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## Debating Women and Islamic Family Law. Disciplinary Shifts, Different Perspectives

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Research Approaches

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Up until the early 1970s the academic study of Islamic family law was largely the privileged terrain of those involved in Oriental studies. In their work, they mainly focused on the texts of the leaders of the major schools of Islamic law, on the one hand; and the newly codified and reformed twentieth-century laws, on the other. Considering family relations as the outcome of the provisions of Islamic law, they tended to define the classical Islamic family as monolithic, static and rigidly patriarchal, and saw the promulgation of the twentieth-century legal reforms as signaling the eclipse of this type of family.<sup>2</sup>

During the last twenty years, such an approach to women and Islamic law has become subject to serious criticism, and the grounds of debate have fundamentally changed. With an increasing number of historians and anthropologists involved in research on Islamic family law, new perspectives have been brought to the fore, and firmly held assumptions have come in for scrutiny. Rather than assuming that law texts determine social relations, these scholars question the ways in which such texts relate to other genres of legal discourse and to various forms of social practice. In order to do so they make use of a greater variety of sources and methodologies, including a wide range of court documents and oral narratives.

This disciplinary shift intersects with the entry of a rapidly growing number of women into the field of Islamic family law, many of them either from the region itself or having close ties of family or residence, also coinciding with the increasing importance of women's and gender studies. This has led to more theoretically informed work on gender relations. Rather than taking the meaning of gender for granted, the focus is on the ways in which gender is constructed in particular local contexts. More nuanced and finely-tuned notions are employed to deal with gender relations rather than patriarchy or male oppression and female subordination. Women's agency is taken into account and women are recognized as knowledgeable actors who make strategic use of the means and resources available, however limited at times these may be. With differences amongst women foregrounded, they are no longer seen as a homogeneous category, and the complex relations between gender and other axes of distinction, such as class, are elaborated on. Recent work, then, has focused on such topics as the construction of gender in various genres of Muslim legal discourse, the ways in which women's voices are represented in court cases and other court documents, and how oral narratives draw attention to the ways in which women from different backgrounds deal with the courts, devise strategies and express their points of view about marriage, divorce, and inheritance.<sup>3</sup> What insights have such shifts in perspective brought about?

### Women's Agency and Classical Islamic Law

To start with, whereas many Orientalists and Muslim scholars underline the similarities between the various classical schools of law, a comparison of legal provisions 'from a woman's point of view' brings out substantial differences. For instance, according to Hanafi law women of legal marriageable age were able to arrange for their own marriages; according to Maliki law they had the possibility to ask for a divorce under specific circumstances, and according to Hanbali law women were able to include certain conditions in the marriage contract. If this already indicates some of women's options in classical law, all schools of law grant women the rights to deal with their property in whatever way they wished.

# Debating Women and Islamic Family Law Disciplinary Shifts, Different Perspectives<sup>1</sup>

Recent studies, employing *fatwas* and court cases in order to discuss how gender is constructed in specific legal discourses and practices, have further undermined the notion of a monolithic, static and patriarchal Islamic family. Authors have pointed to the ways in which *muftis* and *qadis* enforced women's rights and, at times, attempted to modify provisions which would affect them negatively. Those working with court documents used for property registrations, such as *waqfiyyat*, sales registrations and so on, have provided ample evidence that women were, indeed, property owners. Summaries of court cases have been used to prove that women did not hesitate to make use of the court system in order to claim their rights. Those working with contractual provisions, such as the dower, have elaborated on its flexibility and the great variety of arrangements made.

Still, the use of such written sources poses problems. The relation between the information that written sources provide, and actual social practice always needs to be questioned. Authors working with women's narratives (oral history, life stories, interviews, informal talks) have drawn attention to the, at times, substantial contrasts between the amounts registered as dower and what women receive in practice. With respect to court action, they have pointed out that women may turn to the court to ask one thing (for instance maintenance or the balance of the dower) in order to get something else (such as a divorce on their own conditions). In fact, women's turning to the court in itself may have divergent meanings. Whereas it indicates their ability to act as a legal person, it may also point to the lack of any other viable options available to them. In a similar vein, women's access to property does not necessarily imply gendered power; women may claim their share of inheritance because they find themselves in a highly problematic situation (being without the support of brothers, or being pressured to do so by their husbands, for instance), rather than as the expression of a position of strength. A major challenge is then to understand how specific genres of legal writing interact with social relations.

### The Complex Meanings of Family Law Reform

The notion that twentieth-century legal reforms greatly improved the options of women needs modification. Classical family law was considerably more flexible and varied than often assumed, and in respect to certain issues such as paternity claims legal reforms did away with some of the leeway classical law had provided to women. As such it actually worked against women's interests. Also, when comparing classical Islamic law with twentieth-century reforms, there is more at stake than the issue of the substance of the law. As

family law reform also entailed its codification, a greater emphasis on written and official documents, and a much greater control of the State over the court, it may well be argued that reforms have increased its rigidity. In setting clear standards for all, it has been pointed out, codification guarantees the equal treatment of all citizens. There is, however, a contradiction between such proclaimed equality of men and women as citizens, and the gender differences which are inscribed in Islamic family law. If the classical Islamic system was strongly gendered, the codification of Islamic family law has further grounded such gender differences.

Analyses of legal reforms have pointed to the need to place such reforms within the context of processes of state-formation and nation-building, which are far from gender neutral. Twentieth-century Islamic family law has become a powerful political symbol: in Turkey, Pahlavi Iran and Tunisia, the codification and reform of Islamic family law was a strong sign of the State's commitment to modernity; whereas in Iran after the Islamic revolution, the reforms instigated by the Pahlavi regime were immediately abrogated in order to express the State's commitment towards the Islamization of society. Codification has also been employed to unify the nation-state, and legal reforms often entailed attempts at creating a new type of family, undermining kinship loyalties and placing a stronger emphasis on conjugal relations. If, at times, legal reform may limit the control of both kin and husbands over women, it may simultaneously imply greater state control over their lives.

Women have approached family law issues from divergent perspectives. Some have argued for replacing Islamic family law with a secular system. Others have worked for the implementation of Islamic family law reform which would extend women's options and support their interests, whether from a modernist, or from an Islamist point of view. At the same time, women have also made the most of options available to them within existing systems of Islamic family law, for instance through including stipulations in the marriage contract, or by registering particular forms of dower, at times refraining from claiming their legal rights in order to gain other benefits. In order to gain insight into the impact of legal issues on gender relations, we need analyses which pay attention to different genres of legal texts and juridical practices, as well as to women's actions, narratives and strategies. ♦

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### Notes

1. This contribution is a brief summary of my article 'Debating Women in Islamic Family Law: Legal Texts and Social Practices', forthcoming in Judith Tucker and Margaret Meriwether (eds), *The Social History of Women and Gender in the Middle East*.
2. See for instance J. Anderson (1968), 'The Eclipse of the Patriarchal Family in Contemporary Islamic Law', in J. Anderson (ed.), *Family Law in Asia and Africa*. London: Allen and Unwin. Pp. 221-34.
3. See, for instance, Shahla Haeri (1989), *Law of Desire. Temporary Marriage in Iran*. London: IB Taurus; Ziba Mir-Hosseini (1993), *Marriage on Trial. A Study of Islamic Family Law: Iran and Morocco Compared*. London and New York: IB Taurus; Annelies Moors (1995), *Women and Property in Islam. Palestinian Experiences 1920-1990*. Cambridge: Cambridge University Press. Judith Tucker (1998), *In the house of the Law: Gender and Islamic Law in Syria and Palestine, 17th-18th Centuries*. Berkeley: California University Press; Margaret Meriwether, *The Kin Who Count. Family and Society in Ottoman Aleppo, 1770-1840*, forthcoming; Lynn Welchman, *The Islamic Law of Marriage and Divorce in the Occupied West Bank*, forthcoming.