# The Paradox of Equality and the Politics of Difference: Gender Equality, Islamic Law, and the Modern Muslim State

Anver Emon

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## I. Introduction

The pursuit of gender equality in Islamic family law, as codified in various Muslim states, is neither a new phenomenon nor one that is lacking considerable study. Indeed, many scholarly monographs, edited collections, and academic journals present thoughtful, well-researched, and passionate contributions that are animated by the goal of gender justice in the Muslim world.[1] This essay is indebted to that vast body of literature, and indeed is a humble offering that stands in the shadow of all that has come before. the reader's attention to a subtle irony that underlies the pursuit of justice. That irony has everything to do with what is often called the 'paradox of equality'. If equality requires *the same treatment of those who are similarly situated*, the paradox of equality reminds us that we cannot treat similarly those who are *not* similarly situated. Indeed, there are times when justice demands that we legally differentiate between people because of their differences. Legal differentiation is a common feature of the law, a sine qua non of justice. For instance, we may demand separate bathrooms for men and women. In the interest of accommodating the needs of those who are disabled, we may create yet a third bathroom that is specially designated for them and equipped with certain devices designed to aid those who might require assistance. We may even argue (and convincingly so) that differentiation in these cases is right, good and just. However, in all these cases, we cannot deny that men and women are treated differently, and that the disabled are treated differently. In this simple, if not banal, example, we see the paradox of equality at work – sometimes people have to be treated differently in order for justice to be served.[2] Differentiation, in this fashion, is distinct from discrimination. Discrimination is an evaluation that a particular differentiation constitutes disadvantages against a particular group *and* that such disadvantages render the differentiate *illegitimate.* Legal differentiation by itself is therefore a common and expected feature of the

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[1] Examples of such works include: Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (Oxford:Oxford University Press, 1999); Fatima Mernissa, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (New York: Basic Books 1992); Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: Yale University Press 1993); Ziba Mir-Hosseini, *Islam and Gender* (Princeton: Princeton University Press, 1999). For a journal devoted to such issues, see *Hawwa: Journal of Women of the Middle East and the Islamic World* (Brill Publishers).

[2] The banality of this example is rendered complicated when considering how the neat dichotomy between male and female bathrooms does not account for the transgendered, or those in varying phases of gender-reassignment.

law. The paradox of equality offers analytic bite by asking about the conditions under which a particular factual difference leads to a legal differentiation that is not at the same time discriminatory, and thereby illegitimate under the aw.

This essay approaches the question of gender equality from the vantage point of the paradox of equality. Instead of focusing narrowly on whether and how women are discriminated against and challenging the role of patriarchy in animating such discrimination, this essay will step back and instead inquire into whether and why differentiation in the law is justified and legitimated, and explore how legal differentiation in one context can be discrimination in another. The essay will, thereby, distinguish between factual difference, legal differentiation, and discrimination. These distinctions are significant because they beg important questions that all too often remain unaddressed: what makes certain factual differences irrelevant as a matter of law, others as legitimate bases for legal differentiation, and yet others are deemed illegitimate because deemed discriminatory? For instance, the factual difference between a five year old and a six year old boy may not matter in terms of how one measures the relevant standard of care in the Common Law of Tort, where the boy is sued for negligently injuring another child. But the factual difference between a five year old boy and a seventeen year old boy provides a basis for legal differentiation: the seventeen year old will be held to a higher standard of care.[3]

This essay contributes to the existing literature on gender, equality and Islamic law by interrogating the nuances of equality from the vantage point of the paradox of equality. Part II examines the different strategies used by those advocating gender equality in the Muslim family. Part III illustrates how the paradox of equality is an ancient concept with roots in both Greek and Islamic philosophy. Part IV shows how the vantage point of the paradox of equality allows us to critically question and explore the assumptions that animate the development of legal rules that differentiate and discriminate against people on different grounds. Parts V and VI examine how Islamic law has legitimated differential treatment of men and women by reference both to the law and to extra-legal factors associated with the post-colonial condition of Muslim societies. Part VII brings the analysis to a close by suggesting that to shift what the historical tradition represents as legal differentiation between men and women to discriminatory and thereby illegitimate as a matter of Islamic law will involve both legal and extra-legal factors. Drawing upon scholarship about the women's movement in the United States, this essay suggests that legal change in the Muslim world will require more than just attentiveness to the intricacies of legal texts and legal reasoning. It will require social movements to occupy the streets and articulate alternative legal outcomes to expand the scope of what is legally intelligible, meaningful, and possible. Implicitly, this essay suggests that social movements would do well to bear in mind the paradox of equality as they design their research and activist agendas. The paradox of equality helps to identify the unstated assumptions that makes legal differentiation possible, thereby quietly justifying what is tantamount to discriminatory treatment under the law.

## II. Equality in Muslim Reformist Writings

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[3] *McHale v. Watson* (1966), 115 CLR 199 (Aust. HC); see also Mayo Moran, *Rethinking the Reasonable Person* (Oxford: Oxford University Press, 2003) for a discussion of this case and others addressing the reasonable person standard of care.

A review of literature concerning gender and justice in Islamic law shows that Muslim writers begin from the starting point of a patriarchy that is either considered embedded in the tradition or imposed upon it from outside. For instance, Fatima Mernissi, in her path-breaking work, writes in an autobiographical moment: "When I finished writing this book I had come to understand one thing: if women's rights are a problem for some modern Muslim men, it is neither because of the Koran nor the Prophet, nor the Islamic tradition, but simply because those rights conflict with the interests of a male elite."[4] Others note that patriarchy can certainly be read from the main source-texts of the Islam, such as the Qur'an, but they are keen to suggest that patriarchy is separable from the Qur'an's message. Asma Barlas acknowledges that describing the Qur'an as patriarchal is anachronistic at best. Rather, the aim of her book is to "challenge oppressive readings of the Qur'an" and "to offer a reading that confirms that Muslim women can struggle for equality from within the framework of the Qur'an's teachings."[5] Acknowledging that patriarchal readings of the Qur'an abound, Barlas nonetheless seeks to find a way to gender equality through the sacred text. A third approach, complementary to Barlas', is the hermeneutic approach of Farid Esack. Rejecting predominant paradigms of gender relations that perpetuate existing power imbalances between men and women, Esack reads the Qur'an through the hermeneutic lens of justice, and not mere kindness, the latter of which perpetuates the existence of oppression.[6] Theories of interpretation are proffered, building on hermeneutic principles of justice in light of the relationship between the reader, the text, and meaning.

At the heart of these writers' concern is the need to recognize and articulate a conception of gender equality as a character of justice in Islam. However, the meaning and implications of gender equality are not always shared between them. For Mernissi, equality is captured in the language of common and shared "rights" at the political, social, and sexual level. She correlates this rights-oriented view of equality with the historic independence of Muslim states from colonial subjugation. These new states were "born" into an international system of equal and sovereign states, where the aspiration to democracy, constitutionalism, and rule of law forced a recognition of the individual as *citizen*. As new Muslim states entered the international community and redefined themselves, "in the eyes of their former colonizers, they were forced to grant their new citizenship to all their new nationals, men and women… The metamorphisis of the Muslim woman, from a veiled, secluded, marginalized object reduced to inertia, into a subject with *constitutional rights*, erased the lines that defined the identity hierarchy which organized politics and relations between the sexes."[7] Mernissi's equality, arguably, is one that draws upon presumptions about the state, constitutionalism, and the citizen as rights bearer. Likewise, Esack's passionate plea for gender justice perpetuates the language of rights.[8] When writing about the rights "given" to Muslim women, he asks: "Are human rights a gift awarded to well-behaved little children as if women…exist outside the world of Islam…in the same way that children are seemingly external to the

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[4] Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (Reading, MA: Addison-Wesley Publishing Co., 1991), ix.

[5] Asma Barlas, "*Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an* (Austin: University of Texas Press, 2002), xi.

[6] Faris Esack, *On Being Muslim: finding a religious path in the world today* (1999; reprint, Oxford: Oneworld Publications, 2002), 111-136.

[7] Mernissi, *The Veil and the Male Elite,* 22.

[8] Esack, *On Being a Muslim,* 114.

world of adults?"[9] Esack uses the language of rights to characterize his agenda of gender justice, which is constituted by a commitment to equality: "The right to self-respect, dignity, and equality comes with our very humanness."[10] When Mernissi and Esack write about "equality", they have in mind a particular substantive content that arguably echos the language of classical liberal notions of rights. Whether defined by a constitution that grants rights pursuant to general human rights norms, or even human rights treaties such as the Universal Declaration of Human Rights,[11] equality for both authors reflects a certain content (namely a liberal one) expressed in terms of rights.

Departing from the rights-based models of equality, Barlas' approach recognizes that justice may, in fact, require legal differentiation; in other words, she invokes the "paradox of equality". In her attempt to unread patriarchy in the Qur'an, Barlas argues that the Qur'an is egalitarian and antipatriarchal.[12] But she cautions that this does not mean that the Qur'an does not treat men and women differently. Rather, sexual equality need not mean the absence of differential treatment. She writes:

> [W]hile there is no universally shared definition of sexual equality, there is a pervasive (and oftentimes perverse) tendency to view differences as evidence of inequality. In light of this view, the Qur'an's different treatment of women and men with respect to certain issues (marriage, divorce, giving of evidence, etc.) is seen as manifest proof of its anti-equality stance and its patriarchal nature. However, I argue against this view on the grounds both that…treating women and men differently does not always amount to treating them unequally, nor does treating them identically necessary mean treating them equally.[13]

To be anti-patriarchal does not mean that factual difference must be obscured, or that legal differentiation must be avoided at all times and places.

The examples of Mernissi, Esack and Barlas are offered to show different ways in which gender justice and equality are framed in contemporary debates on Islamic law. The specific agenda of each author is less relevant for this essay; what is more significant is their different approaches to the notion of equality. One approach implicitly conveys a liberal-sounding rights-based approach to the content of equality. Another approach views equality and justice as requiring a determination of whether differences exist in fact, and whether those factual differences justify differential treatment, or whether such differential treatment might actually be discriminatory, and thereby illegitimate. This latter approach to equality is particularly important for this essay, as it explores the analytic contribution of the "paradox of equality" to the future of gender equality in the Muslim world.

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[9] Esack, *On Being a Muslim,* 115.

[10] Esack, *On Being Muslim,* 115.

[11] See for example, Mernissi, *The Veil and the Male Elite,* 2, 23.

[12] Barlas, *"Believing Women",* 5.

[13] Barlas, *"Believing Women",* 5.

## III. The Paradox of Equality

The paradox of equality is that, as a principle of justice, it recognizes that equality is not merely about being treated the same. Rather the paradox reveals that equality as a matter of law is not only about treating two things equally because they are the same or share a quality of sameness. Equality as a matter of law must also treat two people differently when they are deemed to be sufficiently different as a matter of fact to warrant or justify such legal differentiation. Indeed, to treat different people as the same might lead to injustice or, at the very least, considerable discomfort. By bringing forward the contrasting tendencies in equality, the paradox of equality requires us to distinguish between the *fact* of sameness and difference, and the *normative implications* given to that factual sameness or difference. That distinction then begs certain fundamental and difficult questions: when and under what conditions should a certain factual difference between two people lead to and justify legal differentiation that entails different distributions of resources and different sets of rights claims? And under what circumstances does that legal differentiation become discriminatory? For instance, in various constitutional democracies, both men and women have the right to vote. In this case, gender difference is irrelevant (although that was not always the case). On the other hand, because of the factual difference of gender, public restrooms are generally gender segregated - a normative *differentiation.* In contrast, a rule that prohibits abortion is discriminatory given the undue burden such a rule places upon women, while men suffer no such burden. In all three cases, the normative or legal implication of factual difference resonate differently; the paradox of equality alerts us to the different registers, and begs important questions about the conditions under which a factual difference matters or not.

This article interrogates the nature of equality by interrogating the dynamics of the paradox of equality. Equality, differentiation and discrimination are terms of art that alert us to the *fact of difference* and prompt us to inquire into whether and why a particular factual difference can or must imply legitimized forms of differentiation, and the conditions under which such differentiation may actually be discriminatory. This approach to equality and discrimination allows us to unpack the assumptions of justice that underlie rules that differentiate between people, and subject those assumptions of justice to critical scrutiny. In doing so, the article will make plain the need for multiple strategies to counter the presumptions that perpetuate the legitimacy of legal differentiations that have discriminatory features and impact.

### A. Islamic Philosophy, *Musāwa,* and the Paradox of Equality

Approaching the issue of equality in light of its paradoxical quality allows us to adopt a critical stance on the premodern Islamic legal tradition without at the same time uncritically reading into that critique liberal notions of equality . Furthermore, to think about equality in terms of the paradox draws upon a principle of justice that, arguably, is shared across traditions. For instance, in his *Nichomachean Ethics,* Aristotle wrote about justice as equality: "Now since an unjust man is one who is unfair, and the unjust is the unequal, it is clear that corresponding to the unequal there is a mean, namely that which is equal; for every action admitting of more and less admits of the equal also. If then the unjust is the unequal, the just is the equal – a view that commends itself to all without proof."[14]

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[14] Aristotle, *Nichomachean Ethics,* trans. Harris Rackham (Hertfordshire: Wordsworth Editions Limited, 1996), 118.

This view about justice as equality finds expression centuries later in the works of Muslim philosophers writing about justice. The premodern Muslim philosopher al-Fārābī (d. 339/950), for instance, held that at its foundation, justice (*ᶜadl*) has to do with distributional equality of the goods in society, and thereafter the protection of each person's enjoyment of his or her share. He wrote:

> Justice, initially, is in [demarcating] the portion of the shared goods (*qisma al-khayrāt al-mushtaraka*) that are for all in the city [together]. Therafter, [justice] has to do with preserving the distribution among them. Those goods (*khayrāt*) consist of security, property, dignity, rank, and all the goods that are possible for all to share in. Each person among the people of the city has an equal share (*musāwī*) of these goods based on his worth (*istiʾhālihi*). To diminish or exceed his portion is unjust (*jawr*). Any diminishment is unjust toward the individual. Any increase is unjust to the people of the city. Perhaps any diminishment is also unjust to the people of the city.[15]

The later premodern Muslim philosopher on ethics, Miskawayh (d. 421/1030) addressed in his *Tahdhīb al-Akhlāq* the relationship between the just person, the pursuit of equality, and the way in which both result in a unity of the "highest honour and most eminent rank." He stated:

> The truly just man is he who harmonizes all his faculties, activities, and states in such a way that none exceeds the others. He then proceeds to pursue the same end in the transactions and the honors which are external to him, desiring in all of this the virtue of justice itself and not any other object...And justice, being a mean between extremes and a disposition by which one is able to restore both excess and deficiency to a mean, becomes the most perfect of virtues and the one which is nearest to unity.[16]

For Miskawayh, the pursuit of justice is the pursuit of the mean between extremes., and the pursuit of the mean has to do with ensuring equal distributions among similarly situated individuals. Various terms that are derived from the Arabic word for justice all point to the importance of balance and equality (*musāwa*).[17] Indeed, equality is the noblest of all proportions for "[i]n its basic meaning, it is unity or a shadow of unity," thus alluding to the oneness and unity of God at the heart of Islamic beliefs.[18]

For the three philosophers though, equality does not prescribe that we treat each person in the polity exactly like the other. Indeed, all seem to recognize that the just portion that each enjoys will depend in part on how one person relates to another. There may be good reasons to differentiate between people, hence invoking the paradox of equality. Al-Fārābī's reference to justice as equal distribution based on one's worth or value (*istiʾhāl*) suggests that equal distribution to all is not the goal of justice. Rather justice is about equal treatment of those who are considered equals. But factual differences between

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[15] Abū Naṣr al-Fārābī, *Fuṣūl Muntaẓaᶜa,* ed. Fawzī Najjār (Beirut: Dār al-Mashraq, 1971), 71.

[16] Aḥmad b. Muḥammad Miskawayh, *The Refinement of Character,* trans. Constantine K. Zurayk (Beirut: American University of Beirut, 1968), 100-101. For the original Arabic, see Ibn Miskawayh, *Tahdhīb al-Akhlāq wa Taíhīr al-A#rāf,* ed. Ibn al-Khaṭīb (n.p.: Maktabat al-Thaqāfa al-Dīniyya, n.d.), 123.

[17] Miskawayh, *Refinement,* 101; Ibn Miskawayh, *Tahdhīb al-Akhlāq,* 124.

[18] Miskawayh, *Refinement,* 101; Ibn Miskawayh, *Tahdhīb al-Akhlāq,* 123.

people may shift the balance of equality, requiring different allocations to different people in the interest of justice. In this case, legal differentiate is not only appropriate, it is a constitutive feature of justice. For instance, Aristotle writes:

> And there will be the same equality between shares as between the persons, since the ratio between the shares will be equal to the ratio between the persons; for if the persons are not equal, they will not have equal shares; *it is when equals possess or are allotted unequal shares, or when persons not equal equal shares, that quarrels and complaints arise*."[19]

Miskawayh, referring to a shoemaker and carpenter, acknowledged that their respective products will have different worth. "Thus when the shoemaker takes from the carpenter the latter's product and gives him his own, the exchange between them is a barter if the two articles are equal in value. But there is nothing which prevents the product of the one from being superior in value to that of the other."[20] In other words, it may be that one product is worth more than the other, thereby requiring more than a one-to-one exchange.

The example above is embedded in the context of commerce and barter. But it nonetheless begs the question: what determines whether two people are factually different, and whether justice demands that their factual difference requires different distributions, whether of property, dignity, or standing in society? The answer to this question may differ depending on the good to be distributed, but it illustrates a difficulty in the way we account for justice as equality. Justice as equality seems to presume a standard by which we judge whether people are in fact equally situated, as well as a standard to determine which factual differences are normatively relevant and which ones are not. In the case of commodities of exchange, we might use an intermediary device such as money or the market to offer an accepted standard by which to measure difference and to account for which differences matter for the purpose of setting comparative price points. However, what operates as a measure or standard of equality and justice when the goods being distributed are not commodities of exchange but rather the freedoms and liberties we can enjoy under the law? Will the scope of freedom depend on whether we are black or white, part of the religious majority or a member of a religious minority, a man or a woman? On what basis is factual difference rendered sufficiently relevant to justify differentiation under the law?

## IV. From *Musāwa* to *Ḥusn* and *Qubḥ*: Legitimating Differentiation in Islamic Law

The philosophical approach to equality introduces the paradox of equality as an analytic vantage point from which to identify and critique the assumptions that animate rules (formal or otherwise) that legitimate differentiation. But on what bases are factual differences deemed sufficient to justify such differentiation? The philosophical approach to the paradox of equality begs the question, but does not neessarily help us answer that question. Rather, as will be suggested in this section, the move from factual difference to legal differentiation involves a variety of value judgements that enter into the realm of law and animate and legitimate rules that differentiate between peoples. Two Arabic terms of art,

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[19] Aristotle, *Nichomachean Ethics,* 118 (emphasis added).

[20] Miskawayh, *Refinement,* 103; Ibn Miskawayh, *Tahdhīb al-Akhlāq,* 127.

*ḥusn* and *qubḥ,* offer conceptual sites through which such value judgements enter into a legal inquiry. *Ḥusn* and *qubḥ*, which literally mean "good" and "bad" respectively, are ethical terms of art utilized in the genre of *uṣūl al-fiqh* and, importantly for this article, reflect the interpretive dynamic of jurists moving from ethical determinations of the good and the bad to legal rules of obligation and prohibition. By attending to the ways in which Muslim jurists moved from ethical norms to legal rules, we can identify the assumptions Muslim jurists imported into their determinations of legitimate differentiation between two people, so as to facilitate critique about the normative significance of the factual difference between them and the discriminatory effect of any differentiation.

In *uṣūl al-fiqh* treatises, the terms *ḥusn* and *qubḥ* were invoked in debates about the ontological authority of reason as a source of law when there is an absence of guidance from foundational source-texts, such as the Qurʾān (*min qabla wurūd al-sharʿ*). In other words, does reason have sufficient authority to be a source of Sharīʿa norms, with the threat of divine sanction or promise of divine reward. Some allowed such a possibility, while others suggested that claims about the good and bad are certainly morally relevant, but have no bearing on legal obligations and prohibitions. Exploring the intricacies of these terms and their implications for law and philosophy is beyond the scope of this article.[21]

One issue of that debate, though, is particularly relevant for this article, namely the issue of determinacy. When ascertaining the substantive content of the good and the bad, jurists were concerned with the extent to which their reasoned deliberations about the good and the bad reflected a determinable divine will or whether they were historically contingent attitudes that had less to do with God and more to do with the human condition prevailing at a given moment. For instance, the premodern Shāfiʿī jurist al-Juwaynī (d. 478/1085) exercised considerable caution when attributing a particular rule of decision to God, since the justifications for any particular legal rule are vulnerable to human contingency and fallibility. Al-Juwaynī does not deny that reason enables us to judge if something is dangerous (*ijtināb al-mahālik*) or offers certain benefits (*ibtidār al-manāfiʿ*). To deny this, he held, would be unreasonable (*khurūj ʿan al-maʿqūl*).[22] Such moral reasoning falls within the normal capacity of human activity, or what al-Juwaynī called the *ḥaqq al-ādamiyyīn.* But this is different from asking what is good or bad in terms of God's judgment (*ḥukm Allāh*).[23] For al-Juwaynī, God's determination of an act's Sharīʿa-value has an authority that human reason cannot enjoy. In Sharīʿa, whether something is obligatory or prohibited depends on whether God has provided punishment or reward for the relevant acts.[24] Unless we have indicators from God, such matters are unknowable by humans (*wa dhālika ghayb*).[25] We cannot make Sharīʿa judgments based purely on a rational analysis into harms and benefits since any such conclusion offers no authority to justify divine sanction, whether in this life only or in the hereafter. This does not mean that we cannot make moral determinations of good and bad. Indeed, it is natural that we would do so. But we can do so

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[21] For an introduction to this debate, see Anver M. Emon, *Islamic Natural Law Theories* (Oxford: Oxford University Press, 2010); idem., "Natural Law and Natural Rights in Islamic Law," *Journal of Law and Religion* 20, no. 2 (2004-2005): 351-395.

[22] Al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 1:10.

[23] Al-Juwaynī, *al-Burhān,* 1:10.

[24] Al-Juwaynī, *al-Burhān,* 1:10.

[25] Al-Juwaynī, *al-Burhān,* 1:10.

only on issues not already addressed by God, and we cannot claim divine authority for them since God has made no decision on them. As al-Juwaynī said, "it is not prohibited to investigate these two characteristics [i.e. *ḥusn* and *qubḥ*] where harm may arise or where benefit is possible, on condition that [any determination] not be attributed to God, or obligate God to punish or reward."[26]

In this passage, al-Juwaynī predominantly worries about the authority of reason and the omnipotence of God. But his concern is no doubt animated by an anxiety about whether we presume too much when we legislate in the name of God based on the contingencies of our moral vision. We cannot be certain that our analysis of God's position is objectively true or right. We may only have an approximation of God's will, or we might have a strong conviction short of certainty that our position is right. In other words, far from being true or right, any legal conclusion bears the authority that arises from the jurist's most compelling opinion, or what al-Juwaynī called *ghalabat al-ẓann*. It is something less than certainty, but is sufficient for the purpose of decreeing a rule of law, as long as we understand that the authority of the rule is thereby limited.[27]

Consequently, the concern about the authority of reason is tied to the authority of the law in light of the epistemic frailty of the human agent who must at times interpret the law without any express evidence of God's will.[28] This anxiety about truth and objectivity allows us to appreciate that, at a certain level, jurists were aware that *fiqh* pronouncements are built upon a certain degree of human subjectivity, thereby rendering any *fiqh* rule vulnerable to a subjectivist critique. We cannot ignore this fact when considering how factual differences are deemed sufficiently relevant to justify legal differentiation. When jurists used terms like *ḥusn* and *qubḥ,* they utilized these general, technical terms to give an objective frame to their own historically conditioned attitudes and predispositions about when factual differences should lead to legal differentiation.

For instance, the premodern Ashᶜarite theologian al-Bāqilānī (d. 403/1013) argued that one can rationally know the good (*ḥusn al-fiᶜl*) or the bad (*qubḥ*) of an act, where such notions are general and abstract. One can make determinations of the bad, for example, on the basis of what one's dispositions find distasteful (*tanfuru ᶜanhu al-nufūs*).[29] To illustrate his point, al-Bāqilānī noted that one can know without reference to scripture the goodness of the believer striking the unbeliever, and the badness of the unbeliever striking the believer.[30] For al-Bāqilānī this distinction seemed obvious and apparent (a differentiation), whereas to modern readers it may seem abhorrent and unjustifiable (discriminatory). How might we understand

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[26] Al-Juwaynī, *al-Burhān,* 1:10. *lam yamtaniᶜ ijrāʾ hādhayn al-waṣfayn fīnā idhā tanajjaza ḍarrarun aw amkana nafᶜun bi sharṭ an lā yuᶜzā ilā Allāh wa lā yūjibu ᶜalayhi an yuᶜāqibu aw yuthābu* . As such a ruler can make laws in areas not addressed by God. But he cannot claim them to be have the authority of Sharīᶜa, as if they reflect the divine will.

[27] Anver M. Emon, "*To Most Likely Know the Law:* Objectivity, Authority and Interpretation in Islamic Law," *Hebraic Political Studies* 4, no. 4 (2009): 415-440.

[28] The link between authority and epistemic limitations lies at the heart of much scholarship on the license to interpret and the authority of the interpretive product. See for example, Khaled Abou El fadl, *Speaking in God's Name: Authority, Islamic Law, and Women* (Oxford: Oneworld Publications, 2001).

[29] Abū Bakr Muḥammad b. al-Ṭayyib al-Bāqilānī, *al-Taqrīb wa al-Irshād al-Ṣaghīr,* ed. ᶜAbd al-Ḥamīd b. ᶜAlī Zunayd (Beirut: Muʾassasat al-Risāla, 1998), 1:284.

[30] Al-Bāqilānī, *al-Taqrīb wa al-Irshād,* 1:284.

al-Bāqilānī's normative claims regarding the factual difference of religious diversity? The paradox of equality immediately alerts us to consider al-Bāqilānī's underlying assumptions that render the factual difference between the believer and non-believer sufficiently relevant to justify differentiation.

If we view al-Bāqilānī's conclusion in light of the more general set of rules governing the unbeliever, in particular the *dhimmī*, we find a complex legal, historical, and political dynamic at work. The *dhimmī* is the non-Muslim permanent resident in Islamic lands. Jurists erected various rules governing and restricting the freedoms and liberties of *dhimmīs* in the Muslim polity; they did so in part because they deemed the factual difference in religious commitment between the Muslim and the *dhimmī* relevant to justify differential treatment under the law. To understand why the factual difference of religious diversity occasioned a differential legal regime requires understanding the socio-political and cultural context that gave intelligibility to the *dhimmī* rules.

The *dhimmī* rules arose amidst a historical backdrop of Muslim conquest of lands, reaching from Spain to India by the 8th century CE. In this context of conquest and colonial rule arose the Pact of 'Umar as an initial statement of the rules regulating non-Muslims living in the Muslim polity.[31] This initial statement was supplemented by later developed rules, whose legitimacy relied on an ethos of Islamic universalism, even as the Islamic empire gave way to multiple polities of regional and local power. A universalist ethos and the memory of imperial conquest offered a normative framework to render the *dhimmi* rules meaningful and legitimate. That framework was, arguably, a lens through which Muslim scholars such as al-Bāqilāni understood and ordered their world. Conquest initially presented itself as an economic and political phenomenon, but soon became part of a collective memory that informed the way Muslim scholars understood their past and its implications on the aims, purposes, and aspirations of governance and law.

As part of the historical memory of a community, the conquest period became aspirational, especially as later centuries witnessed the demise of the Islamic empire into fractionalized polities. As the contemporary historian of Islam Marshall Hodgson states, the period of the early caliphates "tends to be seen through the image formed of it in the Middle Periods; those elements of its culture are regarded as normative that were warranted sound by later writers."[32] For Hodgson, in the Middle Period (roughly the mid-10th century to 1500 CE), the challenges of "political legitimation, of aesthetic creativity, of transcendence and immanence in religious understanding, of the social role of natural sciences and philosophy – these become fully focused only in the Middle Periods,"[33] and in part by nostalgic reference to an imperial past. The memory of a glorious, righteous, imperial past offered a lens for Muslim jurists to understand how a Muslim polity *should* regulate interactions with non-Muslims, given the fact of diversity and despite imperial fragmentation.

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[31] For competing views on the Pact's historical authenticity, see A.S. Tritton, *The Caliphs and their Non-Muslim Subjects: A Critical Study of the Covenant of 'Umar* (London: Frank Cass and Co., Ltd., 1970); Daniel C. Dennett, *Conversion and the Poll Tax in Early Islam* (Cambridge: Harvard University Press, 1950), 63-64.

[32] Marshall G.S. Hodgson, *The Expansion of Islam in the Middle Periods,* vol 2 of *The Venture of Islam* (Chicago: Chicago Universitiy Press), 3.

[33] Hodgson, *Expansion of Islam,* 3.

Consequently, when al-Bāqilānī remarked about the goodness of the believer beating the non-believer, and the evil of the non-believer beating the believer, we cannot ignore how al-Bāqilāni's substantive valuation was dependent upon a particular vision of the Islamic past in light of his present. The horizon of the past and his present were fused to create a norm that depended for its very intelligibility upon the ethics of universalism, imperialism, and the subordination of the other.

## V. Legitimating Gender Differentiation

Heeding the distinction between justice as equality and justice as the good and the bad, though, is not meant to suggest that this study prefers the philosopher's justice over the jurist's one. Rather the philosophical principle of equality provides a vantage point from which we can appreciate the underlying (and often unstated) assumptions that make legal determinations not only possible, but also intelligible. By distinguishing between the fact of difference and the normative implications of that factual difference, we can better identify the assumptions that allow jurists to justify differentiation as a matter of law, and thereby appreciate the scope of critique required to render those assumptions as inherently discriminatory.

This brings us to the issue of gender difference, and global calls for equality in Muslim family law. The existing literature on gender discrimination in both Islamic legal doctrine and Muslim-majority state family law regimes is vast and need not be reviewed here.[34] Indeed, other contributions to this volume outline the doctrines that pose difficulties to gender equality advocates. For the purpose of understanding the doctrines in terms of the paradox of equality, of central interest is the rationale used to justify discriminatory treatment between men and women under Islamic law. This rationale uses the fact of gender difference to justify differentiation.

For instance, Murtaza Mutahhari (d. 1979), a student of Ayatollah Khomeini, argued that legal gender differentiation reflects the very conditions of justice that are captured in the paradox of equality. He took aim at critics who held that gender differentiation in matters of divorce and inheritance law is "contemptuous of, and insulting to, the female sex" -- or in other words, discriminatory.[35] Instead, he implicitly acknowledged that the justification of gender differentiation accounts for the considerations that lie at the heart of the paradox of equality:

> woman and man, on the basis of the very fact that one is a woman and the other is a man, are not identical with each other in many respects. The world is not exactly alike for both of them, and

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[34] For an introduction to the field of gender and Islamic law, see Judith Tucker, *Women, Family and Gender in Islamic Law* (Cambridge: Cambridge University Press, 2008). For an outline of contemporary family law regimes in Muslim states, see Abdullahi Ahmed An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002). For critical analyses of Islamic legal doctrines concerning women and gender, see Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld Publications, 2001); Ziba Mir-Hosseini, *Islam and Gender: The Religious Debate in Contemporary Iran* (London: I.B. Tauris, 2000); Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam: Amsterdam University Press, 2007); Amira El-Azhary Sonbol, *Women, the Family, and Divorce Laws in Islamic History* (Syracuse: Syracuse University Press, 1996).

[35] Murtaza Muttahari, "The Human Status of Woman in the Qur'an," in *Princeton Readings in Islamist Thought: Texts and Contexts from al-Banna to Bin Laden,* eds. Roxanne L. Euben and Muhammad Qasim Zaman (Princeton: Princeton University Press, 2009), 254.

> their natures and dispositions were not intended to be the same. Eventually, this requires that in very many rights, duties, and punishments they should have not have an identical placing.[36]

For him, the fact of biological difference is suitably significant to justify gender differentiation under the law.

In other cases, the fact of gender difference is deemed significant by recasting the difference as shorthand for complex social dynamics that require differentiation. For instance, the Qurʾān asserts that a son will inherit twice the amount of his sister(s).[37] The verse itself does not explain the rationale behind the discriminatory distribution. Premodern Muslim jurists identified this verse as representing a departure from pre-Islamic practices, which often denied daughters any inheritance share.[38] Contemporary writers explain and justify the verse's distribution by reading the fact of gender difference as an efficient way to capture the heart of the matter – socio-economic factors concerning the distribution of economic responsibility for the family. Acknowledging the change from pre-Islamic practice, they recognize that personal status laws such as inheritance rules

> were formulated to meet a woman's needs in a society where her largely domestic, childbearing roles rendered her sheltered and dependent upon her father, her husband, and her close male relations…Because men had more independence, wider social contacts, and higher status in the world, their social position was translated into greater legal responsibilities…as well as more extensive legal privileges proportion to those responsibilities.[39]

In the case of inheritance rules, the fact of gender difference in the Qur'an is made to encompass a historically contingent social hierarchy. That economic and social hierarchy is read into the original Qurʾānic verse, which makes no reference to such social conditions. The verse only references the fact of gender difference. The legitimacy of the verse's inheritance rule, therefore, is explained after the fact and is intelligible once we appreciate the paradox of equality as a feature of justice. But attention to the paradox of equality also illuminates the poverty of the after-the-fact justification to account for changed historical contexts. Despite changes in lived economic realities, and calls to reform Islamic family law, such as the laws of inheritance, little change has been forthcoming.

## VI. Post-Coloniality and the Paradox of Equality

The failure of reformist attempts is not simply a function of the power of the Qurʾānic or other source-text to subvert the claims of history. Rather the imperatives of a post-colonial history more often than not subvert the demands of changing socio-economic conditions, and thereby undermine calls for reform in Islamic family law. Gender-based legal reform is not a new issue, whether one looks to the Muslim world or elsewhere. Gender difference, as a site of legal debate, has been and continues to be an ongoing issue of contention in countries spanning the globe. As such, the Muslim world is hardly unique in being

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[36] Muttahari, "The Human Status of Woman," 261.

[37] Qurʾān, 4:11.

[38] See for instance, Abū ʿAbd Allāh Muḥammad al-Qurṭubī, *al-Jāmiʿ li Aḥkām al-Qurʾān* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1993), 5: 39-40.

[39] John L. Esposito and Natana J. Delong-Bas, *Women in Muslim Family Law,* 2nd ed (Syracuse: Syracuse University Press, 2001), 46.

a site of gender-equality debates. Rather what makes the Muslim world appear unique and distinct is the historical moment in which demands for gender-based reform are directed at the Muslim world, namely a postcolonial context marked by newly independent Muslim states embedded in informal modes of hegemony by the global North over the South. The elite of these newly minted Muslim states participated in the international scene, but could not (and still cannot) go so far as to ignore the traditional modes of identity that animate domestic society. The traditional models of identity, arguably, give content to the national identity and political authenticity of majority Muslim states in an international arena beset by pre-existing and ongoing asymmetries of power.[40] In this context, calls for gender reform inflame conservative segments in Muslim polities that view claims for gender equality as yet another colonial imposition, or as premature given the fragile state of the nation. Ann McClintock, writing about the importance of viewing nationalism in gendered terms, notes that

> *gender* difference between women and men serves to symbolically define the limits of *national* difference and power between *men*. Excluded from direct action as national citizens, women are subsumed symbolically into the national body politic as its boundary and metaphoric limit… Women are typically construed as the symbolic bearers of the nation, but are denied any direct relation to national agency.[41]

The nationality of a new state cannot avoid being framed, in postcolonial settings, by the asymmetry between the former colonial powers, and those that have recently gained independence but are limited in their power, politically and economically. Women contribute to the notion of nationhood, but only passively so. Women are made to represent the nation's ideals, but have no power to determine the content of those ideals. Those ideals draw upon a historical tradition whose continuity has as much to do with the post-colonial condition as with religious adherence.

Attentiveness to the post-colonial context reminds us that the debates on gender reform are embedded in a larger contest about post-colonial identity formation, in which the content of national authenticity is defined in religious doctrinal terms, and the burden of that content is placed squarely on the shoulders of those who, more often than not, have too little power to assert their voice. These political circumstances contribute to an appreciation of why the factual difference between men and women may seem significant enough to justify legal differentiation in the Muslim world today. To recast that differentiation as discrimination, therefore requires more than arguments over competing Qurʾānic verses, *ḥadīth* texts, or methodologies of interpretation.

### VII.(En)Countering Difference: Social Movements and the Re-Reading of Equality

Those who read this essay may be disappointed with the absence of any slam-dunk legal argument for gender equality in Islamic law. But such disappointment is premised on unfair expectations of what is possible within the law. Yes, it is true that there are possible readings of Qurʾānic verses that can lead to a principle of gender equality.[42] Yes, certain *ḥadīth* texts that justify gender based discrimination can be

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[40] Indeed, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), argues that international law continues to perpetuate the dynamic of colonialism and asymmetries of power between the global North and South.

[41] Ann McClintock, "Family Feuds: Gender, Nationalism and the Family," *Feminist Review* 44 (1993): 61-80, 62.

[42] See the works of Amina Wadud, Asma Barlas, Fatima Mernissi, all of which are cited in this essay.

challenged as lacking sufficient authenticity to justify the rule for which they are invoked.[43] And yes, some scholars recognize the need to offer a more general theory of gender relations in Islam to animate new interpretations of Islamic law.[44] Looking for solace in technical legal arguments is quite reasonable, and, most importantly, quite efficient. It allows the proponent of gender equality to make an argument on the assumption that the reader is a reasonable one, open to new readings of the Islamic legal sources, and thereby willing and able to change his or her mind.

However, the dilemma is that changing minds on what might seem to be a minor, technical, legal issue actually involves significant reformulations of socially and culturally embedded ideas about the right and the wrong, the good and the bad – all of which transcend the merely legal. For instance, reasonable arguments can be made to justify the equal treatment of men and women under Islamic inheritance rules. Those arguments can be and are based on historical changes in the economic reality of men and women; and the increasing need for families to have multiple wage earners to ensure adequate financial well-being. But to make a modification to that particular legal rule has implications not only on estate distribution upon death, but also on the social and cultural imagination of the nature of the workplace and the well-being of the family. Indeed, any modification to a specific legal rule may bring with it considerable socio-cultural concerns that exist outside the province of the law, but are no less relevant to consider.

As such, we cannot exclude the importance of harnessing extra-legal factors in the pursuit of gender equality in Islamic law. The role of social movements is particularly crucial in affecting the way in which judges and jurists engage in the ongoing enterprise of legal interpretation.[45] For instance, Professor Riva Siegel of Yale Law School has written about the Equal Rights Amendment in the United States, which sought to ensure gender equality as a constitutional principle. That amendment was never formally passed pursuant to the procedures outlined in Article V of the US Constitution. But as Siegel shows, the failure to amend the Constitution does not mean the social movement failed to change U.S. constitutional law concerning gender equality. Rather, she adopts a different view of legal development that recognizes that judges interpret the Constitution "in the midst of a popular debate about the Constitution."[46] She further elaborates:

> Americans on both sides of the courthouse door are making claims about the Constitution. Outside the courthouse, the Constitution's text plays a significant role in eliciting and focusing normative disputes among Americans about women's rights under the Constitution – a dynamic that serves to communicate these newly crystallizing understandings and expectations about women's rights to judges interpreting the Constitution inside the courthouse door. Such

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[43] See for instance, Khaled Abou El Fadl, *Speaking in God's Name.*

[44] See for instance, Kecia Ali, *Sexual Ethics in Islam: Feminist Reflections on Qur'an, Hadith and Jurisprudence* (Oxford: Oneworld Publications, 2006).

[45] For a recent contribution to the study of women's social movements and the significance of hybridity, see Kristin A. Goss and Michael T. Heaney, "Organizing Women *as Women:* Hybridity and Grassroots Collective Action in the 21st Century," *Perspectives on Politics* 8, no. 1 (March 2010): 27-52.

[46] Riva B. Siegel, "Text in Contest: Gender and the Constitution from a Social Movement Perspective," *University of Pennsylvania Law Review* 150 (2001-2001): 297-351; 314.

> communication occurs whether or not the activities in question satisfy Article V…for constitutional lawmaking.[47]

For Siegel, the meaning of the Constitution can change as long our appreciation of judicial interpretation recognizes the agency of the jurist who interprets the law in light of ongoing contests about its meaning. Consequently, whether or not social mobilizations lead to formal legal change, such movements affect the climate within which judges appreciate the nature of the legal conflict before them. In a context of social movements around legal change, participants make claims about the law's meaning. "Sometimes such mobilizations result in constitutional amendments; most often they do not. But even when no formal act of law making occurs, constitutional contestation nonetheless plays an important role in transforming understandings about the Constitution's meaning inside and outside the courts."[48] Importantly, Siegel is writing about the judicial process, and not the legislative one. Her theory of legal change assumes a constitutional legal order and a sufficiently democratic political order that permits expressions of dissent openly and publicly. Those politico-legal characteristics do not necessarily obtain in the Muslim world. Nonetheless, her thesis about social movements is important if only to illustrate the scope of intervention required for effective legal reform.

If we accept the relationship between social movements and legal change, then we cannot ignore the effect of gender equality social movements on the possibility of legal change in the Muslim world. For instance, Amina Wadud writes about waging a gender *jihād,* and offers numerous stories from "the trenches".[49] More often than not, the stories show that the effort to make changes on the ground have lead to limited, if any, success in legislative reform or changes to mosque culture around the world. Nonetheless, her personal dedication to the cause of gender equality has resulted in considerable public engagement with the status and role of women in Islam generally, and the Muslim world specifically. Sisters in Islam, a Malaysian civil society organization committed to gender equality, has been at the forefront of challenging the patriarchal tradition still affecting Muslim women in Malaysia. While Sisters In Islam has made serious gains in the domestic Malaysian sphere, those gains have not come without cost. In 2005, Sisters in Islam published the book *Muslim Women and the Challenges of Islamic Extremism,* edited by Norani Othman, a professor at the National University of Malaysia. In July 2008, Malaysia's Ministry of Home Affairs banned the book, claiming that it undermined public order. Sisters in Islam petitioned a court for judicial review of the ministerial order, and the presiding judge reversed the ban.[50] The ban illustrates the challenges facing social movements that operate within a political climate that is less than open. In fact, the ban is a reminder that the effectiveness of social movements (and thereby the possibility of legal reform) is directly connected to the openness of a society. Nonetheless, the success in overturning the ban illustrates the power of social movements to change the discursive context in societies that may not be as open as all would prefer. The Malaysian example shows that in less than fully open societies, social movements have the potential to expand the scope of legal arguments that are intelligible, meaningful, and possible.

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[47] Siegel, "Text in Contest," 314.

[48] Siegel, "Text in Contest," 303.

[49] Amina Wadud, *Inside the Gender Jihad: Women's Reform in Islam* (Oxford: Oneworld Publications, 2006).

[50] Liz Gooch, "Ban on book is overturned by court in Malaysia; Government had said the publication might confuse Muslim women," *International Herald Tribune,* January 26, 2010, 3.

## VIII.Conclusion

The beginning of this essay pays tribute to the many voices that have come before to advocate for gender equality Islamic family law. Those voices, while differing from each other in method, approach, and aim, nonetheless speak in unison about the need to reflect on the ongoing existence of gender discrimination in the Muslim world. For some, that reflection requires an analysis of premodern source-texts and their authenticity. For others, it requires unpacking the Qur'anic and legal discourses of the patriarchal attitudes that have for so long animated them. And yet others would suggest that there is no hope for reforming Islamic law, and that instead recourse must be had to a tradition of human rights, whose content is informed by contemporary treaties such as CEDAW. All of these approaches have their merits, and all can be criticized; but, in the aggregate, they constitute the voices of a social movement advocating for change. In some cases that change will come by reference to human rights standards. In others it will come by reference to new interpretations of source-texts that are authoritative within the Islamic legal tradition. And yet other cases will require a blending of international law, domestic constitutional law, and aspects of Islamic law. This fusion will create a legal outcome that reflects the legal pluralism that has become so characteristic of the modern state in an increasingly globalized world.

The strategies may differ, and the outcomes will be inspired by different animating impulses. But in all cases, the effectiveness of any particular strategy requires acknowledgement that the paradox of equality operates in the background and may limit the effectiveness of those advocating for gender equality in the Muslim world. Attentiveness to the paradox of equality will beg important questions about what factual differences are legally relevant and why. The paradox of equality reminds us that while differently situated people should be treated differently to satisfy the demands of justice, what constitutes a legally relevant factual difference is often a naturalized construct that is waiting to be denaturalized and deconstructed. But as gender activists around the world already know, the threat of such deconstruction has the potential to create considerable instability, whether politically, socially, culturally, or legally. This does not mean that gender equality is not possible in the Muslim world. Rather, it suggests that all of us are embedded in a set of predispositions that are difficult to escape. Those predispositions influence how we decide which factual differences are appropriate for legal differentiation, and which ones are not. To view the idea of equality from the perspective of the paradox of equality is meant to illuminate the scale and scope of any intervention that seeks to undo and reverse a legal differentiation on the grounds that it is discriminatory.