadership Summer Program 2010 she recites a 33:32 addressed to the wives of the Prophet which reads: "O ye wives of the Prophet! Ye are not like any other women. If ye keep your duty (to Allah), then be not soft of speech, lest he in whose heart is a disease aspire (to you), but utter customary speech." Al-Hibri notes that the translation isn't perfect and offers her readings "be not too soft of speech" it could also mean don't speak too softly as if you are submissive "lest one whose heart is full of desire" she says this is not desire per se but it could mean ill-will, bad thoughts, but speak in a way that is just.

She emphasizes that Islam was not revealed to the Arabs or the Middle East, and certainly not mankind but for *humankind.* This means that every Muslim in any corner of the Muslim world can talk authentically about Islam so long as the argument is logically sound and based on the principles of the Quran. It is important to learn she notes, how to argue properly.[505] In this lieu, she recalls a story during the reign of Umar al-Khattab the second Caliph. At the time women were asking for higher and higher amounts of dowry. So he went to the mosque and decided to put a limit on it. Then an old woman got up and said: "oh, Umar you shall not take away what God has given us." She uses this example, to denote that women since the early days of Islam stood up and spoke for themselves. She didn't speak out of inclination but she cited a verse from the Quran, the highest authority to prove her point. In response Umar said: "the woman is right and I am wrong." Al-Hibri remarks: "Wow! That is democracy!"[506] Similar to Ahmed, Mernissi, Mir-Hosseini and Wadud, Al-Hibri sees the foundations for egalitarianism and women's emancipation within Islamic legal history, which is clouded by centuries of male juristic interpretation.

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[505] Azizah al-Hibri, "The Islamic Worldview" Parts 1-9 part June 15, 2010 http://www.youtube.com/user/karamah1420#p/a/f/0/QytPyVp-MYA

[506] *Id.*

An Islamic state is governed by a Constitution, she notes in "Islamic and American Constitutional Law Borrowing Possibilities or a History of Borrowing?" and that is the Quran [507] The constitutional principles are sparse but basic, and include legal guidance on the rights of the poor, orphaned, and widowed Specific crimes are outlined and the laws on marriage and divorce are explained [508] However, the Quran does make it "clear that a state must satisfy two basic conditions to meet Islamic standards First, the political process must be based on "elections," or *bay ah* Second, the elective and governing process must be based on "broad deliberation," or *shura* "[509] *Bay'ah*, can also mean to pledge allegiance to as described in 60 12 which reads

> O Prophet! If believing women come unto thee, taking oath of allegiance unto thee that they will ascribe no thing as partner unto Allah, and will neither steal nor commit adultery nor kill their children, nor produce any lie that they have devised between their hands and feet, nor disobey thee in what is right, then accept their allegiance and ask Allah to forgive them Lo! Allah is Forgiving, Merciful

Broad deliberations are mentioned in Chapter 42 entitled *Shura* or the consultation where 42 38 reads "And those who answer the call of their Lord and establish worship, and whose affairs are a matter of counsel, and who spend of what We have bestowed on them" indicating coming together for deliberation as a fundamental part of the faith Al-Hibri argues, that these two constitutional principles uphold the Quranic philosophy of diversity and gradualism [510] The Quran celebrates ethnic and national diversity as a blessing from God [511] This philosophy has not only allowed for a diversity of opinions in the development of Islamic jurisprudence but it has also allowed for the incorporation of

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[507] Azizah Al-Hibri, "Islamic and American Constitutional Law Borrowing Possibilities or a History of Borrowing?" 1 U Pa J Const L 492 (1998 1999) 503
[508] *Id*
[509] *Ibid* at 503-504
[510] *Ibid* at 504
[511] *See* for example, "O mankind! Lo! We have created you male and female, and have made you nations and tribes that ye may know one another Lo! the noblest of you, in the sight of Allah, is the best in conduct Lo! Allah is Knower, Aware " The Holy Quran 49 13

local customs and practices into the Islamic legal framework As such, every region has its own version of Islam Al-Hibri explains the theory of gradualism by noting "the Law Giver recognized both the human ability to constantly evolve and improve and its need to do so over time "[512] One of the most cited incidents regarding the theory of gradualism is the banning of alcohol Since, the Arabs used to drink a great deal of wine at first, the Quran encourages Muslims to refrain from coming to prayer in a drunken manner, [513] and after a while drinking alcohol was forbidden [514] Al-Hibri argues that just like the banning of alcohol, the foundations for a constitutional democracy were established in the Quran through the concept of *shura* However, it was and continues to be up to Muslim interpreters to develop the necessary systems to go along with these ideals

In addition, to Quranic principles, the actions of the Prophet also reinforce notions of participatory politics and democratic principles For example, Al-Hibri highlights, the Prophet "himself was the head of Madinah, the first Muslim city-state He acquired this position through *bay'ah* and conducted his affairs through *shura* "[515] Al-Hibri notes the third and fourth sources of Islamic law, *ijma* or consensus of the community and *ijtihad* as other sources for change and constitutional developments There is a Prophetic Hadith that states "My community reaches no agreement that is an error"[516] As mentioned in the previous chapter, *ijtihad* is an important tool for social transformation at the disposal of *mujtahids* As such, Al-Hibri argues that "Quranic philosophy makes room for gradual

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[512] *Ibid* at 505

[513] " O ye who believe! Draw not near unto prayer when ye are drunken, till ye know that which ye utter, nor when ye are polluted, save when journeying upon the road, till ye have bathed And if ye be ill, or on a journey, or one of you cometh from the closet or ye have touched women and ye find not water, then go to high clean soil and rub your faces and your hands (therewith) Lo! Allah is Benign, Forgiving " 4 43

[514] O ye who believe! Strong drink and games of chance and idols and divining arrows are only an infamy of Satan's handiwork Leave it aside in order that ye may succeed " 5 90

[515] *Supra* note 507 at 505

[516] *Sunan Abu Dawood*, Hadith Tradition 4253 p 1532 *Jame Al Tirmithi*, Hadith Tradition 2167 and *Sunan Maja*, Hadith Tradition 3950 p 2173 in *The Six Books The Hadith Encyclopedia*

progress, as well as customary and cultural preferences Thus, a *mujtahid* today can readily conclude that a Muslim country may choose to be a republic and still be in compliance with Quranic requirements, so long as the vote for the president is genuinely free and the consultation among all branches of government is broad "[517]

To further reiterate this notion, al-Hibri discusses the Charter of Madinah[518] and the pact that the Prophet made with the Jewish and Pagan tribes surrounding Madinah The Charter of Madinah declared all the Muslim and Jewish tribes surrounding Madinah (Yathrib) to be one community Each tribe was allowed to keep its own customs and identity, so long as it pledged loyalty to the pact and promised to protect everyone who was member of the pact "The "federal" system of the Madina was responsible, however, for such matters as common defense and peacemaking, purposes similar to those in the Preamble of the American Constitution," Al-Hibri notes Believing that the roots for democratic governance exist both in the Quran and the actions of the Prophet Al-Hibri says that challenges arising after the death of the Prophet (pbuh) led to the demise of democratic development in Muslim societies [519] She discusses two major events in Islamic history, which lead to this demise and established hereditary, monarchial system to replace the *bay'ah* and *shura* system established by the Prophet The first event she addresses is the murder of the third Caliph Uthman His government was accused of corruption and nepotism After satisfying angry crowds he promised to change his ways instead of resigning However, the angry mob was not satisfied and they stormed into his house and killed him His murder raised a number of questions, mainly whether one should follow the authority of the Caliph and maintain peace or try to change the leader

[517] *Supra* note 507 at 507
[518] The Charter of Madinah 622 C E at http //www constitution org/cons/medina/macharter htm

for a better. His murder also led to the first civil war in the Islamic history, where Ali (the fourth Caliph and son-in-law of the Prophet) fought against Aisha and her followers who claimed, Ali had not avenged the murder of Uthman and instead let the murders go free. This was called the great *fitna* (discord) and established the seeds of division of the Muslims into the Sunni and Shia (Shia Ali—means followers of Ali).

The second episode that al-Hibri discusses is the war between Yazid the Ummayad Caliph who had inherited leadership from his father Muawiyya and Hussein the grandson of the Prophet. This is perhaps the bloodiest war in early Islamic history, where Hussein and his family were massacred by Yazid's army for failing to pledge allegiance to the ruthless rule of Yazid. Al-Hibri argues that these events along with the eventual formation of the schools of law and the supposed "closing of the gates of ijtihad" have led to lack of free-thinking and innovation by people. In other words, power was consolidated and the production of knowledge controlled.

Considering the Quran as the constitution of Muslims al-Hibri emphasizes, that the "Quran does not attempt to articulate, except in certain specific cases, detailed rules to be followed in every country or epoch. Rather, the philosophy of the Quran is to establish certain basic principles which could then be used to develop specific laws suitable for their epoch, customs and needs."[520] As such, given the general principles that the Quran outlines and the practices of the Prophet, it is more than possible for Muslims to choose the kind of government and leadership that they want, consistent with Islamic norms and values. Most importantly, the "head of the Muslim state is not the apex of an authoritarian hierarchy, but only of a formal organization one. Like everyone else, his or

[520] Azizah Al-Hibri, "Islamic Constitutionalism" 24 Case. W. Res. J. Int'l. L. 1 (1992) 26.

her authority is limited by the Quran, and derived solely from popular vote (*baya'*)."[521] For al-Hibri flexibility and diversity are two important characteristics of the political and legal system of Islam, which should not be overlooked or forgotten. In this regard, women can be lawmakers and narrators as well while remaining faithful to the principles of Islam.

Discussing the Islamic world-view, al-Hibri notes that the "The Quran is a seamless web of ideas, where you can't understand one verse of the Quran without putting it into context with the other verses. You need to understand the totality of its worldview."[522] The core principle of Islamic jurisprudence is "*tawhid* or belief in a single God"[523] who is supreme above all beings. As such, "the *tawhid* principle provides the basis for the fundamental metaphysical sameness of all humans as creatures of God."[524] With regards to family law, al-Hibri argues it too "must be based on divine logic as revealed in the Quran and not on some hierarchical worldview foreign to it." [525] The Quran mentions that male and female have been created from the same *nafs* or soul, as such there is no inherent hierarchy between them. However, Muslim jurists notes Al-Hibri, have interpreted the Quran based on their own patriarchal *ijtihads* which were not only the product of their time and place, but were also antithetical to the concept of *tawhid.*

Al-Hibri argues that Islamic jurisprudence is based on an *illah* (justification or

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[521] Azizah al-Hibri, "Quranic Foundations of the Rights of Muslim Women in the Twenty-First Century" in M. Atho Mudzhar Ed , *Women in Indonesian Society Access, Empowerment and Opportunity* (Sunan Kalijaga Press 2001) 7

[522] Azizah al-Hibri, "The Islamic Worldview" Part 1of 9, June 11, 2010. http://www.youtube.com/watch?v=Yz5bgv38j3k&feature=related

[523] Azizah al-Hibri, "An Introduction to Women's Rights" in *Supra* note 434, *Windows of Faith* at 51

[524] *Ibid.* at 52

[525] *Ibid* at 53

reason), so when the *illah* disappears, so must the law [526] Similarly, she notes that the concept of *maslaha* or public interest also comes into play when one is deciphering current Islamic family laws "A system of Islamic laws must avoid harm and serve the public interest, which includes the interests of women "[527] But for meaningful change to happen in Muslim countries which have discriminatory and patriarchal Islamic family laws in place, al-Hibri argues "is to be build a solid Muslim feminist jurisprudential basis which clearly shows that Islam not only does not deprive them of their rights, but in fact demands these rights "[528] Similar to Wadud, she offers her own narrative of the existing laws and interpretations and emphasizes the necessity of internal critique Noting that Muslim women are quite suspicious of the concern of Western feminists about "their plight" al-Hibri argues that Western feminism has not exactly improved the status of women by turning them into "super moms" or turning female sexuality into a commodity [529] In addition, the experience of colonialism in many Muslim countries has left a bitter memory behind, where the colonizers came to "save brown women from brown men "[530] Therefore, al-Hibri believes that for any meaningful change to occur it needs to come through the activity and narrative of Muslim women themselves

In her numerous articles, al-Hibri addresses issues of marriage, divorce, polygamy, mahr, maintenance, and family planning An important point she raises is that regardless of the geographic location or cultural milieu of the Muslim scholar, in this globally connected world, "the women of the *umma*, have the duty of understanding the

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[526] *Ibid* at 56
[527] *Id*
[528] Azizah al-Hibri, "Islam, Law and Custom Redefining Muslim Women's Rights" 12 Am U J Int'l L & Policy 1 (1997) 3
[529] *Ibid* at 4
[530] Gayatri Spivak, "Can the Subaltern Speak" (1985)

true meaning of Islam with respect to their status in today's world."[531] She offers her own propositions with regards to reform and interpretation as a Muslim woman living and working in North America. She addresses Muslim women's legal and financial rights. For example, a Muslim woman retains her last name after marriage, and can own property and retain her financial independence. However, upon marriage the husband is legally responsible to provide for his wife financially (in the form of maintenance). The logic behind this al-Hibri notes, "may lie in the fact that the Quran is simply providing women with added security in a difficult patriarchal world. Put in today's language, the Quran engages in affirmative action with respect to women."[532]

One of the most important concepts that she addresses throughout her work is the concept of "*Qawwama"* as stated in 4:34. The Pickthall translation reads:

> Men are in charge of women, because Allah hath made the one of them to excel the other, and because they spend of their property (for the support of women). So good women are the obedient, guarding in secret that which Allah hath guarded.

Al-Hibri however, translates and analyses the verse as such:

> (P): "Men are [*qawwamun*] to women, [bi-ma] God [*faddala*] some of them [over] some others and [bi-ma] they spend of their money….."[533]

The two words "*qawwamun*" and "*faddala*" are determining factors in terms of how one understands this verse. The singular for "*qawwamun*" is translated as boss, leader, protector, manager and even guide or advisor. These meanings, "while not necessarily hierarchical, are open to hierarchical authoritarian interpretations." [534] The word

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[531] Azizah al-Hibri, "Quranic Foundations of the Rights of Muslim Women in the Twenty-First Century" in M. Atho Mudzhar Ed., *Women in Indonesian Society Access, Empowerment and Opportunity* (Sunan Kalijaga Press 2001) 7

[532] Azizah al-Hibri, "Muslim Women's Rights in the Global Village: Challenges and Opportunities" 15 J L & Religion No ½ 37 (2000-2001) 47

[533] *Ibid* at 52

[534] *Ibid* at 17

"*faddala*" is usually translated as "being superior." [535] Deciphering the historical and at times authoritarian translations of the verse, al-Hibri's translation reads as such"

> Men are [advisors/providers of guidance] to women [because/in some circumstances where/in that which] God made some them different from some others and [because/in circumstances where/in that which] they spend of their money...[536]

Her translation places limitations and specifies circumstances where this concept of "*qiwama*" in terms of hierarchy would apply. So she argues, (P) is specified such that it applies, if "the male be in fact the financial maintainer of the woman, and if the male be in fact more gifted or qualified in the area in which he is claiming *qiwama*. Where these two conditions fail to operate conjointly, there is no *qiwama*."[537] Hence, what al-Hibri is essentially trying to argue is that a) men don't have an inherent or a priori superiority over women and b) the conditions for this advantage or hierarchy are specific and most importantly these conditions are subject to change given the relationships that exist between men and women in different societies. She deconstructs the object and purpose of this verse and establishes a limitation clause to the a priori notion of "male superiority." Her understanding is similar to Wadud's critique of the verse on polygamy, which is widely misinterpreted to allow for the unconditional right of men to have four wives. What al-Hibri is trying to establish, similar to the proposal of the other scholars, is that the Quran must be read, understood and interpreted conscious of the general principles and world-view it seeks to establish. As such, "men are not *qawwamn* over financially independent women, nor are ignorant men *qawwamun* over educated women."[538] To argue otherwise notes al-Hibri, "is to misinterpret a clearly conditional

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[535] *Id.*
[536] *Ibid.* at 18.
[537] *Ibid.* at 19.
[538] *Ibid.* at 19.

verse as a general principle, and to interpret an act of *taklif* (an obligation) as an act of *tashrif* (privilege)"[539] Her narration of the verse is quite significant, because, only a female interpretation of the verse would be able to read this aspect of the verse and declare its application as conditional In other words, it would be hard to find a male jurist who would read the same verse and say that it does not establish male *privilege* only male *obligation* towards women That is why it is so important to have authoritative female narration of Islamic texts and laws, because, so long as we rely on men for their "progressive interpretation" very little will ever change for women

In, "An Islamic Perspective on Domestic Violence,"[540] al-Hibri closely analyzes the "chastisement verse" which supposedly establishes the right of the husband to chastise, discipline or hit his wife The second part of 4 34 reads

> As for those from whom ye fear rebellion (*nushuz*), admonish them and banish them to beds apart, and scourge them Then if they obey you, seek not a way against them Lo! Allah is ever High, Exalted, Great

The term "scourge them" is generally translated as beat them lightly However, in light of verses like 4 1 and 30 21 which reads

> And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your (hearts) verily in that are Signs for those who reflect

Al-Hibri refers to this verse as the "Harmony verse" and notes "that the Quran articulates a basic principle about proper gender relations, mainly, that they are relations between mates created from the same *nafs*, which are intended to provide these mates with tranquility, and are to be characterized by mercy and affection" [541] Given that the message of the Quran is internally consistent al-Hibri notes that interpreting the

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[539] *Id*

[540] Azizah al-Hibri, 'An Islamic Perspective on Domestic Violence' 27 Fordham Int'l L J 195 (2003-2004)

[541] *Ibid* at 203

"chastisement verse" is both "conditional and structurally complex, leaving room for erroneous and culturally subjective interpretations "[542] In her attempt to re-read and re-interpret the verse, al-Hibri deciphers each word and seeks to uncover the real meaning behind it The most striking word is *wadhribuhunna*, which literally means, "hit them " Al-Hibri analyzes this part of the verse by studying the history and context for which this verse was revealed Referring to the philosophy of gradual social change, she notes "[G]radualism is God's merciful recognition of the human condition and its limitations in the face of change " [543] This philosophy applies when considering that during the *jahilliya* Meccan men in particular, were very harsh towards their women and used to beat them With the revelation of this verse "hitting" one's wife was not prohibited, but limitations were established, and a husband had to go through steps of dealing with his "*nashezah*" wife before he could "hit" her to shame her not to physically hurt her In other words, "hitting" became a symbolic act [544]

The most important word of this verse however is "*nushuz*" which means, to rise above, or to act superior to [545] Hence, she argues, "it is understandable that the patriarchal perspective which casts marital life into a hierarchical structure would understand "*nushuz*" in its broader linguistic meaning as disobedience by the wife, an insurrection against the husband "[546] However, reading the verses of the Quran in tandem with one another, al-Hibri discovers that "righteous women are those who honor their marital covenants, even in the absence of their husbands (with whom these covenants were

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[542] *Ibid* at 204
[543] *Ibid* at 207
[544] *Ibid* at 208 209
[545] *Ibid* at 213
[546] *Id*

undertaken).[547] Consequently, *nashizah* women are those who do not honor their marital covenants, and hence disobey God. Thus, the focus of disobedience here is God, not the husband."[548] This is a very different way of understanding the implications of the word *nashezah*. Al-Hibri, of course notes that the husband has standing in reminding the wife of her duties to uphold the marriage covenant which scared and necessary to uphold by both husband and wife.

To further iterate her interpretation of the word *nushuz*, Al-Hibri quotes a statement from the Prophet in his famous Khutba al-Wida (Farewell Sermon) where he has said:

> You [men] have rights against women, and they have rights against you. It is your right that they do not bring someone you dislike into your bed, or that they commit *fahishah* (an act of adultery) *mubayyinah* (which is clear and evident to all). If they do, then God has permitted you to desert them in bed, and [then] hit them lightly. If they stop, you are obliged to maintain them.[549]

According to this Prophetic statement the term *nushuz* encompassed adultery in a way that was clear and evident, in other words an act of adultery that could be proven. Although al-Hibri notes that many jurists interpreted the term "*fahishah mubayyinah*" to broadly mean disobeying one's husband, nevertheless, the specific statement of the Prophet sheds light on the meaning and extent of *nushuz*.[550] The two criteria established in this *hadith*, somewhat clarify the weight and seriousness of the word *nushuz*. It does not only mean committing adultery, but to bring someone else into bed implies a violation of the marital covenant of fidelity. By studying other verses that address the

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[547] Id
[548] *Ibid* at 214
[549] Ibid. at 216 quoting Al Hafidh ibn Kathir, *Al-Bidaya wa Al-Nihaya* 202 (Beirut. Maktabat al Ma'arif 1979).
Note Ibn Kathir (d 1373) was a famous Muslim scholar and exegete (*mofasser*) of the Quran. His Tafsir al-Khathir is among the most authoritative exegesis of the Quran. The book *Al-Bidaya wa Al-Nihaya* (The Beginning and the End) is of the most authoritative sources of Islamic history.
[550] *Id*

notion of adultery[551], al-Hibri notes, "interpretations of "*nushuz*" which forces the wife to give up her independent will in favor of her husband's does not reflect the lives and example of female Islamic role models, including the wives of the Prophet who amazed Muslims by constantly arguing with him "[552] In other words, the "chastisement verse" does not establish the unequivocal right of the husband to "hit" his wife if he thinks she has been disobedient, rather the conditions for such an act are very specific and limited to a grave violation of the marriage covenant on behalf of the wife Most importantly, the right of the husband to admonish and chastise his wife takes place in three different stages, and only if she persists he is allowed to "shame" her not to physically assault her Al-Hibri's re-reading of this verse, in lieu of other verses and hadiths shed light on a highly misconceived notion that men are allowed to hit their wives in Islam

Al-Hibri also addresses family planning in Islam and begins by discussing flexibility in Islamic law and the fundamental principles of *ijtihad* which allow for this flexibility by considering

1 Laws change with changes in time and place,
2 Choosing the lesser of two harms, and
3 Preserving public interest [553]

Al-Hibri begins by noting that like other Abrahamic religions Islam gives great weight to the family structure and encourages procreation However, this does not indicate limitations on family except in two cases The first, the Quran prohibits Muslims from

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[551] The following verses address adultery "As for those of your women who are guilty of lewdness, call to witness four of you against them And if they testify (to the truth of the allegation) then confine them to the houses until death take them or (until) Allah appoint for them a way (through new legislation) 4 15 And as for the two of you who are guilty thereof, punish them both And if they repent and improve, then let them be Lo! Allah is ever relenting, Merciful 4 16"

[552] Azizah al-Hibri, "An Islamic Perspective on Domestic Violence" 27 Fordham Int'l L J (2003-2004) 220

[553] Azizah Al-Hibri, "Family Planning and Islamic Jurisprudence" Address to United Nations panel, "Religious and Ethical Perspectives on Population Issues" May, 19, 1993 1

killing their children from fear of want (VERSE), and the second, the Prophet encouraged Muslims to procreate. Otherwise, there is really no limitation on family planning. In Islam, semen is not sacred and has no special value. In fact, the Prophet was well aware that some of his companions practiced *al-'azl* (coitus interruptus).[554] Referring to the work of al-Ghazali, al-Hibri notes, that he said that there are no prohibitions on contraception and it can be used, provided the husband does so with the permission of the wife (to ensure she is happy). Al-Ghazali "likens to intercourse as a contract, because it consists of an offer, and an acceptance. Thus, so long as the offer is not accepted it can be withdrawn."[555] Contraception is prohibited however, if practiced to avoid a female child however.[556] Contraception and practicing *al-azl* is permitted among all the five schools, again, subject to the consent of the wife.

Al-Hibri notes that abortion is another form of population control and here there are a number of opposing views. While the majority of Muslim jurists allow abortion, they differ at the stage for which it is allowed. The Quran discusses the different stages of the fetus' development in two different verses. 23:13 reads:

> and then We create out of the drop of sperm a germ-cell, and then We create out of the germ-cell an embryonic lump, and then We create within the embryonic lump bones, and then We cloth the bones with flesh - and then We bring [all] this into being as a new creation: hallowed, therefore, is God, the best of artisans!

According to the Quran the fetus goes through a couple of stages: the semen (*nutfah*) which develops in the womb, and together with the ovum form a clinging clot (*'alaqah*), then a chewed up lump (*mudghah*), and then an act of creation takes place (*khalaqan akhar*). At the last stage, ensoulment takes place.[557] Most jurists believe that abortion is

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[554] Ibid. at 2.
[555] Ibid. at 3.
[556] Al-Hibri quoting Al-Ghazali, *Iha Ulum al-Din* (*The Revival of the Religious Sciences*) Vol.2 pg. 54.
[557] Al-Hibri, 4

allowed before ensoulment which could be anywhere between 40-120 days [558] However, there is another group of jurists who strictly prohibit abortion as a form of family planning and allow it only if the mother or fetus' life is in danger Al-Hibri discusses the diversity of positions held by the different schools, for example, noting that the Hanafi's and Shafi'is allow abortion before 120 days, and the Maliki's and some Ja'fari's who prohibit abortion at anytime, except if danger to life is evident In this lieu, Al-Hibri offers her own opinion, and says that the existence of *ijtihad* as a tool for development was encouraged by the Prophet, and if a woman is facing a difficult situation she should choose the route that is best for herself Although contraception is the better method to use for family planning, nevertheless, al-Hibri does not rule out abortion as an option as many jurists or even Muslims would

As a Muslim feminist scholar of Islamic jurisprudence al-Hibri is very clear in her outlook on Islamic laws and practices She believes, like the rest of the scholars studied in this chapter that the interpretation of the Quran by male scholars was biased by their patriarchy As such, she argues,

> feminist Muslims should not be intimidated by the Muslim patriarchal authority Instead, they should be guided by the fact that there is no clergy in Islam, each person being responsible directly to God for her own beliefs Furthermore, if patriarchy itself was able to justify within its ideological bounds the existence of five different schools of thought, then feminists can surely justify the addition of at least one more [559]

Al-Hibri is unapologetic about her very egalitarian and Universalist view of Islam Noting that the Quran is the constitution for us Muslims, she believes there is room for more diverse and inclusive interpretation and most importantly jurists and scholars can use ijtihad to further the goals of the Muslim community Her scholarly work and

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[558] *Id*

[559] Azizah al-Hibri, "Editorial" 5 Women's St Int'l J Forum No 2 (1982) vii

activism through KARAMAH reveal an indefatigable spirit searching for equality of rights and access to opportunity for Muslim women around the world.

Conclusion

Studying the work of these scholar-activists it becomes evident that these two women are passionately feminist and equally passionate about their religion. While each takes a different approach and methodology in indentifying misinterpretations and misrepresentations of Islamic values as laws, nevertheless, they each reach a similar conclusion in that more women need to be narrators and authors of Islamic history and jurisprudence in order to achieve tangible change in existing laws. Wadud and al-Hibri re-read the sacred text from an alternative point of view and see not only the possibility but also rather the necessity to exert feminist agency in the development of Islamic legal thought and practice.

So, whether it is through a historical approach, developing a hermeneutical model, case studies or situating and re-reading the sacred text these women are involved in a historic, religious and political process of alternative narration where they seek to exert themselves in a world where men have reigned for long and are not too happy about welcoming women in. The realm of narration and exegesis, historical and political analysis of sacred texts is one that commands great authority. These feminist scholars are in a position to demand that authority, because, although neither one has the power or authority to practice *ijtihad* and issue new *fatwa's*, nevertheless, they have the power to dispel years and years of patriarchal interpretation of a sacred text and series of Prophetic statements that belong to everyone, not only to men. This alternative feminist narrative can be a powerful tool for change only if its power is recognized and its legitimacy

validated. In other words, alternative feminist narratives are an instrumental tool for change and reform however, the biggest challenge is making the voice of this alternative narrative heard and recognized by male jurists and the rest of the Islamic community.

Alternative narratives must exist not only to challenge exiting powerful ones, but to pave the way for the development of new ethos and norms. And while, a narrative of the law is not as powerful as the creation of a new law, nevertheless, narratives inform and guide the law and they must exist for the law to exist as well. The next chapter will closely look at Islamic family law in US Courts and the debate over the Shari'a Arbitration Tribunal in Ontario as a new frontier, where not only are current laws regulating Muslim life challenged and questioned, but they also serve as a new frontier for the production of an alternative narrative to Islamic law.

Chapter 5
Islamic Family Law in North America

I. Introduction

One of the most important and influential areas of law affecting the daily life of women all around the world is family law, which includes laws that regulate marriage, divorce, child custody, alimony and maintenance. Islamic family law is no different. Islamic family law establishes the conditions for a Muslim marriage between a consenting and mature man and woman. There are many elements that characterize a Muslim marriage, such as the religion and status of each party, the presence of guardians and witnesses, and most importantly the marriage contract, which stipulates the dower and conditions of the marriage. In essence an Islamic marriage is seen as a contract between a consenting man and woman who agree to certain conditions to start a life together. These laws have been established by Muslim jurists throughout the centuries and are often problematic for women in their application. This means, that women as subjects of the law are discriminated in family law matters and they often don't have much choice but to heed to the decision of the jurists.

Muslims living in North America have two sets of laws affecting their daily lives. On the one hand as citizens or residents of the United States and Canada they abide by city, state/provincial and federal laws, and on the other hand, many Muslim immigrants continue to apply Islamic law in their daily personal affairs. In most cases the secular laws of the state do not interfere with the sacred laws that Muslims uphold in their daily lives. For example, many Muslims work in different sectors of society and continue to pray, fast, pay *zakat* and refrain from drinking alcohol and eating pork. In these cases,

secular state laws and sacred Islamic laws do not conflict with one another However, in recent years debates have arisen as to how an American judge should treat an Islamic marriage contract in a divorce case and whether or not the Province of Ontario ought to allow Shari'a Arbitration tribunals to apply Islamic law in settling family disputes These instances highlight the meeting of Islamic family law with family law in the US and Canada Each system of law has its own "idea of how the world should look, smell, taste, and move which confirms the normative view that the system supports" [560] The difference or at times clash of normative and legal outlooks creates room for further debate and exploration of the similarities and differences of each legal systems goal and outlook This meeting of different legal systems provides an opportunity to highlight differences and possibly introduce changes to either legal system In other words, these different legal and normative systems can possibly borrow practices from one another

This chapter will first discuss divorce cases that have come before US courts It will analyze how judges have decided to apply or override Islamic marriage laws in adjudicating cases where Muslim clients wanted to apply aspects of their Islamic marriage contract In the second part, this chapter will study and analyze the Ontario Shari'a debate, which took place between 2004 and 2006 In this case a series of debates led to the abolishment of religious arbitration panels in the province of Ontario This chapter will discuss the different interpretations of *mahr* agreements in US courts and essentially argue that in most cases US laws are more beneficent towards women in upholding the conditions of the marriage contract While there is little uniformity in the interaction of US courts with Islamic marriage contracts, nevertheless, some courts have

[560] Marc L Roark, "Reading Mohammad in Charleston Assessing the U S Courts Approach to the Convergence of Law Language and Norms" 14 Widener L Rev 205 (2008) 205

decided to view the Islamic marriage contract as a simple contract between two persons. Hence, separating the religious element of the marriage contract from the civil aspect of it. This position has proven to be quite conducive to women seeking their dower because, the husbands can no longer deny what is rightfully theirs. In this regard, one can argue that this new narrative of the marriage contract simply as a contract that each party comes into cognizant of their rights and duties and separate from discriminatory Islamic divorce best represents the principles of equality under the law. In other words, the meeting secular US family law and Islamic family can lead to the development of a new narrative of how Islamic family will be practiced and enforced in the United States.

The debates concerning the Ontario Shari'a Tribunal highlight the fears and concerns that many women had in applying Shari'a law in a secular North American context. Many of those opposed to the *Arbitration Act* argued that they had immigrated to Canada to enjoy the benefits of its equitable, fair secular laws. For them the application of the Shari'a was considered a step backwards in their hopes to achieve some semblance of equality under the law in North America. Discussions in the previous chapter highlighted some of the problems that women have during divorce in Islamic countries. During the Shari'a Ontario tribunal debates many feminist groups raised concerns about the pitfalls of Islamic family and discriminatory laws towards women. Had these debates continued they could have led to fertile grounds for the production of an alternative narrative of Islamic family law. What was interesting about the Ontario Shari'a debate is that the discussions were lively and contradictory and each side raised a number of legitimate concerns and demands. However, the discussions led to fear mongering about the specter of Shari'a law in Ontario and led to the eventual repeal of the Ontario

Arbitration Act. Nevertheless, had the debates and discussions continued where both sides would actually talk to one another then perhaps we could have had the production of alternative narrative of Islamic family produced by scholars and activists in Canada.

The discussions in this chapter also note that the practice of Islamic family law in North America places women at a disadvantage. The lack of participation of women in the lawmaking process excludes them from including new norms and values into the Islamic legal framework. As such, they are forced to uphold the norms of a legal system that is at times in conflict with rights accorded to them in the North American context. Muslim women in North America, as in other parts of the world, are not authorized to change the law and despite their numerous efforts at producing an alternative narrative, it is the power that the law vests in the hands of male scholars and jurists that limits women's presence and participation. Nevertheless, this chapter will explore two different venues in North America where Islamic family laws are challenged and debated by secular legal institutions and by Muslims themselves. This can be an opportunity for Muslims to closely look at the narratives that guide Islamic family and include alternative feminist narratives in reforming existing laws. In other words, North America can be the place for the production of a new nomos of Islamic family law, which incorporates Islamic legal principles, and the unconditional equality of men and women before the law.

1. Islamic Family Law in US Courts

Like other religious communities in the US, Muslims have sought to maintain their religious identity by upholding principles of their faith. The family is the building block of any society or community. The meeting of Islamic family law and US law starts at the

point of inception, where a new family is created through the union of a Muslim women and man. A fundamental element of an Islamic marriage is the marriage contract, which not only solemnizes the marriage but also designates the *mahr/sadagh* or bridal dower and other conditions, which the two parties agree to insert into the marriage contract. As Kecia Ali notes, "a Muslim marriage is a contract, not a sacrament." [561] As such, a marriage contract delineates the rights and obligations of each party towards each other. According to most jurists the *mahr* is a condition of the marriage without which the marriage is void. The *mahr* is generally a lump sum of money, property, or jewelry that is given to the bride. The amount of the *mahr* must be specified when the contract is written. The *mahr* is either given upfront at the time of marriage or given at the time of divorce or upon death. As discussed in the previous chapter, assigning the amount of *mahr* and most importantly attaining the mahr at the time of divorce is one of the most contentious aspects of an Islamic marriage and divorce.

In the United States, Asifa Quraishi notes "Muslims do generally include *mahr* provisions in their marriage contracts, their nature varying with the financial status and personal preferences and aspirations of the parties."[562] The amount of the *mahr* can range anywhere from $50,000 to a new car, or the promise to teach the wife the whole Quran. However, generally a tangible monetary amount is required in order for the marriage contract to be written and authorized. The importance of the *mahr* and the relevance of it to our modern society is an issue that has been subject to a lot of debate. Quraishi notes that some reject the importance of the *mahr* "as putting value on the bride, others

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[561] Kecia Ali, "Muslim Sexual Ethics: Marriage Contracts in Islamic Jurisprudence" found at: http://www.brandeis.edu/projects/fse/muslim/mus-essays/mus-ess-marriage.html

[562] Asifa Quraishi, "No Alters: A Survery of Islamic Family Law in the United States" in *Women's Rights and Islamic Family Law: Perspectives on Reform*, ed. Lynn Welchman (London: Zed Boojs Ltd. 2004) 189.

advocate it as a financial protection for women in the event of death or divorce and sometimes as a deterrent against divorce (especially where there is a large deferred dower) "[563] Al-Hibri argues that the *sadagh* or *mahr* "is a gift from the husband to the wife The amount of the *sadâq* is to be agreed upon by the two parties while negotiating the marriage contract "[564]

Although the *mahr* is a gift that is her right to have or attain, it can be seen as a double-edged sword for Muslim women all around the world Under some circumstances attaining it at divorce is a sign of victory for women both emotionally and financially In many other cases it extends the divorce proceeding and creates great hostility between both parties as the man may refuse to pay the *mahr*, leaving the woman in an unpleasant situation The existence of a marriage contract is an empowering tool for both women and men where they can stipulate different rights and obligations and outline the conditions of their marriage before getting married However, stipulating conditions in a contract, especially by a woman would require the woman to be aware of the law and actively involved in this legal process Nevertheless, as Quraishi argues, "the marriage contract remains a very valuable tool because its ground in classical law gives a clear indication of the acceptability of the changing of the more traditional parameters of the marriage relationship "[565]

When a Muslim couple applies for divorce before a US court, one of the first questions that arise is whether their Islamic marriage contract will be recognized as valid

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[563] *Id*

[564] Azizah Al-Hibri, "Muslim Marriage Contract in American Courts" Address at the Minarat of Freedom Banquet 20 May 2000 www karamah org/sp/azizah (I April 2005) 12

[565] *Supra* note 562 at 191

under domestic US law?[566] The second question is, if so, then how will the court uphold or deny the *mahr* provision in the contract? These are two fundamental issues that will be discussed by looking at specific case law before US courts Given the diversity that exists in Islamic law, even if a judge were to enforce the provisions of an Islamic marriage contract, the final decision based on expert testimony and all would be a difficult one to reach for a judge not trained in Islamic law

In *Aghili* v *Saadatnejadi* (1997)[567] the Tennessee Court of Appeals reversed the judgment of the Circuit Court for Davidson County at Nashville (Tennessee), which had initially granted Mr Hossein Aghili an annulment of his marriage with Ms Hamideh Saadatnejadi The appeals court discussed the validity of their Islamic marriage, the authority of the officiant Imam, and whether the late submission of their marriage license invalidated their marriage The couple met in Tennessee, Mr Aghili is an engineer for the Tennessee Department of Transportation and Ms Saadatnejadi was a student at the time They were engaged in Iran in 1994 Upon returning to the US, negotiated a marriage contract where in accordance with Islamic law and Iranian customs the dowry would be 1,400 gold coins and if he violated the terms of their contract Ms Saadatnejadi would receive 10,000 gold coins Mr Aghili had agreed to never marry anyone else during their marriage On December 9, 1994 they obtained a marriage license from Rutherford County and they requested their local Imam Mr Tarahian to perform the Islamic blessing On December 17 Mr Tarahian did so in front of four witnesses The couple and Mr Tarahian signed a marriage certificate filed with the mosque in Nashville However, Mr

[566] *Ibid* at 199
[567] Aghili v Saadatnejadi, 958 S W 2d 784 (TN Ct App 1997)

Tarhian never signed or received the Tennesse marriage license. [568] Upon returning from their honeymoon the couple separated and Mr. Aghili threatened Ms. Saadatnejadi that he would not file the marriage license unless she relinquish her dowry of over 10,000 gold coins. He also informed her that Mr. Tarahian was not authorized to perform their Islamic marriage.

Upon petition for annulment the trial court agreed with Mr. Aghili and found that the marriage was void in ab initio and that Ms. Saadatnejadi's petition for divorce was moot. In an affidavit submitted to the Court, Mr. Aghili, stated in his opinion that Mr. Tarahian was not qualified to solemnize a marriage. However, Ms. Saadatnejad filed an affidavit based on the expert opinion of a Professor of Religious Studies at Boston University explaining:

> In contrast to Western religious teaching and practice (particularly in Christianity, both Catholic and Protestant, but also to some extent Judaism) Islam from its inception to the present has consistently rejected the distinction between clergy and laity. Islamic law stipulates quite precisely that anyone with the requisite knowledge of Islamic law is competent to perform religious ceremonies, including marriage. One is not required to have an official position in a religious institution such as a mosque (masjid) in order to be qualified to perform such ceremonies.
>
> I understand that Mr. Tarahian who performed the marriage ceremony in question is not the official imam of the local mosque, though he does from time **[**10]** to time carry out the duties ordinarily performed by an imam. From the vantage point of Islamic jurisprudence, the question of his right to bear the title imam is irrelevant. His competence before Islamic law to perform Muslim ceremonies is determined solely by his knowledge of that legal corpus. It is quite clear that Mr. Tarahian does possess such knowledge and that he is recognized by members of the Muslim community as possession [sic] the competence to perform religious (and civil) ceremonies.

As such, the court found Mr. Tarahian to be qualified to perform an Islamic marriage. With regards to filing the marriage license, the Court found that the failure of the officiant to return the marriage license within the three-day period to the County Clerk

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[568] *Id.* at 3.

did not invalidate the marriage. As such, the appeals court found the marriage valid and found Mr. Aghili responsible for costs accrued.[569]

This is an important case to consider, given the importance of an Islamic marriage contract and the terms therein for couples living in the United States. Quraishi argues, that those "couples that choose a Muslim ceremony but skip the U.S. paperwork run the risk of losing state-enforceable rights upon each other, thus impacting inheritance, health insurance, and even immigration issues."[570] In the Aghili v. Saadatnejadi case, the validity of the marriage would then allow Ms. Saadatnejadi to ask for her dower, which was rightfully hers.

It is clear that deferring collection of the *mahr* to the time of divorce is an issue that many Muslim women would want to avoid. Whether in Islamic countries or in the US, men try a number of loopholes to avoid paying the *mahr*. More specifically in the US, they often try to avoid paying spousal support, and the division of property. Because Islamic marriage contracts rarely mention property and assets accrued during a marriage, Muslim women often run into trouble when they seek its enforcement. In *Chaudry v. Chaudry*[571] Parveen Chaudry and Hanif Chaudry were married in Pakistan in 1958. According to their marriage contract Parveen's *mahr* would be the equivalent of $1,500 in the event Hanif wanted to divorce her. A year after their marriage, Hanif moved to London to pursue his medical degree, leaving Parveen and their one year old child in Pakistan. Once Parveen was able to join him in London they moved to New Jersey where their second child was born. Hanif then sent his wife and children back to Pakistan with the understanding that they would join him shortly. However, while in Pakistan Parveen

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[569] *Id.* at 5-6
[570] *Supra* note 562 at 200.
[571] *Chaudry v. Chaurdy*, 388 A.2d 1000, (N.J. Super Ct. App. Div. 1978).

gave birth to their third child and stayed there for five years She tried to come back but Hanif took affirmative action to prevent her from returning and filed for divorce He succeeded in obtaining an Islamic divorce through the Pakistani Consulate and only sent Parveen $1,500 which was her mahr Parveen brought suit in New Jersey requesting child support and maintenance A trial court initially awarded Parveen a monthly maintenance award of $430, but refused to grant child support since the children were not in her jurisdiction After further review of the case, the N J Court of Appeals concluded that

> We hold that (1) the trial judge erred in refusing to recognize the Pakistan divorce as valid under principles of comity and, accordingly, he should not have awarded the wife separate maintenance, and (2) the wife was not entitled to equitable distribution or alimony under the proofs presented below
>
> In 1958, by negotiation between their parents, a marriage contract between the husband and wife was entered into They were then, and when they were married in 1961 some three years later, citizens of Pakistan The marriage contract is called a *nikahname* It will hereafter be referred to as the antenuptial agreement [572]

Hence, the appeals court concluded that the Islamic marriage contract was a prenuptial agreement, which did not stipulate any division of property upon divorce Based on the expert testimony the court heard, Parveen and her parents could have entered additional provisions in the prenuptial agreement, but they never did so After fourteen years of marriage, Parveen had to walk away with $1,500, no child support and no share of her psychiatrist husband's estate

In this regard, it is important to note that an Islamic marriage contract is not a prenuptial agreement, and should not be treated as such in US courts Blenkhorn argues,

> [I]nterpreting mahr agreements as prenuptials both ignores the inherent differences in a prenuptial agreement and a mahr provision in Muslims societies, and more importantly, contravenes the original intent of the contracting parties Such an interpretation effectively and unfairly precludes women in America from enjoying their rights under

[572] *Id* at 3

> community property or equitable division schemes, while unnecessarily leaving them destitute [573]

In *re the Marriage of Ahmad and Sherifa Shaban*,[574] Ahmad Shaban and Sherifa Shaban were married in Egypt in 1974 and obtained a divorce in California in 1998 In the divorce proceedings Ahmad Shaban "introduced a document executed in Egypt that he claimed was a prenuptial agreement " [575] The trial court refused to allow expert testimony which was prepared to state that according to the one page "prenuptial" document the couple had agreed that Islamic law would govern their marriage, as well as their property relations at the time of divorce This would mean that the earnings and property accumulation of each party during marriage would be separate In other words, the wife, Sherifa Shaban would only receive, according to that document, her deferred dowry of 500 Egyptian pounds equivalent to $30 Since there is no such thing as joint assets unless otherwise stated or specified, in an Islamic marriage the assets of the spouses are separate and never joint As such, Ahmad Shaban was trying to avoid the communal property divisions according to California state law and enforce Islamic law However, the translation of the document revealed that it was not a prenuptial agreement (the trial judge found the document was really a marriage "certificate") As such, the trial judge having excluded expert testimony proceeded to "apply California community property law to the earnings and acquisitions of the parties "[576] Ahmad appealed the case and subsequently lost again In his opinion Judge P J Sills wrote

> It is not that a document in a foreign language is not a fit subject for parole evidence It obviously is (See Reamer v Nesmith (1868)) We affirm because the requirement that prenuptial agreements be in writing under California law is a statue of frauds provisions,

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[573] Lindsay E Blenkhorn, Notes "Islamic Marriage Contracts in America Courts Interpreting *Mahr* Agreements as Prenuptials and their Effect on Muslim Women" 76 Cal L Rev 189 (2002-2003) 203
[574] In re Marriage of Shaban 105 Cal Rptr 2d 863 (Ct App 2001)
[575] *Id*
[576] *Ibid* at 4

> and to satisfy the statue of frauds, a writing must state with reasonable certainty what the terms and conditions of the contract are An agreement whose only substantive term in any language is that the marriage has been made in accordance with "Islamic law" is hopelessly uncertain as to its terms and conditions Had the trial judge allowed the expert to testify, the expert in effect would have written a contract for the parties [577]

Hence, there are two issues at hand here, the first is the lack of clarity in the language of the document to satisfy prenuptial agreements under California state law, and the second, is that the translation of the document read as a simple marriage contract with the name of the bride, bridegroom, the amount of dower, witnesses and indication that the document was concluded in accordance with the laws of Almighty God and the rules of his Prophet So, in this case Sherifa Shaban not only received her *mahr* but half of her husband's assets and properties as well

As the previous case also suggests, one of the greatest dilemmas facing US courts is the interpretation of Islamic marriage contracts Whitman asks, "[I]f the court interprets them based on religious law, is the state establishing religion—a constitutional no-no? If it is a valid contract, should the court treat it as a prenuptial agreement? What terms are enforceable? Does deferred *mahr* then replace alimony or other financial support?"[578] These are serious questions for a judge to consider and it seems that every court has treated the matter differently In *Odatalla v Odatalla*[579] Zuhair Odatalla married Houida Odatalla in 1995 in Linden, N J The parents of both parties had negotiated the terms of the marriage contract before the ceremony and had video of this process When an agreement was reached both bride and groom signed the marriage contract in the presence of the Imam and their families According to the marriage contract the *mahr* would be prompt one golden pound coin and postponed ten thousand

[577] *Id*
[578] Sylvia Whitman, ' Muslims and Islamic in the Chaotic Modern World Relations of Muslims among Themselves and with Others" Paper Presented at AMSS 34th Annual Conference (2005) 15
[579] *Odatalla v Odatalla* 810 A 2d 93 (N J Super Ct 2002)

U S dollars [580] Upon divorce, the defendant, Zuhair Odatalla opposed the court order to perform the *Mahr* agreement on two grounds "The First Amendment to the Constitution precluding this court's authority to review the Mahr Agreement under the separation of Church and State Doctrine and, Second, the agreement is not a valid contract under New Jersey law "[581] The court heard testimonial evidence for both plaintiff and defendant and concluded that

> The Mahr Agreement is not void simply because it was entered into during an Islamic ceremony of marriage Rather, enforcement of the secular parts of a written agreement is consistent with the constitutional mandate for a "free exercise' of religious beliefs, no matter how diverse they may be If this Court can apply "neutral principles of law" to the enforcement of a Mahr Agreement, though religious in appearance, then the Mahr Agreement survives any constitutional implications [582]

In this case, the court not only applied "neutral principles of the law" to the *mahr* agreement, but it also considered the *mahr* agreement as a contract and not a prenuptial document The Court argued, that "[I]n this case, principles of contract law are to be applied to the *Mahr* Agreement in question " Although the defendant argued that the agreement does not meet the requirements of New Jersey contract law, the Court held that "[I]t is basic contract law that "a contract is a set of promises for the breach of which the law gives a remedy, or performance of which the law in some way recognizes as a duty "[583] As such, Zuhair Odatalla owed the plaintiff, Houida Odatalla $10,000 in deferred *mahr* payment The importance of this case as argued by Abed Awad, counsel for the plaintiff, is that "*mahr* is not consideration for the contract, but rather an effect of it—an automatic consequence whenever a Muslim couple marries "[584] Interpreting an Islamic marriage contract, simply as a contract between two consenting adults not only

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[580] *Id* at 3
[581] *Ibid* at 4
[582] *Ibid* at 5
[583] *Id*
[584] Interview with Abed Awad as quoted in *Supra* note 562 at 201

clarifies the purpose of the document but also avoid its confusion with a prenuptial agreement.

This interpretation and application of the Islamic marriage contract avoids the confusion that ensues when a Muslim couple face divorce as well. In other words, if the precedent is set in US courts to interpret Islamic marriage contracts as simple contracts then it would not only be beneficial to women gaining their dower but they could possibly also benefit from the division of communal property according to the regulating state laws. In essence, we can see US courts as the site for an equitable application of the conditions of an Islamic marriage contract, which stipulates the *mahr* as the right of the woman.

Discussions of divorce cases in Iran and Morocco revealed the difficulties women face in obtaining their dower even when they had legitimate cause for divorce. If *mahr* were to be interpreted as a condition of marriage and not a condition of upholding the provisions of the contract then that would pave the way for many Muslim women to receive their *mahr*. It is clear that the narrative that guides Islamic family law does not recognize the needs and vulnerabilities of women and in fact places the onus of proving due cause on women. Men can divorce their wives without any legitimate reason. This is contrary to the practice of family law in the United States. In other words, the no-fault divorce provision applies to men and not to women in Islamic family law and that is what creates difficulties for women to obtain their *mahr* at the time of divorce. However, if these discriminatory narratives and constrictions were to be lifted and the *mahr* were to be interpreted as a condition of marriage stipulated in the contract and not a consideration of the contract then the situation would change.

This is a mistake that Raghad Zahai Alwatter committed in presenting her case to the Court of Appeals in Ohio in 2008 In Muhammad Zawahiri, Plaintiff-Appellee v Raghad Zahar Alwatter, Defendant-Appellant,[585] Alwattar made the mistake of presenting her marriage contract as a prenuptial agreement at trial and then changed her argument before the appeals court The couple married in 2006 in Ohio and first obtained their marriage license in Ohio and then subsequently conducted their Islamic marriage ceremony They agreed on a postponed *mahr* of $25,000 and her wedding ring and jewelry, which would account for the advanced dower However, the relationship of the couple never blossomed and they never lived together As such, the enforcement of the *mahr* became an issue of contention for both Alwattar argued that the *mahr* agreement constituted a valid prenuptial agreement while Zawahiri argued that it violated the Establishment Clause of the First Amendment [586] Because Alwatter argued the *mahr* agreement as a prenuptial agreement, it had to meet the three special conditions of a prenuptial agreement The first, requires the agreement be freely entered into without fraud, duress, coercion, or overreaching Second, that there was full disclosure, or full knowledge and understanding of the nature, value, and extent of the prospective spouse's property and third, the terms do not promote or encourage divorce or profiteering by divorce [587] The trial court did not find the *mahr* agreement qualifying as a prenuptial agreement and so denied Alwattar her case The appeals court also upheld the trial courts decision Alwattar and her counsel made the mistake of arguing that her marriage was a prenuptial contract rather than a simple contract While the case was settled as such in the

[585] Muhammad Zawahiri, Plaintiff Appellee v Raghad Zahar Alwatter, Defendant-Appellant, 3478 (Ohio App Ct 2008)
[586] *Ibid* at 4
[587] *Ibid* at 5

US court, perhaps in an Islamic court, Alwattar would have at least received half of her *mahr* if her husband had initiated the divorce.

The *mahr* provision of an Islamic marriage contract is perhaps one of the most contentious and complicated aspects of an Islamic marriage. Because, while the *mahr* is the gift of the husband to the wife that she can ask for anytime during her marriage, it becomes problematic in Islamic law when one considers who has initiated the divorce. If the husband initiates the divorce, the wife has right to the full amount, if the wife initiates the divorce in a *khul*, then she technically negotiates her way out of the marriage by relinquishing half or all of her *mahr* to her husband in return for a divorce.

Enforcement of an Islamic marriage contract is even more complicated in US courts where judges have to define what the *mahr* would mean in the American context. Most importantly, as Blenkhorn argues, "[U]uncertainty in interpreting the actual terms of *mahr* agreements in American courts occurs when it is unclear whether couples intended their *mahr* agreement to be the only remedy upon divorce."[588] In addition, she notes, "[T]he terms of the dowers are vague such that courts cannot determine how to dissolve the property or which property has been selected for dissolution."[589] This issue gets to the heart of the matter because two very different definitions of marriage and dissolution of marriage collide when Muslim Americans reach the point of divorce. As discussed earlier, under an Islamic marriage each person maintains his/her own assets and in most cases the house, car, or any other articles of property are in the husband's name. If the wife has property of her own then all profits from it are solely her own. However, in the United States many see it as very important for couples to own property jointly, to share a

[588] *Supra* note 573 at 210.
[589] *Id.*

bank account and to accrue debt together. These two conflicting pressures pose a dilemma for many Muslim Americans.

In *Vryonis v. Vyronis*[590] Fereshteh met Speros in California in 1979. Speros was a teacher at the Center for Near Eastern Studies at UCLA and a non-practicing Greek Orthodox. Fereshteh was a Shia Muslim, divorcee and mother of two who had received her PhD from Cambridge University. They dated in February and March of 1982 and Fereshteh insisted that she could not date him without marrying him first because of her religious upbringing. Speros refused to marry her. However, in March 1982 Fereshteh performed a private marriage ceremony.[591] As a Shia, Fereshteh performed the ceremony for a time-specified temporary marriage or *mut'a* marriage[592], which made their relationship religiously valid from a Shi'a point of view. Speros agreed to this situation. Fereshteh was not aware of California marriage laws. The two kept their "marriage" private and continued to live in separate residences. They filed separate taxes, did not commingle their finances and Fereshteh did not take Speros' last name. However Fereshteh had requested for official solemnization of their marriage in a Mosque which, Speros had refused.

In July 1984 Speros informed Fereshteh that he was going to marry another woman. Fereshteh in turn, began telling people about their marriage. In September 1984 Speros married the other woman. In October 1984 Fereshteh petitioned for dissolution of

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[590] In re marriage of Fereshteh R and Speros Vryonis, Jr Fereshteh R Vryonis, Responsent, v Speros Vryonis, JR , Appellant, 248 Cal Rptr 807 (Cal App Ct 1988)

[591] *Ibid* at 5

[592] A mut'a marriage is a temporary marriage between a man and woman which can be contracted for 1 day to 99 days In temporary marriage the woman receives a mahr and any children born within it can inherit from the husband There is no need for witness or guardian and can be contracted in private by reciting a simple verse. However, it is practiced only among the Shi'a and the Sunni sect does not accept it as valid See for example, Shahla Haeri, *Law of Desire Temporary Marriage in Iran,* (London I B Tauris & Co Ltd 1989)

marriage and sought attorney's fees, spousal support and a determination of property rights [593] The trial court held that Fereshteh had "a good faith belief a valid marriage existed between her and Speros,"[594] given that they had held a private marriage ceremony in her apartment back in 1982 After careful review of the case, the trial court found that a putative marriage (common law marriage) would allow Fereshteh to claim spousal support and property divisions in subsequent proceedings In his appeals Speros argued that

> The trial court erred as a matter of law in finding putative spouse status because (a) there was no evidence of a void or voidable marriage in that neither party made any attempt to comply with the statutory requirements of solemnization and recordation, and (b) there was no objective evidence to sustain the finding of Fereshteh's good faith belief in the existence of a valid marriage without the existence of the usual indicia of a marriage, (2) the ruling in effect resurrects common law marriage, contravening public policy, and (3) it was error to allow Fereshteh to testify as an expert regarding Islamic custom and practice and the Muta marriage [595]

A review of the case by the appeals court found that the trial court erred in accepting the good faith of Fereshtheh in the marriage as fulfilling the requirements of a putative marriage under California law. The appeals court also noted that.

> Subsequent events are not germane to whether there was a proper effort to create a valid marriage in the first instance However, later conduct sheds further light on whether Fereshteh had reason to believe she was married to Speros We observe the parties did not reside together, but continued to maintain separate households They did not assume any support obligations for one another They spent no more than five or six nights together in any given month during the marriage Speros continued to date other women, of which fact Fereshteh was aware Fereshteh did not use Speros's name There was no merging of finances, nor was there any joint accumulation of real or personal property Fereshteh and Speros filed separate tax returns, each claiming single status [596]

Hence, the appeals court concluded, not only was the marriage not solemnized but there was no semblance of a life together either As such, even if Fereshteh conducted the

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[593] *Ibid* at 6
[594] *Id*
[595] *Id*
[596] *Ibid* at 10

mut'a ceremony with belief that a real marriage took place, the marriage was not valid under California state law because it did not fulfill the requisites of good faith. This is an interesting case, because according to *Shii'* law, a temporary marriage is valid until the date it has been agreed to expire. Even though it's a "temporary marriage" nevertheless, the same rules apply if the husband is financially responsible for the woman and if a child is born during its subsistence than he/she takes the last name of the father. Nevertheless, the arguments of the appeals court are two-fold. The first, is that the marriage was never solemnized and it was only Fereshteh who had "good faith" in the marriage and Speros did not. Second, that the couple never occupied the same residence or conduct their financial or personal affairs as married peoples do. While, this can be problematic in the eyes of US family law, nevertheless, under an Islamic marriage (permanent or temporary) the woman retains her maiden name throughout her married life. This is not a requirement of *fiqh* as Al-Hibri argues. In addition, "Muslim women often keep separate bank accounts to protect their right under Islamic law to exclusive control over their personal property."[597]

The intersection of US family law and Islamic family law sheds light on the different narratives that guide each legal framework and most importantly they rights and obligations that are established for each party to the marriage. Under Islamic family law women and men are treated differently, often more favorably to men. US family law defines a marriage in a different light and holds different criteria for identifying a marriage as valid. While the narrative of marriage is different under each legal system, it is safe to say that women are granted more rights under US family law. Under Islamic family law as it stands now women carry a great burden and have to prove to the court

[597] *Supra* note 564 at 14.

and to their community that they were obliging wives and mothers and that they had not transgressed the bounds of Islamic family law. In other words, they need to fit into the mold of a good Muslim wife and even if they do that does not mean they will get all of what should rightfully be theirs in an Islamic family court. As such, the meeting of these two legal narratives can be an opportunity for Muslim scholars and activists to create a new narrative of what Islamic family law can be. Similar to discussions in previous chapters there are always new sites where new alternative narratives of the law can be created. Engagement with Islamic family law in US courts is one such site.

Different interpretations of marriage and the obligations and rights of the spouses both during marriage and upon divorce manifest themselves in the confusions and at times frustrations that arise when Muslims seek divorce in US courts. As such, it becomes incumbent on Muslim scholars and religious leaders in North America to devise solutions to merge the principles of Islamic family law and US family law to create greater harmony and ease for couples marrying and divorcing in the US. Quraishi proposes Muslims to follow in the footsteps of the Jewish community and their long established practice of alternative dispute resolution in the form of *beit din*. She suggests for Muslims to invest in alternative dispute resolution tribunals to resolve their domestic disputes by selecting trusted and knowledgeable arbitrators who are well versed in Islamic law and US family law.[598] While this approach sounds practical and transparent, the next section will discuss the heated debates that took place north of the border in Ontario, where the proposal to establish Shari'a Tribunals as alternative dispute resolution centers was struck down.

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[598] *Supra* note 562 at 215-216.

2. The Ontario Shari'a Debate

The debates concerning the Ontario Shari'a Tribunal can best be characterized as the clash between fear and hope in the interpretation and application of Islamic family law in North America. The heated debates began in late 2003 when Sayyid Mumtaz Ali of the Islamic Institute of Civil Justice (IICJ) announced that:

> they had been looking into ways of establishing a *Darul-Qad*a--a judicial tribunal that will, in effect, operate as a private Islamic Court of Justice without in any way infringing on any Canadian judicial jurisdictions or legal authorities or violating any Canadian law.[599]

The proposal to establish Shari'a tribunals followed established practice among religious minorities in Canada who acted according to the articles of the *Arbitration Act* 1991.[600] The purpose of the *Arbitration Act* was to allow religious minorities to settle disputes outside the traditional court system while upholding their religious norms and laws. The *Arbitration Act* of 1991 was designed to ease the backlog of cases before Canadian courts and "to allow "faith-based arbitration" – a system where Muslims, Jews, Catholics and members of other faiths could use the guiding principles of their religions to settle family disputes such as divorce, custody and inheritances outside the court system."[601] According to article 2.1 of the Arbitration Act:

> (1) Family arbitrations, family arbitration agreements and family arbitration awards are governed by this Act and by the *Family Law Act.* 2006, c. 1, s. 1 (2).
>
> (2) In the event of conflict between this Act and the *Family Law Act,* the *Family Law Act* prevails. 2006, c. 1, s. 1 (2).[602]

Mumtaz Ali and other members of the Islamic Institute for Civil Justice had been working on the enforcement of Islamic Personal status laws in Canada for a number of

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[599] News Bulletin, April 2003 of the Islamic Institute of Civil Justice www.muslim-canada.org/news03.html
[600] Ontario Arbitration Act 1991, http://www.canlii.org/en/on/laws/stat/so-1991-c-17/latest/so-1991-c-17.html
[601] CBC News: Indepth Islam, http://www.cbc.ca/news/background/islam/shariah-law.html, May 25, 2005.
[602] *Supra* note 600.

years In a review submitted to The Review of the Ontario Civil Justice System in 1994, Mumtaz Ali argues,

> Muslims of Ontario are also trying to persuade the government to extend some form of autonomy in respect to Muslim personal/family law which they need as an expression of worship and love of Allah —the two elements inherent in its obedience For Muslims, the *sine qua non* of action is that it be undertaken with the intention of submitting oneself to Allah's Will such that the action is done for the sake of Allah alone [603]

The review made seven recommendations including the establishment of arbitration panels as part of court-based A D R process where Muslim couples would choose to go to resolve marital issues, particularly divorce and child custody [604] One of the main arguments that Mumtaz Ali and his supporters put forward is that as per the *Arbitration Act* of 1991 Muslims, a minority in Canada, would now be able to apply Islamic law to one very important aspect of their lives, namely to their family life As such, he and his supporters who were keen on upholding Islamic law and seized the opportunity to advocate for independent Muslim Arbitration Boards or *darul-qada* where Muslims couples would choose to use in settling their marital dispute [605] One of the interesting references that Mumtaz Ali makes in his numerous articles is to the Canadian Charter of Rights and Freedoms and to the Canadian ideology of democracy As such, he believed that it was his right under a democratic Charter to apply Islamic Family law in resolving family disputes, as a Muslim citizen in Canada [606]

The Islamic Institute of Civil Justice announced in late 2003 that the Arbitration Boards would begin work soon The announcement noted

"It is now clear that according to the current Canadian Law, we are free to set up

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[603] Mumtaz Ali, "The Reconstruction of the Canadian Constitution and the Case for Muslim Personal/Family Law A Submission to the Ontario Civil Justice Review Task Force" 1994
[604] *Id*
[605] Rabia Ali Interview A Review of Muslim Family Law Campaign, Aug 1995, www muslim-canada org
[606] *Id*

> independent Muslim Arbitration Boards (*Darul-Qada*) to serve those who choose to come to them. The decisions of *Darul-Qada* once rendered will be binding on the parties, the relevant ***Rules Of Civil Procedure*** would be applicable, and the decisions will be enforceable through the normal enforcement agencies of the government in the same way as any order of a Canadian Court. [607]

The announcement to start arbitration soon raised a lot of concern among women's groups including the Canadian Council on Muslim Women, the National Association of Women and the Law, and the National Organization of Immigrant and Visible Minority Women of Canada among many others. These women's groups had a number of legitimate concerns, foremost among them was the idea that under the Shari'a women and men are not treated equally, and women generally do not get equal rights in divorce, child custody and inheritance. But there were also fundamental methodological questions at hand, including: how would the Shari'a be interpreted? Which school of law would be applied? How would the arbitrator be selected? How would they be trained? What do the arbitrator's think about women's rights and equality? These questions were among a number of issues that were raised and subsequently debated in the two years that followed.

Given the rising concern in the legal community and among activist women about the implications of Shari'a law in family disputes, in 2004, Dalton McGuinty the Premier of Ontario mandated Marian Boyd to "explore the use of private arbitration to resolve family and inheritance cases, and the impact that using arbitrations may have on vulnerable people."[608] In particular, the review was to address the "prevalence of the use of arbitration in family and inheritance disputes, the extent to which parties have resorted to the courts to enforce arbitration awards, and what differential impact, if any, arbitration

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[607] www.muslim-canada.org
[608] *Ibid* at 5.

may have on women, elderly persons, persons with disabilities, or other vulnerable groups "[609] Among other goals of the review was reiterating that religious groups had been applying religious law in settling their disputes since 1991, and that the application of Shari'a law would just be another group's application of the *Arbitration Act* 1991

In her report Boyd notes

> The idea that the IICJ legitimately held some form of coercive power which would allow it to force Muslims in Ontario to arbitrate according to Islamic personal law instead of using the traditional court route to resolve disputes was formed as a direct result of the pronouncements of the IICJ That this declaration appears to have been taken at face value by both the Muslim community and the broader community is particularly troublesome Further, the IICJ's false contention that arbitration decisions are not subject to judicial oversight was propagated by a misunderstanding of the law on the part of the community, the media, and of course, the IICJ itself Finally, the IICJ position that ' "good Muslims' " would avail themselves exclusively of Muslim arbitration services effectively may have silenced opposition among those who consider themselves devout [610]

The Boyd report also found that the Catholic, Protestant and Jewish community had been successfully applying religious law in settling disputes For example, according to Jewish laws both the man and the woman must agree to a divorce In this case the husband gives the *get*[611] and the woman receives it When a Jewish couple marries they sign a *Ketubah*, a marriage contract When the *get* is received the woman is no longer a married woman and she is free to marry someone else The Boyd report notes

> A Jewish divorce is issued in a Jewish court, which is called a Beth Din The Beth Din usually consists of three rabbis, one of whom is a specialist in the laws of divorce **A civil divorce is not sufficient in Jewish law.** The legal requirement for a GET affects Orthodox and Conservative Jews The Reform movement has determined that a civil divorce is usually adequate However, the GET requirement is operative throughout the State of Israel Parties without a GET would usually be unable to remarry in Israel Thus many

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[609] *Id*

[610] Marian Boyd, "Dispute Resolution in Family Law Protecting Justice, Promoting Inclusion' (December 2004) 4 http //www attorneygeneral jus gov on ca/english/about/pubs/boyd

[611] The *get* is a Jewish divorce document, which the husband gives to the wife upon divorce This signifies the end of their marriage The text of the get reads 'you are hereby permitted to all men which signifies that she is no longer married

> Jews are affected either directly or indirectly by these laws [612]

Thus the Arbitration Act is very important to the Jewish community as well, because, without a religiously sanctioned divorce the couple would not be really divorced This is very similar to the situation for Muslims, where an Islamic marriage or divorce is not finalized without the presence of religious authorities and the relevant contracts

In addition, the report found that many lawyers and practitioners found relief in arbitration and mediation in a system where the courts are backlogged and there is little privacy Quoting arbitration lawyer Philip Epstein, the Boyd report notes

> It would be a significant error, in my view, to prohibit parties from going to arbitration in Ontario to settle family law disputes It is becoming far more common for parties to resolve their disputes in this way and, coupled with mediation, is an extremely useful tool for reducing conflict and encouraging earlier and less costly settlement It would be a huge disservice to the public to take away this tool I say this out of no self-interest factor, since parties will always continue to mediate and I have far more work in that area than I could ever want I make this point because I think that arbitration is an extremely effective tool and there is a huge cost benefit to the parties The courts will always be available for those that do not wish to use this process but, arbitration will become more and more popular as parties learn more about it There is also a significant advantage in arbitration in that it is a confidential process as opposed to the courts and many parties want their problems resolved in a confidential fashion [613]

However, there were many groups that were against the continued practice of arbitration in family disputes The National Association of Women and the Law (NAWL) raised particular concern about the privatization of family law by stating

> It is possible to make a general argument about the impact that the privatization of family law is having on women Indeed, many scholars have written about the dangers of the state washing its hands of responsibility in matters that are "private" [614]

Specific opposition with the use of Shari'a law in family dispute resolution was raised

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[612] Norma Baumel Jospeh, Evelyn Beker Brook, Marilyn Bicher, "Untying the Bonds" Jewish Divorce A GET Education Video and Guidebook " (The Coalition of Jewish Women for the Get, 1997) at 4 cited in Boyd Report at 41

[613] *Ibid* 37-38

[614] NAWL submission quoted in *Supra* note 610 at 33

from a number of groups and organizations who noted the unequal and at times inferior status of women to men in Islamic law which could potentially lead to unfair arbitration in a country where secular laws could potentially be more beneficial to Muslim women Although, highlighting general misapplications of the law as an inherent defect of Islamic law is problematic, nevertheless the opposition raised a number of important and serious points to consider In her submission Mubina Sheikh points out that

> First and foremost there will never be a single, centralized Shariah Tribunal that all Muslims will accept The differences of opinion within Islam would see to that very quickly But Islam does not even call for unity of opinion in every single thing and actually, diversity of legal thought is regarded as a ""mercy from your Lord" " So, Muslims have always had such diverse examples of Shariah, which again shows the flexibility of Islam being able to entertain inclinations of all types Thus far, we have been using the term, "Shariah Tribunal" as if there is a set model There is none Nothing to this effect has been discussed in the Muslim community because there is no central diocese of Islam to legislate such a thing While most Masjids [mosques] operate in total independence from others, the only unity they possess is on basic beliefs [615]

In this context, The Islamic Council of Imams——Canada urged

> These Tribunals should not be allowed to use the word Shariah Court It remains an ADR Tribunal within the context of Ontario law Only difference is that the environment is Islamic, i e members are all Muslims and the resolution is in the spirit of Islam and the Ontario laws [616]

Given that there is no monolithic Shari'a law and that a diversity of interpretations exist within Muslim communities around the world, nevertheless, the opposition women's groups all seemed to agree that regardless of school of thought or interpretation, Islamic law is monolithic when it comes to women Simply put they argued, women are treated unfairly under Shari'a law

The Canadian Council on Muslim Women[617] was a national Muslim organization that heavily advocated against the use of Shari'a in resolving disputes In the position

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[615] Submission of Mubina Sheikh, "Shari'ah Tribunals and Masjed El Noor A Canadian Model" (August 24, 2004) quoted in *Supra* note 610 at 43
[616] *Supra* note 610 at 45
[617] www ccmw com

paper that they presented they note that their stance against the use of Shari'a law in Canada puts them in a precarious position As a faith based organization, they claim to be pro-faith and see no incongruity between the principles in the Quran and the Universal Declaration on Human Rights regarding the inherent dignity of each human being [618] However, they are cognizant of the fact that Shari'a law is not to be confused with the divine sources of the law In other words, Shari'a or Islamic jurisprudence is man made based on human interpretations of the divine As such, they highlight particular concerns with the application of Shari'a law in Canada as follows

> a] As newer immigrants, Muslims are searching for markers to identify themselves as a faith group and the use of Sharia/Muslim family law is being used as one such marker
>
> We are concerned that, in deference to their religious beliefs, some Canadian Muslim women may be persuaded to use the Muslim family law/Sharia option, rather than seeking protection under the law of the land The argument is that to be a "good" Muslim one must live under Muslim family law, and that this is an issue of religious freedom or human rights Although none of these statements is accurate, they may sound convincing to some
>
> b] Using the extreme argument that this is the right of religious freedom, even if inaccurate, makes other Canadians and politicians wary of any analysis and resolution of the issue The issue of separation of state and institutionalized religion needs to be clarified in the context of religious freedom and multiculturalism policies
>
> c] The other cry is to state that this is "multiculturalism " This is another false argument, because in fact it is really a misuse of the policy Multiculturalism was never meant to take away the equality rights of a group such as those of Muslim women
>
> d] Another theme is that instead of addressing the issues resulting from the inefficiencies or ineffectiveness of the federal / provincial court system, the government has allowed for the growth of privatization of the legal system and the lowering of some of the safeguards [619]

In their submission for the Boyd report, however, CCMW highlights the unequal status of women and men in Islamic jurisprudence They note

> The jurisprudence of *fiqh* does have some common understandings It is based on a patriarchal model of community and of the family It is generally accepted that men are the head of the state, the mosque and the family The responsibilities outlined for males is

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[618] Canadian Council on Muslim Women, Position Statement on the Proposed Implementation of Sections of Muslim Law [Sharia] in Canada www.ccmw.com
[619] Id

> that they will provide for their families and because they spend of their wealth, they have the leadership to direct and guide the members of their families, including the women. ……Most proponents of Muslim law accept that men have the right to marry up to four wives; that they can divorce unilaterally; that children belong to the patriarchal family; that women must be obedient and seek the males permission for many things; that if the wife is ""disobedient" " the husband can discipline the wife.[620]

Among its other concerns, the organization was concerned about the qualifications of the arbitrators and the function of the system as a whole as they were concerned with oversight. In a Press Release issued in September 2004 they raised concern about a number of issues including: lack of a regulatory mechanism, which would ensure each party would be treated fairly and equally; lack of transparency about the tribunals stance on child custody; women may be coerced to participate in the arbitration tribunal due to family pressure; the diversity of Shari'a law makes the uniform application of law in Canada quite problematic. "[621] These were among some of the concerns that CCMW raised. As one of the largest Muslim Women's organizations in Canada, CCMW was heavily invested in this campaign and sought the expertise of a number of scholars and groups for advice, including the research findings of Women Living Under Muslim Laws.[622] They often cited the country findings of Women Living Under Muslim Laws as evidence of the unequal treatment of women under Islamic jurisprudence in Muslim countries. So, while the concerns of CCMW were both substantive and methodological, Homa Arjomand and her group, the International Campaign Against Shari'a Court in Canada,[623] talked about the evils of Shari'a law. They argued that applying Shari'a law in arbitration panels in Canada would be a "barbaric act." Arjomand is a staunch secularist who believes in the separation of Church and State. In a letter to Marian Boyd, Arjomand

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[620] Submission of Canadian Council of Muslim Women (August, 23 2004) quoted in Boyd Report at 48.
[621] Canadian Council on Muslim Women, "Tribunals Will Marginalize Canadian Muslim Women and Increase Privatization of Family law (September 2004).
[622] www.wluml.org
[623] www.nosharia.com

argues

> It is a sad and painful fact that, even in Canada, we still have to talk about the religious oppression of women Nonetheless, the reality is that millions of women are suffering and being oppressed under Sharia law in many different parts of the world Some of us managed to flee to a safe country, a country like Canada with no anti-secular backlash Unfortunately, Canada is the only Western country that has given validity to an "Islamic Institute of Civil Justice" (through Ontario arbitration act 1991) that will allow family and civil matters to be arbitrated according to the Islamic Sharia law
>
> We strongly believe that Shari'a tribunals will crush women's civil liberties It will enforce brutal laws and traditions on abused women who are living under the intensive influence of Islam These tribunals will be applying Islamic Shari'a law which will compel abused women to stay in abusive relationship and will give them no choice but to be obedient' or attempt suicide [624]

In her numerous statements, Arjomand cites the story of different clients for whom she advocated in Canadian courts As such, she claims to be speaking from experience In a panel discussion with Marian Boyd at the Law Union in Toronto Arjomand said

> **We are told faith-based court deals with civil and not criminal matters!!** My question is where can we draw a limit on religious law and regulation? To subsume religious law into civil and criminal law is impractical These types of classification are drawn by a secular court system not a religious Under Sharia law there is no boundary between civil and criminal For example, according to Sharia the least penalty a single unmarried woman can have for having sexual relations with a man is death by stoning In the case of pregnancy outside of wedlock the punishment is death by stoning, right after the birth of her child The same punishment is meted out to a married woman having a sexual relationship out of marriage According to today's enlightened view as seen from the perspective of modern secular society and according to criminal law in secular society, no crime has been committed by any of the above mentioned women! [625]

Although the statements and positions of Arjomand cite extreme instances in the Muslim community where young women are wed without their consent or forced to marry men older than themselves, she fails to consider the cultural influences of these decisions In other words, Homa Arjomand and her group, which included the support of individuals

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[624] Homa Arjomand, Letter to Marian Boyd, "Re Islamic Shari'a Arbitration Proposal Submitted by "The Islamic Institute of Civil Justice" (July 21, 2004) www nosharia com

[625] Homa Arjomand, Speech at Panel Discussion with Marion Boyd at Law Union, Toronto, ON (march 5, 2005) www nosharia com

such as Ayaan Hirsi Ali and Irshad Manji, blame all the ailments of Muslim women on Shari'a law alone Nevertheless, despite her biased and very secular perspectives she raised important issues about the abuse of women in Muslim communities and the advantages of applying one law to all Canadians regardless of faith, race or ethnicity

Despite the heavy campaign of the opposition movement and fear of ghettoizing women's issue, the Boyd report concluded that

> The Review did not find any evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues Therefore the Review supports the continued use of arbitration to resolve family law matters However, that use should be subject to the safeguards recommended below
>
> 1 Arbitration should continue to be an alternative dispute resolution option that is available in family and inheritance law cases, subject to the further recommendations of this Review
>
> 2 The *Arbitration Act* should continue to allow disputes to be arbitrated using religious law, if the safeguards currently prescribed and recommended by this Review are observed.[626]

This conclusion was reached through a careful analysis of views both for and against the continued use of the *Arbitration Act* by religious communities The Boyd report cites successful examples of arbitration panels established in the Jewish, Christian and even Muslim communities The Masjed El-Noor in Toronto offers arbitration for dispute resolution The Ismaili community also has their own method of dispute resolution within the confines of their community The Boyd report also notes suggestions from organizations such as the Islamic Council of Imams—Canada which expressed willingness for oversight of the arbitration panels by assigning two lawyers, one male one female, two Muslim qualified jurists one Sunni and one Shi'a, and a Judge from the General Attorney's office to monitor the decisions of the panels[627] The Boyd report

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[626] *Supra* note 610 at 133
[627] *Ibid* at 126

argued that the *Arbitration Act* should exist to serve as a medium to promote multiculturalism and inclusion of faith based communities in Canada

The findings of the Boyd Report did not satisfy the concerns and fears of the advocates against the Shari'a tribunals As such, Dalton McGuinty the Premier of Ontario outlawed the use of religious arbitration panels on September 11, 2005 Establishing faith based arbitration panels could have served as an opportunity for the Muslim community to come together and create a new venue for discussing and interpreting Islamic family law in a manner that would be fair, equitable and most importantly Islamic Muslim engagement with arbitration and mediation in the Canadian context could have given birth to a new form of Islamic family law, one that could have established a Canadian narrative on Islamic family law

However, the discourse was disrupted and can arguably be said to have been stifled by legitimate concern and unwelcome fear from groups whose main concern was to decide how to save the Muslim woman and to keep the dangerous Muslim man in line [628] Razack rightfully argues that "[T]he eternal triangle of the imperiled Muslim woman, the dangerous Muslim man and the civilized European, is fully in evidence in the context"[629] of the Ontario Shari'a debate Razack argues, that Canadian feminists (both Muslim and non-Muslim) utilized frameworks that installed a religious/secular divide, which she argues serves as a color line, dividing people into modern, pre-modern, white, enlightened west and backward Muslim [630] She argues, feminists from both groups had capitulated to the project of Empire and power where commitment to Western values

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[628] Sherene H Razack, "The 'Sharia Law Debate' in Ontario The Modernity/Premodernity Distinction in Legal Efforts to Protect Women from Culture" 15 Fem L St 3 (2007) 4

[629] *Id*

[630] *Supra* note 590 at 6

implied siding with enlightenment and human rights [631] Although her criticisms might be a bit harsh (similar to Homa Arjomand's arguments about the evils of Shari'a law), nevertheless, she makes an important point about the fear that both Muslim and non-Muslim feminists exhibited about Shari'a law She notes, that the Ontario Shari'a debate began life as a "moral panic"[632] and was highlighted by the notion that "Muslim women were caught between the proverbial rock (a state likely to use their rights as a means to police Muslim populations) and a hard place (patriarchal and conservative religious forces within their own communities) "[633] The arguments presented by different feminist organizations such as the Canadian Council on Muslim women implied that Muslim women lacked the agency to decide their own fate

Kortweg argues that agency is "always informed by social contexts "[634] However, she distinguishes between agency as an act of resistance and as self-awareness She notes,

> [T]he distinction here is between seeing agency solely as resistance, which captures actions that explicitly aim to undermine hegemony, and embedded agency, which captures practices that do not have this explicit aim, yet still reflect active engagement in shaping one's life [635]

Fear of Islamic family law by feminist groups in Canada constructed the immigrant Muslim women not only as imperiled and powerless, but also lacking the agency to decide for herself Razack notes that the Canadian Council on Muslim Women quoted "statistics indicating that fewer separated Muslim women sought divorce than do separated women in the Canadian population, and that marriage breakdown for Muslim women between the ages of 18 and 24 is higher than for other women of the same age

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[631] *Supra* note 628 at 5
[632] *Supra* note 590 at 7
[633] *Ibid* at 6
[634] Anna C Kortweg, 'The Sharia Debate in Ontario Gender, Islam and Representations of Muslim Women's Agency" 22 Gender and Society No 4 434 (August 2008) 437
[635] *Id*

group, the Council opined that these patterns could be attributed to higher than usual 'cultural and economic pressures'"[636] As such, feminist groups chose the state, a neutral party to protect women from Muslim men and from Shari'a law Razack contends that the

> Council insisted that since there was no consensus about Sharia, and no accountability for how it was interpreted, conservative and patriarchal interpretations were likely to prevail The answer, then, had to lie in secular law Without it, women would be left at the mercy of their communities [637]

This goes without saying that the concern of CCMW and other activists groups about conservative and patriarchal interpretations was not only legitimate but also very important Discussions in the previous chapters reveal the patriarchal ideology and narrative that dominates Islamic law, especially Islamic family law Nevertheless, the establishment of Shari'a tribunals could have given birth to new interpretations of the Shari'a, one that would be gender sensitive and inclusive of feminist narratives and their ideals In other words, it could have been a site where women's agency would be actively represented and enforced through arbitration panels that women themselves would have helped design However, as Emon argues, the "concept of Shari'a that prevailed in the Ontario debates was one that viewed the tradition as an inflexible code of religious rules, based on the Quran and traditions of the Prophet Muhammad, and immune to change "[638] Emon points out that Muslim fundamentalists use the rhetoric of an unchanging and static Shari'a against modernity Muslim secularists who embrace liberalism on the other hand see the Shari'a as an obstacle to the full realization of equality and egalitarianism [639]

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[636] *Supra* note 590 at 10
[637] *Id*
[638] Anver M Emon, Conceiving Islamic Law in a Pluralist Society History Politics, and Multicultural Jurisprudence" Singapore J Leg St 331 (2006) 333
[639] *Ibid* at 352

These two dichotomous views best describe the Shari'a Ontario debate and the arguments that each side of debate made

This is perhaps the most important challenge that feminist activists face when they call for the incorporation of their alternative feminist narrative into mainstream Islamic jurisprudence The secularists and the fundamentalists both see the Shari'a as static and inflexible However, the brief survey of the development and evolution of Islamic law and the feminist narrative of Islamic legal history reveals the nuances and periods of diversity that animated the development of the legal system As such, it is not impossible to change existing Islamic laws and incorporate new narratives or worlds of meaning into its framework As Mir-Hosseini and the other feminist scholars were arguing changing the law does not mean extinguishing the principles of the Shari'a but rather reforming and changing *fiqh* proceedings, which are based on juristic interpretation This of course would require the cooperation of male jurists and the political will to support changing the existent male dominant narrative of the law

For Mumtaz Ali and his followers the Shari'a tribunals was a way to assert their Islamic identity and uphold Islamic law in a secular state For the opponents of the religious tribunals, modern secular laws offered the best solution for resolving family disputes and were best suited to protect women Emon contends, "for both camps, Shari'a is reduced to a mere shell of code-like rules without historical or theoretical nuance "[640] This view of the Shari'a overlooks the history of the formation and transformation of the Shari'a from a simple set of norms and practices to a vast and diverse legal system

[640] *Id*

In addition, and most importantly, the ideas brought forth by activists such as Ayaan Hirsi Ali and Homa Arjomand whose bad experiences with Islamic law brought about a campaign full of rage and fear emphasized the archaic and at times barbaric nature of Islamic law Margaret Wente writing for the Globe and Mail quotes Ali saying

> Canadian law," [Ayaan Hirsi Ali] says, "is now offering some Canadian men the opportunity to oppress us " She believes in the strict separation of religion and state She believes that the religious law of any faith—Muslim, Christian, Jewish—invariably oppresses women And she believes that the promised safeguards, such as the right to appeal any decision to a secular court, are a load of hooey for women who live, as many Muslim women do, in a closed society "What is freedom of choice when you depend on your family and clan for everything?[641]

Not only do Ali and Arjomand assume that all Muslim women immigrants to Canada live in an oppressed and closed environment, but their arguments predicate women's agency to resistance against religiously informed family and community practices [642] However, as Kortweg notes, "[T]he participation of self-identified religious Muslim women and men in the debate further showed that agency could be embedded in religion (and its intersection with gender, immigration, and ethnicity) "[643] In other words, people's agency can be layered and influenced from a variety of sources In addition, in a multicultural society such as Canada, which seeks to include and accommodate minority groups, the motto is not to homogenize all new immigrants into hard-core secular liberals Rather, the goal is to maintain the diversity of the community

As such, Shachar makes an important point which can be applied for Muslim women living both in the US and Canada She asks "what is owed to those women whose legal dilemma's (at least in the family arena) often arise from the fact that their lives are

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[641] Margaret Wendt, "The Woman who just says No Courting Sharia 'I can't look away because I know what goes on in Islamic families" Globe and Mail August 20, 2005 A 19
[642] *Supra* note 634 at 444
[643] *Id*

already affected by the interplay between overlapping systems of identification, authority and belief" [644] This is important to consider, because, although the Shari'a arbitration panels were never established, this does not mean that Muslim couples will *not* uphold Islamic laws on marriage and divorce This means, that Muslim couples both in the US and Canada will continue to get married using an Islamic marriage contract and establish *mahr* provisions, and perhaps even divorce applying Islamic law. If one is a devout Muslim than there really is no recourse but to uphold the laws on marriage and divorce however unfair or biased they may seem In a multicultural context, Sacher suggests that it is only through the

> recognition of multiple legal affiliations, and the subtle interactions among them, that can help resolve these dilemmas The idea of recognizing the multiplicity of individuals' legal affiliations does not sit well with the traditional view of hermetically separated spheres divided along the presumably clear-cut axes of public/private, official/unofficial, secular/religious, positive law/traditional practice Instead, recognition calls for greater access to, and coordination between, these multiple sources of law and identity

Establishing the Shari'a arbitration panels under the rubric of the *Arbitration Act* and following in the footsteps of other religious communities in Ontario could have given the Muslim community in Ontario the chance to apply Islamic laws of marriage and divorce in a transparent and effective way

Conclusion

Discussions about multiple identities and the influence of multiple legal systems on the daily lives of people encourages us to try to find common ground and seek to reconcile differences Muslim immigrants to North America are keen on preserving their Muslim identity while establishing a new life in the secular societies that constitute this

[644] Aeyelet Shachar, "Privitizing Diversity A Cautionary Tale from Religious Arbitration in Family Law" 9 Theoretical Inq L 573 (2008) 578

continent. However, the divergent views of the secular North American legal system and the Islamic legal system on family law often make reconciling differences not only difficult, but also sometimes impossible. There are certain elements of an Islamic marriage that although problematic, are nevertheless, significant to an Islamic marriage. For example, the contract itself is there to allow couples to negotiate the terms of their marriage and most importantly for women, to establish safeguards in the event of a divorce. The *mahr*, is a condition of the contract without which the contract is void even if the marriage is not considered void. Although, the Islamic view on marriage might not strike one as the most romantic means of starting a life together, nevertheless, to many Muslims it's a practical way of starting a life with a new partner.

Given the central role that the *mahr* plays both at the time of marriage and time of divorce, it becomes incumbent on scholars and jurists living in North America to provide the American legal system with a clear definition of the goals of the *mahr*. The *mahr* is not there to allow the woman to profiteer from the marriage, but it is there mainly to safeguard against an act of divorce initiated by the husband for no good reason. Because, under Islamic law "no-fault" divorce does not exist for women, it is only men, who by law have the right to divorce their wives at will whenever, for whatever reason they want to. Despite heavy protest from women's groups all around the world, this law still exists and even the most progressive *mujtahid's* have not been able to find a solution for it. This is so, because the exact word of the Quran allows men to do so. Hence, the *mahr* exists to act as a deterrent for such an action.

Noting that Islamic law is somewhat resistant or slow to change in family law matters, it is understandable that many women activists were fearful of the application of

Islamic law in alternative dispute resolution in the form of Shari'a arbitration panels in Ontario. They were correct in pointing out the law's injustice towards women in different Islamic countries and the dominance of a male-oriented interpretation of the texts even in Canada. The rigidity of Islamic law in family matters speaks to Cover's analysis of law's violence and the role that power plays in interpreting sacred texts. In this case, despite heavy protest and activism by Muslim women, not only were the women *not* authorized to produce an alternative reading of the texts that would serve as law, but Mumtaz Ali and his colleagues also did not calm the fears of the women by promising to practice and enforce Islamic family in an alternative manner. In other words, so long as both parties, the feminists or the male proponents of Islamic family law, insist on the static nature of Islamic law very little can change to improve the situation for women or for the application of Islamic law in secular countries. In this situation, Muslim women lack the authority to produce legally binding opinions or *fatwas* about family law, and the men insist on the divinity and untouchability of Islamic law. However, it can be argued, had the project carried on, it could have led to a more progressive North American interpretation of Islamic family laws, one that would be faithful to the principles of Islam and cognizant of Canadian family law values and norms. Although, this would have been an arduous process, it could nevertheless, have produced another new narrative, one that could have empowered Muslim women in Canada and set an example for the rest of the world.

Reconciling different world-views is often difficult, even amongst people of the same faith; nevertheless, the production of a new narrative in Islamic family law in North America could have heralded the beginning of a progressive and authoritative narrative.

Despite setbacks and challenges in both the United States and Canada, where courts are often challenged to take action interpreting marriage contracts and settling *mahr* disputes, North America can prove to be the site for the production of a new Islamic narrative One that is gender-sensitive and truly egalitarian The following chapter will discuss some of the proposals that progressive and reformist scholars and jurists are making about changing Islamic laws and norms to meet the sensibilities of modern Muslims living abroad and in Muslim countries Their discussions are important and relevant to the development of an alternative narrative in Islamic law as they too are establishing an alternative narrative of what Islamic can be and perhaps should be

Chapter 6
Progressive Narratives

I. Introduction

There are multiple sites of knowledge production and numerous groups and individuals who propose alternative narratives to what the law is. Moving from where the law *is* to where it *ought to be* is a task that can often takes decades, even centuries to achieve. However, it is certainly possible, especially given that a legal system must be flexible and adaptable to change if it is to survive and remain relevant overtime. The history of the formation and evolution of Islamic law reveals this flexibility and openness to diversity and change. However, in recent decades with the rise of political Islam[645] and fundamentalism, any discussion of reform and revival is taken to mean changing the religion to be more "modern" or as some say "Western."

Following discussions in chapter one, which discussed the diversity of opinions that flourished during the formation of Islamic law (a fundamental aspect of its development) and points made in chapter two about the birth of the Islamic reformist and revivalist movement in the nineteenth century which challenged the established hierarchy of the "authorities," this chapter will discuss some of the theoretical and practical propositions of the modernist scholars and jurists who claim that change and reform is needed in order to move forward and present Islam not as a radical religion in favor of hegemony and terrorism, but as a religion that exudes peace, supports human rights (including women's rights), and is open to progressive narratives and social change.

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[645] *See* for example, Mohammad Ayoob, *The Many Faces of Political Islam Religion and Politics in the Muslim World* (Michigan The University of Michigan Press 2008) and, Ray Takyeh and Nikolas K Gvosdev, *The Receding Shadow of the Prophet The Rise and Fall of Radical Political Islam* (WestPort, CT Praeger Publishers 2004)

Studying the proposals of these scholars and jurists allows us to realize that discourses are taking place in the periphery of the (already established) Islamic legal framework, which not only includes feminist narratives but also narratives from male scholars and male jurists who are challenging the status quo and calling for change and revival. In other words, there are developing alternative communities of meaning. As Cover explains, they are creating their own *nomos* and are working towards validating their discourse and seeking to establish it as a powerful alternative to established traditions. Cover explains that there can you can numerous alternative narrations of the law or *nomos* competing for power and recognition at the same time. As discussions in the earlier chapters reveal there multiple groups that either support the exiting framework or narrative of Islamic jurisprudence (traditonalist, fundamentalists) and others such as the feminists and progressive Muslims who are calling for internal change within the corpus of Islamic jurisprudence. Then there are others such as the secularists that call for the complete abolition of the Shari'a. These competing narratives all seek recognition and validation from the Muslim community and from the authorities. The existence of multiple sites of resistance and alternative narratives reveals that despite critques the Islamic legal system still plays a significant role for many Muslims whether they agree with the framework or not. Hence, one can argue for a legal tradition to survive and maintain relevance it requires renewal and reform, and alternative narratives are the best way to change the framework from within without changing the foundations that it has been built upon.

II. Progressive Scholars

Omid Safi notes, "an important part of being a progressive Muslim is the determination to hold Muslim societies accountable for justice and pluralism."[646] Progressive Muslims believe that at the heart of their project is resisting all forms of discrimination against women, ethnic minorities and religious minorities and exposing human rights violations.[647] Safi emphasizes that at the heart of a progressive Muslim interpretation of Islam is the:

> Simple yet radical idea. every human life, female and male, Muslim and non-Muslim, rich or poor, "Northern" or "Southern," has exactly the same intrinsic worth. The essential value of human life is God-given, and is in no way connected to culture, geography or privilege.[648]

Essentially progressive Muslims are proposing a pluralist narrative on Islam, which upholds human rights and dignity paramount to any other value system. This does not mean that progressive Muslims are not mindful of the Quran and the life of the Prophet. They actually seek to uphold the Prophet's way by valuing human life over anything else. This means, critical engagement with Islamic tradition in search of new interpretations that would offer sufficient guidance. [649] As such, progressive Muslims propose critical engagement with Islamic jurisprudence and *ijtihad*, upholding social justice as preached in the Quran, establishing gender justice and pluralism. These are not easy goals to reach, given the backlash that many progressive scholars and even jurists have faced in the past when they proposed greater critical thinking and revival in Islam. Nevertheless, there are

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[646] Omid Safi, "Introduction· The Times are A-Changin'-A Muslim Quest for Justice, Gender Equality, and Pluralism" in Omid Safi, ed., *Progressive Muslims On Justice, Gender and Pluralism* (Oxford, UK: Oneworld Publications 2003) 2
[647] *Id*
[648] *Ibid* at 3.
[649] *Ibid* at 7

many scholars, activists and jurists around the world who have taken it upon themselves to re-think what might be possible in Islam.

Tariq Ramadan is the grandson of Hasan al-Banna the founder of the Muslim Brotherhood[650] and currently Professor of Contemporary Islamic Studies at Oxford University, St Anthony's College He is a prolific author, and avid activist who proposes reform and revival of Islamic jurisprudence, and active social involvement of Muslims in Europe and elsewhere.[651] He is the president of the think tank European Muslim Network in Brussels[652] In his latest book, *Radical Reform Islamic Ethics and Liberation*[653], Ramadan states that

> the awakening of Islamic thought necessarily involves reconciliation with its spiritual dimension on the one hand, and on the other, renewed commitment and rational and critical reading (*ijtihad*) of the scriptural sources in the fields of law and jurisprudence (*fiqh*).[654]

Ramadan believes that Muslims in both the East and the West are in urgent need of contemporary *fiqh*, to be able to distinguish what is immutable in texts and what may be changed His ideas, although not new, are still radical given the staunch resistance of many Muslim jurists and even scholars to even engage with this idea Ramadan and many like-minded are well aware of this In fact Ramadan notes that many Muslim scholars (*ulema*) oppose the use of the word reform because of the threefold danger that it poses to faithfulness to Islam[655] For some, argues Ramadan,

> 'reforming' Islam thus means—or sounds as though it means—changing Islam, perverting it to adapt it to current times, which is not acceptable to a believing

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[650] *See* for example, the official site of the Muslim Brotherhood, an Islamic political party based in Egypt www ikhwanweb com
[651] www tariqramadan com
[652] www euro-muslims eu
[653] Tariq Ramadan, *Radical Reform Islamic Ethics and Liberation* (New York Oxford University Press 2009)
[654] *Ibid* at 1
[655] *Ibid* at 11

> conscience The second criticism comes from those who see in "reform" something foreign, an approach imported from the Christian tradition to cause Islam to undergo the same evolution as Christianity and thereby make it lose its substance and its soul The third criticism is bases on the universal and "timeless" character of Islam's teachings, which, therefore, the argument goes, are in no need of "reform" and can be implemented in all times and all places [656]

Despite these concerns, Ramadan argues that the tradition for reform and revival exist in the vocabulary of Islamic sciences *Tajdid* meaning renewal or rebirth, as a term, has been mentioned in Islamic texts for over a century In addition, the word *islah*, meaning reform or improving is not only part of the daily vocabulary of many Muslims, but as Ramadan notes has been quoted in the Quran numerous times For example, 11 88 reads

> He said O my people! Bethink you if I am (acting) on a clear proof from my Lord and He sustaineth me with fair sustenance from Him (how can I concede aught to you)? I desire not to do behind your backs that which I ask you not to do I desire naught save reform so far as I am able My welfare is only in Allah In Him I trust and unto Him I turn (repentant) [657]

In fact, as Ramadan argues, and as Muslims are taught since an early age, the Quran and other divine messages have been revealed to reform and improve human behavior and conduct In fact, the messengers of God were *muslihun*, or reformers, those who strived for reconciling human relationship with God, and worked towards improving their societies Hence, revival and reform have a long tradition in Islamic history and Ramadan argues that these twin concepts cannot be applied to the spiritual dimension of Islam only He argues, that

> [T]his revival of faith and religion through a constantly reforming approach of the understanding of texts (*tajadidiyyah*) and of the understanding of contexts (*islahiyya*) is essential to the Islamic tradition and has been so since its early days [658]

Noting that the Quran is the most important text in Islam, Ramadan is aware of the dogmatic stance of the literalists who believe any notion of reform implies questioning

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[656] *Id*
[657] Holy Quran, Pikthal Trans 11 88
[658] *Supra* note 653 at 14

the Quran's status as the absolute word of God Indeed this poses a number of problems for reformists, and most particularly women activists who urge a context-conscious reading of the Quran with regards to women's rights However, as Ramadan argues, linking the eternal status of the Quran to the long established tradition of historical and contextualized interpretation of the text fails to differentiate between the immutable and mutable He argues,

> By failing to distinguish sufficiently between the immutable and the changing—and never doing so systematically—contemporary literalists bestir a series of other confusions involving especially grave consequences Principles can be immutable, absolute, and eternal, but their implementations in time or in history—historical models—are relative, changing, and in constant mutation Thus, the principles of justice, equality, rights and human brotherhood that guided the Prophet of Islam indeed remain the references beyond history, but the model of the city of Medina founded by Muhammad in the seventh century is a historical realization linked to the realities and requirements of the his time [659]

Ramadan is unapologetic about his emphasis on the need to re-read texts in search of new narratives and interpretations He insists on the need to use ijtihad as a legal tool designed for innovation and reformation, and for employing the concepts of *tajdid* and *islah* to make Islamic narratives and Islamic law to the meet the demands of our new realities as humans Similar to the approach of the female scholars studies in the previous chapters, he goes back to the fundamentals of Islamic law and finds methodologies and tools employed by jurists over a long period of time to talk about the possibility to think "outside of fiqh" as a reality of modern day Muslims

However, Ramadan wants to take this reform a step further by calling for "transformative reform" instead of "adaptable reform" which is already practiced in areas such as banking laws, tax and insurance laws, and military law Ramadan's radical reform targets the root of Islamic law, namely *fiqh*, or Islamic jurisprudence, and

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[659] *Ibid* at 19

questions the methodologies of the law and the limitations they have created by establishing texts as the source of the law His call for critical engagement with *fiqh*, "is an appeal to reconsidering the sources through their necessary reconciliation with the world, its evolution and human knowledge Thus reconciling conscience with science is imperative "[660] He is cognizant that this approach will produce a diversity of interpretations that will undoubtedly clash at times However, he believes that the contemporary "Muslim conscience has to transform this turmoil of converging or contradictory ideas into an energy of debate, renewal, and creativity that produces faithfulness as we as serene coherence at the heart of our modern age and its challenges "[661] Hence, he wants to create a new era in Islamic legal history where innovation and reformation within a defined structure will give birth to new meanings, laws and practices that are in sync with our modern times

With regards to women, Ramadan notes that the reform movement that the Prophet established, supported by the verses of the Quran, concerning women "was to be read and interpreted in the light of that movement and in the ideal mirror of the Prophet's behavior "[662] Similar to Mernissi's argument in an earlier chapter, where she argued there was only so much the Prophet could have done during his lifetime to reform the patriarchal attitudes of his followers at the time, Ramadan also notes, that

> [T]he Companions and early *ulema* could not but read the text in the light of their own situation, viewpoint, and context While Book spoke about women, their being and their heart, *fuqaha* set out to determine their duties and their rights according to the various functions society imparted them Women were therefore "daughters," "sisters," "wives," or "mothers," the legal and religious discourse about women was built on those categories It is indeed difficult for a man, and what is more a jurist, to approach the issue of women primarily as beings in their integrity and their autonomy

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[660] *Ibid* at 38
[661] *Id*
[662] *Ibid* at 211

As such, relying and in fact limiting ourselves to those early interpretations as valid and authoritative for all time and place creates the problems that we have today in Islamic societies all over the world. Hence, Ramadan invites us to be cautious when approaching Islamic texts and be cognizant of the "literalist reduction" and "cultural projection" that have influenced the interpretation of the text. In reforming women's status under Islamic law, Ramadan not only urges a reading of the verses and texts that are context specific but one that also considers the goals that the texts sought to establish centuries ago. He says the goals emphasize a continuous process of liberation for women. Most importantly, and this is perhaps what sets his approach different from the feminist scholars that were studied in the previous chapter, he encourages the development of a discourse on women that speaks about "women's being, their spirituality, autonomy and responsibility, and the essential and social meaning of womanhood."[663] He encourages a discourse that focuses on women as individuals and does not merely focus on their roles and functions in the family and society. Most importantly he emphasizes female agency, and notes that without the active presence and leadership of Muslim women promoting reform, this project will never succeed. While Ramadan does not directly call for the inclusion of women in the interpretive and lawmaking process nevertheless, he would support an end to this cycle of female exclusion from religious activity.

While Ramadan speaks about reform from within, Abdullahi Ahmed An' naim, the Charles Howard Candler Professor of Law at Emory Law School, advocates for the incorporation of human rights within the Islamic framework and calls for changes within Islamic law. An'naim is one of the most recognized voices of the relationship between

[663] *Ibid.* at 217.

Islam and human rights today He is a prolific author and speaker who proposes reconciling Islamic values with human rights norms In other words, it is Islamic law that has to accommodate itself to the demands of human rights [664] This suggestion, raises many issues among Muslim scholars who, by belief or by reason, claim that the laws of Islam are indeed universal and human rights friendly, and it is not only Islamic law that needs to seek accommodation and adjustment, rather human rights laws also have to change and be open to different suggestions [665]

An'naim believes that the *Shari'a* as it stands today must be transformed if it seeks to maintain its place as a powerful and influential value system in the world An'naim argues that the *Shari'a* is not the whole of Islam but instead is an interpretation of its fundamental sources As a result it is necessary to think about "reconstructing certain aspects of the Shari'a, provided that such reconstruction is based on the same principal fundamental sources of Islam and is fully consistent with its essential moral and religious precepts "[666] An'naim argues that without reform of historical *Shari'a*, Muslims will not be able to exercise their right to self-determination without violating the rights of others He submits that two primary forces that motivate human rights are the "will to live and the will to be free "[667] Two of the main issues that An'naim points to, are that historic *Shari'a* restricted the rights and freedoms of women and non-Muslims The secondary treatment of women in the social and legal context and discrimination against non-Muslims especially in Islamic states are features of historic *Shari'a* that An'naim

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[664] *See*, for example, Mahmoud Monshipouri "The West's Modern Encounter with Islam From Discourse to Reality" 40 J Church & St 25 (1998) and Abdullahi Ahmed An'Naim, "The Interdependence of Religion, Secularism, and Human Rights" 11 Common Knowledge 1 56 (2005)
[665] *See*, for example, Neil Hicks, "Does Islamist Activism Offer a Remedy to the Crisis of Human Rights Implementation in the Middle East" 24 Hum Rts Q 361 (2002)
[666] Abdullahi Ahmed An'naim, *Toward an Islamic Reformation Civil Liberties Human Rights and International Law* (Syracuse Syracuse University Press 1996) xiv
[667] *Ibid* 164

argues have to change and move with the current of time.[668] In addition, some other issue areas include provisions in family law especially as it pertains to the rights of the women in the family, inheritance laws, the existence and practice of corporal punishment even for youth, and limitations on expression of religious thought.

He highlights the important fact that despite the adoption of secular laws in many Muslim states, family law or personal status laws continue to be regulated by Islamic laws and norms.[669] He points out that, "the extent to which any government succeeded in reforming the pre-existing legal system was conditioned by a variety of factors, including the balance of power between conservative and modernist groups that continue to fluctuate to present times." [670] He points out that because of all other changes in the legal system, Islamic family law was is seen as the last bastion of control for the ulema. For An'naim, there are two dimensions to this debate to consider.

> First, it is conducted almost entirely within the Islamic framework, whereby the possibility of state enactment and enforcement of Shari'a is taken for granted. Second, the debate has acquired a sharp political edge, and in some instances family law reforms had to be withdrawn for fear of 'religious backlash' against governments desperate for political legitimacy and support at any cost.[671]

Hence, for An'naim, the static nature of Islamic family law is not only due to theological impasse and limitations, but it is also the State that does not want to support the reform movement. The fundamentalists view abandoning the Shari'a in the area of family law as the final blow to the Islamic order, and the modernists on the other hand, see it as a necessary step towards achieving egalitarianism. Despite the continued clashes, unlike

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[668] *Ibid* 164-170.
[669] Abdullahi Ahmed An'naim, "Sharia and Islamic Family Law Transition and Transformation" in Abudallhi Ahmed An'naim, ed , *Islamic Family Law in a Changing World A Global Resource Book* (London; New York: Zed Books, 2002) 19.
[670] *Id*
[671] *Ibid* at 18

the previous scholars, An'naim proposes the complete abandonment of the application of Shari'a in family law He argues,

> Like all aspects of the legal system of each country, family law is really based on the political will of the state, and not on the will of God After all, there is no way of discovering and attempting to live by the will of God except through the agency of human beings [672]

For An'naim, it is time to realize that Islamic family law does not exist to please God, but rather, it is there to maintain the status quo and the patriarchal system that dominates and discriminates against women Noting political sensitivity concerning family law, the role of the religious authority, and women's lack of power An'naim also points out the role of human agency, and the important role that it plays in producing any kind of change on the Islamic legal system [673] While his book provides a good overview of the status of family law in different Muslim countries, it also raises the important point that change is possible if only innovation and change is politically and religiously accepted and at times even feasible

Important to note, however, in considering An'naim's propositions to reform "historic Shari'a" is that Islamic law, as it stands today, is not as versatile to change as perhaps the secular laws of human rights can be Being a religious law, the *Shari'a* includes laws and norms that apply both to the temporal and spiritual aspects of life Hence, the main caution is that changeability must never be confused with importing to Islamic law practices that are inherently not Islamic, and which oppose fundamentally a certain Islamic norm As a result, two conditions must be met for any introduction of change First, changeability of rulings must always satisfy and find support within the

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[672] *Ibid* at 20

[673] Asma Barlaas, 'Un Reading Patriarchal Interpretations of the Quran Beyond the Binaries of Tradition and Modernity" Presentation at the Association of Muslim Social Scientists Conference on Islam Tradition and Modernity (Toronto, Canada November 6, 2006) 20

primary sources of Islamic law Second, in addition to satisfying the previous safeguard, the deduction or induction of new rulings must be conducted in accordance with the fundamental principles and procedures of Islamic methodology [674] An example that many Muslim scholars and human rights advocates are struggling with in the Muslim world is the concept of "equality" between men and women Under Islamic law, men and women are seen as "equivalent" to one another This means they are in a state of equity, where they are complementary to one another [675] As a result, there are different renditions of what the rights and duties of women are under Islamic law and under human rights law Recognizing differences and noting that universal values are not inherently in opposition to Islamic values can pave the way for reforming women's rights under Islamic law However, this does not mean that the alternative narratives produced by Muslim feminists, or alternative readings of the law produced in North America and the progressive changes that Ramadan and An'naim propose will be easily accepted by the authorities In other words, the most important challenge that progressive Muslims and scholars whether male or female face is the power of male jurists who for centuries have been the exclusive authorities with interpretive capabilities Hence, incorporating these alternative narratives that exist in the periphery is no easy task and will be quite challenging In addition to violent powers of the jurists one must also consider the role that conservative and fundamentalist forces play in maintaining the structure of the Shari'a intact

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[674] Mahdi Zaharaa, "Characteristic Features of Islamic Law Perceptions and Misconceptions" 15 Arab L Q 168 (2000) 194

[675] *See*, for example, Jamal J Nasir, *The Islamic Law of Personal Status* (The Hague Kluwer Law International 3rd Ed 2002)

Raising great concern about the image of Islam as a religion that has become synonymous with terrorism, honor killings and stoning, Prof. Khaled Abou El-Fadl the Omar and Azmeralda Alfi Professor of Law at UCLA[676] talks about the "vulgarization of contemporary Islam."[677] By vulgarization he means:

> the recurrence of events that seem to shock the conscience of human beings or to contrary to what most people would identify as moral and beautiful. Islam in the modern age has become plagued by an arid intellectual climate and a lack of critical and creative approaches, which has greatly hampered the development of a humanistic moral orientation.[678]

He recounts an incident in Saudi Arabia where in March 2002 a girl's public school was engulfed in fire. Even though police and fire department forces were present, however, the *mutawwa'un*, the Saudi religious police from the Committee for the Promotion of Virtue and Prevention of Vice did not allow the girls to leave the school because they were not properly covered! Witnesses at the scene foretell that the *mutawwa'un* beat not only the girls back to school to get their hijabs, but they also beat the firemen and police who were trying to help them. They had locked the school doors from the outside and as a result fourteen young girls were burned in the fire.[679] This act is what El Fadl characterizes as vulgar and inhumane. He notes, that whatever the rules of seclusion might have been commanded in the Quran, they have always had one justification and that is the safeguarding of women from molestation or harm.[680] For El Fadl this incident not only highlights the abysmal condition of women in Muslim societies, but also the blatant abuse of Islamic traditions in the contemporary age.[681] For El Fadl, for such

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[676] *See* for example, http://www.scholarofthehouse.org/abdrabelfad.html
[677] Khaled Abou El Fadl, "The Ugly Modern and the Modern Ugly Reclaiming the Beautiful in Islam" in *Supra* note 646 at 37.
[678] *Id.*
[679] *Ibid.* at 33.
[680] *Ibid.* at 37.
[681] *Id.*

practices to have become part of the Islamic discourse for some Muslims, albeit a small population, is a cause for concern Because, for El Fadl,

> [E]ven when one is considering Divinely revealed values, such values acquire meaning only within evolving and shifting contexts There is a socio-historical enterprise formed of various participants that partake in the generation of meaning The determination of the participants in a socio-historical enterprise become precedents that help set the meaning, and practical applications, of a text, even if the text is sacred, such as the Quran [682]

In other words, it is a "community of meaning" or a *nomos* that gives value and meaning to these texts and interprets them into actions and traditions The fact that violence takes place in the name of Islam reveals that there certainly is a community that interprets the Divine texts giving them the authority to do so This is not only problematic, but also dangerous, as it leads to the empowerment of groups like the Taliban and Al-Qaeda who stone women and drag them in the streets in the name of Islam These alarming events, lead El Fadl "a Muslim who is interested in reclaiming the moral authority of Islam to confront the quintessential questions of Is this Islam? Can this be Islam? And, should this be Islam?" [683] The answer to these very serious and important questions can have a lot of implications for Muslims today

El Fadl raises the same concern as An'naim, by pointing out that the "real challenge that confronts Muslim intellectuals today is that political interests have come to dominate public discourses to the point that moral investigations and thinking have become marginalized in modern Islam "[684] With regards to womens' situation in the Islamic world, El Fadl notes that the appalling status of women in Islamic societies is not simply due to textual determinations "Rather, there is a certain undeniable vehemence and angst in the treatment of women, as if the more women are made to suffer, the more the

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[682] *Ibid* at 39
[683] Ibid at 42
[684] *Ibid* at 43

political future of Islam is made secure."[685] In *Speaking in God's Name: Islamic Law, Authority and Women*,[686] El Fadl discusses case studies that are mainly *responsa* issued by jurists member of The Permanent Council For Scientific Research and Legal Opinions (C.R.L.O), which is the official institution in Saudi Arabia responsible for issuing religious opinions.

El Fadl notes, the C.R.L.O jurists and many other people still believe that wives are to obey the commands of their husbands so long as it lawful. "Usually, this means that a wife must obey her husband if he orders her not to leave the home, not to work, not to visit friends, etc."[687] Many jurists derive the reason for women's obedience from the Quranic verse, which delineates men as *qawwamun* (maintainers).[688] As discussed in the earlier chapters this verse gives men the aura of authority and control over women. However, El Fadl argues, that "this verse is not dispositive. For one, the word *qawwamun* is ambiguous, and more importantly, the verse seems to hinge the status of being a maintainer, guardian, or protector on objective capacities."[689] However, the contextual reading of the verse has not stopped jurists from quoting weak (*dhaif*) *hadith* from the Prophet stating: "If I would have ordered anyone to prostrate before anyone but God, I would have ordered a woman to prostrate to her husband."[690] Even though the authority of these hadiths are questionable, nevertheless, their use in *responsa* by the C.R.L.O reveals their general disposition toward woman and the narrative that they seek to establish in that society. In other words, despite the weak authority of the supporting

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[685] *Ibid.* at 44.
[686] Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford, UK: Oneworld Publications 2001).
[687] *Ibid.* at 210.
[688] Holy Quran: 4:34 "Men are the maintainers (*qawwamun*) of women by what God has given some over the others, and by what they spend."
[689] *Ibid.* at 211.
[690] *Ibid.* at 211.

hadith and the possibility for interpreting the term "*qawwamun*" in a context specific or limited way the male jurists continue to purport that the Quran establishes male dominance and the inherent superiority of men over women. As such their choice of interpretation is violent as it silences other interpretive possibilities and most importantly reaffirms discriminatory practices against women.

In an effort to emphasize the obedience of wives to husbands, the C.R.L.O. also quote another tradition narrated by Abu Dawud which claims that Umm Salamah, the Prophet's wife had said: "Any woman who dies while her husband is pleased will enter paradise."[691] The use of such traditions is highly problematic. In this instance, the tradition "it makes God's pleasure contingent on the husband's pleasure."[692] In addition, not only is the tradition vague, not clarifying if a pious woman would go to heaven, it really degrades a woman's whole being to her relationship with her husband and how obedient she is to him rather than to God. In essence, it characterizes a woman as having no agency or worse no worth of her own.

For El Fadl, the application of these traditions by the C.R.L.O is highly problematic. Not only is the C.R.L.O reporting traditions that are weak or whose authority are questionable, but they are also fundamentally inconsistent with his understanding of God and Islamic values. He contends, "contemporary jurists who rely on these traditions are violating the contingencies upon which their authoritativeness is founded. The failure largely consists in the fact that contemporary jurists have not diligently investigated the authorial enterprise that retained, transmitted, and constructed

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[691] *Ibid.* at 219.
[692] *Id.*

these traditions."[693] Hence, in these cases it is the failure of following a specific methodology that has led to the citation of the faulty traditions. But aside from methodology, it is only a matter of substance and the ease with which jurists quote traditions that easily violate women's dignity and worth.

These examples reveal the dangers of dogmatic interpretation of divine texts and the role that the authorities, in this case jurists, play in upholding a certain narrative about women's roles and responsibilities in society and in the family alive. As such, the concern for El Fadl and other scholars like him is not only the abuse of Islam by marginal groups who have a very divergent understanding of Islam and its values, but it is also the lack of intellectual curiosity and will to create an authoritative reform movement that can quell the violent actions of the few, and direct the narrative towards the universal Islamic values of justice, equality and human dignity. Although, the above scholars all echoed the same concerns, nevertheless, it is important to see whether their proposals have carried into the seminaries and Islamic institutions where jurists issue *fatwas* and are in fact, the real authorities behind existing laws.

III. Progressive Jurists

Ayatollah Yousef Saanei' is one of Iran's most prominent clerics. During the early years of the Iranian Revolution he served both as a state prosecutor general, member of the Council of Guardians, and a member of the Supreme Judicial Council. However, in the mid 1980's he left his official positions and went to the seminary in Qom (Iran's center of religious learning) and devoted his time to religious scholarship. He is one of, if not the only, jurist who has the power to issue *fatwas* while at the same time

[693] *Ibid.* at 226.

having a very progressive orientation towards society, especially women. The age of puberty for young girls has been an issue that has been discussed in Iran for a number of years. According to law and tradition, a girl reaches puberty at the age of 9 and a boy reaches puberty at the age of 15. Hence, a girl is not only responsible to uphold her religious obligations such as prayer and fasting, but in some circumstances, it is deemed okay to marry her at a very young age, because, as the law says she is now mature. This has a lot of implications for criminal law as well. While the age of puberty for boys at the age of 15 is closer to reality, the age of 9 for girls does not seem right. Ayatollah Saanei is the only jurist who has issued a fatwa stating that the age of maturity for girls should be 13.[694]

Iran is among many other Islamic countries that do not allow women to be judges. In the past decades they have placed women as advisors to the judge in family courts. However, they do not hold an official position. In his book on *Rules Concerning Women*, the question of women entering the judiciary is raised in 2001. He answers, that the condition of being male is not a necessity in judgeship, just like it is not necessary to be a *marja'* (high religious authority). In judgeship, being male is not a necessary element, what is important is the person's knowledge and correct conduct in dispensing justice and upholding Islamic law. Being male is not a characteristic of judgeship, and if the word male has been stated in any of the traditions (*hadith*) then it is a manner of speaking in such statements, and it does not hold any intrinsic value. While men have been active as judges from the time of the holy Imams—women have the right to be so as well.[695]

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[694] Ayatollah Yusef Saanei, *Ahkam Banovan* (*Rules Concerning Women*) 22.
[695] *Ibid* at 311. My translation of the paragraph.

This statement of Ayatollah Saanei is very significant because thus far, no other Iranian cleric has supported his statement on women seeking active roles as judges in all sectors of the judiciary.

Another issue that Ayatollah Saanei has addressed which is very important for both the women's and human rights movements in Iran, is the amount of "blood money" or *diyeh* due for the death of a either a woman or a non-Muslim. In *The Equality of Blood Money (Women and man, Muslim and Non-Muslim)*[696]Ayatollah Saanei addresses the important issue of whether the blood money due to a victims' family is equal for a male and female. He argues that "the majority of jurists, one can even say, all Muslim jurists, except for a very few, believe that the blood money for a woman is half that of a man's, and the blood money for a non-Muslim is less than that of a Muslim's." [697] He continues by saying, that "I believe that the amount of blood money for either sex should be equal. There is no evidence in the Holy Quran citing evidence to this inequality, rather, the principles and rules of Islam speak about equality."[698] Saanei makes the important point that the Quran is silent on the amount of blood money whether it is for a woman, man, for a Muslim or non-Muslim. Hence, he argues how the law is derived is really based on general Islamic principles, *hadith*, and the consensus of the community. There is only one verse which addresses the issue of blood money, which reads:

> It is not for a believer to kill a believer unless (it be) by mistake. He who hath killed a believer by mistake must set free a believing slave, and pay the **blood-money** to the family of the slain, unless they remit it as a charity. If he (the victim) be of a people hostile unto you, and he is a believer, then (the penance is) to set free a believing slave. And if he cometh of a folk between whom and you there is a covenant, then the **blood-money** must be paid unto his folk and (also) a believing slave must be set free. And

[696] Ayatollah Yusuf Saanei, *The Equality of Blood Money (Woman and Man, Muslim and Non-Muslim), The Fiqh and Life Series* (2006).
[697] *Ibid.* at 14.
[698] *Ibid.* at 15.

> whoso hath not the wherewithal must fast two consecutive months. A penance from Allah. Allah is Knower, Wise.[699]

He continues by citing examples of *hadith* that actually prescribe equal amounts of blood money as retribution to the families of the victims. Under most circumstances if the blood money for the death of a man is set for $30,000 by the governing State, the amount of blood money for the wrongful death of a woman would be half of that amount. The amount of blood money for the wrongful death of a non-Muslim in a Muslim country would be determined by the State, but it would be less than the amount established for a man. Ayatollah Saanei not only refutes this equation based on existing *hadith* that address the issue in general terms, and the silence of the Quran on the exact amount of the blood-money, but he argues that the principle of equality applies in this situation because all humans are created equal and they are of equal worth before the eyes of God.[700] In other words, for Saanei a man is not worth more than a woman, and a Muslim life is not more worthy than a non-Muslims. All human life is sacred, worthy and deserving of respect. Hence, in the case of wrongful death it is incorrect for a legal system to determine the value of that human's life based on his/her sex and religious affiliation. The remarks and statements of Ayatollah are not only revolutionary given the resistance of *mujtahids* to issue rulings in complete opposition to the views of the rest of the Muslim community, but he also applies general universal principles such as equality, human dignity and even rationality to his judgments. As such, he is a progressive Muslim jurist who is aware of the need to reform and even change existing laws to meet the standards of modern societies.

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[699] Holy Quran 4:92.
[700] *Supra* note 696 29-32.

Another interesting jurist is Ali Gomaa[701], the Grand Mufti of Egypt. Currently he is the highest-ranking *mujtahid/mufti* in the Egypt. He has been the Grand Mufti of Egypt since 2003. He has issued a number of *fatwas*, but the most interesting one is the one he issued regarding Female Genital Mutilation (FGM) a practice widely practiced in Egypt. An international conference addressing the issue was held in the facilities of Al-Azhar University[702] (the Islamic world's oldest and most prestigious center for religious learning). A group of scientists and Islamic scholars gathered and issued the following recommendations that were approved by Ali Gomaa and included in his *fatwa* collection. The conference made the following recommendations:

8. God gave people dignity. In the Qur'an God says: "We have dignified the sons of Adam". Therefore, God forbids any harm coming to man, irrespective of social status and gender.
9. Genital circumcision is a deplorable, inherited custom, which is practiced in some societies and is copied by some Muslims in several countries. There are no written grounds for this custom in the Qur'an with regard to an authentic tradition of the Prophet.
10. The female genital circumcision practiced today harms women psychologically and physically. Therefore, the practice must be stopped in support of one of the highest values of Islam, namely to do no harm to another – in accordance with the commandment of the Prophet Mohammed "Accept no harm and do no harm to another". Moreover, this is seen as punishable aggression against humankind.
11. The conference calls on Muslims to end this deplorable custom in accordance with the teachings of Islam, which forbid injuring another in any form.
12. The participants of the conference also called on international and religious institutions and establishments to concentrate their efforts on educating and instructing the population. This concerns particularly the basic rules of hygienic and medicine, which must be maintained for women so that this deplorable custom is no longer practiced.
13. The conference reminds the educational establishments and the media that they have an implicit duty to educate about the harm this custom brings and its devastating consequences for society. This will contribute to stopping the custom of mutilating the female body.
14. The conference calls on the legislative organs to pass a law, which bans the practice of this gruesome custom and declares it a crime, irrespective of whether this concerns the perpetrator or the initiator.
15. Furthermore, the conference calls on international institutions and organisations to provide help in all regions where this gruesome custom is practiced, which will contribute to its elimination.[703]

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[701] www.aligomaa.net
[702] *Id.*
[703] http://www.aligomaa.net/fatwacollection.html

In addition, Ali Gomaa has endorsed the work of several civil society organizations that have been working towards educating the public about FGM and spreading the *fatwa* of Ali Gomaa about the harm that it causes the female body. This is a very important step taken by a Grand Mufti in an issue directly affecting the life of women and girls. In a society where there is little discussion about the female body, a *fatwa* by the Grand Mufti can possibly have a good influence on the continued practice of FGM. He has taken an important step as a Muslim jurist in raising awareness about the abuse of women's bodies and by taking a stand he has opened the door for other jurists with a progressive penchant to be more vocal about women's issues and their rights.

Conclusion

The discussions in this chapter highlight the progressive narratives that animate and guide the reformist movement in modern Islam. Tariq Ramadan proposes radical reform, by questioning the root sources of Islamic jurisprudence, by asking why are we limited to interpreting existing text when we can use our reason and ethical principles to guide our reformist actions. An'naim approaches reform and particularly Islamic family law from a human rights perspective, and believes, that because family law is more a matter of politics than religion, we should forego the application of the Shari'a in this realm, and instead employ human rights frameworks to improve women's rights. El Fadl is concerned about the rise of fundamentalist and "ugly" violent acts committed in the name of Islam by people whose definition of Islam is vastly different from the moral values that Islam has put forth throughout the centuries. He urges Muslim intellectuals to seriously reconsider what Islam means or rather should mean and look like in modern times.

The radical statements of jurists such as Ayatollah Saanei and Ali Gomaa reveal that although they are very few in number, there are indeed Muslim jurists who are willing to struggle to effect changes in societal norms and are willing to advocate for reforming laws to better reflect society and in the case of FGM science's concerns These actions and theories although limited, nevertheless, may herald the progression of a reformist narrative in Islam, through which the ideas of scholars and jurists may trickle down to the practices of the general population and most importantly in laws to affect change These narratives are all important to consider because these scholars and jurists do not speak and act in a vacuum, rather, they are the result of the societies and communities they are a part of As such, one can argue that if more scholars and jurists speak about their concerns for women's rights and their equality under the law, then it is possible to one day see feminist narratives on Islamic law being part and parcel of mainstream Islamic jurisprudence, just as valid, and just as authoritative as any other interpretation and narration

Conclusion: Where to From Here?

Working towards an alternative narrative of Islamic law that is both feminist and authoritative is an endeavor that requires the combined application of feminist theoretical approaches and active female and progressive male engagement with Islamic laws. The goal of this dissertation was to study the production of these alternative feminist narratives and situate them in the context of Islamic legal history and the Islamic reformist movement that has been taking place since the nineteenth century. The methodologies employed for studying this issue were Critical Discourse Analysis (CDA) and Robert Cover's definitions of nomos and narrative. CDA was helpful in situating the production of language and law in a socio-historical and political context. CDA provided the tools to explain how dominant discourses are produced and how they can be challenged. Cover's view of law and narrative provided a nuanced tool for identifying the discourse that Muslim feminists are producing as an alternative world of law, or a nomos. These two theories guided the direction of this research.

This dissertation was organized such that the reader would be aware of the history of the formation of Islamic law and its evolution from a simple normative system in the seventh century to an established corpus of jurisprudence by the tenth century. Noting the role of history and politics in the formation and expansion of the law, it was important to note that Islamic legal history was characterized by a diversity of discourses and narratives. And, in fact it was this diversity that was celebrated as the hallmark of a legal system that was capable of adapting to new cultural milieus.

Following discussions of the evolution of the Islamic legal system, it was important to consider the role that the authorities, jurists, scholars and *mujtahid's* have played in

constructing the legal framework and maintaining positions of authority to stipulate what the law is and what it ought to be. Studying the role and power of the authorities revealed that in fact, their peers and their followers gave these positions of power to these scholars and jurists, and that they were not God given. As the years passed, the statements and findings of these noted scholars were solidified into schools of law and a staunch conservatism ensued which considered the work of jurists and most particularly, high ranking *mujtahid's* as absolute law. In other words, by the tenth century it seemed that all the laws that humanity would ever need from then on were already discovered and excavated from the divine sources. This contraction in the expansion and development of Islamic law, not only resulted in solidifying the position of the jurists and *mujtahid's* as the only authorities capable of explaining what the law is, but it also, restricted the voice of anyone who attempted to suggest what the law ought to be, perhaps in an alternative manner. As such, a legal framework, based on the divine sources, the Quran and *hadith*, and explained through human reason and interpretation was established through the authority and will of male jurists.

In analyzing the development of an authoritarian and dominant framework of Islamic jurisprudence the methodologies of CDA were important in understanding how powerful elite interact with texts and how they establish their interpretations as dominant. In the process of the construction and interpretation of Islamic law, women were largely absent as participants in constructing this legal framework, whether as scholars, interpreters of the Quran, or (most importantly) as jurists. The only active role that women had in this process was the transmission of *hadith*, and even in this case it was only the wives of the Prophet, an elite group, that have been included in this process. **In**

this regard, three guiding concepts of CDA namely concern for: power, history and ideology are instructive in deconstructing the authoritarian and exclusive legal framework that male jurists and their peers had constructed. Given that women did not have access to the sources of the law they did not have the knowledge or capability to challenge the patriarchal biases of the Islamic legal framework.

However, in the advent of the nineteenth century, where the publication of books enabled many to have access to these sources, and with the entrance of women into institutions of higher learning and into politics, we saw the burgeoning of a greater awareness among Muslim women about their absent role in Islamic legal history. Hence, Muslim women from the nineteenth century until now have taken it upon themselves to learn the language of Islamic law, understand its sources and its methodology, and produce their own narrations of what the law is and what it ought to be. In other words, they are challenging the ideology and power that had for long maintained men as guardians and narrators of the law. In effect, they are becoming the narrators of a new nomos that challenges the exclusivity of the dominant Islamic legal framework.

In this process, numerous women scholars have criticized how Islamic law treats women and suggested alternative narratives regarding how the law can be reformed to become more sensitive to the needs and wants of women. These brave souls have challenged a long established system of authority, which deemed maleness as a condition for scholarly and juristic input and output. As such, the scholars that this dissertation studied are part of a long tradition of Muslim women who have challenged the status quo and sought to have their voices heard by both society and law. These scholars provide an internal critique of the place of gender in Islamic law and as Cover describes, create

alternative narratives of what the law ought to be by challenging the dominant Islamic legal framework.

Leila Ahmed and Fatima Mernissi grew up in different contexts and different cultural traditions nevertheless, their approach to Islamic law and women are quite similar. They both study history and the role that it has had on interpreting texts and transcribing certain norms and attitudes as aspects of Islamic law. Both Ahmed and Mernissi engage in CDA by conducting textual analysis and discovering the role that power and patriarchy have had on creating the language and discourse of Islamic law. Leila Ahmed takes the reader to the days before the advent of Islam in the Middle East and notes the dominant patriarchal culture present in Mesopotamia and among the Zoroastrians in Iran. She then takes the reader to Medina, among the wives of the Prophet, and discusses his kind and loving attitude towards his wives, most of whom were war widows. She notes, as Islam expanded into different geographic areas, and as the Islamic Empire grew, it was only the practical voice of Islam that gained power, and powerful rulers silenced the ethical vision of Islam that aimed for a just and egalitarian society. For Ahmed, the ethical vision of Islam and the practical vision of Islam, which is not women friendly, have always been in competition. As such, it is not the egalitarian narrative that gained power with the expansion of the Islamic empire but the practical more authoritarian, juristic voice that gained dominance.

Mernissi, sees the history of Islamic legal development in the same light and points out that the revolutionary changes that the Prophet sought to make were met with many challenges from the male elite in Medina. Hence, to keep their support for his burgeoning political system, the Prophet had no choice but to limit changes to women's status.

Mernissi recounts the conflict that arose between the men in Medina and the Prophet when women were granted inheritance though revealed verses of the Quran. Mernissi, points out however, that the changes introduced at the time of the Prophet should have translated to greater gain for women in the latter years. But, unfortunately the male elite maintained control of law and politics and established boundaries or *hudud* for women, from which they could not escape. Hence for Mernissi it seems that women are always trying to cross the frontier and break boundaries and enter the world as active participants in the making of their own history and their own narrative. Ahmed and Mernissi both employ the same methodology in their analysis of Islamic texts. They deconstruct and criticize current narratives of the law by highlighting the role that history and politics have on developing the norms of Islamic jurisprudence. Both authors are well aware of the influence of power and thus, by critiquing the existing framework challenge the status quo and demand change.

Ziba Mir-Hosseini approaches the issue of women's relationship with Islamic law in a more practical manner. She discusses marriage and divorce cases in Iran and Morocco and shows the difficulties women face when they seek divorce and the hurdles that the legal system has in place in both contexts for a woman to get what is rightfully hers, namely her *mahr*, maintenance, and custody of her children. She also takes us to Qom, the center of Islamic learning in Iran where she notices a change in the outlook of male jurists on the position of women. In the numerous discussions that she has with journal editors and progressive jurists it becomes evident that perhaps one part of the Seminary in Qom has become aware of the need to change and reform law's discourse on women's rights. This is a promising start, however, conscious of the role of politics,

governments play a powerful role in determining which legal narrative they want to protect and promote. Mir-Hosseini engages with a different set of texts, namely court records and the personal narratives of women seeking divorce. However, she too employs the tools of CDA by highlighting the influence of power and politics in the implementation of Islamic family law in Iran and Morocco. Her discussion with jurists in Qom also reveals that exclusive access to the language of the law still remains in the hands of jurists and religious scholars. In other words, it is still the mujtahid that maintains power over the production of Islamic legal narrative and as such maintains the patriarchal status quo of the law.

The works of American based scholars, Amina Wadud and Azizah Al-Hibri reveal their desire to make gender sensitive narrative as an important part of Muslim Americans' understanding of Islam. Amina Wadud re-interprets verses of the Quran from a hermeneutical perspective, considering the raison d'être of the verse and whether a traditional interpretation is in sync with the general message of the Quran. She claims to be engaged in gender jihad, seeking to include female interpretations of the Quran as part of mainstream Islamic discourse. She notes that women have never been authors of the law or interpreters of the divine sources. As such, Islamic law has been developed without the input of half of its adherents. Azizah Al-Hibri, in similar vein seeks to address traditional male interpretations of the Quran and includes her feminist voice in seeking the goal and rationale behind the verse.

Studying the numerous scholarly works of the above mentioned activists and scholars reveals, that an alternative feminist narrative in Islamic law is not only possible but is also necessary in order to change years of male (read patriarchal) interpretation of

texts. All five scholars are well aware of the importance of their voices and the limitations that being a female scholar and activist rather than a jurist or *mujtahid* entails. Nevertheless, as Cover notes, it is important to have alternative narratives that challenge existing norms and laws from within the Islamic community than to not have a voice at all. In other words, simply by creating an alternative world of law, or nomos, these women are challenging the dominance of mainstream Islamic jurisprudence. These feminist narratives are an important part of the process of reform and can become effective if taken seriously overtime by the authorities. The fact that these women scholars and many others like them are producing an alternative narrative that challenges the existing legal framework and the authority of the jurists reveals the existence of a community which seeks to create its own *nomos* of Islamic laws and seeks to challenge the violence of exclusion that the male authorities have long upheld. As such, even if their alternative narratives remain in the periphery of Islamic seminaries or courts, nevertheless, they are a site for resistance and change. Muslim jurists have long considered academia as one of their main competitors and challengers; its location is only a matter of geography.

It is important to note that it is not only academia that presents opportunities for creating alternative narratives. In studying cases before US courts, it becomes evident that Muslims living in North America must be aware of the conflicting legal systems that affect their lives. Applying both Islamic laws on marriage and divorce and US civil laws at the time of divorce becomes problematic when it comes to enforcing *mahr* provisions and division of property. The judge often becomes conflicted as to which law to apply and if in the application of one he doesn't violate the general principles of the other.

However, the decision to interpret the marriage agreement as a contract and the *mahr* provision as a condition of the marriage produced an alternative narrative to how the mahr can be distributed at the time of divorce. In Ontario, Muslims were presented with a unique opportunity to discuss the shortcomings of Islamic family law and debate ways that Shari'a law could be practiced within the confines of a secular state. However, fear and concern over the abuses of Islamic family law towards women placed a hold on any constructive discussion. It remains to be seen, if Muslims living in North America and different parts of the world can use the opportunity of a different geography and different cultural and legal context to their advantage in reformulating the Islamic legal system to be gender neutral and women friendly.

Having studied the production of alternative feminist narratives, it becomes incumbent to situate their discourse as part of a greater discourse on Islamic reformation and revival that has been taking place for a long time. Reformist scholars and progressive Muslims such as Tariq Ramadan, Abudllahi Ahmed An'naim, and Khaled Abou El Fadl, all believe in the ethical and egalitarian vision of Islam. However, they each propose reform and change through different means, ultimately reaching the same goal of presenting Islam to Muslims and the world as a religion of peace, humanity and equality. Each reformist raises concern about the conservatism that has taken over Islamic discourse and proposes change. In a similar vein, there are progressive jurists such as Ayatollah Saanei and Ali Gomaa the Grand Mufti of Egypt who have taken the issue of women's rights to heart and are campaigning for changing existing laws and societal attitudes towards women.

Noting the theories that have established the frameworks for critique and analysis

throughout this dissertation it is important to address how theory speaks to the scholarship of the feminists and how the analysis of the feminists speaks to theory. Critical Discourse Analysis and Robert Cover's concepts of nomos and narrative were essential in understanding the significance and importance of the critique of Islamic jurisprudence that these feminist scholars have produced. The work of all five scholars uncovered the role that history, politics, power, access to knowledge and language have had on the development of a dominant male Islamic legal framework. The critique produced in academia and the challenges that Muslims face today in upholding Islamic laws in North America reveals that maintaining the status quo is not possible and more importantly no longer desired by adherents. The academic work of the scholars sheds light on the fact that female narratives of the law have been largely absent and were in fact excluded due to the influence of power and patriarchy by the male elite. In addition, it was lack of access to the sources of knowledge and the language of the law that made it impossible for women to deconstruct authoritarian narratives of the law. Engagement with Islamic family law in the North American context reveals the challenges that maintaining patriarchal interpretations of the law have for Muslims living in societies where family laws are much more cognizant of the rights of women.

Weaving the goals of CDA into the analysis of feminist scholar-activists, ordinary Muslims living in North America and reformist scholars and jurists reveals that they are working towards deconstructing the frameworks of Islamic jurisprudence and in fact, challenging it from within by using the same language and methodology that the jurists have used to produce the framework in the first place. In other words, these scholars and activists are challenging the dominant narrative by re-interpreting the law, identifying its

discriminatory aspects and producing an alternative framework and narrative of the law on their own. Their work re-affirms the building blocks of CDA such that it is possible to de-construct a discourse by engaging in different levels of analysis and engaging in critique that is cognizant of the role of history, politics and power.

Robert Cover discusses the production of alternative narratives of the law, which lie outside the borders of dominant legal frameworks but have the power to challenge them. The work of the feminist scholars studied in this dissertation re-affirms Cover's view that multiple narratives of the law exist and that they challenge the status quo. The alternative feminist narratives that the scholar-activists and reformist scholars and jurists are producing does in fact challenge the authority and authenticity of the existing Islamic legal framework and has the potential to change the law from within. However, as Cover notes, the violence that is committed in choosing one narrative dominant over all others is the result of the power employed by judges, in this case mujtahids or jurists. As such, even though the alternative feminist narratives must exist to raise awareness about the injustices and discriminatory practices of Islamic law, nevertheless, changing the law from within requires a degree of power and influence that feminist scholar-activists do not have yet. However, in the quest to make feminist narratives influential one of the first and most important steps have been taken, namely identifying the influence of politics and power in the construction of patriarchal male narratives of the law.

This dissertation claims that not only is it possible to have alternative narratives of the law, but given the role that politics, history and power have had in constructing authoritarian, male, and exclusionary narratives of the law that it is necessary to have alternative narratives to change and reform the law from within. Studying the work of

these five scholars makes us aware that they are engaging with Islamic law using the same tools and methodologies that the jurists have used throughout centuries. As such they critique Islamic law using its own language and methodology. All five scholars are cognizant of the role of history and power in the establishment of patriarchal norms and laws in Islamic jurisprudence and through their alternative feminist narratives they seek to shed light on these biases and change the law from within.

Muslim women, all over the world, are challenging existing laws and producing their own narrative of how the law ought to be. From the One Million Signature Campaign in Iran, to providing feminist interpretations of the Quran in Malaysia through Sisters in Islam, to campaigning for an end to violence against women and FGM in Egypt, these women are actively seeking to change society and law's attitude towards women. These grassroots activities highlight the awareness of Muslim activists on the need for new approaches and venues for which they can voice their concerns and demand change. As such, one can see that scholars and activists are working hand in hand in making an alternative Feminist narrative on Islamic law a reality within tangible reach.

Although alternative narratives exist and challenge the status quo, it remains to be seen, how inclusive can the Islamic legal system be of women's voices and their narratives. Given the reformist and revivalist movement, I am hopeful that one day we will have Muslim women jurists and *mujtahids* issuing *fatwas* for the Muslim community. It is my hope that future research will reveal the effectiveness of this feminist narrative and the power that it had to bolster other alternative narratives to change the law for a truly egalitarian representation of all.

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