THEMES IN ISLAMIC LAW

Women, Family, and Gender in Islamic Law

JUDITH E. TUCKER

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WOMEN, FAMILY, AND GENDER IN ISLAMIC LAW

In what ways has Islamic law discriminated against women and privileged men? What rights and power have been accorded to Muslim women, and how have they used the legal system to enhance their social and economic position? In an analysis of Islamic law through the prism of gender, Judith E. Tucker tackles these complex questions relating to the position of women in Islamic society, and to the ways in which the legal system shaped the family, property rights, space, and sexuality, from classical and medieval times to the present. Hers is a nuanced approach, which negotiates broadly between the history of doctrine and of practice and the interplay between the two. Working with concepts drawn from feminist legal theory and by using particular cases to illustrate her arguments, the author systematically addresses questions of discrimination and expectation – what did men expect of their womenfolk? – and of how the language of the law contributed to that discrimination, infecting the system and all those who participated in it. The author is a fluent communicator, effectively guiding the reader through the historical roots and intellectual contours of the Islamic legal system, and explicating the impact of these traditions on Islamic law as it is practiced in the modern world.

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For Sue, Beth, and Prilla
my sisters

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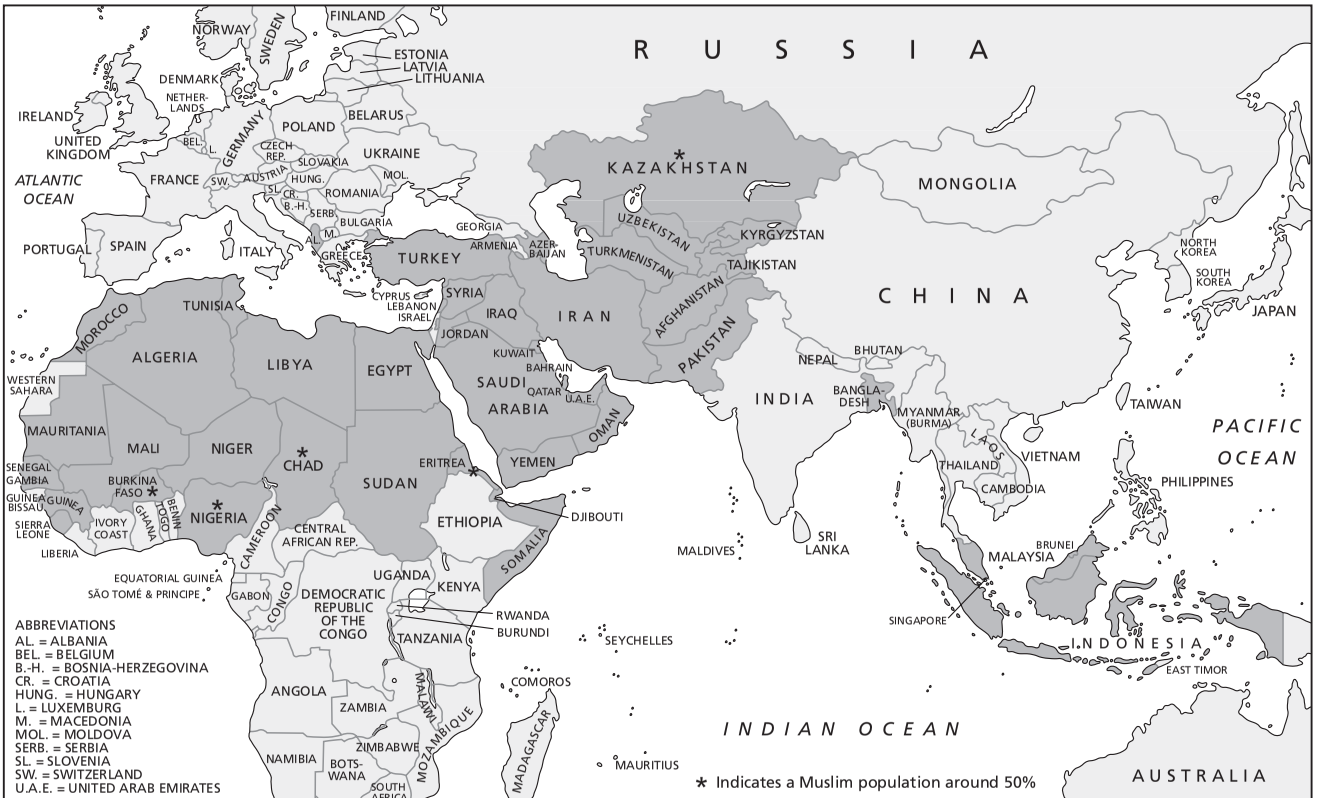
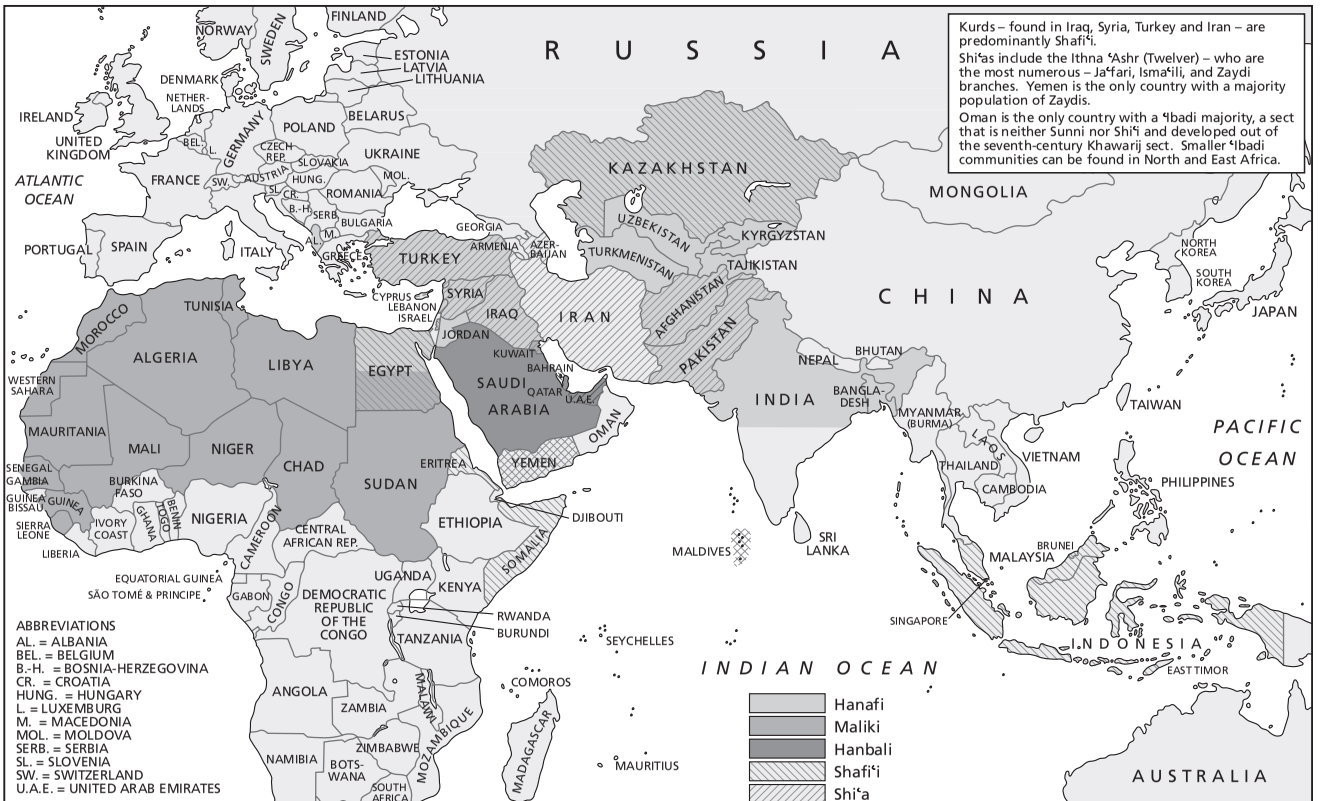
Every effort has been made to secure the necessary permission to reproduce the photograph used on the front cover of the book, however, it has proved impossible to trace the copyright holder. If any omissions are brought to our notice, we will be happy to include appropriate acknowledgements in any subsequent edition.



Map 1 Countries with majority Muslim populations



Map 2 Areas of predominance of Islamic legal schools (*madhhab*s)

1

Introduction

As I began to work on this book, I was the unhappy recipient of much bad news, forwarded on by friends and colleagues. A woman in Nigeria who had given birth out-of-wedlock faced a sentence of death by stoning as soon as her baby, whose father had been allowed to deny paternity, was weaned. The wife of a prominent entertainer in Cairo grew suspicious of her husband's behavior, followed him to an apartment, found him in bed with another woman, and made a huge scene, only to discover that the other woman was a legal second wife. Feeling was still running high in Saudi Arabia about the decision by religious police to prevent "uncovered" girls from leaving their burning school building, leading to the death of fifteen. A religious council challenged the minimum legal marriage age of eighteen in India, arguing that it violated the rights of community members to marry off their daughters as soon as they reached puberty. All this in the name of Islamic law. Of course, bad news travels fastest and farthest – these incidents cannot be taken to represent current doctrines and practices of Islamic law. Still, they demand our attention: how could a legal system that attempts to follow the will of God, a God who is compassionate and just, permit and even facilitate the expression of such rampant misogyny and unbounded patriarchal privilege? Why would many Muslim women, and their male allies, remain steadfast in their belief that Islamic principles are the fount of goodness and righteousness in this life and the hereafter, and Islamic practices, although perhaps in need of some review and revision, are the best guarantee of rights, privileges, and fairness for women?

The question was further complicated, for me, by the fact that my prior research interests, as a social historian of the Ottoman period in the Arab World, had brought me into contact with Islamic legal materials, including some of the juristic texts and records of legal practice that survive from the seventeenth and eighteenth centuries. I found it very difficult to reconcile the texture of these discussions and practices, imbued as they were by palpable concern for the rights of vulnerable members of society – the

poor, the orphaned, the female – with the tone of current debates on matters like female dress and adultery. What was the relationship of the views of traditional jurists to those of the present? Are there enduring themes in the Islamic legal position on women and gender or do we see great variation over time? What are the basic premises of the Islamic legal constructions of women and gender and how have they been affected by historical contingencies? How have those constructions shaped and been shaped by the understandings and activities of ordinary people?

I raise these questions as a historian. I am not a Muslim and I am not exploring Islamic law from a faith-based perspective. My purpose is not, and cannot be, to engage in original interpreting of the law or to sit in judgment on how others have understood the rules of their religion. Rather, I approach the topic of Islamic law, women, and gender as a study of a multilayered history. It is part of the history of doctrinal development, the ways in which Islamic jurists, working with received texts and sophisticated methodologies, formulated rules about women, men, and their relationships. It is part the history of legal institutions and practices, how these rules were understood, implemented, and even modified by a range of legal actors, from individual judges to centralized state powers. It is also part the history of lay members of Muslim communities whose choices of doctrines to follow and legal avenues to pursue allowed the law to develop in rhythm with social needs, just as their legal inquiries and court appearances also served, at times, as contestation of legal discourse on women and gender issues. I try to address all three of these interwoven layers in the pages that follow as I consider how Islamic law and the Muslims who lived it constructed the relationship between law and gender.

LAW, WOMEN, AND GENDER

What is the relationship between law and gender? What role do law and legal institutions play in defining the male and the female in any given society? What kinds of limits based on the sex of a subject are set by the law and what kinds of liberations are made possible? In what sense can we talk about "gendered law" as a universal phenomenon, and what are the processes by which various systems of law are gendered? How do we mount challenges to a system of legal gendering that disempowers and impoverishes women as Women materially and emotionally just as it confers dubious privileges on men as Men? And is the law, in fact, a significant stage for struggle over basic issues of gendering in any society?

Feminist legal theorists in the West have debated such questions for the past few decades so that we now have a substantial body of literature addressing issues of the gendering of law and legal institutions in the West and its consequences for women in particular. They have developed a number of contending positions and approaches that, while by no means relevant in all instances to the issues and debates I will be considering in the context of Islamic law and gender, can be very helpful as points of comparison. In tracing some of the developments in feminist legal thought in the West, I am not intent on discovering a blueprint for subsequent discussion of Islamic law, but rather seeking out the questions and issues that may be of comparative interest.

The approach with the longest lineage, reaching from mid-Victorian times up to the present, is that of liberal feminist thinkers. The liberal tradition, particularly prominent in the Anglo-American context, accepts law and legal institutions as based on principles of rationality, objectivity, and fairness in their dealings with an autonomous legal subject. The problem, as far as women and gender are concerned, is that certain aspects of law have built-in, and often hidden, inequalities between men and women as a result of the evolution of the law in a patriarchal social environment. The feminist task, as far as liberal theorists are concerned, is to identify and correct those aspects of law that belie the liberal promise of equality and freedom of individuals before the law by discriminating against women. Examples of such discrimination include: disadvantaging women by allocating fewer material resources to them, as was long the case in property settlements in divorce cases; judging men and women's similar actions in different ways, as in criminalizing the behavior of the female prostitute but not her male client; and assigning men and women to distinct social roles, as in the sex-based classifications of "breadwinner" and "homemaker." Only with the eradication of such discriminatory laws and legal categories will women be able to realize the liberal promise of equal treatment as individuals with equal rights. The task is one of identification of such legal inequalities and their correction so that women can realize the promises of freedom and equality made by the liberal state and its legal institutions.[1]

The liberal project has not always proved to be so straightforward. Many who believe in calling upon the law and legal institutions of the liberal state

[1] For discussions of liberal feminist theory, see Hilaire Barnett, *Introduction to Feminist Jurisprudence* (London: Routledge-Cavendish, 1998), ch. 1; and Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989), ch. 8.

to live up to their own terms of self-reference in regard to their female citizens are not entirely sanguine about the outcome. As Wendy Williams has pointed out, courts are not a source of radical social change; legal activism may succeed in extending male privileges to women, but it cannot change the fact that the law is fundamentally designed with male needs and values in mind. Equality is always comparative: in order to be equal to men, women must be the same as men, i.e. be ready to accept the standard of gender neutrality, the "single standard" that is based on male experience and male values. The only alternative under liberal thought is to accept that women do have certain differences from men and need protections and special benefits to compensate for this difference, although again the standard for difference, as with the standard for sameness, is that of the male. At a maximum, legal activism can recognize and redress past unequal treatment (by the law) by treating women in a special fashion (affirmative action) for a specific purpose and a limited time. But the larger project of achieving equality inevitably runs up against cultural assumptions that the law cannot directly challenge – that is the role of much broader social and political movements. Still, for Williams, the strategy of bidding for legal equality is an important one: women stake their claim to equal rights and a full share in their society by agreeing to the male norm, at least for the moment. On this basis, for example, Williams shied away from treating pregnancy as any different from other disabilities: viewing pregnant women as temporarily "disabled" allows them to receive benefits like men who are disabled without opening the Pandora's Box of special treatment for women as women.[2]

Questions about the limits of the liberal approach in general, and the insular, self-referential, and male-normed nature of liberal legal thought in particular, prompted the emergence of a contending approach that can be designated as "woman-centered" or "essentialist" depending on one's point of view. By way of positive assessment, Joanne Conaghan observed, "Such an approach lifts women from the wings and places them, their lives and experiences on centre stage."[3] Such centering has had a number of important results: Conaghan notes, for example, how attention to the ways in which women actually experience male violence was interjected into debates about the reform of criminal justice, and has in fact resulted in some changes

[2] Wendy Williams, "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism," in *Feminist Legal Theory: Readings in Law and Gender*, ed. Katharine T. Bartlett and Rosanne Kennedy (Boulder, CO: Westview Press, 1991).

[3] Joanne Conaghan, "Reassessing the Feminist Theoretical Project in Law," *Journal of Law and Society* 27, no. 3 (2000): 363.

in the way courts handle these cases.[4] At a more comprehensive level, a woman-centered approach, according to advocate Robin West, addresses the harms to women that go unnoticed by the law because of the denial of women's experiences and, indeed, phenomenological existence:

> Just as women's work is not recognized or compensated by the market culture, women's injuries are often not recognized or compensated *as injuries* by the legal culture. The dismissal of women's gender-specific suffering comes in various forms, but the outcome is always the same: women's suffering for one reason or another is outside the scope of legal redress. Thus, women's distinctive gender-specific injuries are now or have in the recent past been variously dismissed as trivial (sexual harassment on the street); consensual (sexual harassment on the job); humorous (non-violent marital rape); participatory, subconsciously wanted, or self-induced (father/daughter incest); natural or biological, and therefore inevitable (childbirth); sporadic, and conceptually continuous with gender-neutral pain (rape, viewed as a crime of violence); deserved or private (domestic violence); non-existent (pornography); incomprehensible (unpleasant and unwanted consensual sex) or legally predetermined (marital rape, in states with the marital exception).[5]

These "gender-specific injuries" that have been dismissed, trivialized, and ignored are all made possible, for West, by the female biological difference: women can be intimidated, raped, impregnated, and otherwise violated because of their biology. Female difference renders women vulnerable to special kinds of bodily harm, types of bodily invasion that men do not ordinarily experience and that the law, as a result, has not recognized. This same biological difference also shapes women in ways that undermine basic premises of the liberal legal system. The masculine bias of a legal system founded on the notion of an autonomous individual accords poorly with women's experience. Again, according to West:

> Women, and *only* women, and *most* women, transcend physically the differentiation or individuation of biological self from the rest of human life trumpeted as the norm by the entire Kantian tradition. When a woman is pregnant her biological life embraces the embryonic life of another. When she later nurtures her children, her needs will embrace their needs. The experience of being human, for women, differentially from men, includes the counter-autonomous experience of a shared physical identity between woman and fetus, as well as the counter-autonomous experience of the emotional and psychological bond between mother and infant.[6]

[4] *Ibid.*, 365.
[5] Robin West, "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory," *Wisconsin Women's Law Journal* 3, no. 81 (1987): 82.
[6] *Ibid.*, 140.

The implications for law and legal institutions of such observations are far reaching. If we bring women, both as biology and experience, to the center, we immediately perceive the myriad ways in which law and legal institutions are dominated by male biology and experience. The woman-centered approach seeks to open up this system to the female as well, in terms of biology, experience, and even fundamentally different ethical sensibilities.

Not all critics of liberal feminist theory accentuate the positive in woman-centeredness. Catharine MacKinnon, for one, seems to caution against romanticizing the experience of women even as she embraces the position that the woman's point of view has been ignored in legal thought and practice. The fundamental problem, for MacKinnon, is that the legal system enshrines a gender hierarchy of subordination of the female by the male. This is not just difference, it is dominance. The law reflects and enables social and political institutions of inequality: women get unequal pay, do disrespected work, and are sexually abused. Such inequalities precede the law, which subsequently in the case of the liberal state legitimates the idea of non-interference with the status quo and the correction of only those inequalities actually created by prior legal action. Indeed, the liberal notion of privacy, that restrains the state and the law from entering into the "private" world of body and home, permits the oppression and abuse of women to proceed apace in the venue, the home, where it is at its most pervasive. Any appeal to abstract rights in such a context of social inequality can only authorize and reinforce male dominance.[7]

The history of women's experience, then, is a negative one which we draw on to reveal harms and abuses: there is little sense in MacKinnon's writing of a superior female ethics of connection that can serve as an alternate basis for legal development. Still, there is a very real role for feminist jurisprudence – MacKinnon critiques the "traditional left" view that law can only reflect existing social relations. Rather, a proactive feminist jurisprudence needs to push for substantive rights for women.

> To the extent feminist law embodies women's point of view, it will be said that its law is not neutral. It will be said that it undermines the legitimacy of the legal system. But the legitimacy of existing law is based on force at women's expense. Women have never consented to its rule – suggesting that the system's legitimacy needs repair that women are in a position to provide. It will be said that feminist law is special pleading for a particular group and one cannot start that or where will it end. But existing law is already special pleading for a particular group, where it has ended.[8]

[7] See MacKinnon, *Toward a Feminist Theory*, 160–64, 187–92. [8] *Ibid*., 249.

Male dominance of the law, then, is to be replaced by female dominance. With women's experience of domination and abuse as the guide, feminist legal thinkers need to focus on developing laws and institutions that redress the harms done to women and establish the rights they need as *women*. One suspects that this is meant to be a transitional phase of legal activism but MacKinnon does not spell out her hopes for the final outcome.

Approaches like those of West and MacKinnon have been criticized as being "essentialist" in the sense that they tend to talk of women's experiences as if they were uniform across cultures, classes, and races, as if all women have some in-born attribute(s) that define them as women. Woman-centered approaches critique the "Woman of law" as a fiction created by law and legal institutions, but is the "Woman of legal feminism" equally fictional? Do the woman-centered theorists, in their claim to represent all women, actually erase the experiences of women different from themselves? There have been a number of responses to such criticism, including: an insistence on making very specific reference to women's experience in terms of class, culture, etc.; a self-conscious use of a "strategic essentialism" that is careful not to assume a single female identity; and, most often, a turn toward the study of the way law constructs gender and its social effects.[9] The last, exploration of the ways in which the law is productive of gender difference and is part of a society's gendering practices alongside other forms of knowledge like medicine, literature, etc., has probably captured the most attention among feminist legal theorists in recent years.

The major difficulty with woman-centered approaches, according to a legal theorist like Drucilla Cornell, is that they rest on the premise that there is a knowable woman's "nature." But how do we come to know this nature?

> the deconstructive project resists the reinstatement of a theory of female nature or essence as a philosophically misguided bolstering of rigid gender identity which cannot survive the recognition of the performative role of language, and more specifically the metaphor. Thus deconstruction also demonstrates that there is no essence of Woman that can be effectively abstracted from the linguistic representations of Woman. The referent Woman is dependent upon the systems of representation in which she is given meaning.[10]

Thus the Woman and for that matter the Man of legal discourse are discursive constructs, only two of many contributions from various fields of knowledge that gender society. Since this discursive project permeates all

[9] Conaghan, "Reassessing," 366.

[10] Drucilla Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (New York: Routledge, 1991), 33.

production of knowledge, we are not able to step outside language to ascertain the true nature of either the feminine or the masculine. At its most restrictive, the focus on deconstruction can lead away from giving any attention at all to women's lived experience – the danger here is that feminists will posit law as a "gendering practice" and concentrate only on unveiling its "gendered narratives" without any reference to women's lived experiences, and therefore without any sense of prospects for change in the system.[11] In fairness to Cornell, this is not her position. On the contrary, she thinks that the project of deconstructing legal (or other) discourse can be done using imagination and metaphor to produce alternate visions, feminine ways of seeing a world in which gender plays out very differently – she believes in the power of utopian thinking. In this more activist deconstructive mode, an exploration of the ways in which law and legal institutions construct gender takes its place as part of the larger project of examining gendering practices in the society as a whole with an eye to change. The law is just one small site of possible contest over gendered power relations, of course, and gender-neutral law, or rather law that realizes the full potential of both the masculine and the feminine, could only emerge in the context of a transformation of the entire society.

All the foregoing discussions of law and gender rest in part on the premise that law and legal institutions are created and controlled by a state or other power cluster, and that the discourses and practices of the law play their part in the perpetuation of prevailing power relationships, from the fairly benign liberal idea of a tainting of the law by patriarchal influence to the more intractable postmodern notion that legal discourse is thoroughly implicated in the construction of gender hierarchies. Across the spectrum there is a sense that the law is something that happens to individuals, that through its claims to abstraction, rationality, and neutrality it imposes its gendered version of power. Even for those theorists who embrace Foucauldian skepticism when it comes to the relevance of juridical frameworks to modern forms of power, legal institutions are part of the disciplining process. The question is primarily one of focus: most feminist legal theorists have concentrated on exploring the formal law that has come to monopolize the meaning of "law" in the West.

Legal theorists who have turned their attention to other areas of the world, where modern and postmodern forms of power in general and formal law in particular have less claim to total hegemony, have tended to approach the question of law and gender somewhat differently. Many in the

[11] Conaghan, "Reassessing," 369.

field of legal anthropology, for example, assert that the model of legal centralism, the system in which state law is the normative order and all other sources of norms are illegal or unimportant, applies rather poorly in large areas of the world, particularly those with a colonial past. We are more apt to encounter legal pluralism, the existence of more than one system of law or legal discourse (customary, tribal, religious, colonial, etc.), possibly including as well a number of "semi-autonomous social fields" that generate rules drawing on any of the above systems of law as well as norms derived elsewhere.[12] Different social fields (families, community groups, village or tribal councils, local courts, etc.) participate in the process of legal gendering in a society, and are characterized by a high level of interaction among parties in a process that privileges negotiation over rote application of rules. The law, in this context, is a fairly fluid and open system, subject in its interpretations and rulings to considerable ongoing input from those involved in the negotiating process. Such an analysis shifts our focus from formal rules and the ways they are applied to women in the courts to the array of actors in the legal system – jurisprudents and judges, community elders, the litigants themselves – who are continually gendering the law through their selective use and interpretation of different sources.

I must be careful not to overstate the case here: this is not a version of the Weberian theory of the evolution of law and legal institutions that describes a "primitive" legal system that is irrational with no solid basis in intellectual reasoning (rather than rational like that of the West) and substantive with no fixed rules (rather than formal with abstract rules like that of the West).[13] The kind of pluralist legal system described above may, in fact, have elaborate and multiple intellectualized legal cultures and a high degree of consistency and predictability in its legal discourse. The salient point is that the system allows for, in fact mandates, a fairly high level of lay participation in the unfolding of various legal processes. While one can argue that women, for example, might still experience considerable difficulty in representing themselves in any terms other than those of the dominant discourse, the availability of multiple discourses and the process of negotiation entailed in the system at least introduces the possibility of a more active subversion of some of the harmful aspects of gendered discourse and practice.

[12] See Agnete Weis Bentzon *et al.*, *Pursuing Grounded Theory in Law: South–North Experiences in Developing Women's Law* (Oslo: TANO Aschehoug, 1998), ch. 2, who draws from the work of Sally Falk Moore as well.

[13] For a helpful summary of Weber's legal theories and a discussion of their (in)applicability to Islamic law, see Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994), 27–30.

Susan Hirsch, in her study of legal processes and gender discourses in Swahili coastal Kenya, is interested in the ways in which gender is constituted and negotiated through speech in the legal arena.

> In Bourdieu's terms, some discourses are authorized as official by those with institutional standing, and others are marginalized, silenced, or ignored. Such authorizations, which are sometimes expressed through explicit ideological statements, have significant impact on speakers' abilities to constitute gender. Institutional regimes of language combine with legal definitions of persons to construct those who enter court, shaping their discursive possibilities for indexing and reconfiguring gender. Paradoxically, law "genders" individuals in ways that define their positions both in society and in legal contexts, while also affording space for contesting those positions. [14]

Hirsch explores the ways in which women, in particular, work within the confines of a gendered law (specifically the Islamic regulations for marriage and divorce) on the one hand and the social conventions of female speech and behavior on the other to bend rules in their favor. While women are supposed to be obedient to their husbands, for example, such obedience does not prevent them from going to court to complain about their treatment by their husbands: they present themselves as obedient and persevering wives using a standard female narrative style even as their very presence in court and their public airing of their husbands' shortcomings send quite a different message. They are able to use conventional forms of gendered speech (women's story telling) in court, a venue that ordinarily privileges speakers (men) who are more at ease in public institutional settings, to contest and help redefine social expectations of female tolerance in a marriage.[15] They are operating within the terms of the dominant legal discourses, but the interactive and negotiable aspects of legal practice allow them to shift those terms to their advantage.

Another highly relevant aspect of Hirsch's study is the fact that the parties to these marital conflicts are able to draw on an array of legal discourses. Islamic law is one such discourse, or rather it should be said set of discourses open to a certain amount of interpretation when it comes to the rules governing marital relations. In addition, in the pluralist legal atmosphere of the Swahili coast, disputants may also have recourse to what Hirsch terms "Swahili ethics," a version of the ethical life that colors community views of how one should act based on Swahili *mila* or custom. Although many

[14] Susan F. Hirsch, *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* (Chicago: University of Chicago Press, 1998), 20.
[15] *Ibid.*, 20–22.

elements of ethical marriage reflect Islamic legal concerns, the discourse of Swahili ethics also includes additional rules and understandings about matters of love and propriety. A third discourse that can be activated in legal settings is that of the Swahili spirit world: possession by *jini*, or spirits, can be identified as the source of marital conflict and exorcism as the resolution. Last, and least prominent in Hirsch's view, is the secular law of the state, an artifact of the colonial experience. For coastal Swahili people, the postcolonial state is remote and alien, much as the colonial state was, and thus the rules and conventions of the official legal discourse are little known or trusted. Although Swahili people rarely resort to official secular law in marital disputes, it does exist as a possible last resort in intractable cases. Hirsch is careful to note that these legal discourses do not exist as hermetically sealed systems, but rather merge and overlap. The ideology of the official secular discourse, for example, is that all the others (Islamic, ethical, spirit world) are subordinate: they claim jurisdiction only at the pleasure of the state.[16] What happens on the ground suggests that something very different is going on as disputants choose their venues and have selective recourse to a variety of discourses. It is this possibility of choice and manipulation of various discourses that seems to present opportunities that are not found in systems of legal centralism.

As I explore Islamic law and legal institutions in relation to women and gender, I want to be attentive to the ways in which law and legal spaces are gendered by rigid definitions of male and female, by hidden harms done to women through the norming of the male experience, and by the strictures of dominant discourse that set limits on how women can even think about themselves and their relations to others. I also want to open the discussion to the possibility of female agency in legal systems, to the ways women have found in the past and present to maneuver within and between different legal discourses and practices. Feminist legal theorists and legal anthropologists, through a variety of different approaches, have raised many relevant questions about the nature of law and legal struggles that will help direct our attention, I hope, to both the shared and unique features of gendering in Islamic law.

ISLAMIC LAW

Before we address Islamic legal discourse and related practices as implicated in larger projects of gendering in Islamic societies, we need to consider however briefly the nature of the law, what "Islamic law" has been

[16] *Ibid.*, 85–90.

understood to mean over the past 1,400 years of Islamic history, and how various Muslim thinkers and communities have institutionalized Islamic legal practices. Islamic law, perhaps most importantly, is held to be divine law. Most Muslim and non-Muslim scholars of the law would agree with the significance of Coulson's remark: "Law is the command of God; and the acknowledged function of Muslim jurisprudence, from the beginning, was simply the discovery of the terms of that command."[17] Islamic law or the sharīʿa, as the path or way of God, was to be comprehended (insofar as humanly possible) and implemented as part of individual submission to God's will and as vital to the wellbeing of the Muslim community as a whole. Once we move beyond this basic agreement on the centrality of the sharīʿa as a guide to both personal and community life, universal consensus tends to erode.

First, there is the epistemological question of how Muslims should go about discerning God's commands. There was, and still is, widespread concurrence that the single most important source of knowledge about the sharīʿa is the revelations recorded in the Qurʾan. Roughly 10 percent of Qurʾanic material legislates human behavior, although much of this has to do with religious duties and ritual practices and only a small fraction with rules for social relations and community life. Some topics, such as marriage and inheritance for example, receive fairly detailed treatment but many other issues are dealt with in a general fashion or not at all. Muslim intellectuals developed techniques for reading and interpreting Qurʾanic verses the meanings of which were not always transparent: this science of *tafsīr* was an important component in the development of Islamic jurisprudence or *fiqh*. Not all interpreters agreed on the meanings and implications of the rules for human behavior laid down in the Qurʾan, however, so that there were divergences in juristic opinion from early on.

A second important source for legal guidance was the hadith, the narratives of the *sunna*, the practices and sayings of the Prophet Muhammad during his lifetime that were passed down by his associates. The hadith were eventually gathered into a number of canonical collections, but there was some disagreement concerning the authenticity of certain of the narratives despite the development of a rigorous and sophisticated methodology of hadith authentication. Still, the hadith played a very important role in the development of the law because they were a source often employed to help with the interpretation of opaque verses of the Qurʾan on the one hand, and to fill in the many silences of the Qurʾan on issues of legal import on the

[17] Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 75.

other. The Shiʿi branch of Islam was more restrictive in its use of the hadith, accepting only those narratives recorded by one of their own leaders or imams. Among Sunnis, questions of authenticity and legal relevance were never definitively settled and continue to fuel disagreements right up to the present.

A third recognized source of law was *ijmāʿ*, consensus, following the Prophet Muhammad's reported remark that "My community will never agree in error." Although originally conceived of as the consensus of the Companions of the Prophet, those who actually shared in the early mission of Islam, over time such consensus came to be defined by most as agreement among the great jurisconsults of an age as to the implications of the Qurʾan or hadith for a given legal doctrine, or even their consensus on matters that were not explicitly discussed in either of the sacred sources. In its reach outside the boundaries of the sacred texts, *ijmāʿ* had a potential similar to that of the fourth source of law, *qiyās*, or analogical reasoning. *Qiyās* allowed jurists to address "new" situations not covered explicitly by the Qurʾan, hadith, or a pre-existing consensus by deducing a legal rule by way of analogy to an existing point of law or principle found in any of the three prior sources.[18]

The types of mental effort and techniques that legal thinkers employed in this process of using textual guidance, consensus, and their own powers of deduction to discern the shariʿa were termed *ijtihād*, the exercise of one's reason to interpret the law. Western scholarship once differed in its understanding of the role that *ijtihād* played over time in the development of the law because some of the pioneers of Islamic legal history had embraced the idea that, after a period of legal development, "the gate of *ijtihād*" had been effectively closed in the late ninth century by which time the major legal doctrines had been put in place.[19] This is no longer the predominant scholarly view; rather we now have broad consensus that *ijtihād* continued to be a widely accepted practice across the Islamic centuries, as clearly witnessed by ongoing doctrinal developments in a rich legal literature, and scholarly attention has turned to various subtleties in the development of hermeneutical methods.[20]

[18] For standard discussions of the sources of Islamic law, see *ibid*., chs. 3, 4; J. N. D. Anderson, *Law Reform in the Muslim World* (London: University of London Athlone Press, 1976), ch. 1; Jamal J. Nasir, *The Islamic Law of Personal Status*, 2nd edn (London: Graham & Trotman, 1990), 18–28.

[19] This is the view of both Coulson, *A History*, and Anderson, *Law Reform*.

[20] See Wael B. Hallaq, "Was the Gate of Ijtihad Closed?," *International Journal of Middle East Studies* 16, no. 1 (1984); Baber Johansen, "Legal Literature and the Problem of Change: The Case of Land Rent," in *Islam and Public Law: Classical and Contemporary Studies*, ed. Chibli Mallat (London: Graham & Trotman, 1993), 29–47; Rudolph Peters, "Idjtihad and Taqlid in 18th and 19th Century Islam," *Die Welt des Islams* 20, no. 3/4 (1980): 131–45.