Muslim Reformist Thought and Rethinking the Institution of Nikāh

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The last few decades have witnessed an explosion of feminist critiques of Islamic family law. Termed ‘Reformist’, much of this literature challenges the traditionalist understanding of the Islamic marriage contract (nikāh), which to date has been constructed upon the premise of gender inequality. To remedy this, Reformist authors such as Amina Wadud, Dahlia Eissa and Ziba Mir–Hosseini advocate a feminist rereading of the two primary sources of Islamic law; the Qur’an and Sunnah. Such a reading reveals equality as the ratio legis of Qur’anic legal rulings, which can then be contrasted with the patriarchal exegesis of these rulings by traditionalist scholars. These interpretations have long been subsumed into Islamic orthodoxy at the cost of women’s rights. In effect, Reformism distinguishes the spirit of Islamic law from its practice. This Article attempts to collate Reformist arguments and assess how they are legitimised in relation to three areas of Islamic family law; guardianship, polygyny, and divorce law. Reformists argue that gender inequality arose in these areas as the result of a patriarchal social environment.
that informed the worldview of early Islamic jurists. Inequality thus became enshrined in legal rulings, thereby not accurately reflecting the spirit of the Qur’an and Sunnah, but the opinions of jurists who were a product of a patriarchal society. Therefore, Reformism is primarily an exegetical enterprise with an eye towards the socio-historical context of Qur’anic revelation and its early juristic interpretation. At its core, this exercise is a form of ijtihād (individual reasoning) which is a cornerstone of the Islamic legal philosophy. In addition to analysing Reformist arguments, this Article will make note of the fact that Reformism is an ‘internal’ movement within Islam. It rejects the idea that Western legal theory and social practices are the ideals against which Islamic law can be compared. Instead, the movement utilises internal vehicles for reform, such as ijtihād, that are well-established in the Islamic legal tradition. These are the means by which the ideals of reform are legitimised.

Introduction

Islamic law is self-sufficient in its ability to reform Islamic dogma. That is, Islamic law contains within itself the methods for re-interpretation through its reliance on the primary sources of Islamic orthodoxy. As J. Bowden explains, ‘the two authoritative sources of Islamic law, sine quibus non, are the
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Qur’an and the *sunnah*. The interpretation of these sources lends itself to the native reformation of teachings without relying on foreign influence so often discredited as heterodox innovation or *bid’ah*. Although the existing channels for reform are well-established, their use today is often counteracted by the powerful conservative trends of Islamic legal theory. *Ijtihād*, translatable as ‘exertion of effort’, implies the concerted application of hermeneutics and individual reasoning for the purpose of, as Irshad Abdal-Haqq describes, ‘seeking to formulate a legal determination based on the principles of the *sharī’ah*’. Often it is *ijtihād* that bears the brunt of conservative criticism vis-à-vis the reshaping of the *sharī’ah*. The fallacious, albeit highly contested, argument that the ‘gate of *ijtihād*’ has been permanently closed since the 12th century regularly serves as a rebuttal to the practice of individual reasoning. Much has been written on this topic, and I could not, within the scope of this Article, hope to argue any point that has not been made before by more qualified legal academics. Instead, I will suffice to say that modern academic literature is fighting against this current of conservatism, emboldened by the sweeping social changes of the last two centuries. The scholar Andrea Büchler notes:

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1 Jeremiah J Bowden, ‘Marriageable Age in Islam: A Study on Marriageable Age Laws and Reforms in Islamic Law’ (2013) 2 LUX: A Journal of Transdisciplinary Writing and Research from Claremont Graduate University 1, 2.
Today’s modern Islamic legal scholars are adopting a variety of methodological approaches in order to circumvent the narrow restrictions placed on their work by classical Islamic scholarly tradition and the literal adherence to source texts which its exegesis demands. Reference to the history of Islam and the historicisation of certain *sharia [sic]* legal concepts is being used for interpretative initiatives, not in the sense that Islam should be abandoned as a point of reference, but rather that inspiration should again be drawn from its core...⁴

Respectively termed ‘Reformist’ by Ziba Mir-Hosseini,⁵ or ‘Modernist’ by Nadya Haider,⁶ the exertions of modern scholars are most apparent in the field of Islamic family law. There are three possible reasons for the Reformists’ focus on this field. First, it is the area of law best supported by the Qur’an and *sunnah*.⁷ The wealth of ancillary *āyāt* and *ahādīth* regarding family law accommodate a rich tradition of exegesis, allowing scholars considerable hermeneutic freedom while remaining rooted in the strata of the primary sources. These roots provide modern scholars with the best chance of legitimising their arguments with the support of holy

⁴ ibid.
⁷ Andrea Büchler and Christina Schlatter, ‘Marriage Age In Islamic And Contemporary Muslim Family Laws: A Comparative Survey’ (2013) 1 The Center for Islamic and Middle Eastern Legal Studies 37, 39.
scripture. Second, Islamic family law emerged relatively unscathed following the era of colonialism, where secular authorities sought to usurp religious laws and customs.\(^8\) By consequence it has retained its Islamic character, becoming a 'symbol of collective identity'.\(^9\) This has allowed a transparent form of discourse where the difference between Islamic and Western laws are clear. Third, the Weltanschauung of today is moving decisively towards social liberalisation and women’s rights; the area most affected by family law. If, as modern scholars would posit, social context can be applied retrospectively to better understand Qur’anic teachings, it would be myopic to assume that social change today has little bearing on contemporary Islamic law. Amani Saleh Alessa, for example, writes that family law codes in the Middle East often ‘enshrine’ sex-based discrimination,\(^10\) thereby placing legislation on a collision course with the global trend towards social ethics. On the matter of social ethics, under which we encounter the issues of equality and women’s rights, legal theory is where the tangible effects of these issues are most felt. In the words of A.K. Reinhart, ‘only Islamic law is both practical and theoretical, concerned with human action in the world, and (strictly speaking) religious. In this sense, Islamic

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\(^8\) Ebrahim Moosa, ‘Colonialism and Islamic law’ in Muhammad Khalid Masud, Armando Salvatore and Martin van Bruinessen (eds), *Islam and Modernity: Key Issues and Debates* (Edinburgh University Press 2009) 158, 169.

\(^9\) Büchler, Schlatter (n 7) 9.

law and legal theory must be the true locus of the discussion of Islamic ethics.\textsuperscript{11}

I will examine the status of marriage under Islamic law. Such a topic cannot be covered in its entirety in one study, so I will limit the discussion to the question of women’s rights. Specifically, the woman’s right to freely consent to and determine her marital rights and responsibilities to the capacity of any man. The question of equality is linked to three key aspects of marriage: guardianship, divorce law and polygamy, which will be the primary focus of this study. The discussion will begin with an attempt to define \textit{nikāh}; its definition necessarily pertains to its purpose and its doctrine. The position of classical Islamic jurisprudence on guardianship, polygamy and divorce law will then be explained with a critique of Reformist literature for each. The Reformist’s methodologies will also be analysed. Namely, \textit{ijtihād} and the examination of the socio-historical context of the Qur’an. This is especially relevant given that, as Amira Mashhour argues, ‘by applying \textit{ijtihād} generally or feminist \textit{ijtihād}, based on justice, which is the core value of Islam, one can fulfil gender equality to its fullest’.\textsuperscript{12}

Before beginning this discussion, however, it is worth evaluating the literature surrounding this topic. The last few decades have witnessed an explosion of literature from both


the West and the Muslim World, critiquing Islamic law from a feminist perspective, facilitating a lively debate on women’s rights in Islam. Much of this critique is aimed at challenging not the rulings of the Qur’an, but the rulings of the Traditionalist fuqahā. Hammudah Abd al ‘Ati’s summarises the Traditionalist position in *Family Structure in Islam*. On the areas of divorce law, polygamy and guardianship, Abd al ‘Ati provides a comprehensive summary of classical opinion. However, as an authority on orthodox doctrine, it pays little notice to the emerging Reformist movement this study seeks to engage with. In response, Mir-Hosseini’s paper, *The Construction of Gender in Islamic Legal Thought and Strategies for Reform* is notable for dividing the Reformist trend from the Traditionalist and the Neo-Traditionalist respectively. For the sake of clarity, I have subscribed to her term ‘Reformist’ to encompass scholars such as Wadud and Eissa. Mir-Hosseini specifically examines women’s rights under modern legal codes, similarly to Majid Khadduri (*Marriage in Islamic Law: The Modernist Viewpoints*). Andrea Büchler and Christina Schlatter take this further to adopt a primarily legal perspective of gender discrimination in *Marriage Age in Islamic and Contemporary Muslim Family Laws*.

While this Article will make some reference to modern legislation, it is not my intent to present a handbook of legal injunctions. Instead, this study will involve an appraisal of Islamic legal hermeneutics and the interpretation of the primary sources of Islamic law. With regards to the latter, Wadud embarks on a verse by verse deconstruction of gender discrimination in *Qur’an and Woman: Rereading the Sacred Text from a Woman’s Perspective*. While this study makes no pretense of offering a derivative exegesis, Wadud’s emphasis on the intent of the law rather than its letter is central to Reformism.
By asserting that this intent was obfuscated by Muslim jurists, Wadud inadvertently counters the questionable theory expounded by Annelies Moors in Debating Islamic Family Law: Legal Texts and Social Practices that the view of Islamic family law as essentially patriarchal is an Orientalist construct. This paper will follow Wadud in this regard, as well as analysing the various methodologies employed by Reformists such as Wadud’s hermeneutics. Wadud touches briefly on the historical context of gender discrimination, though a more thorough assessment of this context can be found in Dahlia Eissa’s Constructing the Notion of Male Superiority over Women in Islam. Kecia Ali (Marriage and Slavery in Early Islam) and Leila Ahmed (Women and Gender in Islam) also utilise the historical-critical method in examining the status of women during the pre-Islamic Jāhilīyah period and the formative years of Islam. Mona Siddiqui, in her Article, The Concept of Wilaya in Hanafi Law, extends this method to draw parallels between doctrines such as guardianship and similar practices in other cultures. Her work perceptively notes the effect of male-dominated societal norms on legal institutions. The historical-critical method of Qur’anic interpretation is an important factor in the legitimisation of reform and will be extensively discussed in the following pages.

In terms of methodology, I will adopt a qualitative approach in the form of documentary analysis. From the literature at hand, I shall attempt to explain how the Reformist movement seeks to legitimise the reshaping of nikāh in terms of women’s marital rights. This methodology necessarily involves the identification and analysis of Reformist themes in a broader sense than that offered by Wadud’s exegetical work or Büchler and Schlatter’s specifically legal approach. It is true that qualitative thematic analysis is fraught with the danger of potentially adopting biases present in the source literature.
However, rather than denying that these biases exist, I will defer to the assertion that social norms are moving towards gender equality, and any legal literature is undoubtedly shaped by the social norms of its time. This notion has significant implications for the socio-historical critique of the discriminatory doctrines of polygamy, divorce law and guardianship, in that they were shaped by anachronistic social norms. Therefore, the methodology of this Article is primarily antipositivist, as it will rely on the premise that the Qur’an, and by extension its interpretation by early jurists, is necessarily affected by its historical and sociological context. By consequence, I reject the assertion that the law formulated by the fuqahā represents the objective manifestation of Divine Law. To emphasise this point, I will refer throughout this paper to the distinction between the intent of the law dictated by the Qur’an and its practice in the form of legal rulings. Wadud, Eissa and Mir-Hosseini all allude to this distinction to different degrees. My approach is that of a student of Islamic law with the aim of collating Reformist themes to present a comprehensive counterargument to specific doctrines of nikāh.

The Definition of Marriage: Contract or Sacrament?

As Abd al ‘Ati notes in his work *Family Structure in Islam*, ‘the foundations of the family in Islam are blood ties and marriage arrangements’.\(^\text{13}\) Marriage, the monolith of Islamic family law, legitimises both sexual relationships and the resultant children. Therefore, the importance of nikāh stretches beyond the scope of the relationship between man and wife; it is the bedrock upon which all familial relationships are built. Given

its weight within Islamic law, it is perhaps surprising that its very definition is clouded in ambiguity. Firstly, the dichotomy arises of whether nikāh is a civil contract (‘aqd) or a sacramental union (mithaq-e-ghaliz). While all jurists agree that the nature of nikāh is that of a contract, the extent of its importance as ‘aqd is a matter of debate. Legal theorist D.F. Mulla attempted to define marriage in purely contractual terms as a bilateral agreement which ‘has for its object the procreation and legalising of children’. Islamic legal scholars are in agreement with Mulla’s contractual definition, with the exception of a minority of dissenting voices exemplified by scholars such as Muhammad ‘Abduh. ‘Abduh does not shy away from placing the blame for women’s denigration at the feet of the fuqahā and their contractual view of marriage. He argues that the Qur’anic ideal of a love-based marriage has been overwhelmed by ‘the definition that was poured upon us from the knowledge of the fuqahā’ (fāḍa min ‘ilm al-fuqahā), who sought to emphasise contract over sacrament. ‘Abduh, however, found himself in the minority. In accordance with the classical jurists, nikāh appears to have all the trappings of a civil contract; the conditions (shurūt) of consent, sanity, puberty (bulūgh) and majority (rushd), and the absence of legal impediments are the prerequisites for marriage.

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Yet the contractual view seems somewhat incomplete. Indeed, Mulla makes no mention of the protection and abode of a conjugal life proffered by ‘Abduh and found in the Qur’an, such as Sūrah Al-Baqarah: ‘They are raiment for you, and you are raiment for them’ (Qur’an 2:187). Abd al ‘Ati argues convincingly for the synthesis of civil contract and sacramental union, stating that while it contains elements of both, it is neither wholly one nor the other. He advocates an understanding of nikāh as a ‘divine institution’, given that ‘any action or transaction has religious implications’. At its core, marriage in Islam is primarily an act of piety. The Prophet intimated that marriage is a religious duty for those who could undertake it, as found in the hadīth of Ibn Majah: ‘Marriage is part of my sunnah, and whoever does not follow my sunnah is not of me’. (book 9, hadīth 1919) From a precursory reading of the textual sources, the religious nature of nikāh is impossible to dismiss. Thus, what emerges from the milieu of contract and sacrament is an intimate connection between the two. Qutub Jehan Kidwai and Nandini Chavan succinctly described this connection as marriage operating contractually in its opening stages before progressing to a sacred covenant following its solemnisation.

However, the question remains – what effect does the definition of marriage have on our understanding of women’s rights concerning nikāh? Marriage, contractually defined by Mulla, binds purpose with definition. That is to say, the

17 Abd al ‘Ati (n 13) 59.
18 Nandini Chavan and Qutub Jehan Kidwai, Personal Law Reforms and Gender Empowerment: A Debate on Uniform Civil Code (Hope India Publications 2006) 209.
definition of marriage as a means of legitimising sexual relations insinuates its purpose therein: that of procreation. Classical jurists are generally concordant with this view, asserting that through marriage the husband gains the right of sexual gratification from his wife and her womb.\(^{19}\) Contrarily in Reformist works such as *Marriage and Slavery in Early Islam*, Kecia Ali identifies the term *milk* as symbolising this right. She explains: ‘The same term, *milk*, was used – though with a somewhat different semantic range – for ownership of a slave. It was the exclusive *milk* over a particular woman – as a slave or as a wife – that rendered sexual access licit’.\(^{20}\) The connotations of servitude, Ali asserts, are not coincidental. The institution of slavery was widespread in the world of the early jurists,\(^{21}\) which may have resulted in them emphasising the contractual nature of marriage as a commercial transaction analogous to slavery.

Although there are other considerations involved in the marriage contract such as mutual support, love, and rights of inheritance, these are often peripheral from the perspective of classical Islamic jurisprudence. Many of these factors also find their roots in procreation. For example, the institution of *nikāh* stipulates, *inter alia*, the right of the husband’s paternity over any children resulting from the marriage.\(^{22}\) This was an important consideration for early Muslim jurists, who sought

\(^{19}\) Mir-Hosseini (n 5) 6.


\(^{21}\) ibid 8.

to legitimise ancestry and fatherhood.\(^23\) Abd al ‘Ati’s emphasis on blood ties and marriage as the cornerstone of the Islamic family unit brings procreation to the fore of our discussion and leads to the following issue: framing procreation as the centrepiece of marital union invites the question of women’s agency. Wadud states that ‘because a woman’s primary distinction is based on her childbearing ability, it is seen as her primary function’.\(^24\) By consequence, since women are the only individuals capable of bearing children, the central purpose of marriage is incumbent upon them. Eissa suggests that this responsibility denigrates women to the status of amorphous vessels for childbearing, thereby implying that ‘if she does not marry, her life is without virtue’.\(^25\) Katherine Lemons termed this ‘the marriage imperative – the view that marriage is the only secure status for adult women’.\(^26\) A woman’s agency and equality are thus relegated by submission to this imperative.

Reformist literature has attempted to wrest the institution of nikāh from the grip of the ‘marriage imperative’, in favour of understanding nikāh as an agreement based on love and


\(^{24}\) Amina Wadud, *Qur’an and Woman: Rereading the Sacred Text from a Woman’s Perspective* (2nd edn, Oxford University Press 1999) 64.


equality. In her work *Qur’an and Woman: Rereading the Sacred Text From a Woman’s Perspective*, Wadud argues extensively for the rehabilitation of marriage back into the orbit of core Qur’anic principles. She explains:

The Qur’an encourages men and women to marry as a safeguard of moral behaviour between the sexes. However, some interpretations of the rights and responsibilities between the married couple have so severely restricted woman [sic] that marriage becomes an institution of oppression for her. If marriage is the means by which a woman is stripped of her individuality and her self-respect as a human equal in humanity and in spiritual capacity to any man, then this is clearly against the Qur’anic intent for a just and moral social order...27

Significantly, the rationale behind reform comes not from foreign influence, but from the Qur’an itself. While Wadud acknowledges the biological differences between men and women, which she terms ‘functional distinctions’, she presupposes that the ethical basis of Qur’anic teaching is equality, with the only degree of difference lying in the question of piety (*taqwa*).28 Eissa further supports this idea by quoting *Sūrah an-Nisāh* regarding the creation of men and women ‘from one soul’ (Qur’an 4:1).29 If spiritual equality is assumed ab ovo, what follows is not an overhaul of marital doctrine, but a rebalancing of its principles. It is important to

27 Wadud (n 24) 103.
28 Wadud (n 24) 63.
29 Eissa (n 25) 24.
note that modern scholars validate their argument via exegesis of holy scripture; a process that could be defined as a renewal of *ijtihād*. Although *ijtihād* is itself controversial, its use nevertheless lends weight to the Reformist argument. This is because *ijtihād* is an established vehicle for reform within Islamic law. By avoiding the comparison of reform to *bid'ah*, the Reformist viewpoint is strengthened, allowing the woman to reclaim her agency through the rebalancing of ethical norms. This process subverts Annelies Moors’ dismissal of the patriarchal structure of Islamic family law as an ‘Orientalist construct’ and J.N.D. Anderson’s corresponding claim that such a structure has been eclipsed.\(^{30}\) Ziba Mir-Hosseini notes a trend in Islamic legal theory tending towards women’s rights that is ‘still in the process of formation’.\(^{31}\) Far from being Orientalist, this trend is attempting to reshape Islamic principles via the internal mechanisms of Islamic law, for the sake of equality and women’s agency.

However, Abdullahi An-Na’im is quick to note the limitations of exercising *ijtihād* to this end. With regards to the decidedly unambiguous passages of the Qur’an and *sunnah*, *ijtihād* is not permitted. It follows, An-Na’im argues, ‘that any discriminatory rule that is based on an explicit and definite text – and some of the most obviously discriminatory rules are in fact based on such texts as Qur’an or *sunnah* – is not open to


\(^{31}\) Mir-Hosseini (n 5) 3.
reform through *ijtihād*. Conversely, Wadud argues in *Qur’an and Woman* that the unambiguous passages which are shielded from *ijtihād* are those that support equality rather than discrimination; An-Na’im’s criticism is therefore misdirected. These verses represent the ‘Qur’anic intent’ explained previously, allowing modern scholars to separate this intent from the actions of the early jurists who sought to obfuscate it. Wadud suggests that the verses in support of male superiority are the ones in need of further clarification, as they reflect a ‘particular subject, event, or context’. In this sense, the *ijtihād* of Reformists is justified in reintroducing Qur’anic concepts in favour of equality. The renewed emphasis on equality bears important implications in three areas of Islamic marriage: guardianship, polygamy and divorce law.

**Guardianship: An Issue of Consent**

The doctrine of guardianship (*wilāyah*), particularly the betrothal of a minor (*qāṣir*) under the guardian’s (*walī*) influence, corresponds to the question of agency and equality in the sense that consent in the minor’s name can be given by the *walī*. However, before we begin the discussion of guardianship, it is first necessary to define the nature of *wilāyah* and its legal boundaries, and what constitutes a minor under Islamic law. As previously stated, procreation and licit sexual relations lie at the heart of the institution of *nikāh*. As a result, the age of majority (*rushd*) is intrinsically linked to the onset of puberty (*bulūgh*). Most classical jurists maintained that *bulūgh* could be assumed to have been reached at age 32.

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33 Wadud (n 24) 63.
fifteen for both sexes,\(^{34}\) with the exception of the Maliki madhab, which maintains a marriageable age of seventeen for both, and the Hanafi madhab, which permits ages as low as nine for females and twelve for boys. Although a major under classical law is still a minor under statutory law, I shall nevertheless refer to a ‘minor’ as a child prior to the attainment of bulūgh, during which time they fall under the tutelage of their wali.

Mona Siddiqui explains that the idea of the wali ‘implies in it the concept of guardianship found in archaic or Roman jurisprudence’, specifically, the office of patria potestas.\(^{35}\) This is traditionally understood as a father’s dominion over his daughter(s), with the stipulation that ‘marriage automatically emancipated a woman from her father’s potestas, for it was incumbent upon her to leave her father’s house and take up residence with her husband’s family’.\(^{36}\) The similarity between patria potestas and wilāyah is striking. The wali, like the pater of Roman law, is typically the father or the grandfather, although his authority is not diminished provided, he is a close male relative. Guardianship erodes the agency of the minor girl insofar as it allows the father ‘jural authority, control, and power over his daughter’s activities’.\(^{37}\) Such power, in the case

\(^{34}\) Norman Anderson, Law Reform in the Muslim World (University of London Athlone Press 1976) 103.


\(^{36}\) Thomas Kuehn, Law, Family, and Women: Toward a Legal Anthropology of Renaissance Italy (The University of Chicago Press 1991) 198.

\(^{37}\) Shahla Haeri, ‘Mut’a: Regulating Sexuality and Gender Relations in Postrevolutionary Iran’, in M. K. Masud, Brinkley
of natural guardians, was practically uninhibited according to classical jurisprudence. As Mahmoud Yazbak explains: ‘A natural guardian could enforce his decisions, including the choice of marriage partner (wilāyat al-tazwīj), with virtually no possibility for the minor to protest effectively (wilāyat al-ijbār)’.\(^{38}\) The term wilāyat al-ijbār is translatable as ‘coercive guardianship’, with the obvious restrictive implications on the ward’s agency. However, it is worth noting that this form of guardianship is a subject of contention among Islamic scholars. Abd al ‘Ati argues: ‘Nowhere does the Qur’an or the Prophet speak with approval of such coercive authority. There are some authentic reports that some fathers gave their daughters in marriage without their consent, but probably not without good intentions’.\(^{39}\) I will raise the following objection to this statement: any subversion of consent necessarily entails the suppression of the minor’s agency. Good intentions, admirable as they are, do not detract from this fact. By passing the responsibility of consent from the minor to the guardian, nikāḥ ceases to be an inter partes agreement, as the woman is relegated to the status of a third party in her betrothal. Moreover, all the principal law schools allow the wali authority to contract a marriage in the name of his ward, although they disagree on its binding status. To justify this, classical jurists typically allude to the Prophet’s betrothal to Aishah.\(^{40}\)

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39 Abd al ‘Ati (n 13) 83.

40 Bowden (n 1) 4.
Nevertheless, the necessity of consent is well-attested in the Qur’an and sunnah and their subsequent exegesis by classical scholars. It is a fundamental condition for the validity of nikāh. They reference the hadīth found in Sunan Abu-Dawud: ‘A virgin came to the Prophet and mentioned that her father had married her against her will, so the Prophet allowed her to exercise her choice’. The importance of consent is also enshrined in the ‘option of puberty’ (khiyār al-bulūgh). The option of puberty states that upon attainment of bulūgh, the woman gains the right to annul the marriage contracted for her by the wali. However, from the traditionalist perspective, this option is only legally valid for marriages contracted by a non-natural guardian, resulting in further restrictions on women’s agency. Even then, according to the doctrines espoused by Abu Hanifa and Abu Yusuf of the Hanafi School, the woman would lose the right to exercise the option of annulment if she did not do so immediately after reaching puberty. While these doctrines have, in many cases, been overturned by the legislatures of Muslim-majority states, their influence persists. In her study of sexual violence in Islam, Hina Azam notes that ‘classical Islamic law, far from being a medieval system devoid of contemporary significance, continues to be highly influential in modern Muslim legal codes’. By consequence, any discussion pertaining to...

41 Sunan Abi-Dawud, The Book of Marriage (Kitab-Al-Nikah) Hadith 2091.
42 S Jaffer Hussain, ‘Judicial Interpretation of Muslim Matrimonial Law in India’ in Tahir Mahmood (ed), Islamic Law in Modern India (Indian Law Institute 1972) 176, 178.
43 ibid 178.
women’s rights under Islamic law requires an assessment of the formative discourse of the early jurists.

Although classical scholars agreed on the importance of consent, how it is given is another area which calls the woman’s agency into question. First is the issue that silence can be considered consent. The basis for this lies in the hadīth considered authentic by al-Bukhari and Muslim, in which the Prophet states, regarding the shy virgin, ‘her silence implies her consent’ The primary madhabs are unanimous in their agreement on this, with the exception of the Shafi’i school, which asserted that the consent of the virgin is by words when the wali is neither the father nor grandfather. Some early scholars such as Ibn al-Mundhir attempted to mitigate this doctrine by arguing that this form of consent was only valid if the woman was aware of her acquiescence through silence. Even so, silence is no longer considered consent in most modern cultures, particularly with regards to sexual relations and contract law; the two areas corresponding most closely to the institution of nikāh. This is primarily because it poses a significant threat to agency, given that ‘the approval of a girl’s wali (guardian) seems to be more important to the authorities than her consent, as the transacting official can accept a girl’s silence as acquiescence according to the law, but will not

perform the marriage if her father is against it’. The inequality of accepting silence as consent is clear; only virgin girls are subjected to this practice. By contrast, the consent of men and previously married women is made explicit by words.

Considering the issues surrounding wilāyah, modern academic literature looks to the socio-historical context in which marriage and the associated doctrine of guardianship were formed. The dichotomy between this and the assertion that ‘the basic ethical norm of the Qur’an is equality between the sexes’ forms the basis of the Reformist movement. Mir-Hosseini explains:

While sharī’ah ideals call for freedom, justice and equality, Muslim social norms and structures in the formative years of Islamic law impeded their actualisation. Instead, these social norms were assimilated into fiqh rulings through a set of theological, legal and social theories and assumptions such as: ‘women are created of and for men’, ‘marriage as contract of sale’... and ‘male and female sexuality differ and the latter is dangerous to the social order’. All these either were developed by the fuqahā’ themselves, or reflected the state of knowledge of the time, or were part of the cultural fabric of society.

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48 Büchler (n 3) 126.
49 Mir-Hosseini (n 5) 21.
Therefore, it would be prudent to examine the Volksgeist of pre-Islamic Arabia to separate the intention of the Qur’an from its later exegesis. Mir-Hosseini, Wadud, Eissa, and others presuppose the early centuries of Islam to be fundamentally patriarchal, due in part to the fact that the predominant social unit – the tribe – was a patrilineal institution.\(^{50}\) However, such inequality was not unique to Arabia, demonstrated by the similarity of wilāyah to the Roman patria potestas. Men’s superiority was an assumed social norm across many cultures contemporaneous with the rise of Islam. This superiority is unassailable if we examine the status of women during the Jāhilīyah. During this time, women were afforded no rights; the killing of newborn baby girls was common, and men were able to marry and divorce at will.\(^{51}\) Kecia Ali, however, notes that ‘marriage patterns in pre-Islamic Arabia are necessarily obscure; our sources are Muslim and view many facets of that era through contemptuous eyes, especially practices dealing with sexual morality’.\(^{52}\) Likewise, Leila Ahmed contends that there was no solidified institution of marriage during the Jāhilīyah, but rather a mix of different customs.\(^{53}\) While the specifics of pre-Islamic marriage arrangements may be difficult to discern, scholars are generally in agreement that the sharī‘ah altered the status of marriage to accord women some degree of legal personality.\(^{54}\) Consent became a

\(^{50}\) Noel J Coulson, *A History of Islamic Law* (Routledge 2011) 15.

\(^{51}\) Büchler, Schlatter (n 7) 13.


precondition for the validity of marriage and certain rights and responsibilities were enshrined in its contract. The balance of rights in marriage remained unequal, as the practices of guardianship and polygamy were not abolished, so the intention behind these initial changes must be examined. As Büchler and Schlatter explain, marriage reform ‘served less to turn existing social order on its head than to place as many restrictions on the customary laws which had prevailed in pre-Islamic times as the society of the day was prepared to accept and understand’. 55

A major key to the Reformist understanding of sharī‘ah is the fact that it aimed to widen the scope of women’s rights within the context of Arabia during the birth of Islam. In short, it would be impractical to suggest that the Prophet ought to have introduced 21st-century women’s rights to the Peninsula. For example, although it is mentioned in holy scripture, 56 the introduction of love as the basis for marriage is recent in many societies. As a result, it rarely features in early Islamic juristic texts. 57 Thus this clearly illustrates how the socio-historical environment of the early scholars informed their perspective on nikāh; their exegesis shifted the focus from love to procreation and contract. Therefore, Islamic legal theory inherently reflects the society in which those theorists were born and raised. While this may have resulted in the passive osmosis of patriarchal perspectives into legal rulings, Eissa

55 Büchler, Schlatter (n 7) 44.
56 Qur’an (Surah Ar-Rum) (30:21).
goes one step further to suggest that jurists actively ensured the preservation of their gendered hierarchy. She argues that the view of women as ‘infantile and sexually vagrant’ lead to the ‘formulation of detailed and complex legal rules that curtail women’s agency of free movement.’ In this sense, doctrines such as wilāyah represent not the objective letter of the Qur’an, but the subjective application of fiqh by its early exegetes.

In turning to the original intention of the shari’ah in broadening women’s rights in a seventh-century context, the Reformist movement seeks to do the same for the present day. At the heart of this approach is the understanding of revelation as essentially chronological. The Qur’an, Wadud argues, ‘sets forth a logical progression with regard to the development of human interactions, morality and ethics, as reflected by the growth and development of the community of Muslims who lived concurrently with the revelation’. From this perspective, the reform of marriage laws towards equality was intended to be gradual, evidenced by the restriction of established customary practices rather than their abolishment. This approach is like Mahmoud Mohamed Taha’s theory espoused in his seminal work The Second Message of Islam. A modernist scholar, Taha identified a contradiction between the suwar revealed by the Prophet in Madina and those revealed earlier in Mecca. The latter, Taha argues, forms the basis of the ‘second message’ – truer in spirit to the Islamic notions of equality and freedom. The ‘second message’ implied greater rights for women and non-Muslims in particular, and Taha

58 Eissa (n 24) 16.
59 Wadud (n 24) 63.
60 Alberto M. Fernandez, ‘Remembering a Radical Reformer: The Legacy Of Mahmud Muhammad Taha’ (Memri, 11 June 2015)
recommended that it must serve as the foundation for modern legal reform.\(^{61}\) Conversely, the restrictive Madinan surāh were deemed unsuitable for a twentieth-century context and ‘set aside as having served their transitional purpose’.\(^{62}\) Taha’s thought bears similarities to ‘Abduh’s synthesis of revelation with ‘the sociological concept of progressive evolution’.\(^{63}\) According to ‘Abduh, revelation is given to society at a certain point in their development. Following this, as the distance from revelation grows with time and space, the spirit of the revealed message is perverted by human error until moral reform reorients society towards the revelation it had once forgotten.\(^{64}\) The acceptance of change as an influential factor in revelation is a central theme found in Reformist thought. As Mohamed Mahmoud notes, ‘Taha’s willingness to incorporate the principle of change into his understanding of Islam was the solid foundation of his modernism’.\(^{65}\)

If we apply Taha’s modernist approach to the doctrine of wilāyah in conjunction with the Reformist belief that the spirit of the Qur’an is equality, we observe that they are complementary. The verse that ordains men as ‘maintainers and protectors of women’ (Qur’an 4:34) is found in Surāh an-Nisāh; a Madinan surāh. Indeed, the Qur’an makes no mention

\(^{61}\) Taha (n 32) 40.
\(^{62}\) ibid 23.
\(^{64}\) ibid.
\(^{65}\) Mohamed A. Mahmoud, *Quest for Divinity: A Critical Examination of the Thought of Mahmud Muhammad Taha* (Syracuse University Press 2015) 39.
of women’s rights until the Madinan period, following the exodus of the nascent Muslim community from Mecca to Madina in 622 C.E. According to Taha, therefore, this surah is inapplicable in a modern context. Likewise, based on the assertion that wilayah necessarily violates the equality of women, particularly minors contracted into marriage, the power of the wali is curtailed. It is through these means that the woman’s agency can be reclaimed.

Polygyny as an Artifact of Customary Law

The second area of marriage relating to agency and equality is the practice of polygamy. Specifically, I refer to polygyny (ta’addud az-zawjāt); the practice of a man having more than one wife. Polygyny in Islam is a source of contention; it is both the subject of derision by critics and viciously defended via polemical attacks on Western ‘immorality’, as found in the works of Salafist scholar Bilal Philips. Both arguments fail to address the nuance of the topic that modern literature is attempting to recapture. To fully understand these nuances, it is necessary to define polygyny and its limitations and justifications within Islamic law.

Polygyny is justified by scholars on the grounds of surah 4, verse 3: ‘marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one’. According to classical jurisprudence,  

66 Wadud (n 24) 78.  
therefore, a man is limited to a maximum of four wives, so long as he can act equitably towards all of them. This requirement frames polygyny as a uniquely conditional practice, rather than a generalised right for all men. As a result, some legislatures of Muslim-majority states have enforced the need for certain prerequisites to be met before a man can take a second wife.\textsuperscript{69} Classical Islamic jurisprudence codified these conditions, determining that the husband must provide equal maintenance to all of his wives and spend an equal amount of time with each (the wife’s right, however, was to the husband’s companionship rather than sexual relations).\textsuperscript{70} As a counterbalance to polygyny, some states such as Jordan, Egypt, and Syria have adopted the Hanbali position that a woman can divorce her husband if he takes another wife, provided that this stipulation was part of the marriage contract.\textsuperscript{71} In Egypt, some conservative scholars argued against the article introducing these stipulations on the basis that ‘by rendering polygamy as a prejudice to the wife, the article implicitly blamed the Prophet and his companions for permitting injurious acts towards women’.\textsuperscript{72} Clearly, this is a contentious topic. Yet it is worth noting that even where polygamous marriages are legally permitted, they are in the minority; they represent only two percent of marriages in

\textsuperscript{69} Andrea Büchler (n 3) 46.
\textsuperscript{70} Dawoud El-Alami, Doreen Hinchcliffe, ‘Islamic Marriage and Divorce Laws of the Arab World’ (1996) 2 Centre of Islamic and Middle Eastern Law Series 1, 18.
Lebanon and eight percent in Jordan. The importance of polygyny, however, especially in modern discourse, outweighs the extent of its practice. Lynn Welchman explains:

The institution of polygyny is in many ways one of the ‘totems’ of Islamic family law. Targeted by early reformists and modernists in the Arab world, including the early feminist movement, as anachronistic and almost the antithesis of ‘modernity’, it was also pointed up by colonial and imperial powers in the discourses of power and subjugation. These days it falls foul of the human rights norm of equality and non-discrimination and continues to be a target for women’s rights activists in the region and beyond.

The inequality Welchman mentions is clear; the right of the husband to take a second wife is a source of fear and unease for many women, owing to the humiliation and emotional pain it would entail. This fear is particularly acute considering that ‘the most common reasons given by men for taking a second wife included wife deficiency, whether mental, physical [or] social’. Polygyny reinforces the imbalance of a marital relationship by essentially placing the wife ‘on the back foot’; her only legal recourse being divorce. For these reasons, polygyny is widely condemned as a practice that

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73 Sulafa Abou-Samra, ‘Family Life’ in Felicity Crowe, Jolyon Goddard, Ben Hollingum, Sally MacEachern and Henry Russell (eds), *Modern Muslim Societies* (Marshall Cavendish 2011) 9, 35.
75 Amira El-Azhary Sonbol (n 46) 131.
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violates women’s rights, regardless of its legality in certain states. Moreover, the conditions for a man to exercise polygyny were not always adhered to, resulting in many men taking multiple wives while ‘disregarding the attached condition...without any qualms of conscience.’

With this considered, Reformist scholars seek to reform the institution of polygyny by utilising the same methodology explained above with regards to guardianship. By examining the context in which sūrah 4 was revealed, we see that it was explicitly suited to the hardships the early ummah faced at that time, particularly following the conflict with Mecca and the costly Battle of Uhud. Riffat Hassan explains: ‘Due to the death of many Muslim men in the wars between Muslims and the non-Muslim Meccans and the conversion of women (married to non-Muslims) to Islam, there were a large number of dependent children and women who had to be provided for.’

Some scholars such as Muhammad ‘Abduh and Rashid Reda consequently argued that polygyny, having served its temporary purpose for the early Islamic community, was no longer applicable in a modern society where it is often misused. In the Qur’an, polygyny was not sanctioned as a means for men being able to licitly engage in sexual relations

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79 ibid.
80 Abdullah, Kamaruddin (n 75) 177.
with more than one woman, as it is often distorted into, but was rather a way for the large number of widows and orphans to be protected and cared for in a society in which marriage afforded them the highest security.\(^81\) This is reflected in the conditions stipulating equality of maintenance, such as the equal provision of accommodation for the co-wife. Equality of treatment, however, ‘represents the ideal rather than the practiced reality’.\(^82\) The inability of a husband to treat his wives equally is recognised in the Qur’an itself, in the same \textit{sūrah} that appears to condone polygyny: ‘And you will never be able to be equal [in feeling] between wives, even if you strive [to do so].’\(^83\) By subjecting polygyny to conditions that are impossible to fulfil, some scholars have argued that this equates to nothing short of prohibition, which is the interpretation adopted by the Tunisian Law of Personal Status.\(^84\) The Tunisian government subsequently abolished polygamy under Article 18, which, Khadduri notes, was innovative ‘because it was the first law which repealed a fundamental Quranic precept’.\(^85\) Significantly, Tunisian reformers relied on the Qur’an for this alteration, demonstrating the varied interpretations that can be extrapolated from the Qur’anic verses concerning polygyny. This may indicate the usefulness of \textit{ijtihād} in securing women’s rights. Through careful consideration of the socio-historical context in which revelation occurred, and the importance of certain verses vis-à-vis others, the Qur’anic ideal of equality can be realised to its fullest extent.

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\(^81\) Hazrat Ahmad (n 65) 98.
\(^82\) Zeitzen (n 74) 75.
\(^83\) Qur’an (Surah An-Nisa) (4:129).
\(^84\) El-Alami, Hinchcliffe (n 68) 17.
\(^85\) Khadduri (n 54) 215.
About context, it is possible to re-evaluate polygyny through the Reformist lens of emphasising scriptural intent rather than practice. This approach has much in common with the theories of Fazlur Rahman. Rahman ‘sought to establish a theoretical model that distinguishes between the Quran’s ‘literal’, context specific laws on the one hand and the eternally valid ‘reasons’, rationes legis, behind those laws on the other’. It follows from the idea of the rationes legis that once the reason for the law subsides, so does the law itself. To apply this concept to polygamy, the ummah is no longer afflicted by the gender imbalance from costly wars, so it is not an acceptable practice. For their part, while the Reformists do not argue for the abolishment of polygyny based on the spurious assertion that this was the Prophet’s intention, they examine the conditions imposed upon it by the Qur’an in light of the intention of equality. This approach relies upon the premise that polygamous marriages existed during the Jāhilīyah, and that these marriages were both widespread and afforded fewer rights to women than were offered by the sharī’ah. As explained previously, the dearth of information pertaining to pre-Islamic marriage contracts subjects this premise to the danger of speculation. Nevertheless, Amira Mashhour suggests that polygamous marriages were ‘widely predominant in pre-Islamic societies’ and were largely unrestricted. If we proceed to apply Wadud’s assertion that revelation was intended as a ‘logical progression’ to Mashhour’s premise, it is possible to suggest that the Prophet

87 Mashhour (n 12) 568.
sought to restrict polygamy in the interests of promoting monogamy. Khadduri writes:

Viewed from this perspective, it would seem that the Quranic law concerning marriage, rather than intending to ratify the practice of polygamy, sought to reform it to the extent possible at the time. To abolish polygamy, under the conditions then prevailing in Arabia, would have been an extremely difficult undertaking. By restricting the practice of plural marriage, the ultimate intent of the Prophet was to transform marriage from a polygamous to a monogamous relationship.\textsuperscript{88}

The adaptation of customary traditions such as polygamy, Leila Ahmed argues, reflected the societal importance ‘given to paternity and the vesting in the male of proprietary rights to female sexuality and its issue’.\textsuperscript{89} The early jurists, whose views were informed by male-dominated societal norms, applied these rights to the institution of polygyny. In the centuries that followed the Prophet’s revelation, the emphasis was therefore placed on polygyny as an Islamic tenet, disregarding the intent of the Qur’an in seeking to curb an established societal practice. The goal of the Qur’an’s restrictions was, as Khadduri explains above, the endorsement of monogamy as a more acceptable relationship than that of polygamy, which the Qur’an subjected to conditions and context. This view is in keeping with the Reformist assertion, espoused by Wadud, Eissa and others: that the overarching theme of the Qur’an is justice and equality. Thus, they assert

\textsuperscript{88} Khadduri (n 54) 217.
\textsuperscript{89} Leila Ahmed (n 53) 45.
that polygyny was not abolished by Islam due to the difficulties that would arise from such abrupt societal change. Instead, Islam demarcated its practice by introducing conditions and requirements, with the intention of replacing polygamy with monogamy as the ideal relationship. However, this intent was sidelined by early jurists who reflected the patriarchal society in which they lived, resulting in the characterisation of polygamy as a uniquely Islamic practice which is applicable in modern times. The Reformists reject this characterisation, relying on the premise that the spirit of the Qur’an dictates equality. On these grounds, the Reformists argue that polygyny can be justifiably countered.

**Divorce Law: Bridging the Distance Between Gender Inequality**

The final area of Islamic marriage I shall address is divorce or *talāq* (repudiation) and the corresponding right of the woman to *khul* or initiate the divorce. The eminent *faqīh*, Imam Ibn Humām al-Hanafi, defined *talāq* as the ‘termination by the husband, through the use of explicit or implied words, the bond created by marriage contract’. There are three forms of *talāq*: *talāq-e-ahsan* (most approved), *talāq-e-hasan* (approved) and *talāq-e-bidat* (innovative divorce). The third, *talāq-e-bidat*, allows the husband to irrevocably divorce his wife with three pronouncements of divorce in one sitting and represents the strongest threat to women’s rights in marriage. However, it is considered by many prominent classical scholars to be a

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questionable form of divorce unsubstantiated by the Qur’an.\textsuperscript{91} This is because the practice was a remnant of pre-Islamic customary tradition which was absorbed into Islamic law.\textsuperscript{92} By consequence, while most jurists consider it sinful, they agree that it is legally binding.\textsuperscript{93} This has resulted in its widespread abuse, particularly in states with a significant number of Hanafi followers such as India, Pakistan and Iraq.\textsuperscript{94} The ease by which a wife’s stability and spousehood can be dissolved makes \textit{talāq-e-bidat} a significant obstacle to women’s marital equality. Despite this, \textit{talāq-e-bidat} will not form the basis for our discussion on Islamic divorce law as it is widely understood by scholars to be contra-Qur’anic, notwithstanding its legal validity. Instead, I will focus on the types of divorce that are universally accepted by classical Islamic jurisprudence: \textit{talāq-e-ahsan}, \textit{talāq-e-hasan} and the corresponding right of the woman to \textit{khul}.

\textit{Talāq-e-ahsan} and \textit{talāq-e-hasan} are subsidiaries of \textit{talāq al-sunnah}, whereby the husband makes a pronouncement of divorce, followed by a period of three months or menstrual cycles of the wife, known as the ‘\textit{iddah}, during which the couple must abstain from sexual relations.\textsuperscript{95} The pronouncement of \textit{talāq} can be withdrawn by the man at any

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\item \textsuperscript{91} Nehaluddin Ahmad, ‘A Critical Appraisal of Triple Divorce in Islamic Law’ (2009) 23 International Journal of Law, Policy and the Family 53, 57.
\item \textsuperscript{92} John L Esposito and Natana J DeLong-Bas, \textit{Women in Muslim Family Law} (1st edn, Syracuse University Press 2001) 31.
\item \textsuperscript{93} Muhammad Munir, ‘Triple Talaq in One Session: An Analysis of the Opinions of Classical, Medieval and Modern Muslim Jurists under Islamic Law’ (2013) 27 Arab Law Quarterly 29, 32.
\item \textsuperscript{94} Nehaluddin Ahmad (n 91) 56.
\item \textsuperscript{95} Mashhour (n 12) 572.
\end{enumerate}
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point during this period, on the understanding that at the end of the ‘iddah, the marriage is dissolved. Central to the purpose of the ‘iddah is the opportunity for the couple to reconcile their differences to avoid divorce. While the Qur’an emphasises the importance of solving marital difficulties through ‘arbiters’ (Qur’an 4:35), the strongest disapproval of divorce comes from the hadith stating that: ‘Of all things permissible, the most displeasing to Allah is divorce’ (Ibn Majah book 10, hadith 2096). Couples are therefore discouraged from pursuing divorce except as a last resort. Indeed, the accessibility of divorce for men, exemplified by the simple declaration of talāq, appears to be countered by the gravity of its meaning. However, as Abd al ‘Ati writes, ‘people’s reactions do not always correspond with the intent or spirit of the law’, resulting in the widespread misapplication of divorce as early as the seventh century.96

For women, the right to pursue divorce is one of the most important rights under Islam, 97 and is known as khul. However, while talāq is only subject to the will of the husband, khul is dependent on the mutual consent of both parties, although it may be initiated by the woman. Under khul, ‘the wife may offer to pay a certain sum (usually the amount of her dower) to her husband in return for his releasing her from the bonds of matrimony’.98 Islamic scholars unanimously agree on the legality of khul as a counterbalance to the husband’s right of talāq. 99 However, they are fundamentally unequal in

96 Abd al ‘Ati (n 13) 221.
97 Hassan (n 76) 247.
98 El-Alami, Hinchcliffe (n 68) 27.
99 Dawoud el-Alami, ‘Remedy or Device? The System of Khul and the Effects of its Incorporation into Egyptian Personal Status
practice. On the subject of *khul* under Egyptian Personal Status Law, Dawoud El-Alami argues that it amounts to ‘little more than a “quick fix”, an almost immediate release, but at the cost of her legitimate rights’. Under Egyptian law, the rights she forfeits are usually monetary, owing to the renouncement of the dower and all financial rights. This problem is particularly acute when considering the aforementioned ‘marriage imperative’; in the Muslim world ‘women find their security primarily in marriage’, meaning that the forfeiture of her financial rights is a serious issue. Indeed, by asserting that marriage is the most stable status for women (financially and socially), while simultaneously threatening the removal of this stability should she pursue divorce, her rights are curtailed. Furthermore, the transactional/contractual approach to marriage is reinforced by the requirement for the wife to ‘purchase’ her husband’s consent to divorce.

The difference between *khul* and *talāq* is also evident with regards to consent. At its simplest according to classical Islamic law, the husband retains the right to unilaterally dissolve the marriage of his own volition, without cause, without either the consent of his wife or the intervention of the court. This is problematic in that it disregards the wife’s procedural rights to the effect of subjecting her to a legal

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100 *ibid* 139.
102 El-Alami, Hinchcliffe (n 68) 22.
103 *ibid*. 
procedure that she cannot object to. Nehaluddin Ahmad notes that while there is *ijmā* (consensus) among the jurists that *talāq* can only be pursued on reasonable grounds, ‘the prevalent practice is very different, and divorce has become an exclusive privilege of the husband’. *Khul*, by contrast, is dependent on the consent of both parties. In both *talāq* and *khul*, therefore, consent of the husband is paramount. While a woman may, under current legislation such as that of Egypt, seek divorce without her husband’s consent via intercession from the judiciary, this process is obfuscated by the requirement of arbiters, witnesses and the ‘alleged conservatism of judges’. The intercession of the court in allowing a woman to trigger divorce is a matter of debate among the *madhāhib*. Although all *madhāhib* allow the wife to seek a judicial dissolution (*tafrīq* or *tatliq*) of her marriage, they disagree on the reasons.

The Hanafi School denies this right after the marriage has been consummated, no matter the circumstances. The only recourse for the wife under Hanafi law is when the husband is unable to consummate the marriage, or otherwise, if the wife was contracted into the marriage by a non-natural guardian, thereby allowing her to exercise *khīyār al-bulūgh*. The remaining three *madhāhib* are

104 Büchler (n 3) 52.
105 Nehaluddin Ahmad (n 91) 59.
more generous, allowing the termination of marriage based on physical defects and diseases, the husband’s absence or his failure to maintain the household. The Maliki School even allows divorce on the basis that the marriage is causing harm to the wife. 109 Although this represents a progressive expansion of women’s marital rights, she nonetheless remains at a disadvantage considering the husband’s practically uninhibited right to pronounce *talāq*. Moreover, divorce by judicial dissolution represents the minority of cases; *talāq* and *khul* are far more widespread,110 perhaps owing to the lengthy and difficult process it requires.

Given the disparity between *khul* and *talāq*, pre-modern scholars of the principal *madhāhib* stated that it was acceptable for a husband to transfer his right to divorce to his wife; an act known as *tafwīd al-*talāq.* 111 However, Fareeha Khan writes, ‘notwithstanding the historical presence of this theoretical possibility, it seems that in some cultural contexts it was a rare occurrence for women to actually be given this right’.112 By relegating *tafwīd al-*talāq* to the realm of theory rather than practice, classical jurisprudence hampered the possibility of women reaching the same right to *talāq* as their husbands. As a result, wives seeking divorce had to rely on *khul*, which, as delineated, remains an unequal method of divorce in comparison to *talāq*.

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112 ibid 504.
In response to this inequality, the Reformists seek not to reduce men’s freedom to exercise *talāq*, but instead raise the status of women to a parity of rights between the parties. Khadduri explains:

Reformers have found no difficulty in justifying the imposition of restrictions on the husband’s right to divorce, as there are ample warnings in both the Qur’an and the Tradition of the Prophet against unrestrained exercise of the right of divorce. Procedural restrictions are even set forth in the *Shari’a* to limit the exercise of this right. Modern reformers have not sought to deprive a husband of the right to divorce; they have merely given a wife the same right to seek a divorce...113

For example, in Pakistan courts have effectively exercised *ijtihād* in cases of *talāq* and *khul* to broaden the scope of women’s rights. 114 This is in response to the Marriage Commission; a Pakistani modernist report claiming that *ijtihād* can be exercised by secular judges, thereby removing individual reasoning from the exclusive realm of the *mujtahid*. 115 In Egypt too, legislators caved to modernist pressure by restricting the power of *shari’ah* courts and the application of Hanafi law therein. 116 This was especially innovative considering the conservatism of the Hanafi *madhab* in its doctrine of judicial divorce. By slowly reducing the jurisdiction of *shari’ah* courts and integrating senior *qādis* into

113 Khadduri (n 54) 216.
114 Haider (n 6) 289.
115 ibid 293.
the legal hierarchy following their abolition. \(^{117}\) Egyptian authorities cultivated a legal system that straddled the *shari‘ah/secular* divide. While this was not without its problems, it nevertheless represents the ability of lawmakers to create a legal system that is both Islamic and secular as is the case in Pakistan. In comparison to guardianship and polygamy, the active role of the judiciary in pursuing legal reform may reflect the court’s ability to influence rulings on divorce, should the couple seek judicial intercession. The transfer of power from religious scholars to the courts is exemplified by Tunisia’s Code of Personal Status, which abolished *talaq* in favour of making divorce a matter for the judiciary. \(^{118}\) Based on this transfer of responsibility, it is possible to suggest that secular influence plays a larger role in divorce law than other areas of marriage such as guardianship and polygamy. While this argument may hold some substance, it is tempered by two key facts: first, secular influence is difficult to quantify, and second, the exercise of *ijtihād* (as in Pakistan) and the residual authority of the *shari‘ah* (as in Egypt), reflects the creation of a new form of legislation that is ‘Islamic in flavor but Western in practice’. \(^{119}\) This approach resonates with the Reformist emphasis on women’s equality being central to the Qur’an, disavowing the need for foreign legislation when *ijtihād* can be applied instead in order to realign Islamic doctrine with Qur’anic principles.


\(^{119}\) Haider (n 6) 294.
To conclude, Reformist literature is reshaping the institution of nikāh by widening the scope of women’s marital rights, particularly with regards to their consent and equality. The Reformist approach is built on two premises. Firstly, they assume that the true spirit of the sharī’ah, dictated by the letter of the Qur’an, is equality. This idea is neither new nor starkly innovative. As Wadud and Eissa argue, the notion of equality can be gleaned from even the most precursory reading of the Qur’anic verses of Sūrah an-Nisāh. The second premise relies on a thorough examination of the socio-historical context behind both the Qur’an and the discourse of the early jurists. In both cases, patriarchal societal norms predominated. Rather than attempting to overthrow established customary traditions, the Prophet sought to restrict their application with the intent of equality. These restrictions are most evident in the areas of polygamy, guardianship and divorce law. As explored, prefatory rights for women were espoused as far as seventh-century Arabia was willing to accept. Based on Wadud’s assertion that revelation follows a ‘logical progression’, the ultimate end of this progression is multilateral equality. Monogamy was preferred over polygamy; consent became a requirement for a valid marriage contract and women were given prelusive divorce rights in the form of khul. In this sense, the Qur’an was the terminus a quo of women’s rights under Islam, rather than dictating their equality to the fullest extent.

However, the Reformists argue, the intent of equality was shrouded by generations of Muslim jurists whose rulings reflected the unequal society in which they lived, rather than the Qur’anic ideal. Our social environment inevitably informs
our perspective, which is as true today as it was in the pre-modern period. For the classical jurists, the interpretation of Islamic law was a subjective, human enterprise relying on objective, divine sources. The result of this dichotomy was the assimilation and promotion of practices that were familiar to a pre-modern patriarchal society, such as polygamy, guardianship and unequal divorce laws. Subsequently, modern literature is attempting to free the essence of Islamic law from the fuqahā. By utilising the methodologies available to them, primarily *ijtihād*, they are instigating a transformative realignment of *shari‘ah* principles. This process is distinctly Islamic in its outlook; it does not rely on Western legal theory for its foundations but instead derives its authority from the Qur’ān itself. This transformation is perhaps best exemplified in the personal law codes of Tunisia and the *ijtihād* of Pakistani judges which provide interesting case studies for the burgeoning Reformist movement.

The *shari‘ah* is an inherently flexible legal system owing to the established methods of *ijtihād*. Yet those who exercise *ijtihād* face an uphill battle. Individual reasoning is dealt with tentatively by conservative jurists, and the entrenchment of patriarchal systems pose a significant challenge to Reformists. Nonetheless, in the realm of family law and *nikāh*, modern scholars such as Mir-Hosseini, Wadud and others, are producing a corpus of literature for the sake of advancing women’s rights. Their commitment to these rights aligned with Qur’anic principles makes the Reformist movement the best hope of securing gender equality across the Muslim World.
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