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Deconstructing Patriarchal Jurisprudence in Islamic Law: A Faithful Approach

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INTRODUCTION

Islamic law is viewed by the West as patriarchal, oppressive, and incompatible with basic Western values such as democracy and human rights.¹ In particular, it is viewed as hopelessly oppressive to women.² This attitude is partly rooted in our ignorance of the history of Islamic societies, especially the early ones. It is also rooted in our ignorance of the flexibility of and rich diversity within Islamic jurisprudence. To complicate matters, we are barraged in the West by news reports about oppressive practices against women in Muslim countries. From these instances we hasten to conclude unjustifiably that Islamic law itself must be discarded if our suffering sisters are to find relief.

This chapter will show that this conclusion is both unwarranted and unworkable. Briefly, it is unwarranted because it attributes to Islamic law problems that arise as a result of patriarchal local customs and patriarchal judicial perspectives. We cannot simply make these problems disappear by blaming them on Islamic law itself. They are just as likely to arise under a secular legal regime, and must be confronted directly. The conclusion is also unworkable because most Muslim women are serious about their religion and prefer to solve their problems from within that framework. So long as Muslim women are led by patriarchy to believe that their oppression was divinely decreed, they will hesitate to change the status quo, as oppressive as it may be. Therefore, it is important to unmask the patriarchal assumptions lurking within present laws in Muslim countries, and to reveal them for what they are, neither divine nor condoned by the Divine.


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Additionally, attempts to encourage Muslims to discard their religion are viewed in Muslim countries with extreme suspicion. They seem to continue in a new guise the concerted efforts of Western colonialists to achieve similar results in the last century. Not only was colonialism instrumental in weakening Muslim societies, it also played a very important role in the West. As a result of the colonialist heritage, Western views of Islam have been based on the works of Orientalists and Neo-Orientalists who built whole careers on “interpreting” Islam to the West. Some succeeded in their endeavor, but most were unable to escape their culturally and religiously biased perspectives. Their conclusions unavoidably reflected these perspectives and resulted in a highly negative and distorted view of Islam.

The typical Orientalist view of Muslim women pictures them as passive, oppressed, and confined to the seraglio. This theme has been circulated in the United States for at least two hundred years. It can be argued that its most recent formulation uses the language of international instruments and universal human values. A prime example was offered by the Fourth World Conference on Women, held in Beijing, China. There, the Platform for Action originally contained language inconsistent with Islamic Shari'ah (basic law). When the discussion of that language reached the floor, Muslim delegates refused to accept it, stating repeatedly that they regarded the law of God as superior to the law of the United Nations.

This, then, is the crux of the issue: Is Islamic law oppressive to women? Furthermore, if the West believes it is, should it accept the religious choices of Muslim women, or should it liberate them against their own will? Because of limitations of space, this chapter will address the first question only. The second question is quite important; a positive answer to it underlines further the patriarchal/patronizing attitude adopted by the West generally, and the feminist movement specifically, toward Muslim women. We now turn to a brief introduction to Islamic law.

**ISLAMIC LAW AND CUSTOM**

To understand Islamic law, we need to understand its basic principles and its relation to local custom. Islamic law is based on Islamic shari'ah, which in turn is based on the Qur'an, the revealed word of God. To the extent that Qur'anic verses may need further illumination, Islamic shari'ah is also informed by the sunnah (life, words, and example of the Prophet Muhammad). Both sources are supplemented by *ijtihad* (juristic interpretation of text) whenever necessary, and by other sources of Islamic jurisprudence, such as *ijma' (consensus) of the Muslims. Today there are five major schools of *ijtihad*. They are the Hanafi, Hanbali, Maliki, Shafi'i, and Ja'fari schools. All these schools were established between the seventh and eighth centuries A.D.

*Ijtihad* is open to all qualified Muslims, whether male or female. The qualifications concern the knowledge of the *mujtahid* (one engaging in *ijtihad*) of the Qur'an, the *sunnah*, important commentaries, and other related works. They also concern the *mujtahid*'s piety and fairness. Furthermore, since it is a basic jurispru-