

## **Women in Islam and the *Shari'a***

A significant era in the history of Islam was the decade of the 1980s, which was characterized by the emergence of ultraconservative, politically active Islamic movements that were labeled as *fundamentalist* in the West since they sought the government institutionalization of Islamic laws and social principles. Eventually, some conservative Muslim scholars in countries with significant Muslim populations were able to implement state laws based on the *shari'a*, particularly in the area of family laws and morality, with the *shari'a* being characterized as a monolithic set of rules that is immutable. On the other hand, theologians, scholars and jurists with a more contemporary perspective, aware of the external realities presented by the milieu, argue that the *shari'a* actually includes a variety of opinions between different schools of thought and further reflects regional influences and local customs that are not solely based on the interpretation of the religious texts and the teachings of the Prophet [*hadith*].

Islam began in the Arabian peninsula [Mecca and Medina] and spread to the Middle East, North Africa, Persia and Afghanistan during the 7th century; Spain and Asia during the 8th century; Turkey, sub-Saharan Africa, India, Malaysia and Indonesia from the 10<sup>th</sup> to the 13th centuries; China, Philippines and Eastern Europe for the next two centuries; and finally to Europe and North America during the 20th century.

The spread of Islam throughout the Arab world, parts of Asia and even to the West brought the need for Islamic laws capable of handling the different needs of Muslims especially in areas where the *Qur'an* and the *hadith* did not provide adequate details. To accommodate this, legal experts emerged that were given the mandate to interpret and apply Islamic principles to different situations throughout the Muslim world. However, different scholars disagreed with these experts in the interpretation of various areas, especially in morality, marriage, divorce, inheritance and the custody of children thereby leading to a splinter of legal schools of thought within Islam that eventually became different sects. The largest of the sects are the Sunni Muslims that comprises about 90% of the Muslim population followed by the Shi'ite [Shia] and the Sufi. It was also during this formative period of Islamic law that four separate Sunni schools developed and survived. These schools differ in their usage of each of the four sources of law: the *Qur'an*, *sunna* [traditions of the Prophet], *ijma* [reasoning by analogy], and the consensus of the *ulema* [religious scholars].

The Hanafi school predominates in the territories formerly under the Ottoman Empire and in Muslim India and Pakistan and relies heavily on consensus and analogical reasoning in addition to the *Qur'an* and *sunna*. The Maliki school, which developed in Medina, is dominant in Upper Egypt and West Africa and emphasizes the use of the *hadith*. The school of Muhammad ibn Idris ash Shafii, which prevails in Indonesia, stresses reasoning by analogy. Lastly, the legal school of Ahmad ibn Hanbal is adhered to in Saudi Arabia. This school of thought has attracted the smallest following because it rejects the use of analogy and the consensus of judicial opinion except as recorded by the jurists of the first three centuries of Islam. However, it should be noted that an important principle in Hanbali thought is that things are assumed to be pure or allowable unless first proved otherwise.

In the latter half of the 20<sup>th</sup> century and influenced by the rise of nation-states, Western colonial intervention, the process of modernization and through various reforms and nationalist movements, the sexual roles of women have been significantly transformed by creating more awareness in women's sexuality in terms of education, political rights and reproductive health rights.

### **Sunni Muslims**

Sunni Muslims are followers of the Hanifa [named after Abu Hanifa], Shafi [after Muhammad ibn Idris al-Shafi'i], Hanbali and Malik [after Malik ibn Anas] schools. They are the largest group of believers in the Muslim world, constituting about 90% of the majority population

and are considered to be mainstream traditionalists but are comfortable pursuing their faith within secular societies allowing them to adapt to a variety of national cultures.

The Sunnis subscribe to the literal interpretation of the *Qur'an* with the *shahada* [testimony] as central to Islamic belief [“There is no god but Allah, and Muhammad is His Prophet’]. Islam means submission to God, and one who submits is a Muslim. The legal capacity of any Muslim begins at birth and ends with death with the essence of legal responsibilities distinguished between the “capacity of execution” and “capacity of obligations.” The former involves the capacity to enter into contract, dispose of property and also includes the fulfillment of one’s obligations which is harmonized with one’s legal and moral obligation under the religion.

The Sunnis follow three sources of law: the *Qur'an*, *hadith* and the consensus of Muslims, with emphasis placed on the power and sovereignty of Allah and His right to do whatever He wants with His creation. They further believe in the prophets and sages of the biblical tradition such as Abraham [Ibrahim], Moses [Musa], and Jesus [Isa] and accept the concepts of guardian angels, the Day of Judgment, general resurrection, heaven and hell, and eternal life of the soul.

Both the Sunni and Shi’ite Muslims believe in the five pillars of Islam. The difference however is that while the Sunnis tend to pray five times each day and during Ramadan fast from sunrise to sundown, the Shi’ites combine the five prayers into three sessions and during the Ramadan they tend to fast for only half the day which is until noon. The believer is to pray at dawn, midday, mid-afternoon, sunset, and nightfall while the *muezzin* intones a call to prayer to the entire community.

Whenever possible, men pray in congregation at the mosque under a prayer leader and during Fridays the practice is obligatory. Women may attend public worship at the mosque, in an area segregated from the men, but woman most frequently pray at home. The acts of worship must be performed with a conscious intent, not out of mere habit. The *shahada* is also uttered daily by practicing Muslims as an affirmation of their membership in the faith and their acceptance of the monotheism of Islam and the divinity of Muhammad's message.

The Sunni doctrine of the caliphate is based on the belief that the caliph is the selected successor of the Prophet for political and military leadership but not as a religious authority that falls under the *ijma* [consensus] or the collective judgment of the community of the *ulema* [religious scholars or judges]. They follow a strict pre-determinism towards the rulership of the Caliphate [the office of the Muslim ruler considered to be the successor to Muhammad] although succession is not through hereditary lineage as believed by the Shi’ites. Most Sunni scholars, preachers, and judges traditionally believe that the door of *ijtihad* [private judgment] closed some four hundred years after the death of Muhammad [he was the “seal of the Prophets”].

## **Shi’ite Muslims**

The Shi’ites are a minority in the Muslim world [an estimated 15-20% of in the Muslim world] with adherents of Shi’ism having a higher concentration of followers in Iran, Iraq, Pakistan, India, Afghanistan, Lebanon, Azerbaijan, Bahrain and other Persian Gulf states. Known as the Ja’firi school, the Shi’ites separated from the Sunni over the issue of the succession when the fourth caliph was assassinated in 661 since it is their belief that the successor to Muhammad should have been Ali ibn Abu Talib, his son-in-law who became the male head of the Ahlul Bayt, Muhammad's household, after the Prophet’s death. The Shi’ites believe that subsequent successors should have been through his lineage through his wife Fatima.

The Shi’ites consider the “Justice of God” as part of *Usool-e-Deen* [Roots of Religion] wherein there is intrinsic good or evil in things. The belief is that God commanded mankind to do the good things while forbidding the evil. Further, God’s actions are part of a grand design that is incomprehensible by ordinary human analogy. It is this Shi’ite doctrine of God’s justice that the Sunni School of thought does not subscribe too since their view is that nothing is good or evil per

se. What God commanded became good by virtue of His command while those that He forbade became evil.

However, the greatest difference between Shi'ite and Sunni Islam is the former's belief in the Imamate [God-appointed Leadership of humankind] that has both far-reaching political implications and defines the very concept of submission to God. The Shi'ites believe that the divinely appointed Imam is the leader of mankind in all aspects of life, including all political and religious affairs. Their belief is that Muhammad appointed Ali as the first Imam [according to God's command] while Ali then appointed his eldest son by Fatima, Hassan ibn Ali, as the second Imam. Hassan then appointed his brother Husayn as the third Imam and so on and so forth. Hence, the sequence is hereditary as decreed by God, who is the ultimate source of the authority of the Imam.

The Shi'ite sect is divided on their beliefs regarding the sequence of the imams. Most are Twelvers who recognize twelve imams, of whom the twelfth, the *Mahdi*, has been occulted [in *Ghaibah*] or removed from human view by God and will return at some time in the future. They believe that the Twelfth Imam is still alive and will return accompanied by Jesus who will then affirm Muhammad's message to mankind from God. The Twelve Imams are as follows:

1. Ali ibn Abu Talib [600–661]
2. Hasan ibn Ali [625–669]
3. Husayn ibn Ali [626–680]
4. Ali ibn Husayn [658–713], also known as *Zainul Abideen*
5. Muhammad al Baqir [676–743]
6. Jafar as Sadiq [703–765]
7. Musa al Kazim [745–799]
8. Ali ar Ridha [765–818]
9. Muhammad at Taqi [810–835]
10. Ali al Hadi [827–868]
11. Hasan al Askari [846–874]
12. Muhammad al Mahdi [868-]

There are also several groups of Sevener Shi'ites with the largest being the Ismailis. On the other hand, Fiver Shi'ites are also called Zaidis and are found mostly in Yemen. The *imams* they accept are only the first five listed above. Further, they reject the notion of divinely appointed Imams.

Shi'ism is composed of three main sects with each group having differences in doctrine.

- The Twelve-Imam [Persia, Iraq, Afghanistan, Lebanon, Pakistan, and Syria]
- The *Zaydis* [Yemen]
- The *Ismailis* [India, Iran, Syria, and East Africa]

Shi'ite theology also includes a doctrine known as the five supports:

- Divine Unity [*tawhid*]
- Prophecy [*nubuwwah*]
- Resurrection of the soul and body at the Judgment [*ma'ad*]
- The Imamate [*imamah*]
- Justice [*'adl*]

The first three are also found in Sunni Islam albeit with some differences of emphasis.

The tension that exists between the Sunni and the Shi'ite religious communities are also evident in their disagreement towards the Shi'ite doctrine of *taqiyya* or dissimulation, a consequence of the long history of Sunni persecution of Shi'ite Muslims as it is mentioned in the *Qur'an* [one should not throw oneself into ruin]. According to this doctrine, it is permissible to hide one's true religious convictions if under the threat of death or injury since it is a human response to

protect oneself. Hence, they are more tolerant and forgiving of those who could not face the prospect of death for themselves or for their families and communities and are forced to deny their religious convictions.

Although both the Shi'ite and the Sunni Muslims accept the *Qur'an*, they differ in their approach to the *hadith*. For example, Shiites permit temporary marriages, or *mut'a*, which can be contracted for months or even days, and follow different inheritance laws while the Sunni reject it as being mere fornication and therefore forbidden.

Contrary to the belief of Sunni scholars and *ulema* regarding the sealing of the *ijihad* upon Muhammad's death, the Shi'ite scholars believe that the door has never closed and that they interpret the *Qur'an* and the Shi'ite traditions with the same authority as their predecessors.

The Imamate, however, is the essence of Shi'ism and Justice is a principle inherited from the Mu'tazilites, or rationalists, whose system is in many ways perpetuated in Shi'ite theology. The Imamate is the political and religious leader of the Shi'ite sect that possesses great power and influence and the Imam must be a biological successor of Ali and therefore viewed as sinless and infallible on all matters of Islamic doctrine. It is believed that the Imam will be the one to intercede for Muslims in the afterlife.

## **Sufi Muslims**

The word Sufi originates from *tasawwuf* wherein the root word is the Arabic word *Saaf*, meaning pure, clean or blank. Hence, *tasawwuf* means purifying or making clean and a Sufi is a person who practices purification of heart.

The Sufi practitioners are a mystical tradition where the followers seek inner mystical knowledge of God. This sect emerged around the 10th century<sup>1</sup> and partly arose as a reaction to the growing Islamic materialism that had developed at that time when Islam had achieved great imperial power and geographical scope bringing vast material gain. Since then the Sufi Muslims have fragmented into different orders [Ahmadiyya, Qadariyya, Tijaniyya, and others].

The Sufi mystic must follow a path of deprivation and meditation through various forms of abstinence and poverty including renouncing all worldly things and hold an unquestionable faith in God. The mystical focus in the Sufi doctrine means that the *Qur'an* is subject to multiple interpretations hence it contains mystical meanings hidden within its pages. Out of this mysticism developed a sense of pantheism, a teaching that God and the universe are one. This idea is however rejected by the orthodox Muslims [Sunnis] since they claim that Allah is the creator of the universe and distinct from it.

A good number of Sufi practitioners are organized into diverse groups of brotherhoods and sisterhoods. Instead of focusing on the legal aspects of Islam [*fiqh*], Sufism focuses on the internal aspects that involve perfecting the aspect of sincerity of faith and fighting one's own ego with the central concept revolving around the essence of "love." Dervishes [the name given to initiates of Sufism] believe that love is a projection of the essence of God to the universe. Since everything is a reflection of God, Sufism practices to see the beauty inside that appears to be apparently ugly as well as opening their arms to even the most vile.

The Sufi cosmology is composed of the following:

- *Alam-e-Hahoot* [Realm of He-ness] - or the Realm of pre-existence [i.e. the condition of the universe before its formation] and is equated with the essence of God.
- *Maqaam-e-Mehmood* [Place of the extolled] - It is the residing place of the Prophet
- *Alam-e-Lahoot* [Realm of Divinity] - It is also known as *Tajalliat* [The Beatific Vision, or the Circle of the Beatific Vision] where there are countless circles that form the bases of the root causes

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<sup>1</sup> Some Sufis believe their roots can be traced back to the inception of Islam in the early 7th century.

of the universe. These circles create the various species [or even non living things] in the universe and the entire circle is called the *Ghaib-ul-ghaib* [Unseen of the Unseen].

- *Alam-e-Jabaroot* [Realm of Omnipotence] - It is the stage when the universe is constituted into features and the *Hijab-e-Kibria* [The Grand Veil] is the last limit of this realm.
- *Alam-e-Malakoot* [Angelic Realm] - Is the stage when separate consciousness arises as the characteristics of the species and their individuals descend from the Realm of Omnipotence with the *Hijab-e-Azmat* [The Great Veil] being the last limit.
- *Arsh-e-Mualla* [The Divine Throne] - This is the limiting boundary through which no one but the very nearest to God can pass.
- *Sab'a Samawat* [The Seven Skies] - The seven skies are the 7 energy levels or 7 levels of enlightenment. The highest point of 7th sky is known as the *Baitul Mamoor* [Inhabited Dwelling] and after which is found the station called *Sidratul Muntaha* [Lote Tree] which is the last limit of the flight of the most intimate angels.
- *Alam-e-Nasoot* [Realm of Humans] - The foundations of the tangible world of matter are known as *Alam-e-Nasoot* and includes the material realm [which is visible to humans], and all the normal cosmos is included in it. This is the first of these Lataif, located slightly below the navel, and is associated with yellow color. Its energies are increased by meditation.

### **The Traditionalist or Conservative View of Gender**

Oftentimes the Western media has portrayed Islam as a “unitary phenomenon like no other religion”<sup>2</sup> that is incapable of development and seeks to subjugate women through complete and utter obedience totally ignoring that the prevailing attitudes of Muslim women are subject to shifts in different points of history. It also chooses to ignore the possibility of Muslim women being capable of agency through a heightened gender awareness that seeks a reconciliation of their faith and their full participation in the societal scheme of things. After all, gender roles and relations are not absolute and fixed social constructs that are incapable of negotiating change in response to social, political and economic realities.

The issues of women and gender relations have proven central to the various religious and political discourses in the Muslim world. It appears that “...arguments about Islam and as the main cause of women’s subjugation, or as the panacea for women’s problems, and more recently, arguments that Muslim societies have denied their rightful status, or that Muslim jurists have misconstrued the Prophet’s message of egalitarianism”<sup>3</sup> [Mir-Hosseini, 1999] have been the most predominant accusations hurled by the critics of Islam. Mir-Hosseini defines Traditionalists as comprising of clerics, laymen and religious leaders whose arguments for the *shari’a* are grounded on the natural order of things wherein men and women possess immutable roles that are complementary to each other and not always mutually exclusive. The status of women in Islamic societies has always been viewed as symbol of faith, hence its implications for the whole religion of Islam. Conservative [or Traditionalist] interpretations pervade a social structure that is primarily patriarchal and where women are veiled and segregated from men through exclusion. There is a rejection towards modernity due to its perceived “cultural contamination”<sup>4</sup> arising from the West. In order to preserve cultural authenticity [*asala*] then “cultural change must be withstood.”<sup>5</sup>

Traditionalists aim to contain what the perceived “cultural invasion” by the West that threatens the ideological definition of the Islamic order. For example, in 1967 the late shah of Iran promulgated the Family Protection Act that strengthened women’s rights in the country, especially pertaining to marriage. This law was however repealed and recast into more liberal terms in 1975

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<sup>2</sup> Ibid p 4.

<sup>3</sup> Mir-Hosseini, Ziba. *Islam and Gender: The Religious Debate in Contemporary Iran*. Princeton Press, 1999. p 3.

<sup>4</sup> *Arab Women: Old Boundaries, New Frontiers*. Tucker, Judith (ed). Indiana Press: 1993.

<sup>5</sup> Ibid, p 7.

and eventually suspended by Ayatollah Khomeini due to its symptomatic representations of the decadence prevalent in the Pahlavi regime that created Westernized “dolls”<sup>6</sup> out of Muslim women.

Traditionalists pursue an Islamic society wherein men and women are aware of the value and special status of women since “if a woman realizes her true stature and does not lose her spiritual values then she will not be overwhelmed by West-struck culture.”<sup>7</sup> In order to curtail this apparent “cultural invasion,” some Traditionalists proposed three measures.

- The “expansion and clarification of the culture of *hejab* and the Islamic code of dress for women...”<sup>8</sup>
- Encouraging marriage for the youth by making it more affordable through various economic measures
- The control of the press, public media, television and radio by the Islamic regime in order to encourage young girls to wear the chador and other Islamic dresses.

Traditionalists in Iran argue that prior to the revolution women’s social mobility was curtailed and relegated in the sphere of the private [i.e., the home] since allowing her freedom of movement will open her to the corrupt, prurient and forbidden attention from strange, unrelated men. This era is referred to as “a time of ignorance [*jaheliyeh*]” when women cared only for Western culture and was subject to the corruption<sup>9</sup> of the “cultural invasion.” After the revolution women were able to come out and play a vital role in the Islamic regime. However, Traditionalist constructs dictate that a woman’s political and societal participation is anathema to the traditional Islamic order where Fatima<sup>10</sup> embodies the Islamic ideal of womanhood. Whereas pre-revolution Islamic thinkers and ideologues urged women to follow Fatima’s lead as an exemplary role model for Muslim women embodying the values of “defiance, struggle and protest against tyranny and justice,” after the revolution Fatima’s image underwent a transformation into one that is a symbol of chastity, piety and submission.

A further argument from the Conservative school is that women have equal positions to men and sometimes even enjoy a higher status. Closer scrutiny by certain scholars of Islamic jurisprudence and *Quranic* interpretations contend that contrary to the Traditionalist argument of an elevated and equal status prescribed to women, patriarchal constructs subvert a woman’s natural sexual desire by emphasizing instead her chastity and self-restraint [of her sexual urges] in order for a woman to be elevated in the “company of angels.”<sup>11</sup> Such representation of Muslim women creates an impression of asexuality [or being severely sexually repressed], as being only baby-bearers or as passive recipients of the sexual desires of Muslim men. Muslim women are therefore encouraged to follow Fatima’s attributes of: “infallibility, devotion to God, knowledge of the traditions, self-denial, self-sacrifice, politics, *hejab*, housekeeping and heavenly progeny”<sup>12</sup> where the advancement of women is only possible through exercising the qualities of self-restraint and a life of devotion and worship [Mir-Hosseini, 1999].

The Traditionalist argument is fundamentally rooted in the language of complementarity between genders. It presupposes that Allah created men and women to complement each other and though independent, one cannot fulfill his or her duty without the other. Heavy jobs are thus assigned to men while delicate and light jobs are prescribed to women although both possess the same human value and greatness. The gender roles prescribed to both sex originate from the creation and the natural order wherein all responsibilities are assigned to the man while the main duty of the woman is in the realm of the household primarily in performing the role of a parent that

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<sup>6</sup> Sanasarian, Eliz. *The Women’s Rights Movement in Iran: Mutiny, Appeasement and Repression from 1900 to Khomeini*. Praeger Publishers. 1983.

<sup>7</sup> Ibid p 53.

<sup>8</sup> Ibid p 52.

<sup>9</sup> The Traditionalist view of Islam mentions two defects in women which are “the love of luxury and display” and the “lack of knowledge and strong reasoning” which can only be remedied by swearing allegiance and accepting the guardianship of religious leaders.

<sup>10</sup> Fatima Zahra is Mohammad’s daughter and the wife of his cousin Ali who eventually became the first Shi’ite Imam.

<sup>11</sup> Referring to the role of Mary, the mother of Isa [Jesus] whose sexual purity elevated her into the “company of angels.”

<sup>12</sup> Mir-Hosseini, p 56.

covers the infant's well-being and eventual religious development. As Traditionalist clerics perceive women's rights in the West as being opportunistic that tends to degrade the "delicate nature" of the woman by assigning her heavy work that is contrary to her nature, the Western construct of "equality" and rights-based approach are to be rejected. Further, the vast amount of freedom that Western societies grant to women's dress code also permeates a culture of decadence by sexually objectifying women. Allowing women to wear forms of dress that is not the chador is "tantamount to nakedness" and only serves to promote the "culture of nudity" that subjects women to the lustful gaze of men. They further claim that prior to the emergence of Islam, women lived in a patriarchal society that treated women as commodities. Islam was the catalyst that gave women the right to own personal wealth thereby allowing them to gain economic independence.

However, the Islamic principle of equality contradicts itself in the realm of unilateral divorce wherein the *talaq* is in the hands of men since women are presupposed to be, by nature, "capricious, impulsive and emotional," and granting her the *talaq* might cause irreparable harm on herself and her children, hence the emergence of a paternalistic tendency to protect women from herself. Men, on the contrary, are presumably rational and non-emotional beings whose acute knowledge and wisdom make them better heads of household unlike women whose compassion and mercy are detrimental in making wise and sound judgments. Most Traditionalists cite the Sura Nisa, verse 34 to argue women's submission and obedience to men since God created men to be in charge of women due to their superiority. It is this social, and not natural difference, prescribed to men that justify their assigned role of maintenance [i.e. breadwinners] of the family. In return, a good Muslim woman must submit herself to obedience towards her husband especially in matters of mobility outside the home and in areas of clothing. Donning such forms of "cover" as the *hejab* or the *chador* is a convention that manifests her piety, modesty, chastity and respectability and is a symbolic separation of the men's and women's spheres where a woman is associated with the family and home and away from the public space where strangers mingle.<sup>13</sup>

A woman, being one who encapsulates the desires and yearnings of men, must be privy from the eyes of other men who are not her relatives.<sup>14</sup> Men, in return, are granted the responsibility to control the movements of their wives including preventing their wives from leaving the safe seclusion of the home. As women are obligated to obey men in the "protection of the essence of the family," a man's duty is to instruct his wife in what is permitted and forbidden nor should he bring unrelated men into the house.

In order to rectify and regulate women's mobility in the private and public spheres, the Traditionalist view of the Islamic Order in promoting the "culture of the *hejab*"<sup>15</sup> is meant to offer women a form of "portable seclusion" [Hanna Papanek, 1982] similar to the *burqa*. This would enable women to observe the moral requirements of gender separation and protection while allowing her to abandon the segregated living spaces. Since a woman's modesty is of utter importance and must be protected at all times, it is imperative that she protects her chastity by donning an overgarment since corruption emanates from a mere glimpse of a woman's ears, hands or face as well as all actions and sounds. It is a woman's piety that makes her a suitable partner for a Muslim man and the mere tapping of a decorated feet or the simple act of singing is forbidden<sup>16</sup> once it stimulates sexual desire. The rationale of obligating women to wear cover themselves with the *hejab* or the *chador* is justified as a means to curtail the men's sexual urges by guarding their gaze that could incite an avalanche of impure and corrupt thoughts. "If a woman understands why a man is attracted to her, she will feel degraded, not respected, because the opposite sex has seen her as a means of satisfying his own sexual and animal urges...From this it is clear that the benefit of observing [the] *hejab* goes to women themselves, not to men."<sup>17</sup>

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<sup>13</sup> Abu-Lughod, Lila. Do Muslim Women Really need Saving? Anthropological Reflections on Cultural Relativism and Others. *American Anthropologist*. September 2002. p 785.

<sup>14</sup> The *hadith* of Fatima is often used to strengthen this argument: "The best thing for a woman is not to be seen by unrelated men."

<sup>15</sup> Mir-Hosseini, p 56

<sup>16</sup> Imam Ali's *hadith* presumably supports this prescription: "If possible do not give (women) permission to leave the house."

<sup>17</sup> Mir-Hosseini, p 68.

The emphasis on women's obedience, chastity and piety is a recurring theme in the language of the Traditionalists. In conjugal matters, women are obliged to obey their husbands including satisfying his sexual needs in order for him to be calm at the workplace and society, and avoid the temptation of pursuing sinful acts to satisfy his sexual urges. A woman is also instructed to procure her husband's permission in engaging in the public sphere and to leave the house without his permission is tantamount to committing a sin. On the other hand, Traditionalists contend that certain edicts are also favorable to women such as the right to ask her husband to pay for certain parts of the living expenses, for instance the care and breast-feeding of the children.

Neo-Traditionalists, however, do not believe in the similarity of rights between men and women but instead argue that for women to gain equal rights with men and enjoy equal fortune, then "the similarity of rights must be removed."<sup>18</sup> Only then could the politics of gender be redefined that allows men and women to acquire their proper rights. Further, the dissimilarity of rights within the limits set by nature is incompatible with justice, natural law and the well-being of the family and society since the nature of men is different from women wherein "women want to be loved, men want to love; women want to be possessed, men want to possess; women are the hunted, men are the hunters."<sup>19</sup>

Mir-Hosseini argues, however, that the differences are not fixed constructs but are products of social conditions. The inclination of women to please and compromise is a product of socialization that emanates from infancy where gender is defined at such an early stage. If those definition are to be argued as natural, then discrimination can be interpreted as "divine justice," which Traditionalists contend as a kind of justice wherein women do not have the right to divorce and a man can take up top four wives.

Women's physical and mental inferiority appears as a recurring theme in the conservative discourse including her submissive and domestic roles that are meant to provide men earthly pleasures. Tal'at Harb [Egyptian nationalist and founder of Bank Misr] opposed women's emancipation by labeling it as an imperialist plot to undermine Egypt's social structure, religion and morality.<sup>20</sup> Harb maintains that if God intended women to formulate policies or provide opinions, then He would have granted women such qualities as chivalry, courage, audacity and intrepidity. Having been created with a weaker constitution than men, women's menstruation is a malady and weakness that connotes hurt and pollution. Women should therefore cease from claiming rights of a quasi "masculinity" and instead demand her real rights that are those of family and motherhood.<sup>21</sup>

In the 1950s, the conservative stance on women's inferior nature shifted from the inequality of the sexes into one of perceived equality based on the difference in the nature of the sexes as created by God. It is this difference that therefore makes both genders complementary since each one has a predestined task and to attempt to alter what God has willed and competing with men who toil outside the home to provide for the family is sinful and bound to cause societal corruption. "Only as wife and mother will a woman achieve rank, honor, and even her selfhood" [Tucker, 1993]. It is this difference in the interpretation of women's participation in the private and public life, including her right to work, that serves as a fundamental difference between the two schools. The Modernists argue that original Islam supports these rights while the Conservatives reject this proposition arguing that a woman who is outside her home and apart from her male relatives is *fitna* [a source of social discord]. By leaving her throne [her house], she loses her crown [her chastity] in order to mix with lowly, prurient and corrupt men in the workforce.<sup>22</sup> By ignoring this edict, women create social anarchy since it causes havoc with man's guardianship [*qiwama*] over women as

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<sup>18</sup> Mir-Hosseini, p 117.

<sup>19</sup> This Traditionalist theory expounded by Motahhari was originally argued to be based on nature and supported by psychology has long been refuted.

<sup>20</sup> Tucker p 13.

<sup>21</sup> As claimed by Egyptian misogynist and intellectual Abbas Mahmud al-Aqqad, who wrote two books in the 1950s: *al-Mar-a fil-Qur'an* (Women in the Koran) and *Hadihil-Shajara* (This Tree).

<sup>22</sup> Tucker p 17. Conservatives further support this argument by quoting *Surah [Ahzab]* 33:33, bidding the Prophet's wives to stay at home; [*Nur*] 24:31, prohibiting Muslim women to display their wares and ornaments except to male relatives; and [*Ahzab*] 33:33 forbidding Mohammad's wives from displaying their charms.

legislated in *Sura [Nisa] 4:34*, “Men are the guardians and maintainers of women, because God has given the one more than the other, and because they support them from their means...”

More harmful than a woman’s accommodation into the labor force is her political participation since it necessitates long hours of work separated from the family and includes mingling with unrelated men. The conservative thinkers view this as a far serious aberration since they claim it goes directly against Islam. They claim that both the *Qur’an* and the *hadith* forbid women access to public leadership as clearly stated in a *hadith* in Bukhari wherein a society that has appointed a woman as ruler will not thrive.

It should be noted that the conservative view of Islam struck a responsive chord among middle-class men and women, especially during the 1970s when there was a massive change in the social and economic structures. In Egypt, for instance, Nasser’s reforms that granted women access to education and a commitment to employment to government offices, was met with the state’s failure to meet the growing number of demand from college graduates. The Conservatives’ demand to return to the traditional Islamic definitions of labor and segregation of the sexes was used by some as a catalyst to legitimize the women’s return to the domesticity when unemployment was rampant. Further, the adoption of the “new veiling” [McCleod, 1991] by the women was not merely to protect themselves from sexual harassment in the work place and in the streets, but also as a means of “accommodating protest”<sup>23</sup> and reconciling their Muslim identity with preconceived gender roles of mother and wife, with the economic realities that witnessed a need for dual participation of the couple into the labor market to augment income.

The reversal of gains achieved by Egyptian feminists such as Doria Shafik and Huda Sharawi were further manifested in Article 2 of the constitution when it was amended in 1976 allowing for the *shari’a*, which used to be a source of legislation, to become the *principal* source of law making. Islamic law was the argument used to mobilize the Egyptian public against the personal status law [1979] when it considered taking a second wife as a source of harm [*dharar*] for the original wife thus giving her grounds for divorce. In 1985 the High Constitutional Court struck down the law based on a legal technicality and was rapidly substituted that discarded a woman’s undisputed right to divorce in case of her husband marrying another. This also granted the judge the power of interpreting whether or not harm actually occurred.

The most significant indicator of the growing shift toward conservatism was exemplified in the Kingdom of Saudi Arabia, perhaps the most conservative Islamic country. The decades of the 1960s and the 1970s in Saudi Arabia have been characterized by explosive development and liberal openness to the cultural inundation of the West. This trend however came to an abrupt end in 1979 when the Grand Mosque in Mecca came under attack by religiously motivated critics of the monarchy.<sup>24</sup> The call of Iran’s Ayatollah Khomeini to overthrow the Al Saud directly challenged the legitimacy of the monarchy as custodian of the holy places, and to the kingdom’s stability with its large Shi’ite minority. In May 1991 more than 400 men from the religious establishment and universities which included the country’s most prominent legal scholar, Shaykh Abd al Aziz ibn Baz, petitioned the king to create a consultative council to which the king responded favorably. The signatories of the petition asked not only for more participation in decision making, but also for a revision of all laws, including commercial and administrative regulations, to conform with the *shari’a*.

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The foremost factor that some scholars perceive as having influenced the increased attraction of the populace to Islamic conservatism was the impending loss of national identity caused by overwhelming Westernization. The spread of secular education, population mobility, the breakup of extended family households, and the employment of women chipped away at the

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<sup>23</sup> See also Arlene McCleod’s “Accommodating Protest:

<sup>24</sup> The same year saw the establishment of the Islamic Republic of Iran.

fundamental institutions of family and society and religion became a refuge and a source of stability.

The Conservative Revival was expressed on an individual level when educated young Saudi women expressed the revivalist mood by supplementing the traditional Saudi Islamic *hijab*, a black cloak, black face veil, and hair covering, with long black gloves to hide the hands. In reaction to this, the government also backed the *mutawwiin*<sup>25</sup> in responding to calls for controls over behavior perceived as non-Islamic.<sup>26</sup> Although primarily responsible for merely enforcing the attendance of men in the mosque at prayer time, the tasks of the *mutawwiin* since the 1980s have increased to include enforcing public abstinence from eating, drinking, and smoking among both Muslims and non-Muslims in the daylight hours during Ramadan. They are also perceived as Committees for the Propagation of Virtue and Prevention of Vice or Committees for Public Morality that includes the responsibility of making sure that shops are closed at prayer time and that modest dress is maintained in public.

Religiously sanctioned behavior, once thought to be the responsibility of families, was being increasingly institutionalized and enforced and women were prevented from traveling abroad unless accompanied by a *mahram* [male guardian]. This mandate was a shift from the policy of the late 1970s when a letter granting permission to travel was considered sufficient.

The family is the most important social institution in Saudi Arabia and the primary basis of identity and status for the individual through the formation of alliance with other families that share a commonality of interests and life-styles. Personal status law presently remains in force and unmodified in Saudi Arabia where marriage is a civil contract to be signed by witnesses and which specified an amount of money [*mehr*] to be paid by the husband to the wife. The contract might further include a clause for an additional amount to be paid in the event of divorce. Further, in the interest of equitability, it might also add a stipulation that assures the wife the right of divorce if the husband should take a second wife. Divorce, however, is usually instigated by the husband alone, and because by law children belonged to the father, he could take custody of them after a certain age [the age is usually seven for boys and puberty for girls].

Upon marriage, women might become incorporated into the household of the husband but not into his family. She is also not permitted to take her husband's name but keeps the name of her father because legally women are considered to belong to the family of their birth throughout their lives<sup>27</sup>. Under the legal framework of Saudi Arabia, a woman's closest male relative [a father or brother] is obligated to support her upon divorce or widowhood. Hence, women in Saudi Arabia appear to be at a considerable disadvantage in marriage since the prerogatives of divorce, polygamy, and child custody lay with the husband. Some scholars argue that these presumed disadvantages are partially offset by a number of factors. Firstly, children are initially attached to their mothers and when grown, especially sons, their ties to the mother secures her a permanent place in the husband's family. Secondly, marriages are often contracted by agreement between families that leans to uniting cousins or individuals that seek to expand alliances and prestige, thereby a successful marriage was in the interest of both husband and wife. Thirdly, Islamic inheritance laws guarantee a share to daughters and wives wherein women are entitled to full use of their own money and property resulting to many women in the kingdom as personally holding considerable wealth.

However, the increase in unemployment coupled with the decline in morals as a result of Western influenced, Islam became the source of legitimacy for the monarchy that was a cohesive force in the kingdom. The ultraconservative moral agenda appealed on an emotional level to many Saudi citizens in expanding the jurisdiction of *shari'a*.

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<sup>25</sup> They serve as missionaries and enforcers of public morals.

<sup>26</sup> In November 1990, a group of forty-seven women staged a demonstration to press their claim for the right to drive that provoked the ire of the *mutawwiin* and demanded that the women be punished. The government confiscated the women's passports while those employed as teachers were fired. The previously unofficial ban on women's driving quickly became official.

<sup>27</sup> Many in Saudi Arabia interpreted the retention of a woman's maiden name, as well as her retention of control over personal property as allowed under Islamic law, as an indication of women's essential independence from a husband's control under the Islamic system.

### **The Neo-Traditionalists (Middle Ground)**

Some clerics are aware that the practices and politics in the Islamic Republic are remote from the ideals of the *shari'a* and have shifted the language of the discourse from what has been viewed as a patriarchal bias in Islamic law into one that recognizes the influence of time and place and the need for change.

The Neo-Traditionalists do not subscribe to the doctrine of appeasement but seek a gender balance in the discourse and implementation of the *shari'a*. This new wave of religious thought and jurisprudence is intent on finding a solution to the issues of gender by seeking new interpretations of the *shari'a* and dismisses the equality in rights and duties as a Western, liberal construct that is incompatible with Islam. Most Neo-Traditionalists base their views on Ayatollah Motahhari's<sup>28</sup> *System of Women's Rights in Islam* that subscribes in the complementarity of the sexes although they further transmit gender inequality on a spiritual plane rather than an immutable biological, psychological or natural thesis.

As advocates of the new school of Dynamic Jurisprudence, the Neo-Traditionalists seek to redefine the gender notions in the *shari'a* by adapting the *feqh* and the *ijtihad* to the shifting conditions of time and place. Although "the *shari'a* and its ruling are immutable" it must also be subject to reinterpretation or new Rulings as new circumstances emerge. The three main examples of gender inequality in *shari'a* laws are founded in the discourse about the *hejab*, marriage [and its dissolution] and polygamy. Unlike Traditionalists that reject the concept of gender equality as mere Western propaganda and refuses to believe in the similarity of rights between men and women, the Neo-Traditionalists distinguish equality and balance as rights that are proportional to duties. The rights of individuals must be divided by their duties that result into equality,<sup>29</sup> similar to forging an equitable contract with a company wherein one gets paid according to the level of investment and time exerted. If everyone were paid equally regardless of the varying degrees of duties, investments and roles played then inequality exists instead and becomes an essence of oppression and injustice.

Neo-Traditionalists consider Islam marriage as a dyadic contract entered into by two rationale and free individuals. The responsibility of Islamic philosophy only lies in determining the framework of this contract that is the pillar of marriage. Otherwise, "the rest is left to men and women to agree and do what they want."<sup>30</sup> The foremost responsibility of clarifying law by providing boundaries and defining frameworks fall into the hands of the government. They add that it is often neglected that men and women marry on the basis of compulsion and all marriage aspects are defined by the *shari'a* which defines only *limited* measures and rules. The rest, such as "the dowry, place of residence, employment and the right to divorce can be determined" only one at a time. Hence, Neo-Traditionalists contend that Islam cannot be blamed for the actual practices in society since Islamic law and *feqh* regulations have nothing to do with social realities and the government has the duty to implement the law such as stopping the *mullah*<sup>31</sup> who failed to do his duty which was to insert in the contract what the two parties agreed upon.

It is not the principle of equality between men and women that are disputed by the Neo-Traditionalists, but its interpretation. They claim that roles and rights are not the same since men and women within the familial system possess different and complementary roles, which in turn produce different conditions according to the difference in the defined roles. The contractual side of marriage is based on this prescribed gender roles of the man playing the head of the household and main provider of the family as his primary duty [as defined by a *shari'a* Ruling] while the wife is in no obligation whatsoever to perform the same function. Although in cases where it is an economic

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<sup>28</sup> Ayatollah Motahhari was one of the great contemporary Islamic thinkers of Iran and was considered to have contributed greatly to the rebirth of Islamic Iran. With the triumphed of the Islamic Revolution of Iran in 1979, he was appointed as chairman of the Revolutionary Council, but was later assassinated by the group Furqan on May 1, 1979.

<sup>29</sup> Mir-Hosseini outlines this as being Women's Rights: Women's Duties = Men's Rights: Men's Duties.

<sup>30</sup> Mir-Hosseini, p 119.

<sup>31</sup> Under Islam a mullah is a learned man, a teacher, a doctor of the law of Sharia. In India the term is applied to the man who reads the Qur'an, and also a Muslim schoolmaster.

imperative for a woman to engage in outside employment, the couple must reach a consensus that the man either stays at home while the woman works, or both couples work in order to provide financial support for the family. This act however is dictated by external realities that is separate from religion, but are human values and ethical imperatives [such as cooperation and self-sacrifice] that are separate from the *shari'a* obligations. In case the man cannot provide, then the wife has the right to resort to legal means in order to secure her right to maintenance since in *feqh* it is a man's duty to provide maintenance.<sup>32</sup> However, although the wife has no duty to provide under the *shari'a*, neither is there a law that prohibits her from seeking employment or participating in society.

The current definition of men and women's rights within marriage is that of the man possessing two main duties as being both the head of the household and its main provider, hence he is given the privilege of the *talaq* [unilateral divorce]. The position held by the Neo-Traditionalists is that if a man wants to use his unilateral right to divorce without any good reason, careful examination must follow in order to determine the cause or validity of the act as well as exhausting all possible means to reconcile the couple.

On the other hand, a woman's access to divorce, they argue, is not limited since a woman who cannot tolerate a life with her husband has no obligation under the *shari'a* to persist in that kind of life then the government, specifically the judiciary, must play its role in effecting a separation through a "government divorce." Marital life is therefore not a dichotomous construct that prevents women from having the freedom of entry and exit since one of the accepted Principles in *feqh* is the ruling on "denial of harm." Despite its patrilineal and patriarchal representation in the West, Neo-Traditionalist clerics argue that Islam does not allow hardship and harm. For instance, if "a woman's husband doesn't mistreat her, provides for her, and is a very good person, yet she dislikes him and for this reason can't continue to live with him; if the court reaches the conclusion that the continuation of marriage is difficult for such a woman, then it will either order the husband to divorce her or itself effect a divorce."<sup>33</sup> A man cannot impose his will over his wife since doing so obliges her to disobey him as based on the *Quranic* verse "the religion does not put hardship on you." By not allowing the man to control her, the woman is not being disobedient nor loses her right to maintenance since it is the husband's duty to provide for her.

Although some critics argue that Islamic philosophy on marriage is not dyadic due to the man's privilege of the unilateral dissolution of marriage, Neo-Traditionalist clerics refute this by stating that a woman is granted the agency to free her self by annulment<sup>34</sup>. Further, she does not need the permission of the religious judge although it is a recommended precaution so that *talaq*<sup>35</sup> is pronounced instead of an annulment. However, her going to court is a matter of formality [to register the separation] and not to establish grounds for the separation according to the law.

## **The Modernists or Reformists**

The "Modernists" that include clerics, laymen and religious leaders pursue a pragmatic approach to Islamic thought and are willing to engage in non-religious perspectives in interpreting the *Quranic* texts. Not prone to rejecting an idea simply because of its Western construct, they are also more aware that Islam is not a hegemonic solution to the economic, social and political woes of the Muslim world. Instead they argue that Islam is flexible and its tenets can be [re]interpreted to

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<sup>32</sup> A man can only be freed from this duty if his wife chooses to forgo her right to maintenance either because she is financially able or chooses to pursue employment among other factors.

<sup>33</sup> Based on an interview conducted by Mir-Hossein with Seyyed Zia Mortazavi, one of the renowned Neo-Traditionalists who accepts the immutability of the gender model manifest in Islamic law, but see the need for change through new interpretations of the Islamic jurisprudence.

<sup>34</sup> Under Civil Code, annulment (*faskh*) is permitted on one of two grounds:

1. Resulting from a fault in the substance or form of the marriage contract
2. Due to certain conditions that are either present or absent in either one of the parties.

For a more detailed list of the Civil law, download [www.alaviandassociates.com/documents/civilcode.pdf](http://www.alaviandassociates.com/documents/civilcode.pdf).

<sup>35</sup> For more information about the *talaq*, visit: <http://www.law.emory.edu/IFL/legal/iran.htm>

encourage both democracy and pluralism. Being proponents of a return to the *Qur'an* and towards modernity school of thought, the Modernists such as the Egyptian theologian Muhammad Abduh contend that Islam and modernity are compatible by separating the *'ibadat* [religious observances], found in the *Qur'an* and in the *shari'a*, from the *mu'amalat* [social transactions] which is largely made up of family law. Some feminist scholars argue that the purpose of this distinction was to establish the dichotomy between the *'ibadat* and the *mu'amalat* wherein while the former restricts interpretative change, the *mu'amalat* allows room for considerable interpretation and adaptation by various generations of Muslims depending on the milieu. However, the reinterpretation of the "woman question" especially within the domain of the family was less for the benefit of the women but to spur a possible moral rebirth of Islamic society. For reformists such as Abduh, the Egyptian society of his time was on the verge of a moral disintegration that needed a "re-Islamization of the family"<sup>36</sup> while other Modernists are critical of both Muslim women who accept their traditional role without question and of modern, Westernized women who fall prey into the West's consumer culture that create a woman as "a human being who shops."

There are various reform measures proposed by the Modernists and Abduh enumerates three significant ones. First is the need for women to be educated regarding the rights and obligations afforded to them by the Islamic religion. Second is the education of the men "in the true meaning of Islam." Men are equally responsible to promote the true meaning of the religion by abrogating "selfishness, material greed, power hunger and love of tyranny." Third is the reestablishment of marriage as a righteous and "solemn covenant" that reconfirms the "exact equivalence" of the couple wherein the natural order charges man with the "leadership" of the domicile due to his physical constitution [strength, perfection, beauty] while the woman's role is to take charge of domestic affairs.

In Iran, a prominent figure in the wave of Islamic Modernists is Abdolkarim Soroush who reintroduced an element of rationality into Islamic philosophy and enabled people to be critical without compromising their faith. It is his contention that Islam and ideology must be separate entities claiming that political ethics is distinct from religious ethics. The dichotomous nature of ethics and religion are recurring themes in his speeches and writings and is an integral aspect of the Modernist perspective.

The earlier interpretations of the *Nahj ol-Balagheh* [Collection of Imam Ali's Sayings] were originally uncongenial to women. However as time progressed the perception of women [and men] shifted and the aforementioned *nahj* has been contested as infringing on the "cultural notions and democratic values" of women by marginalizing women from the affairs of state and society. Modernists believe that a woman's participation in society does not, in any way, violate her womanhood and Muslim identity since it is but natural and logical that women be allowed greater access to social, economic and political resources. They further argue that the *hadiths* are "pseudo-universal propositions" that reveal "the conditions of the women of their time." Hence, the credibility of the *hadith* lies in the force and validity of its reasoning and not on the authority who utters it. Further, gender roles are human and social concepts that are unrelated with the divine realm wherein sexual markers that are recommended by religion must not be accepted as proof of immutable gender constructs.

In the reformists' interpretation of the religion, oppression is manifested in multiple forms but is expressed stronger in the practice of polygamy. Abduh<sup>37</sup> even declared *fatwas* calling for the abolition of polygamy in Islam that, although was a sound practice for the early believers, transformed into inequitable and unbridled lust in the course of the centuries. Although he mentions notable exceptions [such as a barren wife], he contends that this up to the decision of a judge to permit the man to take a second wife. He argues that this is not impeded by the religion but by custom [*'ada*].

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<sup>36</sup> Abduh, Muhammad. *Al-Islam wal-Mar'a fi Ra'y al-Imam Muhammad 'Abduh*. Cairo. P 136.

<sup>37</sup> Abduh's *ijtihad* have remained to be rejected by conservative thinkers even to this day, especially the *ulama*, although ironically the great lecture hall of *El Azhar* bears his name.

Inheritance law is another area that is viewed as a patrilineal system focusing on the male and is defined by blood linkage that some feminists label as a form of “sexual apartheid.” Further, such laws are products of male-interpretation of Quranic texts such as [Sura Nisa, 11] “God commands you concerning his children (*inheritance*), for the male a share proportionate to the shares of two females...” which are then codified in the Civil Code.<sup>38</sup> Some scholars further contend that although the women’s share is less, this is not substantial proof that they are valued less than men nor should it be arbitrarily concluded that women are neither consulted nor assigned any form of social and political status and if women tend to inherit less, it is simply because “they are told to do so.”<sup>39</sup>

Iranian Reformist Soroush’s theory of *Expansion and Contraction of the Shari’a* emphasizes that the understanding of sacred texts is time-bound and that the opinions emanating from the *ulamas* are subject to the influence of what he calls “extra-religious knowledge.” He is also quick to criticize *ulamas* that are unwilling to revise their understanding of the religious texts in the light of changes in knowledge and dictates of current realities. He further argues that there has been a recurring problem in the Muslim world in explaining the differences in rights between genders and upholding the argument that Islamic thought advocates gender equality while rejecting similarity in rights.<sup>40</sup> This discourse has been approached in various ways with some jurists and clerics arguing not a difference in rights but in the prescribed duties of each sex as determined by the natural division of labor and the differing abilities of each gender.

Modernists speak of the two normative views of women’s purpose in creation that they then proceed to deconstruct. First is the proposition that women were created *for* man [includes her whole being, disposition and personality where perfection depends on her union with man] and second is that women have their own purpose in creation. Women were created to “mediate man’s perfection,” but “to say a woman is created for man does not mean she is created *for*, or to be *at the mercy of*<sup>41</sup>, man’s whims.” Moreover, a woman’s perfection resting in union with a man does not necessarily imply marriage although Islamic thought considers the family as one manifestation of such a connection [between men and women] and serves as an arena for complementarity and mutual perfection. The authenticity of the *hadith* is not the main contention but the “meanings attributed to them” by the religious scholars who “have taken them seriously.” Religion must therefore be separated from the interpretation of the religion because “Islam is not the same as the views of all Muslims.” It is further argued that the only Islam that exists is the one that Muhammad brought to the people from God and those who are labeled as “Companions of the Prophet” have committed “erroneous religious thoughts” by making interpretations that have nothing to do with the religion. The discriminatory interpretations regarding women are mere interpretations of the religion and must not be mistaken as being *the* religion.

In promoting the Modernist perspective of equality, they outline four principles that are the basis of this postulation:

- Humans are subjects under the rule of God
- Every religious Ruling is contractual and is neither innate nor natural
- The Principle of the “force of Reason” that opposes blind, unquestionable obedience since humans possess the capacity of understanding the reasons for God’s commands
- A distinction must be accorded between God’s commands and that of other commands, regardless of the source [Imams, Prophet, Companions] because religion is distinct from its interpretations.

Some more progressive Modernists have been inclined to view women’s rights as natural rights that are vital to the progress of society. Women’s mobility, the freedom to work and acquire

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<sup>38</sup> See <http://www.wluml.org/english/pubsfulltxt.shtml?cmd%5B87%5D=i-87-2620>.

<sup>39</sup> Mir-Hosseini, p 225.

<sup>40</sup> The contradictions that arise in Soroush’s arguments are further discussed by Mir-Hosseini in her book.

<sup>41</sup> Italics mine.

education, are “natural rights” born from their “intellectual and spiritual equality with men.”<sup>42</sup> Qasim Amin, an Egyptian journalist, politician and lawyer, had a secularist approach concerning women’s issues and accorded that the European and American models of dealing with the politics of gender are to be emulated by the East since “the countries where women enjoy freedom and all their rights...lead all other nations on the path of perfection.”<sup>43</sup> Similar to Abduh’s position of women’s education as a source of reform, Amin adds that it is a woman’s natural right being man’s spiritual and intellectual equal. However he contends that women only require an elementary education that is to be supplemented by regular contacts with the realities outside the home. He further lashed out against the *hijab* as being a source of ignorance that is a barrier to women’s growth due to its prescribed segregation of men and women with women being relegated to seclusion in the home, and the veiling of the face. He insisted on women’s right to mobility and an adaptation of the *shari’a* veiling that leaves the face and the hands uncovered as being the only authentic form of Islamic dress code that Muslim women should follow. In ensuring that this Islamic garb would not lead to general corruption, he demanded that it is the men’s responsibility to control themselves rather than to merely rely on the women to prevent them from falling into temptation.

Muhammad Ahmad Khalaf Allah, another prominent figure in contemporary Islamic modernism, further argues that the *Qur’an* does not prescribe an “Islamic dress” for women but that the two verses on the *Qur’an*<sup>44</sup> refer to a garment that distinguishes the free woman from the slave and the other demanding modesty. Unlike other Modernists, Khalaf Allah is unconcerned with a woman’s right to education but with her participation in public life. But similar to those who preceded him, Khalaf Allah does not propose to disentangle the patriarchal order of Islamic society nor to undo the family structure with its prescribed gender roles of “provider” and “protector” assigned to men.

In Egypt, Mahmud Shaltut, the Rector of El-Azhar and ally of Gamal Abdul-Nasser, made an innovative and daring move to open the doors of the Azhar to women, albeit on a different campus and in different disciplines. He insisted on a woman’s right to education as man’s equal partner in creation and religious responsibility as well as supporting the women’s right to political participation. Women, therefore, are justified to ask for their legitimate Islamic rights, including the right to work outside the home since development is impossible without the participation of women in the workforce.

However, like with any school of thought, some Modernists differ from their predecessors with regards to the issue of polygamy by insisting that polygamy is a part of Islam that is sanctioned by the *shari’a* and called for the state’s support of polygamous families within the poor community. Although the notion of man’s “superiority” over women is an incorrect one that is subject to faulty interpretation of the *Qur’an*, polygamy may sometimes be necessary at certain times although it is the right of Muslim society to legislate the validity of this Islamic practice in lieu of the public’s interest.

Islamic modernism has focused on reform on women’s issues as vital to society’s holistic development that includes increased participation in the public sphere in the areas of labor and politics, while the issue of women’s rights and freedom as part and parcel of the human rights discourse has been ignored.

## **Conclusion**

### **CEDAW and the *Shari’a***

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<sup>42</sup> Tucker p 10.

<sup>43</sup> Ibid.

<sup>44</sup> Verses 33:59 and 24:31.

The Convention on the Elimination of All Forms of Discrimination Against Women, otherwise known as the Women's Convention, is recognized as the most comprehensive international treaty about women's rights seeking to regulate both state and non-state actors. On 3 September 1981, the Women's Convention entered into force upon ratification by 20 states and is the culmination of more than three decades of work by the United Nations Commission on the Status of Women that was established in 1946 to monitor the situation of women and to promote women's rights.

Under international law, governments may support a convention in two ways: first is by signing the treaty and agreeing to not contravene the provisions and second is through ratification wherein the State concerned accedes to the convention and to apply its provisions. Under the Vienna Convention on the Law of Treaties, there exists the principle of *pacta sunt servanda* that stipulates that all treaties are binding and States Parties to the treaty are bound to carry out the provisions "in good faith." However, the Vienna Convention also provides the clause allowing states to make reservations to specific articles as long as it does not conflict with the treaty's object and purpose. According to some legal scholars, the Women's Convention is the only international human rights treaty that has attracted the most number of reservations that could potentially exclude almost all of the terms of the provisions. Further, it has also been a center of debate from sectors arguing that the CEDAW epitomizes the cultural and religious hegemony of the Western states.

Of the 132 States Parties to the Women's Convention, 12 have predominantly Muslim population [Bangladesh, Egypt, Indonesia, Iraq, Jordan, Libya, Mali, Tunisia, Yemen, Turkey, Tajikistan and Morocco] and all, sans Mali and Tajikistan, have declared reservations to the Convention. Bangladesh, Iraq, Morocco and Egypt reserved the right to accede to Article 16 [Family Relations] due to perceived conflicts with the *shari'a*, considered to be a divine law that dictates how Muslims should live and conduct themselves. The argument is that the principles of the *shari'a* are framed in terms of duties unlike the West's rights-based approach. Further, the *shari'a* is all encompassing and influences everything from the moral and ethical [fasting and praying] including legal standards [wills and contracts] that are considered secular in Western societies.

Morocco declared its reservation on the provisions of Article 2 which it claimed to conflict with the *shari'a* in terms of equality between men and women in the dissolution of marriage. Morocco opined that Article 2 and its provision of taking "*all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women*" is incompatible with the *shari'a* that provides rights and responsibilities to men and women within the framework of equilibrium and complementarity between the sexes as well as a woman's right to divorce falling under the mandate of a *shari'a* judge.

In Egypt where marital relations are governed by Islamic religious beliefs that are unquestionable, adherence to the provision of equal rights and responsibilities between the spouses as declared under Article 16 was deemed unfeasible. It has been asserted that Egypt and Morocco's reservations based on the "separate but equal" argument contradicts with the aim of the Women's Convention that seeks to eliminate family laws that are gender-specific and seeks to reinforce the unequivocal position of women in society.

In Iran, the *shari'a* remained untouched in the realm of morality, marriage, divorce and family relations. Although the Family Protection Act of 1967 was passed to restrict polygamy by having the man ask the court's permission before bringing in a second wife [failure of which is tantamount to a penal offense] as well as allowing both parties to divorce with the court's consent, in reality the reform proved ineffective due to legal loopholes and ingrained customs which further entrenched men's hierarchy in the social and familial strata. Further, the success of the Act was also dependent on the judge's enforcement of the laws that would work to the woman's advantage as well as her knowledge of her rights and in proactively exercising them.

In the case of Egypt where civil and criminal codes are influenced by European, particularly French, laws, the family law remains in the purview of the *shari'a*. It should be noted that one

Egyptian reformer who had considerable impact on Islamic law was Rifaah Badawi Rafi al-Tahtawi [19<sup>th</sup> century] who stressed the need to adapt the *shari'a* according to the changing circumstances. The method he proclaimed was *takhayyur* wherein Muslims could adopt prevailing interpretations of another Sunni school as applicable in the current millie. The *takhayyur* proved to be crucial in the reforms that favored women in the 20<sup>th</sup> century.

Another influential figure was Muhammad Abduh, Father of Muslim Modernism, who claimed that polygamy was contrary to the teachings of the *Qur'an* by using Sura 4 Verses 3 and 129 as examples wherein more than one wife was only permissible when equal justice and impartiality was guaranteed. Since it was impossible to achieve, he argued that the *Qur'an* therefore promoted monogamy.

The Egyptian government's enactment of Law No. 25 in 1920 and the second phase of reform that happened nine years after [Law No. 25 1929] resulted into women having expanded rights in terms of divorce under one of the following circumstances: the husband's failure to provide her with *nafaqah* [maintenance support], her husband being infected with a contagious disease, maltreatment of the wife, and desertion by the husband. This law was significant in the sense that prior to its enactment, the husband was only responsible for the maintenance owed while ignoring the debt of the past maintenance. Law No. 20 served to amend this by stipulating under Article 1 the provision of cumulative debt that could result into divorce.

Another important development in Egypt's laws pertaining to marital relations was Law no. 44 which Anwar Sadat passed as a Presidential Decree in 1979. Otherwise known as Jihan's Law [in honor of his wife], Law No. 44 gave women adequate protection to the original wife in case the husband decides to be polygamous and take a second wife. The aforementioned law granted the first wife the right to divorce based upon the failure of the husband to inform her of his subsequent marriage or should the second marriage cause harm to the first wife. However, regardless of the reformative intentions of Jihan's Law, it failed to address other issues such as the lack of a judicial measure prior to pursuing a polygamous marriage as well as acquiring the court's permission in order for a man to divorce his wife. In 1985 the Supreme Court finally struck down Law No. 44 on the grounds that it was unconstitutional. The Court claimed that the power to issue Presidential Decrees were only limited to emergency situations and not personal status law. The repeal of Law No. 44 caused a backlash from women's groups who rallied for its reenactment causing Law No. 100 [1985] was enacted to revise the 1920 and 1929 Laws on Personal Status which is currently the main legislation concerning women and family relations. Reforms that existed in the 1979 law were reintroduced as well as the addition of new provisions such as the wife's automatic right to a divorce from her husband once he practices polygamy. However, as a concession to religious conservatives, the presumption of injury occasioned by a polygamous marriage was removed and instead required the wife to clearly establish that her husband's polygamous union caused her harm. Thus, the ground for divorce was no longer automatic but was left to the discretion of the courts.

The tension that exists between the *shari'a* and the Women's Convention is illustrated in the reservations of the States Parties to particular provisions, specifically Article 16 that mandates the discriminatory position allotted to women in the areas of marriage and family. Some scholars argue that CEDAW itself is culturally biased that ignores the context of Muslim practice such as in the realm of Islamic marriage.

While the Convention deems it discriminatory that men are granted greater property and inheritance rights, countries such as Libya invoked a reservation under the Islamic justification that although female children are granted less inheritance, they acquire it without concomitant obligations unlike the men who are the main providers of the family. The main argument coming from predominantly Muslim countries is that the Women's Convention is culturally insensitive and a reflection of Western hegemonic ideals that ignores the Islamic concept of equitability [complementary yet equal roles for men and women] that deviates from the Western language of equality and its rights-based approach.

Egypt's invocation of Article 23 of the Convention allowing States Parties to apply their own legislative measures in the promotion of equality between the genders was an example of the

presumed incompatibility between the CEDAW and the *shari'a*. Egypt argued that the language of women's rights under the Women's Convention is defined in terms of men thereby ignoring the facet of equality based on the complementarity of roles between men and women that underlies Islamic belief. Hence, the object of achieving full compliance for human rights instruments is hampered by the set of reservations that serve to curtail the promotion of equality. Reservations should therefore either be withdrawn or formulated in a narrower context. Although the freedom of religion is protected under international law, it is a recognized principle that the freedom of religion has prescribed limitations and must not be used as a justification to derogate rights that are universally recognized. Further, domestic law cannot be invoked to escape compliance as based on the Vienna Convention. It has also been further argued that Article 2 of the CEDAW breaches the object and purpose test of the Vienna Convention since "*reservations based on domestic provisions contravene the generally accepted norm that domestic law cannot be used to as a justification to refuse compliance with international treaty provisions.*"

People's understanding of the woman question must then change in order for women's position in society to be reconciled with democracy and Islam; otherwise women will remain entrenched in a society that regards them as second-class citizens and be subject to rights bestowed out of charity or necessity and not by decentralizing the center.

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