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Fiqh, Women and Human Rights: Competing Methodologies

Introduction

The academic debate about human rights, women and Islam that has developed in recent times reveals a plethora of voices, opinions and proposed legal solutions to what has become a high-ly controversial and emotive politico-legal issue in the Muslim world. The controversial nature of the debate is particularly height-ened in the field of international law where the compatibility of Islamic law with UN-inspired legal regimes is contested and de-bated amid a backdrop of recent colonialism, Third World pover-ty and an academic history of Orientalism.

Although this field of enquiry has received considerable atten-tion, subtle and often pervasive omissions become apparent in much of the literature—omissions that are particularly glaring when interrogating monographs written by authors from diver-gent legal, religious and educational backgrounds. Apart from the influences of such external factors such as the role of the nation state and post-colonial struggles, the omissions in the debate arise from different methodological approaches in the field of human rights as well as from divergent scholarly training in religious and secular texts. The result of this heterogeneous foundational lega-cy is methodological and ideological confusion. "Comparative" studies, such as those undertaken by A.E. Mayer, tend to polarise politico-legal issues and obsfucate others. The readers of such com-parative studies tend to get the impression that for Islamic law to be brought into harmony with the Universal Declaration of Hu-man Rights (UDHR)[1] in relation to women's human rights, that individual Muslims must choose the secular UDHR over *sharî'ah*.[2]

It is precisely this polarised message that has the effect of further narrowing the debate and causing reactionary responses from many Islamist[3] groups. *Sharî'ah,* in much of the literature is presented as being monolithic in nature (by both sides of the debate) and as something that should therefore be jettisoned in order for progress to be made within the field of human rights.

At the same time, many Muslim proponents of human rights advocating a reformed approach, adopt the terminology of "constitutionalism", "democracy" and "civil society" without locating these terms precisely within an Islamic legal framework. The result of mixing this "Western" theoretical terminology with Islamic concepts is to lay these Muslim human rights activists open to charges of being "imitators" of "Western feminism and colonialism".[4]

The result of discordant and incoherent foundational approaches in the legal debate is that, quite often, individual authors are articulating their ideas in completely different (theoretical) languages. The resulting cacophony of voices has the effect of creating a polarisation in the debate about Islam, human rights and women. What is required, rather, is a space within which multifarious voices from the Islamic world can be heard. In particular, the various attempts at critically engaging with and debating the historical, sociological and legal aspects of *sharî'ah* must be given priority if any cogent and confident legal response is to be formulated in the area of human rights and Muslim women. At a deeper level however, after surveying the literature which critically engages with *sharî'ah* and *uṣûl al-fiqh,*[5] a theoretical vacuum needs to be filled which coherently addresses the problem of legal methodology. Without a foundational reconstruction of Islamic methodology, the conceptual framework in this area of law reform will remain fraught with confusion and misunderstanding.

This paper attempts to, firstly, examine in some depth various writers' investigations into Islam, women and human rights. Secondly, and more importantly, it attemps provide a clear conceptual framework within which to articulate a foundation for the subject in the future. Such a re-conceptualisation is necessary to anchor future attempts at law reform within an Islamic jurisprudential heritage. By re-locating the debate within the Islamic heritage, any articulation of human rights and Muslim women will have the authority of a *fiqh*-inspired methodology. For Muslim

women engaged in the struggle for human rights, such a strategy will be more successful than either employing secular "Western" feminist discourse or by claiming the right to interpret the original Islamic sources whilst ignoring *fiqh* history, methodology and terminology.

In order to more clearly examine, interrogate and, finally, articulate these issues in greater depth, this paper proceeds in a number of sections. First, as a preliminary introduction, a brief outline of the main sources of Islamic law and jurisprudence will be adumbrated. Section I will critically examine some recent scholarship in the field of Islamic law, women and human rights. The authors chosen for this examination include both Muslim and non-Muslim women. The nature of their divergent theoretical approaches will be discussed so as to uncover hidden biases, different conceptual matrices utilised and foundational deficiencies inherent in the respective approaches. Section II will outline two specific examples of writers locating their arguments for Islamic law reform pertaining to women from within both Shia and Sunni *fiqh* traditions. The final section will then take the discussion to a broader level of discussion by exploring the possibilities for re-articulating an Islamic legal methodology. Modern attempts at reconstructing such a methodology are numerous, but the writers selected here (Rahman and Shahrur) have been chosen because of their comprehensive and coherent structural approach.

The aim of this paper is therefore to advocate a two-tiered approach in the academic study of Islam, human rights and women. On one level, Muslim and non-Muslim women need to actively and critically engage with the juristic heritage of *uṣûl al-fiqh*. This is necessary because of the requirement of authenticity and authority for Muslims caught up in the process of legally and politically adjusting to, and debating with, modernity and a colonial legacy of political dominance. Adopting the voice and reasoning tools of *fiqh* sources will significantly reinforce the struggle for human rights and law reform. Furthermore, such a strategy ensures protection from being labelled a "Western agent of imperialism" by reactive elements within Islamist circles. On another level, and at the same time, Muslim and non-Muslim writers must be involved in reformulating the structure of Islamic legal methodology so as to provide a coherent and logical foundation for their

legal reforms. Such a re-conceptualisation of Islamic law is necessary so as to avoid *ad hoc* and confusing reform programs articulated by reformers such as Muhammad Abduh and Rashid Rida.[6]

The Sources of Islamic Law and Jurisprudence[7]

So as to provide a legal and historical background to the subsequent sections of this paper, a brief outline of the main sources of Islamic law and *fiqh* will be presented here. First, the primary source of Islamic law is the Qur'ân. It is a record of the verbal revelation vouchsafed to the Prophet Muhammad during a period of about twenty-two years at Mecca (610-622 AD) and Medina (622-632).[8] The Qur'ân is therefore regarded as being "the sum total of God's revelations to the Prophet"[9] and hence utterly sacred in content and form for the vast majority of Muslims. It is also a religious and historical document in which all possible legal issues are not dealt with comprehensively or consistently. Out of necessity therefore, the Qur'ân needed to be supplemented with other sources for the purposes of building the foundations of legal theory. The second major source of Islamic law is *Sunnah*[10] or "practice/tradition" of the Prophet and his Companions which provided a great deal of textual material for the development of legal theories and juristic tools during the first century of Islam. The basis of the *Sunnah* are the stories that relate to the behaviour of the Prophet and his Companions. The *Aḥâdîth*[11] were recited and recorded both orally and textually and the textual collections form the basis of the *Sunnah*.

Whereas the Qur'ân and *Sunnah* are the sources *from* which Islamic law is derived, the sources *through* which the law may be derived represent either methods of legal reasoning and interpretation or the sanctioning instrument, of *ijmâ'* or consensus (Hallaq, 1997: 1) *Ijmâ'*[12] is a sanctioning instrument whereby the *mujtahids*[13] representing the community at large, were considered to have reached unanimous agreement on a technical legal ruling. The fourth source of law subsumed under the rubric of *ijmâ'* is *qiyâs*[14] or analogical reasoning. *Qiyâs* became tied to the twin doctrine of *taqlîd*[15], which represented the unquestioning acceptance of the doctrines of established legal schools and authorities. This development represents the famous "closing of the gates of *ijtihâd*" by jurists in the tenth century.[16] Less important methods of

legal reasoning were based on considerations of juristic prefer-
ence (*istiḥsân*)[17] or public welfare and interest (*istiṣlâḥ*).[18] From this
brief outline of Islamic legal sources and juristic tools, the paper
will now focus upon two examples of how modern authors have
used and represented this legal heritage in the area of human rights.

A.E Mayer and Sisters in Islam:
Are We Speaking the Same Language?

The aim of this section is to critically examine the academic
efforts of a number of Muslim and non-Muslim writers in the field
of human rights, Islam and women. More precisely, this section of
the paper will demonstrate how a lack of a coherent and consis-
tent legal methodology prevents such scholarship from articulat-
ing a response that is intellectually sound and capable of reaching
a wide cross-section of readers. Often writers do not seem to be
even speaking in the same language. This "language" is one that
encompasses issues such as interpretative frameworks, Oriental-
ism, the educational backgrounds of various writers and, most
importantly, the issue of legal methodology. When such interpre-
tative "filters" are not used uniformly, or are not even acknowl-
edged, then the debate is one that becomes fraught with method-
ological confusion. It is precisely this problem of speaking differ-
ent methodological languages that will be examined by interro-
gating the work of Ann E. Mayer and the Malaysian Muslim Wom-
en's group, Sisters in Islam (SIS).

A.E Mayer

Ann E. Mayor's book, *"Islam and Human Rights: Tradition and
Politics"*(1995) is a comparative survey of international human rights
standards as expressed in the UDHR and the US Constitution,
and various human rights schemes articulated in, for example, the
Iranian Constitution (1980)[19] and by Islamists such as Mawdudi[20]
and Tabandeh.[21] In the preface to her book, Mayer sets forth the
parameters of her approach to this comparative analysis by hedg-
ing her thesis with the rather trite statement: "[t]he Islamic sourc-
es and the core doctrines of Islam as a religious faith are not being
subjected to critical assessment in this study"(Mayer, 1995). Rath-
er, according to Mayer, her book points to the "imprecise legal
methodologies" and "misleading terminology" of the Islamist hu-

man rights schemes' proponents.[22] To this end, Mayer sets about presenting a dual structure to facilitate her argument. The Table of Contents follows a simple counterpoint: "[equality in the Islamic Legal Tradition" is immediately followed by "[e]qual protection in U.S. and International law"; "the contribution of Western civilisation" is set forth in contradistinction to "the role of Islamic law" and "the premodern Islamic heritage".[23]

Before embarking upon this bifurcated approach to her argument however, Mayer addresses the issue of Orientalism and its use by many Western scholars to discredit any comparative study of Islam and International law.[24] Although she makes it clear that her intention is not to display Islam in a pejorative manner by comparing it to international rights standards, Mayer seems to misunderstand Said's thesis. Orientalism,[25] according to Said, is not about preventing further scholarship from taking place between the "Orient" and the "Occident". What Said is asking scholars to be aware of is the process of *representation* that is employed by writers which tends to posit an epistemological distinction between the Orient and the "West". Such a process of representation leads to a method for dominating, restructuring and having authority over the Orient.[26] In this sense, Orientalist approaches serve to contrast and generate knowledge about "Islam" from a position of relative power. It is precisely the process of representation (the comparative lens) in Mayer's work that has the effect of entrenching a polarised and truncated view of Islam and human rights, which is neither helpful nor relevant for Muslim women.

At the same time Mayer's work is laudable in that she attempts to uncover the political-and quite often reactive, motives of Islamists such as Mawdudi. In particular, Mayers close analysis writers, such as Tabandeh, uncovers the issue of sex-stereotyping that informs the premises of many Islamist human rights regimes (Mayer, 1995: 98). For example, the focus upon the "essential" differences between males and females which warrants different standards of human rights protections, is a central feature of Mawdudi, Tabandeh and Ayatollah Banohar.[27] Each states, with varying levels of candour, that women are "by nature", more emotional than men, more suited to housework and motherhood, lacking in strong willpower and, owing to their physical "weakness", are

not as mentally proficient as men (Mayer, 1995:98-107). After detailing these hidden and manifest assumptions and stating that under the Convention for the Elimination of Discrimination Against Women (CEDAW), countries are obliged to "fight" sex stereotyping, Mayer concludes that patriarchal, traditional cultures influence the creation of such (erroneous) assumptions that belittle and devalue women's human rights (Mayer, 1995: 121).

However much this may be true, the deficiency in Mayer's analysis is that she fails to present a legitimate means of rectifying the situation. Instead of approaching the issue of Islamists' assumptions from *within* the Islamic tradition, Mayor's analysis ends on a note that simply asks whether or not the Islamic sources actually support a patriarchal assumption of women's inferiority (Mayer, 1995; 122). By delimiting her book to one that approaches the topic within a narrow, almost simplistic framework, Mayer prevents her own analysis from operating at a higher theoretical level. As will be detailed in Section II, despite Mayer's supposed academic credentials as an authority on Islamic history and law (Mayer, 1995: 211), she does not venture into the realm of Islamic jurisprudence which addresses the issue of a woman's legal, physical and mental capacities. In various places in her book, Mayer cursorily mentions the history of Islamic law, but only to emphasise its complex, diverse and heterogeneous nature and the fact that Muslims do not agree on one precise formulation of what the law should be (Mayer, 1995: 9). The conclusion Mayer draws from this is that Muslims, in order to overcome their legal confusion, should abandon their search for Islamic responses to human rights and adopt the legal panacea of the UDHR.[28]

Mayer rightly points out that Islamist regimes take a highly selective approach when formulating their Islamic-based rights schemes. However, Mayer fails to show precisely *how* and *where* Islamists do not recognise or gloss over, the various and conflicting jurisprudential material on the issue of women and human rights. Her comparative legal approach has the effect of not adequately providing legal models or methodological answers to the problem of Islam, women and human rights. Rather, Mayor's *own* methodology is exposed as being woefully inadequate for the task.

Sisters in Islam (SIS)[29]

This section of the chapter will present an examination and discussion of two Muslim women and their attempt to critically engage with the legal heritage of *sharî'ah* in an effort to articulate a framework for women's human rights.[30] Both papers are illuminating for the conceptual frameworks they choose to use, for the particular use of terminology such as "citizenship" and "constitutionalism", and for the method by which each author attempts to use language of justice and ethics from the original sources of Islamic law.

First, in Zainah Anwar's paper, the right to re-read and independently understand the sources of Islamic law is claimed *along with* the right to use the theoretical and practical terminology of the modern nation-state. Anwar explicitly addresses the "givens" of modern Malaysia: the fact that Malaysia has a constitution, that it claims to be democratic and the fact that it is multi-ethnic and multi religious (Anwar, 1998: 2-3).

This use of terminology is significant for a number of reasons. It attests to the fact of cultural and socio-legal hybridity that exists within Malaysia.[31] It is practical proof of the changing flux in the debate about human rights in Islam in terms of the conceptual armoury used to discuss the nature of law and rights by Muslim authors. This change is particularly revelatory in terms of the apparent contradictions that appear in Anwar's analysis.[32]

Second, like Mayer, Anwar discusses particular aspects of the recent changes to the Islamic Family Laws in relation to the Convention on the Elimination of Discrimination Against Women. Where Anwar's examination of the international human rights regime differs from Mayer, is in the two-pronged theoretical discussion she undertakes simultaneously. First, she emphatically and clearly invokes the legal and moral authority of the Malaysian Constitution in stating and protecting the rights of women. Second, the subsequent reservations the government placed upon various articles of CEDAW —without reference to democratic processes—is criticised by Anwar as an example of the antidemocratic nature of consulting an obscure group of (unelected) Islamic scholars (Anwar, 1995:17). Anwar labels these reservations as "un-Islamic", but does not elaborate any further. Rather, the focus of her criticism of recent government policies adopts the rhetoric of

an egalitarian Qur'ânic ethic conjoined with an appeal to the legal and moral ideals enunciated in the Federal Constitution. For Anwar, there is no contradiction between democracy, civil liberties, constitutionalism and an Islamic value system. Moreover, Anwar views the adoption of laws which have not been passed through democratic processes as being clearly un-lslamic. One example she uses to demonstrate this antidemocratic tendency, is that of the position of the state *muftî*, whose *fatwâ*s have been given automatic legal sanction without going through a democratic legislative process. By disregarding democratic machinery, Anwar sees the role of the state and the religious scholars as "tantamount to rule by decree of a theocratic dictatorship" (Anwar, 1998: 17). Moreover, Anwar points out, *fatwâ*s never had the automatic force of law in Islamic history and it was not a crime for people to disregard a *fatwâ* as it was seen as being simply an advisory opinion (Anwar, 1998: 17-18).[33]

In addition to viewing the issuing of legally binding *fatwâ*s as anti-democratic and un-lslamic, Anwar is more concerned about *how* a few religious scholars could have had their personal legal opinions passed by all relevant arms of government without any public consultation, debate or discussion. In particular, Anwar points out that the very nature of a *mujtahid's* opinion, and the process of exercising *ijtihâd*, necessarily involves differences of opinion. The implication of having legitimate differences of opinion in a legal milieu is that a nation-state, claiming to be democratic, must publicly debate and thoroughly discuss all the implications of a law before it can be accepted by ifs citizens. This co-option of the vocabulary of individual rights *vis-a-vis* the state, the use of democratic terminology and the appeal to the constitution, reveals the accretion and cross-fertilisation of legal and political thought in the intellectual heritage of a modern, practising Muslim. In particular, the fact that Anwar appeals to the constitution reveals the theoretical and ethical parallel and compatibility she (implicitly) makes between the instrumental legitimacy of the constitution and the egalitarian ethic of Islam as a worldview. In addition, Anwar refers to the multi-ethnic and multi-racial character of Malaysia, the push for economic ascendancy, and the pace of social change as a result of government policies designed to promote such modernisation (Anwar, 1998: 19). Linked to all of

these socio-economic changes, is the Malaysia itself, where religious leaders at the state level constantly undermine the federal government's attempts at providing coherent legal reform (Anwar, 1998: 21-22).

Yet again, this discussion reveals Anwar's implicit and explicit acceptance of the modern forms of governance, the various ways of dividing political power within the state, and the reality of economic change, which demands the education and employment of women. Here, one cannot find an analysis of the world and it's ills as filtered through the lens of *dâr al-Islâm* and *dâr al-harb*.[34] The theoretical and methodological responses Anwar makes to the issue of human rights and Muslim women in Malaysia contain the hybridised language of modern forms of political language with a very different perspective on Qur'ânic justice and legal norms than the usual (male) Islamist response.

Anwar makes an attempt to reformulate the methodological framework for human rights and Muslim women by privileging the principles of "justice, equality, freedom and virtue" (Anwar, 1998)[35] as the Qur'ânic benchmarks for interpreting and reforming the law. At the same time, Anwar side-steps the issue of the history of *usûl al-fiqh*, by emphasising and claiming the right to *ijtihâd* over and above the other juristic devices present in Islamic jurisprudence. This is an important and interesting distinction because it highlights the crux of the theoretical debate about legal methodologie(s) in the Muslim world. At one level, it serves to point to the inherent problem of reformulating the political philosophy of Islam. For example, the reliance upon notions of "public welfare" (*istislâh*) in formulating legal opinions and translating them into law, was, in the classical era of the Islamic empire, a juristic device used by political and legal authorities as a valid basis on which to pass laws. Along with the devices if *ijmâ'*, *qiyâs*, the doctrine of *taqlîd* and the complex system of *hiyal*, Islamic jurisprudence became intricately connected to the prevailing political authority in power in a way that was to preclude the complete development of a strong and independent judiciary—so necessary for the control and accountability of the Westphalian template of modern nation-states (Coulson, 1985: 210-213). By reclaiming the method of legal reasoning as embodied in the *hadîth* of the Prophet, Anwar does away with the need for investigating the *usûl al-fiqh*. This is problematic in that Anwar's at-

tempt does not systematically deal with the hierarchy of juristic devices in the classical legal doctrines in which *ijtihâd* became enmeshed in a dialectical relationship with *ijmâ'* and *qiyâs*. To this extent, Anwar's analysis shares theoretical and structural weaknesses with Mayer's work. Instead, Anwar chooses to use the language of democracy conjoined with Islamic terminology:

> ... Today's women will not be cowed into silence anymore. They are more convinced than ever that it was not Allah's intention to keep them submissive, inferior, silent just because they are women. It is this conviction *in an Islam that is just* that gives us the courage to stand up to reclaim our religion and to claim for ourselves the *democratic space* to speak out against all kinds of injustic (Anwar, 1998: 29, emphases added).

It is this recurring motif of "democratic space" which lies beneath Anwar's attempt to articulate a view from within the Islamic heritage about the role of the *'ulamâ'*[36] in interpreting the body of Islamic law. Anwar does not deny the right of the *'ulamâ'* to undertake their role in juristic interpretation. She does, however, question any attempt of an individual or unelected minority of people to claim a monopoly over the act of interpretation (Anwar, 1998: 26). Anwar views any claim of universality in monolithic terms as inherently unjust and lacking the *Weltanschauung* of the Qur'ân—the ethos of justice and egalitarianism. Rather, she states, the "experience of others who have been traditionally excluded from the process of interpreting, defining and implementing Islam must be included" (Anwar, 1998: 27).

Amina Wadud dissects the themes included in Anwar's paper with greater clarity. Specifically, Wadud examines the Qur'ânic notion of *Khalîfat* (vicegerency) as it relates to citizenship and gender in civil society.[37] In particular, Wadud draws a distinction between moral society and civil society: the former can only be developed at the individual level through the exercise of moral agency. This (initially) internal source of a moral society necessarily precludes the use of force. As Wadud emphatically states, "you cannot legislate a person into a state of moral excellence".[38] Therefore, even when the goal of an Islamic civil society is to establish a moral order, there is, according to Wadud, a functional disparity between the intent and the fulfilment of that intent.[39] This is because the development of the moral agent in the context of a mor-

al society cannot be achieved through external means. At the same time, however, Wadud argues that civil society has a crucial role to play in fostering the fulfilment of the moral agent within a moral society. This role is an instrumental one which involves providing a system of checks and balances within a society that demarcates and allocates loci of (temporal) power.

But in what way exactly does moral society require civil society and how does this relate to agency and gender? First, according to Wadud, an "Islamic" society goes through an almost teleological process of deciding what is *ma'rûf* and *munkar*.[40] In order to facilitate this process, various mechanisms were formulated during the classical era of Islamic history (*ijmâ',qiyâs* etc.). As the process of deciding the best path for a moral society is an unfolding one, there is, argues Wadud, always a distinction between human implementation of the divine will and the divine will itself (Wadud, 1998: 11). To illustrate this point, Wadud gives the example of the Indonesian and Malaysian *qâḍî*s and their respective "rulings" on the role of Muslim women as judges. In the former, women are considered quite legitimate representatives of the courts, whereas in the latter, the *qâḍî*s have decided that women are not fit to fulfil all the obligations of a *qâḍî* (Wadud, 1998: 13). Wadud's point here is deceptively simple but always dismissed as irrelevant by some Islamists: that there has always been and always is a disjunction between the human, still-evolving part of interpreting the law, and the ideal of moral society as enunciated in the Qur'ân.

Keeping this important distinction in mind, it becomes clearer how Wadud's moral-civil paradigm relates to the issue of agency and gender in Islam. If women are not considered to be full moral agents by the society they live in, then the result of this truncation of vicegerency ,through the human inspired law, is the nullification of the Qur'ânic vision for moral society (Wadud, 1998: 12). This vision includes the many verses relating to *taqwâ*, which is the chief end of moral society in the Islamic milieu, the attainment of which is not fettered by gender-based restrictions (Wadud, 1998: 22-3). The implications of this mode of reasoning is that women are deemed to be full moral agents who must avail themselves of all means in civil society engage in law reform (Wadud, 1998: 26-27). The rationale for law reform being that it is part of the process of creating a moral society:

> [Y]ou cannot construct laws that legislate the lives of *full moral agents* without the participation of the agents themselves in the *process* of legislation (Wadud, 1998: 27).

It is important to point out at this stage that Wadud does not do away with the need for *sharî'ah*. Rather, she regards the corpus of juristic methods, rulings and *fiqh* as a central instrument in providing the individual moral agent with a historically-based means by which to survey and assess the creation of a moral society (Wadud, 1998: 29). However, the fact that the *sharî'ah* evolved with only the input of male moral agents is significant in formulating *sharî'ah* now. By interrogating the *sharî'ah* of the classical era, the texts reveal how made jurists addressed women as *objects* of the law rather than full moral agents (Wadud, 1998: 24; see also Wadud, 1994). By constructing the law through an androcentric lens, the male jurists have granted Muslim women an insufficient status, which prevents her from completing her *khilâfah* before Allah—*khilâfah* being the ultimate purpose of her humanity. Resisting the unfair legal treatment of women becomes, for Wadud, part of an individual's moral duty.

By using the theoretical vehicle of *khilâfah*, Wadud is able to negotiate the difficult territory of *sharî'ah*, political power and human rights without totally jettisoning the heritage of *sharî'ah*, *fiqh* and an Islamic cosmology based on the creation of a moral order on earth. Rather than positing a crude either/or dichotomy between secular "modernity" and twelfth century *sharî'ah* underneath the rubric of state power, Wadud manages to articulate a (partially) viable Islamic solution to the theoretical debate on women and human rights. Yet, as will be demonstrated in Sections II and III, even this attempt must be reinforced with a clear Islamic-based methodology if it is to remain a consistently viable position on Muslim women's legal rights.

Relocating the Debate within *Uṣûl al-Fiqh*

The preceding section has demonstrated the various omissions and deficiencies in the academic literature on Islam, human rights and women. The aim of this section is to provide two examples of recent scholarship that address the problem from within the perspective of *fiqh*.[41] Both articles demonstrate that the struggle for Islamic law reform would greatly profit from exploiting problems and tensions that have been recognised to exist within Islamic law.

Ziba Mir-Hosseini and Zanan *Magazine*

At the outset of her article Mir-Hosseini asks to what extent and by what means can limitations imposed on women by *sharî'ah* texts be re-negotiated? To this question Mir-Hosseini's reply is affirmative only if Islam no longer remains part of an oppositional discourse which makes any scholarship conducted in this area both apologetic and reactionary.[42] Now that official discourse in Iran is no longer geared toward opposing the Shah's legal regime, the national debate on legal reform situates itself within *Shia* jurisprudence.[43] This shift in the parameters of the debate is significant in that the custodians of the *sharî'ah* are in power and so must justify any discriminatory laws on the basis of the same *sharî'ah*. This process of justification is gradually revealing the hidden biases embedded in the *fiqh* that cannot be attributed to the spirit of the Qur'ân.

The results of the change in the foundations of the discourse have resulted in some startling and provocative re-readings of Islamic primary and secondary sources of jurisprudence by both female and male religious scholars. Perhaps the most surprising aspect of Mir-Hosseini's article is that the most incisive and confident legal arguments in favour of women have come from a male religious scholar using a female pseudonym in a women's magazine! What is remarkable about this male legal response is that it tackles the patriarchal interpretations of the *sharî'ah* by Mortaza Motahhari,[44] Ali Sharî'ati[45] and medieval jurists from within the *fiqh* tradition by employing traditional tools of interpretation.

The debate centres upon the introduction of the new Family Protection Law (FPL) in December 1992 (entitled "Amendments to Divorce Law").[46] The new legal regime outlaws registration of all divorces without a court certificate. It also requires all divorcing couples to go through a process of arbitration and allows for the appointment of women judges as advisers to the primary judge hearing the case. Most radical of all, the Amendment allows the court to place a monetary value on a woman's housework and entitles her to *ujrat al-mithl* ("wages in kind") for all housework done throughout her marriage.[47] The law, however, only passed the Council of Guardians and the Majlis after much debate over its provisions, particularly the provision relating to *ujrat al-mithl*.

The significance of the new divorce law and the debate surrounding it underscores the fact that the present debates are taking place in the Islamic Republic, whose claim to uphold and enforce *sharî'ah* makes it directly responsible for any injustices that take place under the legal regime (Hosseini, 1996: 292). It is within this context that the women's magazine *Zanan* opens up the debate in a series of articles focusing upon "Law/Rights" as they pertain to gender inequality (Hosseini, 1996: 292). *Zanan 4* in particular displays a very marked shift in tone and style. This change is because the author, with the female pseudonym of "Mina Yadegar Azadi" takes issue with the premises of the *Shia* discourse on the position of women by using the juristic and logical argumentative devices of *uṣûl al-fiqh* (Hosseini, 1996: 297). The first article by Azadi deals with the issue of forbidding women, since 1979 to serve as judges on the grounds that it is against the rules of *sharî'ah* to do so (Hosseini, 1996: 297). Azadi systematically deals with each reason behind the legal proscription. First, Azadi looks at the Qur'ânic verses used to support the prohibition, namely, 4: 34 (al-Nisâ'), 2: 228 (al-Baqârah) and 59: 33 (al-Aḥzab) (Hosseini, 1996: 297). To the orthodox interpretation of the first verse which many Islamists claim prohibits women from having dominion over men, Azadi counters the view by arguing that the verse does not indicate that men are superior to women. Rather, the verse merely recalls the place of married men within the family that corresponds to economic conditions.

More specifically, Azadi employs an etymological analysis of two words within the verse which have been interpreted by men to justify men's natural and institutional superiority over women. These words are *faḍl* ("to excel"), and *qawwâm* ("to maintain") (Hosseini, 1996: 296). Using his knowledge of Arabic linguistics, Azadi explains that *faḍl*, rather than denoting a natural or foundational advantage, actually indicates a level of advantage or superiority that is *achieved*. He does this linguistic deconstruction by distinguishing three nuances of the term. *Faḍl*, Azadi explains, has both negative and positive connotations. In the positive sense *(faḍl i-mamdûḥ)*, it can mean a) *faḍl* by variety, such as the superiority of animal over plant life; or b) *faḍl* by species, such as the superiority of humans over other mammals; and c) *faḍl* by essence *(dhât)*, such as the advantage of one person over another which is commonly

measured by some criteria such as wealth or education (Hosseini, 1996: 296). Viewing the verse in the light of the last connotation of *faḍl*, Azadi concludes that men's *faḍl* in relation to women only arises in the event of his having to manage and provide for his own family (Hosseini, 1996: 298).

The same etymological distinction is drawn when dissecting the meaning of the word *qawwâm*, which denotes a contract or a custom that men voluntarily undertake to run the affairs of a family (Hosseini, 1996: 297). Rather than implying superiority, the two words indicate that men's right to maintain their families is tied to economic imperatives and duties. If, for example, the economic roles were to be reversed, then a wife would have an *achieved* right of making decisions for the management of the family if she so fulfilled the *duty of* responsibly providing for her family (Hosseini, 1996: 298).

Azadi treats the remaining two verses in a similar manner. With regard to verse 228 of al-Baqârah which is taken to mean that men are a degree higher in status than women, Azadi argues that the difference in rights and duties, which is both relative and a matter of convention, cannot justify men's "innate" superiority —both are equal on account of their humanity (Hosseini, 1996: 298). To counter the argument based on verse 33 of al-Aḥzâb, which is used to justify restricting women to the home, Azadi offers a number of responses. First, he points out that the preceding verse reveals that it was addressed to the wives of the Prophet and therefore not applicable to any other women. Second, assuming that it was addressed to all women, its command (*ḥukm*) is guiding (*irshâdî*) in nature, not binding (*ilzâmî*). This latter point is agreed upon by all jurists who have not decreed that God's command in the verse be taken as an obligatory that women should be confined to their houses (Hosseini, 1996: 298). The conclusion Azadi draws from the examination of all three verses is that women are in no way debarred from serving as judges. Any other conclusion is but a pretext for those in political power to keep Muslim women second class citizens (Hosseini, 1996: 298).

It is in the next issue of *Zanan* (June/July 1992) that Azadi focuses on the relationship between *ijmâ'* and *ijtihâd*. He begins by defining the nature, scope and function of *ijmâ'* in *Shia fiqh* and its relationship with *ijtihâd*. The thrust of his argument is that *ijmâ'*

involves the gathering of opinions of scholars and jurists on a particular issue and is therefore merely a tool for denying a law from the primary sources —it is not a source of law on its own (Hosseini, 1996: 299). Since there is no requirement as to the minimum number of these opinions, it has become customary to claim that *ijmâ'* has been achieved for some legal rulings whose principles do not necessarily correspond to those as embodied in the primary sources (Hosseini, 1996: 300). Furthermore, Azadi elaborates that there are two kinds of *ijmâ'* . The first, *ijmâ' -i- muḥassil* (obtained consensus), is obtained through the collection of all the jurists on a particular issue. The second, *ijmâ' i-manqûl* (narrated *ijmâ'*), is formed when a *faqîh* of *mujtahid*, in order to support his own opinion, makes a claim of other jurist's consensus without conducting thorough research (Hosseini, 1996: 300). As the first type of *ijmâ'* is virtually impossible to achieve, according to Azadi, the jurists of today are referring to the second type. As such, the function of the second type of *ijmâ'* is to affirm the *Sunnah.* The second type of *ijmâ'* therefore has little legitimacy on its own —otherwise the jurists' opinion could replace the primary sources (the Qur'ân and the *Sunnah*) (Hosseini, 1996: 300). With regard to women's capacity to be judges, there is no *ijmâ' -i-muḥassil* preventing women from holding such positions. Of the *ijmâ' -i-manqûl*, Azadi questions the gender assumptions of the various male jurists who claim that women are naturally inferior to men. He clearly points out that centuries of confinement to the home has led men to believe that women are incapable of holding public office (Hosseini, 1996: 300).

In the final issue of *Zanan,* where Azadi attacks the orthodox approach of viewing the law as it pertains to women, he draws a clearer distinction between the primary sources of law and secondary jurisprudential *(fiqh* texts). He emphatically points out that the primary sources do not contain any evidence which would warrant the secondary sources banning women from working, issuing decrees or becoming a religious leaders. Rather, he points out that the secondary sources reflect the views and biases of historical Muslim scholars and jurists rather than the original texts. He calls for all *fiqh* opinions to be reassessed in the light of the principles and ethical postulates presented in the Qur'ân.[48] Azadi concludes his arguments in Zanan by calling for complete gender

equality in all spheres of *sharî'ah* by presenting a *sharî'ah* bill of rights for women. This is done by elaborating six principles entailing equal rights in 1) education, 2) choosing a profession, 3) administering justice, 4) attaining spiritual perfection, 5) being the recipients of equal rewards and punishments and lastly, 6) developing a healthy society and fulfilling other social and human needs (Hosseini, 1996: 303).

The implications that emerge from this examination of Azadi's contribution to the debate are significant in terms of constructing an incisive and authoritative approach and methodology for law reform in the area of Islam, human rights and women. As Mir-Hosseini points out, by taking a *fiqh* approach it is possible to, firstly, survey the divergent opinions and rulings of jurists and judges. Then the issue can be put into historical perspective and evaluated in the light of the Qur'ân, *ahâdîth, ijmâ'* , reason as well as the local practices of that time. Finally, those opinions which are contrary to the writers' position can be refuted by using juristic devices. Among the various *fiqh-based* arguments included are the distinction made between the Divine Lawgiver and the temporal law maker (the Islamic Republic), and between primary and secondary sources of the *sharî'ah*. While primary sources are subjected to innovative methods of interpretation, the secondary sources are actively debated and at times refuted by the aid of the former. Mir-Hosseini and *Zanan* authors argue that history and politics are the decisive factors which moulded the specific juristic rules governing women. Of these rules, some are binding (*ilzâmî*) and others are guiding (*irshâdî*). Moreover, writers such as Azadi support a radical use of *ijtihâd* in order to rectify the gender discrimination present in the legal system. By using this wide spectrum of reasoning, juristic tools and linguistic critique, *Zanan* writers are prising open the fissures in the legal heritage of *sharî'ah* so as to reform the law from the authoritative voice of a fiqh background. Although somewhat unstructured in their approach, the *Zanan* debates are an example of the beginning of a new and more effective strategy in the struggle for Muslim women's human right (Hosseini, 1996: 315).

Muhammad Fadel and the Law of Female Testimony

Muhammad Fadel explicitly takes a *fiqh* approach to this controversial area of the *sharî'ah* by pointing out that jurisprudence by its very nature takes a broader interpretative perspective. Ḥadîth collection or exegesis (*tafsîr*) on the other hand adopts a more atomistic approach and allows for a greater risk of an androcentric interpretation of the legal sources.[49] Fadel then introduces the best-known example of discrimination against women in Islamic law: the relative weight given to women's testimony as witnesses in comparison to mens'. The discrimination that is evident in this area of the law arises from the following Qur'ânic verse:

> O believers, when you contract a debt one upon another for a stated term, write it down ... and call in to witness two witnesses, men; or, if they not be men, then one man and two women, such witnesses as you approve of, lest one of the two [women] err, then the other will remind her.[50]

Many jurists, as proof that women are more prone to error than men, have attributed the possibility of error to women. The twelfth century theologian Fakhr al-Dîn al-Râzi explained the inferior status of women's testimony as emanating from her "nature" which made her more likely to forget than a man (Fadel, 1997: 186). This view has resonances in the twentieth century in the comments of Sayyid Qutb where he argued that a woman's psychology and motherly instincts prevent her from possessing the objectivity for being a single witness (Fadel, 1997: 186). The Egyptian reformer Muhammad Abduh was the first twentieth century scholar to provide a different explanation by pointing out that the different economic roles of men and women in society made each likely to forget those things which were not part of his or her daily experience (Fadel, 1997: 186). According to reformers like Abduh, the apparent rule established by the verse was neither universally applicable across time nor generally applicable to all types of cases brought to court (Fadel, 1997: 186).

Despite the foundational premise established in this area of the law that discriminated against women's testimony, a careful examination of the historical and legal medieval legacy reveals two interrelated themes that could serve to provide a powerful argument for *fiqh*-based law reform. One issue is that medieval jurists accepted or rejected testimonies based on criteria pertaining to

social status, religion and whether the witness was a slave or a free person. Because the arena of the court was laden with partisan interests, the judge made a distinction between normative speech and political discourse when assessing the credibility of witnesses (Fadel, 1997: 187). Fadel defines political discourse as statements which, if admitted in the courtroom, would lead to some immediate, tangible consequence in favour of one party and against the other (Fadel, 1997: 188). Therefore a witnesses' testimony and a judge's verdict are both political because of the consequences of either are immediate irrespective of the consent of the party who contests either the facts presented by the witnesses or the rule of law applied by the judge (Fadel, 1997: 188). In contrast, normative discourse, if admitted establishes a universal norm or fact, but only potentially affects tangible interests of the litigants (Fadel, 1997: 188). The manner in which Islamic law treated both forms of course was divergent. More precisely, a disputed fact in a lawsuit, could generally be established by the testimony (*shahâdah*) of *two* men (Fadel, 1997: 188). However, the normative statements used by an independent interpreter of the law (*mujtahid*) as a source for the derivation of the law only needed the narration of *one* person. In other words, the narration of normative statements was gender neutral. For example, Faṭîmah and 'Aîshah's narration of a ḥadîth would be as probative as 'Alî's so long as all narrators were credible.[51]

Furthermore, the process by which legal norms were derived from the Prophetic reports were also considered to lie in the normative realm of discourse, and was therefore gender-neutral. This logically extended to interpretation of revelation. Hence, the opinion (*fatwâ*) of a woman in law was just as valid and legitimate as that of man (Fadel, 1997: 190). A woman could theoretically be a *muftî* and a legal expert. The reason behind the gendered nature of *a* woman's courtroom testimony therefore has reasons *other* than those rooted in epistemological differences in character or "nature". The reason that emerges from the historical and legal literature is one that centres on the differing modes of regulating transmission and testimony (Fadel, 1997: 190). For if a woman's reasoning powers were deemed so deficient that her recollection of facts were not to be trusted, then courts would have rejected her interpretations of revelation as also being defective and therefore

inadmissible. Apart from considering a woman's' legal opinion as sound as any mans', women actually participated in the production and reproduction of the theoretical sciences as well as in branches of speculative legal philosophy (Fadel, 1997: 190-1). The fact that women were recognised as equal participants in intellectual fields of study and inquiry including law, created an awareness of the fundamental contradiction between this participation, and women's marginalised position as political actors in a court of law (Fadel, 1997: 190-1). More importantly, it served to prevent arguments about the discriminatory political rules of women's testimony being grounded in epistemological, essentialised terms (Fadel, 1997: 190-1).

What is unearthed from Fadel's historical examination are a number of medieval jurists who locate the source of this testimonial discrimination in specific social circumstances that women find themselves in. In addition, certain jurists identify and admit the reasons so uncovered point to a contradiction in the law. First, the fifteenth century Syrian Ḥanafî jurist al-Tarâbulûsî admits that the truth-value of testimony is not linked to the gender of the speaker (Fadel, 1997: 193). However, he then hedges and expands his argument by stating that women are required to stay at home so as to prevent *fitnah* from disturbing the social fabric of society (Fadel, 1997: 142-3).[52] Therefore, so as to discourage the use of female witnesses (in a public arena) the law governing testimony discriminated against women. By so doing, the law was encouraging the use of male witnesses in civil transactions, thereby reducing the need for women to leave their homes (Fadel, 1997: 142-3). Rather than locate the source of the discrimination in a woman's nature, al-Tarâbulûsî justifies the rules on the basis of social costs of treating a woman's testimony as that of a man's. The argument then, is political as it is balancing competing interests of society and individuals. Thus on a legal basis Muslim jurists had to admit that from within the criteria of jurisprudential reasoning, discrimination against women on the basis of intellectual or psychological inferiority of women, was an untenable position (Fadel, 1997: 194).

A second tension in the *fiqh* history offers an even stronger argument for modern law reformers in their struggle to rectify gender-based discrimination in this area of the law. The dominant juridical discourse was premised upon the distinction between

a normative realm and a political realm of discourse. The particu-
lar interests involved in the political realm involved a higher de-
gree of scepticism. However, a few well-known jurists such as Ibn
Taymiyyah and Ibn Qayyim al-Jawziyyah, rejected this distinc-
tion between *shahâdah* and *riwâyah* altogether (Fadel, 1997: 197).
Al-Jawziyyah emphatically stated that the transmission of a Pro-
phetic report required the greatest test of stringency with regard
to precautions in discourse. Moreover, a slave's transmission of a
Prophetic report, if accepted, is ample justification for permitting
a slave's testimony into a courtroom. The implications of this ar-
gument by al-Jawziyyah extends to women's testimony and Ibn
al-Qayyim employed these implications to argue that if a woman
was regarded as being reliable in her testimony in financial mat-
ters, then she must also be regarded as reliable in all other walks
of life (Fadel, 1997: 197). Second, ibn al-Qayyim and Ibn Taymiyyah
extrapolated from the preceding, arguments: that a judge should
be permitted to rule on the testimony of men or women based on
the likelihood of that evidence being true (Fadel, 1997: 197). On this
basis both jurists rejected the foundational normative-political dis-
tinction used to justify discrimination on the basis of gender.

In order to base this argument in the primary sources, Ibn
Taymiyyah comments on Q II: 282 by pointing out that the re-
quirement of plurality of witnesses in the, Qur'ân is for recording
purposes. If a woman is "intelligent and remembers and is trust-
worthy in her religion" then her testimony is like that of the trans-
mission of a religious text (Fadel, 1997: 197). In addition, Ibn
Taymiyyah points out that the verse is not directed toward judg-
es, but, rather, toward individuals who are involved in an indi-
vidual transaction thereby making the relevance of verse to the
courtroom fairly oblique (Fadel, 1997: 197). The actual meaning of
the verse would be to use two male witnesses or, in their absence,
with one male and two female witnesses (Fadel, 1997: 198). It is
important to point out at this juncture that no school of Islamic
law ever restricted the use of combinations of witnesses accord-
ing to the nature of the matter before the court (Fadel, 1997: 198).
To highlight the axiom behind such a practice, Ibn Taymiyyah states
that the requirement to ask two women to testify at the time of
recording the testimony does not necessarily mean that judgement
cannot be rendered with a lesser number of witnesses. He con-

cludes his argument by stating that the admissibility of testimony should not be determined on the basis of gender, but rather, on the basis of the credibility of the witness (Fade, 1997: 198).

It is this rich source of contradictions, differing sociological views and the rigor of Ibn Taymiyya's juristic reasoning that provides a *fiqh*-based authority to rectify the gender discrimination in the area of the probative value of a woman's testimony. Rather than simply state that sex stereotyping is the cause of much of the legal discrimination against Muslim women (as does Mayer), writers should follow the example and approach of Fadel who has succeeded in presenting a far more practical and helpful legal armoury for purposes of law reform. Not only does Fadel's analysis provide an authoritative *fiqh* (Ibn Taymiyyah) to present a modern-day interpretation of both primary and secondary legal sources regarding women's testimony, but the jurisprudence reveals that the normative-political division allowed women (in *Sunnî* schools) to be *muftîs*. It is at this point, after presenting the capability of *uṣûl al-fiqh* to yields favourable interpretations of the primary and secondary sources of law, that the question of legal methodology becomes all the more pertinent. This urgency is informed by the need to more coherently and systematically provide a structure within which to clearly articulate modern readings of the original sources. It is to the possibility of such a task that the paper now turns.

The Methodologies of Rahman and Shahrur

At this juncture, it is possible to draw two conclusions regarding the premodern juristic heritage and modern attempts at Islamic law reform. First, the reasons for the narrow literalist approach to the law and the processes of deriving the law pertain both to mundane requirements of medieval state administration, to an Ash'arite[53] theological postulate and to modern history of colonial resistance. With regard to the first temporal exigency it is important point out that the medieval legal establishment was obliged to develop an internal system regulating the giving *iftâ*.[54] Thus, the reiteration within the four schools of the necessity for an authoritative hierarchy of sources had the effect of preventing jurists from departing from the legal doctrines as stated in the sources.[55] Without such a hierarchy the administration of law would have been impossible.[56]

The second aspect which emerges from previous sections regarding the premodern heritage and modern attempts at law reform, is that even if such reform is approached through a *fiqh*-based foundation, the methods by which reformers such as Abduh and Rida derive their reforms display a dangerously inadequate structure. The inadequacy of the legal reasoning in this situation can best be illustrated by the use of *talfiq*.[57] quas-*ijtihâd*,[58] and *maslahah*[59] which produced an amalgamation of doctrine that is unsustainable precisely for its lack of consistency of underlying rationale. The danger that arises in this *ad-hoc* approach to law reform is that by mixing legal doctrines, the reasoning embedded at the core of various rulings is often contradictory. This results in the lack of a consistent underlying legal rationale in each attempt at law reform. Put simply, inconsistent legal reasoning is the result of an arbitrary methodology.

What do the preceding two points means in terms of articulating new and coherent Islamic legal methodology? Perhaps more than anything else they highlight the need for a way in which to formulate legal principles and tools or extracting such principles, that reflect the ethical postulates of the primary sources of *fiqh*. The first examples of such an attempt to present a legal methodology is that presented by Fazlur Rahman.

Rahman's "Double Movement Theory"

The way in which Rahman approaches the concept of methodology hinges upon the connection he makes between the revealed text and the broad intention and spirit behind the specific language of the text.[60] The main thrust of this argument is that rather than interpreting the primary legal sources on a verse by verse[61] basis, the Qur'ân must be analysed as a unity against the backdrop of Meccan and Medinian society.[62] A thorough knowledge of Arabian customs, society and economics is required for this task. Rahman illustrates how his method of interpreting the Qur'ân applies to the apparently conflicting verses pertaining to the consumption of alcohol. There are three verses, which relate to alcohol consumption. The first mentions alcohol as being part of God's bounty along with milk and honey (Qur'ân 16: 66-69). A later verse then qualifies the initial verse by stating that alcohol is both beneficial and detrimental with the latter quality outweighing the

former (Qur'ân 2: 219). Still, later, when a group of Ansar in Me-
dina became inebriated and misread the Qur'ân, the verse (Qur'ân
4: 43) was revealed which unequivocally stated that alcohol should
not be consumed so that it would interfere with prayer. Finally,
after a severe disturbance broke out amongst a group of inebriat-
ed Muslims in Medina, a fourth verse (Qur'ân 5: 90-91) was re-
vealed, exhorting believers to desist from drinking because it was
the cause of discord and strife between members of one commu-
nity. The traditional jurists rationalised the apparent contradic-
tion of verses by resorting to the principle of *naskh* or of "gradua-
tion".[63] Rahman, however, proposes to extract a legal principle from
the seemingly contradictory set of verses by looking at the socio-
logical and historical reasons for their revelation. The reason be-
hind the verses is that when humans gather into societies, often
the social effect of alcohol consumption is detrimental.[64] This is
the general principle or rationale behind the series of verses. A
failure to elicit general principles results in precisely the fragment-
ed nature of the traditional jurists reasoning and rulings.[65]

How does Rahman's system of eliciting general principles from
the primary sources apply to the law pertaining to Muslim wom-
en? With regard to the verses relating to polygamy, Rahman points
out that the rulings are, at first glance, contradictory. In 4: 2 the
Qur'ân warns against the unlawful use of orphan's property with
whom they are entrusted. Then, in 4:126 the Qur'ân states that the
guardian are permitted to marry up to four of the orphaned girls
when they come of age if they (the guardian) fear they may be
unable to safeguard the properties. This permission is given pro-
vided the guardians can be just to all the wives. If they cannot be
just, then they marry only one (Qur'ân 4: 3). However, 4: 127 stip-
ulates that it is impossible to do justice among a plurality of wives.
Rahman points out that what many jurists and Islamists forget, is
that the verses were revealed in the context of orphaned girls.
Instead of confining the interpretation of the verse to this situa-
tional context, jurists deemed the permission to marry up to four
wives as beings legally sanctioned, whereas the requirement of
justice between wives was left to individual consience of the hus-
band. By so doing, Rahman shows how the general principle be-
hind the verses relating to justice was taken to be a mere recom-
mendation, and the situational verse to be a universal, legally val-

id rule.[143] Rahman further argues that the verse relating to justice should take precedence over the ones sanctioning polygamous marriage because of the recurring theme of justice in the Qur'ân (Rahman, 1997: 244).

What Rahman propose to do therefore, is to elicit general principles from specific rulings through the interpretative lens of the sociological forces that produced those rulings. The potential problem of this approach however, is that it is too open to charges of subjectivity. In particular, it is the second movement of the theory—the one proceeding from the general principle to the modern context—which requires a more precise criteria to be applied to it. Such criteria would address the crucial question of which general principles to accept or reject (Rahman, 1997: 245). What is required of Rahman's methodology in this respect, is a precise mechanism by which to apply the systematic principles derived from the revealed texts and their context in a modern milieu. An additional drawback of Rahman's approach is that he presents his methodology using only a few examples. It is therefore uncertain whether his theory of eliciting general principles could be used for every verse or ḥadîth (Rahman, 1997: 245). It is precisely this uncertain and vague part of legal methodology that the Syrian reformer, Muhammad Shahrur addresses.

Muhammad Shahrur "Theory of Limits"

Shahrur's recent work (1992)[66] presents a remarkable and innovative[67] system of legal methodology that has the potential to adequately address the Islamic law as it pertains to women. Shahrur uses a conceptual matrix from the areas of mathematics and physics to put forward a "Theory of Limits". First, on the basis of Qur'ân 15:9, he legitimately arrogates to the present generation of Muslims the right to interpret the primary sources an the light modern conditions.[68] By pointing out that the Qur'ân promises to "preserve" its own text, it is as much the property of later generations as that of earlier generations. As such, we are entitled to interpret the primary sources in a manner that responds to the exigencies of our age.[69] Shahrur takes his analysis one step further by viewing the issue of "Remembrance" in a teleological manner. According to this perspective, Shahrur maintains that modern Muslims are better equipped to understand the meaning of the revelation as

the Qur'ân speaks of people who have a "higher" level of culture as being better equipped to comprehend the revealed texts.[70] Therefore, since twentieth century Muslims are possessed of a "higher" culture and scientific knowledge, they are better qualified to engage in interpretation of the primary legal sources than their classical and medieval predecessors.

Intersected with this clever argument regarding jurisdiction over the right to interpret the Qur'ân and *Sunnah*, is a crucial distinction made between "the Qur'ân" and "the Book". This distinction, Shahrur explains, arises from the separate functions of the Muhammad as a Messenger (*Rasûl*) and as Prophet (*Nabî*). The latter title made the Prophet the recipient of information dealing with prophecy and religious matters whereas the former gave to him a bulk of legal instructions *in addition to* the Prophetic information (Shahrur, 1997: 246-7). Furthermore, Shahrur characterises the function of the Prophet as being religious, whereas that of the Messenger is legal. Following from this distinction, Shahrur states that prophetic information (the Qur'ân) is textually ambiguous and is hence capable of various interpretations. At the same time, the legal subject matter is clear although it can be subject to *ijtihâd*. *Ijtihâd* in this context, is distinguished from interpretation by pointing out that *ijtihâd* is a process by which legal language is made to yield a particular effect according to different historical contexts (Shahrur, 1997: 247).

It is it at this point that Shahrur introduces scientific concepts in order to elucidate the legal Message. Here he explains that the Qur'ân contains the two attributes of straightness (*istiqâmah*) and curvature (*ḥanifiyyah*) that correspond to qualities that exist in the natural world. He does this by listing various verses in the Qur'ân where these two terms occur (Shahrur, 1997: 247). The nature of both terms is that of a symbiotic relationship. Shahrur illustrates this relationship by showing how all motion in the natural world, from an electron to the movement of star systems and galaxies, conforms to a non-linear pattern. Similarly, curvature in law represents itself as the change and evolution societies experience through time and space. So as to order the curvature that exists in a changing society, the principle of "straightness" becomes a means by which society regulates and harmonises the curvature.[71] Whereas curvature exists in the natural world, straightness must be intro-

duced by divine revelation so as to co-exist with curvature in the ordering of human societies (Shahrur, 1997: 427). Shahrur rein-forces this part of "his argument by quoting 1: 5 where humans are shown to as for guidance regarding the-straight path.

The picture that emerges then of the attributes of straightness and curvature is that both exist in a dialectical-relationship that allows for law to adapt to different times and places. This simul-taneous intersection of straightness and curvature is the basis for Shahrur's "Theory of Limits", According to this theory, humans may move in a *curved* manner within the straight lines of the The-ory of Limits (Shahrur, 1997: 248).

More precisely, the Theory of Limits represents the divine message as expressed in the Qur'ân and Sunna, which sets a Low-er and Upper Limit for all human actions. Nothing short of the minimum is legally permitted and nothing above the Uppers Limitis deemed lawful (Shahrur, 1997: 248). Shahrur presents six kinds of Limits the details of which are too complex to describe here. How-ever, his Theory of Limits as it applies to the issue of polygamy will be detailed as it relates to the central aims of this paper. Be-fore embarking on the application of his Theory to polygamy, Shahrur is careful to expose the erroneous epistemological pre-mises of the early jurists. First, he says that the jurists failed to distinguish between the primary sources that express the Limits of God and these that are merely instructions. Secondly, jurists have failed to view the Qur'ânic and Sunnic rulings on women as just the beginning of the gradual process of emancipation. The liberation of women was therefore meant to continue after the death of the Prophet rather than to be frozen in time (Shahrur, 1997: 250). As to the Theory of Limits, Shahrur states that the tra-ditional interpretation regarding the polygamy verses has been that the Lower Limit is to marry one wife and the Upper Limit is four wives. However, what the Jurists have failed to realise is that the verses have, a significant qualitative aspect. For example, what sort of women are the verses alluding to? The verse makes it clear that its main focus are orphans (*yatâmâ*)[72] and the next verse then refers to "women" thus; "marry of the women". Here Shahr-ur infers the women alluded to here are the widowed mothers of the orphans. Therefore to allowed marriage of up to a fourth wife is a permission that pertains to the legal means by which protec-

tion can be extended to orphaned children (Shahrur, 1997: 252). The importance of this, humane act is highlighted by the repeated Qur'ânic and Sunnic exhortations relating to the protection and care of orphans. The main thrust of the verses is therefore directed not at women, but at the protection of orphans.

What unfolds from the discussion of Rahman and Shahrur's methodologies is the nascent foundations of a clearer structure from within which to articulate a more sophisticated and progressive discourse for Muslim women's human rights. Although both examples are not without their respective flaws, they stand as more precise and holistic conceptual structures from which to launch coherent legal reform for women living under Islamic systems of law. More importantly, they systematically deal with the historical and legal heritage of *fiqh* without which any discussion in this area of legal reform is dangerously lacking in both authority and substance.

Conclusion: Towards a New Methodology of Islamic Law and Human Rights

The purpose of the preceding discussion and critique of the current academic debate about Muslim women and human rights is to point out that practical and inclusive academic strategies need to be urgently devised and employed if any meaningful progress is to be made. Understanding the fundamental and crucial link between theory and practice, scholars and academics need to re-think the very foundations of the discourse of human rights and Islam. Such a reconceptualisation entails a critical awareness of Orientalism. More precisely, each individual scholar must be alerted to the interstices of knowledge and power that are part of the process of representation of Islam. Cultivating such an awareness will have the effect of allowing for a more nuanced approach—one that explores and makes constructive use of the rich and contested site of Islamic jurisprudence, the Arabic language, Islamic history as well as the terminology of human rights.

It is very easy to simply attack a way of life and a system of law as being androcentric and inimical to women's human rights. The ease with which such an attack can be launched is demonstrated by Mayer's comparative study which, at its culmination, provides no practical legal solutions to very real everyday human

rights abuses. Moreover, Mayer proposes to write a tome about Islam and Human rights in which only a fraction is devoted to exploring the sources, nature and scope of over fourteen hundred years of highly complex jurisprudence.[73] Rather, Mayer (inadvertently) causes the scope of the debate to be narrowed and further polarised by omitting this crucial foundation to the current legal human rights situation. Anwar and Wadud, although re-locating the debate within the Islamic tradition, fail to adequately deal with the question of *fiqh* precisely for the same reason: the *lack* of a coherent approach and an inability to systematically engage with the juristic heritage of *fiqh*.

More importantly, Muslim women are fighting two battles, one stemming from internal patriarchal pressures and the other emitted by forces that are seen to be threatening people's national-cultural boundaries. Often, close association or identification with Western images and discourses may jeopardise the effectiveness of Muslim women's internal legal struggles.[74] Without a new approach, Muslim women engaged in the very real (and often dangerous) struggles for human rights will continue to be caught between "betrayal and betrayal".[75] It has been the aim of this paper to submit that a more practical and adequate approach is one that actively and critically engages with the Islamic legal sources and tools and acknowledges the legacy of legal Orientalism. Such an approach must be simultaneously conjoined with a broader task of reformulating an internally coherent legal methodology. The history of European dominance over most of the Islamic world, the resistance movements that grew out of colonial occupation and the current Islamist resurgence, all require such a revised methodology. It is hoped that this paper will point the way to more inclusive, sensitive and coherent method for approaching Islamic law, human rights and women in the future.

Endnotes

1. The UDHR of 1948 forms part of the International Bill of Human Rights. It includes the International Covenant on Economic, Social And Cultural Rights (ICESCR), of 1966 and the International Covenant on Civil and Political Rights (ICCPR) also of 1966.
2. *Sharî'ah* is the "whole duty of mankind" encompassing all aspects of public and private law. See Vesey-Fitzgerald, (1955: 85). For a more detailed analysis of the development of the concept of *sharî'ah* see Rahman (1979: 101-9). For a shorter exposition see Schacht (1964: 1). Alternatively, for a detailed discussion see, Hallaq (1994); Aziz al-Azmeh (1988); Heer (1990).
3. "Islamist" in this context is a term meant to describe various movements which urge the (selective) reinstitution of laws and practices set forth in the core Islamic legal discourses. Examples of Islamist individuals and groups will be mentioned subsequently.
4. Badran (1995: 23); for a more detailed discussion of the effect of the colonial feminist legacy in the Muslim World see Ahmed (1992: 244). [Hereafter cited as *Women and Gender in Islam*]. A more recent analysis can be found in Haddad and Esposito (1998); Walther (1993: 221-260).
5. The literature on *uṣûl al-fiqh* is vast. A preliminary explanation is given by Schacht (1964: 58-68). The nuances in its meaning are explored by Makdisi (1984: 5-47).
6. The attempt by Abduh and Rida to reform Islamic law using a quasi-ijtihad under the rubric of "public welfare" will be detailed later in section II and III of the paper. For a detailed analysis see Kerr (1966: 103-186). Also see Adams (1968). For an example of an imprecise attempt at legal reform in this area see Esposito (1982: 103-135).
7. The literature detailing and explaining the highly complex sources and tools of Islamic jurisprudence are too numerous to adumbrate in paper as short as this. These sources have been studied and debated for many decades and a starting point for surveying the literature is Coulson (1964); Schacht (1964) and (1950); Kamali (1989). For a refutation of Schacht's thesis; also see al-Azami (1985). For a very comprehensive overview of the legal sources from a lawyer's perspective that is also an Islamic scholar, see Mahmassani (1961).
8. Khan (1971: ix-xiii).
9. Stowasser (1984: 11). For studies dealing with the text of the Qur'ân and its interpretation see Wansborough (1977).
10. See Powers (1986). Also see Juynboll (1969) and (1983).
11. Known individually as *ḥadîth* (plural *aḥâdîth*).
12. For an excellent description of *ijmâ'* see Hallaq (1997: 75-81).
13. '*Mujtahid*' is the description given to one who exercises *ijtihâd* (independent reasoning) in uncovering the terms of God's law. See Hallaq (1997: 117) for a succint explanation.
14. See note 8 for basic introductions of *qiyâs*.
15. "*Taqlîd*" means "imitation". See Schacht (1964: 69).
16. There has been considerable academic debate about the apparent "closing of the gate of ijtihad". Perhaps the best recent work in this area has been undertaken by Hallaq (1984).
17. See Hallaq (1997: 220-222), for a historical discussion of *istiḥsân*.
18. *Ibid.*

19. *This is the official English translation of the Iranian Constitution.*
20. Maulânâ Abû al-A'lâ Mawdûdî's major writings are an excellent example of reactive Islamist positions on women, law and human rights. See, for example (1980) and (1980a).
21. Tabandeh (1970).
22. *Ibid.*
23. *Ibid* (vii-ix).
24. *Ibid* (8-9).
25. Said (1978: 1). According to Said, "Orientalism is a way of coming to terms with the Orient that is Based on Orient's special place in European Western Experience".
26. *Ibid* (3). Also see Said's comments about this misuse and misunderstanding of his critique of Orientalism in Said (1997).
    Also Osbourne (1996: 76-78). For a detailed examination of the process of Orientalist representation see Said (1981); for a more controversial examination of Said's legacy see Abaza and Stauth (1988: especially pp 352-353). For a more expansive illustration of Orientalism see Said (1993). The way in which Islamic law is viewed in the European imagination is examined by al-Azmeh (1993: 161-180).
27. Ayatollah Javad Banohar was briefly Iran's prime minister before being assassinated. He was also a close aide of Ayatollah Khomeini. Mayer dissects his work "Islam and Women's Rights" (1984: 160).
28. Anouar Majid has undertaken an incisive critique of Mayer from an Islamic and Marxist perspective. Majid (1998: 321-356).
29. Sisters in Islam (SIS) is a group of professional Malaysian Muslim women formed in the mid 1980's which was established to draw government attention to the implementation of the Islamic Family Laws in 1988. Since that time, SIS members have written extensively on issues relating to Muslim women, state nationalism, the role of civil society and human rights. For example see Othman (*1994)* and Ismail (1995).
30. Anwar (1998). [Hereafter cited as "The Struggle for Women's Rights"]. Wadud (1998).
31. For the way in which Malaysian *adat* has interacted with Islamist law see Hooker (1970). For a very detailed description of the complexity of this legal interaction and its social consequences, see Karim (1992).
32. To be discussed at the end of the section.
33. Anwar displays a lack of knowledge about the role of *muftîs* and their historical relationship with state authority. A closer historical examination reveals that there were varying levels of political interactions between *muftîs* and those in authority. See Masud, *Messick and Powers* (1996: 3-4).
34. *Dâr al-Islâm* and *dâr al-ḥarb* are politico-legal concepts devised to describe the temporal location of the Islamic Empire and the "realm of unbelievers". Its precise parameters are too complex to be dealt with in this paper. See Khadduri (1955). Also Lambton (1981). For a more modern analysis, see Piscatori (1986).
35. c/f Fazlur Rahman's "Double Theory Movement" in Section III.
36. For a description of the role of the *'ulamâ'* in classical and medieval Islamic society, see Hallaq (1997: 153-161).
37. Wadud (1998: 1). A similar argument which employs very effective Islamic conceptual tools has been written by Barazangi (1996: 79-85)

38. Wadud (1998).
39. *Ibid.*
40. *Ibid* (10). "*Ma'rûf*" and "*Munkar*" refers to the enjoining of what is right and the forbidding of what is wrong.
41. Hosseini (1996: 285); [Hereafter cited as "Stretching the Limits"]. Fadel (1997).
42. Hosseini (1996: 285).
43. For an introduction to *Shiah* jurisprudence, see Schacht (1950); also, Fyzee (1955: 115). For a more modern analysis of Shi'i jurisprudence see Calder (1996).
44. Motahhari (1981).
45. Shariati (1978), also (1979)
46. Hosseini *(1996:* 290).
47. This is the divorce is initiated by the husband, *ibid* (292).
48. This is very similar to Fazlur Rahman's methodology, which will be outlined in the next section.
49. See also, Ahmed (1992); Mernissi (1987: 75 and 126).
50. Qur'ân 2: 283
51. Fadel (1997: 188), see note 46 for a more detailed discussion of the regulation of normative discourse.
52. See Mernissi (1997) for a historical and modern sociological discussion of *fitnah* in Islamic societies.
53. The conflict between the *Mu'tazilah* and the *Ash'arites* is discussed in Hourani (1971); Also, Khadduri (1984: 78-105). For a far more analytical exposition which describes how the *Ash'arite* world-view came to dominate the interpretation of revelation, see Fakhry (1991). Any discussion of this development in Islamic legal history must deal with the issue of freedom, humanism and individualism in the Muslim tradition. These issues are beyond the scope of this paper. As an introduction see, Kraemer (1992); Rosenthal (1960); Coulson (1957); Makdisi (1990). For a modern exposition see, Monshipouri (1998).
54. The way to achieve such regulation was to recognise a set of canonical works within each school of law, without knowledge of which a person's *fatwâ* was deemed inadmissible by a court. Hallaq (1997: 209).
55. Coulson (1996: 44).
56. Hallaq (1997: 209).
57. "*Talfîq*" is where a part of a doctrine of one school is combined with part from another. For example the Ottoman Law of Family Rights (1917). See Hallaq (1997: 210).
58. This is an ijtihad that does not conform to the strict rules regarding the authoritative hierarchy of legal sources as stated in the four schools of law. See Hallaq (1997: 210-211).
59. "*Maṣlaḥah*" is the doctrine of "public interest" which was used by Abduh in a fairly utilitarian manner; See Kerr (1966).
60. Rahman (1965); Also see (1979). Another excellent example of Rahman's argument and methods can be found in (979: 223). The most thorough overview can be found in (1982) and (1980).
61. Or in the case of the *Sunnah*, a report by report basis.
62. Rahman (1986: 45)
63. The centrality of the doctrine of *naskh* in the interpretation of Qur'ânic

verses is too vast to be dealt with here. For an excellent appraisal see Hallaq (1997: 83-101).

64. Rahman (1986: 47).
65. For the ethical implications of such fragmentation see Rahman (1985: 3-5).
66. No translation of this book in English exists, so I am relying on Hallaq's exposition of Shahrur's thesis in (1997: 245-254).
67. This is not to detract from the fact that Shahrur's book is not accepted by the orthodoxy as it employs some quite radical terminology that often cannot be explicitly rooted in primary sources. Nevertheless, it is presented here as an example of how the spirit of the Qur'ân can be harnessed in a systematic way for the purposes of law reform.
68. "Indeed, We have revealed the Remembrance, and lo, we verily are its Preservers".
69. Shahrur (1997: 246).
70. This reading of the Qur'ân emerges from 9: 97 where the Bedouins are said to have been "more hard in disbelief and hypocrisy" than other Arabs who possessed a higher level of culture, and were therefore likely "to be ignorant of the limits God revealed to his Messenger, Shahrur (1997: 240).
71. For an excellent description of this process, see Bohm (1980).
72. Shahrur, with the help of an Arabic linguist Ja'afar Daqq al-Bab, establishes that the meaning of *yatâmâ* refers to children with no father. Al-Bab's complex linguistic arguments are beyond the scope of this essay. For a succinct expostion see Fakhro (1996: 253) where she applies Shahrur's thesis to the issue of legal reform in the Gulf. The centrality of language and legal science 'in Islam is discussed by Weiss (1984: 15-21).
73. For an Excellent and incisive critique of Western feminists' approach in the area of human rights, see Kishwar, (1996: 30)
74. Tohidi, (1998: 283)
75. The term is taken from Bennoune's, (1995: 51)

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