

Gender and Equality in Muslim Family Law

Justice and Ethics in the Islamic Legal Tradition

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The Editors

REVISITING WOMEN'S RIGHTS IN ISLAM*

'Egalitarian Justice' in Lieu of
'Deserts-based Justice'¹

Mohsen Kadivar

In traditional Islamic thought women's rights have been defined on the basis of a 'deserts-based' notion of justice (*al-'adāla al-istiḥqāqiyya*), by which individuals are entitled to justice according to their status, abilities and potential. This notion of justice leads to proportional equality, which recognises rights for individuals in proportion to their 'deserts'. In modern times this notion of justice has encountered enormous problems. Can we reread the Qur'an and the traditions in the light of an egalitarian notion of justice that is premised on fundamental equality between men and women?

This chapter is an attempt at such a rereading. It is written from the position of an Usuli Shi'i,² with the method of 'ijtihad in foundations' (*al-ijtihād fī al-uṣūl*), that is, *ijtihād* in the theoretical and philosophical foundations of Islamic law. The chapter is based on the following premises: (i) The rulings (*aḥkām*) on women in the Qur'an and the traditions (Sunna) strongly defend the principle of justice.

* Translated from Persian by Ziba Mir-Hosseini.

(ii) These rulings are explained by arguments and proofs. (iii) Justice is a prior principle to religion, and the definition of justice and justification of the different approaches to it are matters of reason and philosophy. (iv) Some Qur'anic verses and hadith relating to women are generally based on justice and non-discrimination, others appear (*zāhir*) to be based on a deserts-based notion of justice and proportional equality. (v) Muslim scholars, who (whether exegetists, hadith specialists, theologians, jurists, mystics or philosophers) have been predominantly men, understood and continue to understand justice as deserts-based justice, and equality as proportional equality. (vi) There are undeniable biological and psychological differences between men and women. (vii) The site of discussion is those rulings that grant women, because they are women, greater or lesser rights than men; these rulings are mainly found in the two fields of civil and penal law, so rulings that do not treat men and women differently (those pertaining to worship and commerce and the majority of those relating to matters of belief and ethics) fall outside our discussion.

There are two parts to my thesis in this chapter. First, the notions of egalitarian justice and fundamental equality accord better with the spirit of the Qur'an and Islamic standards. Secondly, the verses and the hadiths that have been invoked as justifying disparity in men's and women's rights are not an obstacle to egalitarian justice and fundamental equality.

The chapter consists of four sections. Section one is a review of the most important rational and textual arguments for legal parity and difference. Section two examines the perspective and arguments of 'deserts-based justice'. Section three describes those of 'egalitarian justice' and 'fundamental equality', and explores how they are more in line with the spirit of the Qur'an and Islamic standards. Finally, section four takes the Qur'anic verses and hadiths invoked to justify legal differences between men and women, and rereads them in the light of egalitarian justice.

1. The most important textual and rational arguments for legal equality and inequality

In the Qur'an and traditions we encounter two types of argument regarding women's rights. The first type treats men and women as equal, entitled to the same human rights without any legal difference. The second suggests that men are superior to women, thus they enjoy more rights but at the same time are charged with protecting women. There are rational arguments, independent of the texts, for the essential goodness of justice and the essential badness of injustice and discrimination. Before engaging in any kind of interpretation, let us examine the most important of these verses and hadiths, and elucidate their rational arguments.

a. Qur'anic arguments for the legal equality of men and women

The verses indicating equality can be divided into five groups, implying: (i) equality in creation; (ii) equality in the hereafter; (iii) equality in rights and duties; (iv) equality in rewards and punishments in this world and the other; and (v) equality in married life.

(i) This group presents men and women as created from the same essence, and rejects gender-based superiority. Gender does not produce human dignity and closeness to God; how can it produce superiority?

O mankind! We created you from a single (pair) of a male and a female, And made you into nations and tribes, that ye may know each other. Verily the most honoured of you in the sight of Allah is the most righteous of you (49:13).³

Gender, tribe, race, colour, wealth, status and power do not produce superiority; God-consciousness (*taqwā*) is the measure of dignity and closeness to God. *All people, male or female, are descended from a single man and woman* (4:1).

(ii) In the afterlife, God treats men and women in the same way. Gender plays no role in salvation, which is determined by belief and righteous action.

Whoever works righteousness, man or woman, and has faith, verily, to him will We give a new life and life that is good and pure, and We will bestow on such their rewards according to the best of their actions (16:97).⁴

The Qur'an names ten categories of believing men and women who will receive forgiveness and great reward:

For believing men and women, for devout men and women, for true men and women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who fast (and deny themselves), for men and women who guard their chastity, for men and women who engage in Allah's praise, for them has Allah prepared forgiveness and great reward (33:35).

Here too gender difference has no place.

(iii) Equality in rights and obligations:

The believers, men and women, are protectors, one of another: they enjoin what is just, and forbid what is evil; they observe regular prayers, practice regular charity, and obey Allah and His messenger. On them Allah pours His mercy (9:71).

This verse recognises that believing men and women have a responsibility to protect each other. The equality of men and women in the important duties of

'enjoining good and forbidding evil' and mutual protection leaves no doubt; if women lacked the essential ability, they would never be charged with such responsibilities. This verse provides the basis for understanding the second type of verses (inequality).

(iv) Equality in rewards and punishments in this world and the other. Qur'an 48:5, 6 and 25, and 57:12–13 treat men and women equally in regard to entitlement to reward or punishment. Likewise, Qur'an 5:38 and 24:2, 26 and 31 speak of identical worldly punishments for male and female thieves, fornicators and wrongdoers.

(v) Equality in marital life. Qur'an 2:187 gives a picture of equal shares for spouses in their shared life: 'They are your garments and you are their garments.' This picture is repeated in 30:21: the creation of men and women is among the signs of God, and the presence of each is a source of tranquillity, love and mercy for the other. Should not this logical foundation be the basis for understanding other Qur'anic verses relating to the family?

b. Rational arguments for justice in the realm of women's rights

Can reason on its own (*al-'aql al-mustaqill*) give a ruling about women's rights? Let us review some preliminary points here. First, certain acts are either good or evil inherently, that is to say, without a ruling from the Lawgiver. This is the basic claim of the Muslim rationalists (People of Justice, that is, the Shi'a and the Mu'tazili). Secondly, reason has the capacity, independent of scripture, to decide whether such acts are good or evil; this is the main claim of the Shi'a Usulis as opposed to the Shi'a Akhbaris. Thirdly, most Usulis claim that if reason considers something good, religion declares it mandatory, and if reason finds it bad, religion declares it forbidden. Fourthly, *shar'i* rulings that are based on the principle of correlation (between reason and Shari'a) are valid (*hujja*), in the sense that when we are absolutely sure that the Lawgiver has not forbidden it, our rational ruling (based on the principle of correlation) can be counted as a *shar'i* ruling. This is the claim of most Usulis as opposed to those who reject the ruling of reason.

Among these four preliminary points, the first and last are important; that is to say, we can settle the question (i.e. whether reason can produce a *shar'i* ruling independent of texts), if we can demonstrate the validity of the first point, and if the conditions for the fourth point are present. Now, we can restate the first point as follows: rulings related to women's rights are in the realm of reason. Legal justice in regard to men and women is a good thing. Reasonable people, as they are reasonable, approve of legal justice. Legal justice is one of the praised ideas and common premises (*al-ārā' al-mahmūda wa al-qadāyā al-mashhūra*). Reasonable people, as they are reasonable, praise those who implement justice, and blame those who neglect it.

Practical reason rules that legal justice is good (and injustice and legal discrimination are bad), because it is consistent with the human soul, which recognises

the public benefit (*naf' 'amm*) in legal justice (and the harm caused by injustice and discrimination). People seek the public good (*maṣlaḥa 'amm*) that comes from justice, and resist the corruption stemming from injustice and legal discrimination. People recognise that this is a public, not a personal matter; indeed that it is a universal matter, of interest (*maṣlaḥa*) to the whole human species. This interest is necessary for the protection of order in human society and for the survival of the human species. The basis of this recognition is the rational faculty. So all reasonable people, as they are reasonable, praise it. By the same token, legal discrimination is a great cause of corruption (*mafsada*) to humanity, therefore all reasonable people disapprove of it, finding it unwholesome and evil.

When reasonable people, as they are reasonable, collectively agree that justice is good and deserves to be praised, and that legal discrimination is evil and deserves to be blamed, on the grounds that they are, respectively, beneficial and harmful to the public interest, then Shi'i Usulis will consider it to be a rational ruling.⁵ Legal justice reflects the perfection of human societies, and legal discrimination the imperfection of them. Reason perceives such perfection and imperfection in a general way: perfection is in the interest of humankind while imperfection leads to injury. People of reason, as they are reasonable, make this judgement in order to obtain beneficial consequences and to reject harmful consequences for humanity. The Lawgiver necessarily concurs with reasonable people, because it is a basic principle of the 'People of Justice'⁶ that the Lawgiver is reasonable and, in fact, is the head of all reasonable people.

Legal justice is a cause of goodness, and injustice and legal discrimination are causes of evil. On this basis, justice and discrimination are essentially good and evil respectively. Reasonable people praise those who stand for justice and blame those who stand for injustice and discrimination. The goodness of justice and the evil of injustice are absolutes that transcend questions of expediency and usefulness.⁷

c. Textual arguments for the legal superiority of men over women

The most important textual arguments for men's superiority over women can be found in four verses from the Qur'an and two hadiths from the Prophet Muhammad and Imam 'Ali.

And women shall have rights similar to men to the rights against them, according to what is equitable; but men have a degree (of advantage) over them. (2:228)

And in no wise covet those things in which Allah has bestowed His gifts more freely on some of you than on others; to men is allocated what they earn, and to women what they earn; but ask Allah of His bounty. (4:32)

Men are the protectors and maintainers of women because Allah has given the one more than the other, and because they support them from their means. (4:34)

Is then one brought up among trinkets, and unable to give a clear account in a dispute (to be associated with Allah)? (43:18)

A sound hadith from the Bukhari collection:

When I was in doubt whether the supporters of 'A'isha were in the right and whether or not I should join them in their fight, God helped me by a saying from the Prophet and saved me from falling into the trap. When the news was brought to him that the daughter of the Persian king Kasra had assumed the throne, the Prophet said: People who entrust their affairs to women will never know prosperity and find salvation.⁸

From Imam 'Ali's sermon about women's defectiveness after the Battle of the Camel:

O people, women are inferior to men in faith, in wealth and in reason. The proof of their deficiency in faith is that they do not pray or fast during their menses, the proof of their deficiency in reason is that the testimony of two of them equals that of one man, and the proof of their deficiency in wealth is that their share in inheritance is half of that of men. So keep away from bad women and be careful with the good ones, and do not give in to them when they are good, so that they do not expect you to obey them when they are bad.⁹

2. Women's rights from the perspective of deserts-based justice

In this section I first present women's rights in the words of the chief proponents of deserts-based justice, then narrate the rational and textual arguments they put forward.

a. Deserts-based justice and women's rights in the discourse of contemporary thinkers

'Allameh Seyyed Mohammad Hossein Tabataba'i (d. 1981) clearly sets out his perspective on women's rights during his interpretation of the above verses. Given his high level of learning and his nearness to us in time, he is one of the most important exponents of deserts-based justice.

In the following paragraphs I summarise his views.

Islam upholds equality between men and women in organising their lives, but woman has been created with two distinctive traits. One is that woman is like soil for the cultivation and growth of the human species; therefore, the survival of the human species depends on women. For this reason, there are rulings for women like those for agricultural land; hence, they are distinct from men. The second trait

is that, besides their physical delicacy, women have been endowed with mental weakness, which has a bearing on their social status and duties.

Men and women can have two kinds of superiority. One is specific to men (their share of inheritance) and women (their entitlement to maintenance); the other is not specific to men or women but is based on behaviour and attributes that bestow superiority, such as faith, knowledge, piety (*taqwā*), and other virtues praised by religion.

All rulings related to worship and social rights treat men and women the same, except in matters that, by nature, require difference. The most important of these are: women cannot lead in political or judicial affairs; in war, they are not required to engage in combat, though medical aid and nursing the wounded is another matter; women's inheritance share is half of that of men; for women hijab and covering the site of ornaments (*zina*) is mandatory; women are required to submit to their husbands in sexual matters. A woman is compensated for her loss in these areas by her lifelong right to maintenance by her father or husband. The husband is obligated to protect his wife as best he can. The right to raise and care for the children rests with the woman. God has mandated these in order to protect a woman's life, her (sexual) honour and even her reputation, and she is excused prayer and fasting during her menses. Women must be treated leniently in all conditions.

A woman need not seek knowledge apart from that pertaining to major religious beliefs and practical obligations (i.e. laws regulating worship and social affairs), and she has no other duty than that of obeying her husband and meeting his sexual desires. She is not required to go out to work, to manage the family or to study, though all these activities are advantageous, and not forbidden to women.

According to Tabataba'i, equality is a natural prerequisite of social rights and duties, but equality that stems from social justice does not require that all social ranks be distributed among all members of society. The prerequisite of social justice that can be interpreted as equality is for all to have their proper rights. Thus, equality between individuals and classes means only that every person should get what they are entitled to, without conflict between these entitlements. Qur'an 2:228 stresses equality in men's and women's rights and yet admits the natural differences between them.

Women are like men in being endowed with thought, free will, authority and control in all areas of personal and social life (except those mentioned), yet in these areas they differ from men in certain respects. Biologically, the average woman is inferior to the average man in brainpower, heart, veins and nerves, let alone height and weight. For this reason, women's bodies are softer and weaker and men's rougher and physically stronger; and women have gentler feelings such as love and tenderness and a greater interest in beauty and self-adornment, while men are more rational than women. Thus, women's life is emotional and men's life is rational.

In Islam, the difference in social duties and obligations (of men and women) is due to their different emotional and rational faculties. For example, men are specialists in politics, law and warfare, where rationality plays a greater role, while women specialise in raising children and managing the household. Men are responsible for the expenses of women and children, for which God compensates them with a double share in inheritance. In reality, men possess two-thirds of the property, but women too get two-thirds (one-third by ownership and one third as beneficiary of men [i.e. their right to maintenance and dower]). Consequently, men have overall control because of their rationality, while women get more assistance because of their emotional advantages.

The above paragraphs summarise Tabataba'i's 'What did Islam innovate on the women's issue?', a section of his long 'scientific discussion' of the rights of women.¹⁰ In the following section, entitled 'The liberty of women in the West', Tabataba'i proceeds to argue as follows.

If it is objected that such concessions to women are the cause of the women's lack of social progress, the answer is that Islamic rulings themselves are not the problem; rather, it is their incorrect application. Non-pious rulers are the main cause of women's lack of maturity and adequate upbringing. The contemporary West assumes the universal legal equality of men and women, ignoring women's immaturity compared to men; the prevalent view is that if women are inferior to men in maturity and virtue, it is because of centuries of poor upbringing, whereas by nature men and women are created equal.

We criticise such a view, Tabataba'i continues, by saying that, if women were not created inferior, their natural equality with men would, in time, have manifested itself, and women's primary and secondary faculties would have become the same as men's. In the course of history, and even in the modern times in the West, in all matters where Islam has officially recognised men's priority over women (politics, law and warfare), men are still dominant and we do not see equality.¹¹

'Allameh Tabataba'i explains verse 4:34 as follows: what is meant by superiority (*faḍila*) is the advantages that the Lawgiver has given men and women through specific rulings, such as men's advantage over women in terms of polygamy and a greater share of inheritance, and women's advantage over men in their right to claim maintenance and dower from their husbands. God has instilled these advantages in the human soul. The term *qayyim* means someone who stands *qiyām*, responsible for another. *Qawwām* and *qayyim* are intensive forms of the same *qiyām*. What is intended by *mā faḍala Allāh* ('Allah has given the one more') is the advantage that God has given men in creation and nature, that is, their superior reasoning power, which enables them to handle difficult tasks. Women's life is based on emotion, tenderness and gentle feelings. 'They support them' refers to maintenance and dower. The corollary of the generality of these reasons for men's authority ('Allah has given one more' and 'they support them') is that the ruling is

not limited to husbands and wives, but is generalised to the authority of the class of men over the class of women, in public matters which affect the survival of both. For instance, government, judgment and military defence demand physical and intellectual strength. Anyway, the beginning of the verse, 'men are the protectors and maintainers of women', sets a general rule, and subsequent phrases in the verse are elaborations of this. A woman's duties to obey her husband when he is present and to keep chaste in his absence outweigh any rights that may conflict with them.¹²

In the commentary on the Qur'an 43:18, 'Allameh Tabataba'i states that women are naturally stronger than men in feelings and kindness, and weaker in reason. The clearest manifestations of their emotionality are their extreme partiality to bodily adornment and their weakness in argument, which is based on the rational faculty.¹³

Ayatollah Morteza Motahhari pursued his teacher's line of argument when giving the following philosophical exposition of the notion of (deserts-based) justice:

Islam is not opposed to equal rights for men and women, but is opposed to identical rights ... Since men and women are different by nature, then different rights for them are not only more concordant with both justice and natural rights but provide more happiness in the family and progress in society. Justice and the natural and human rights of men and women require a certain disparity in rights ... Any innate aptitude is in itself the basis of, and evidence for, a natural right.¹⁴

In the last years of his life, Ayatollah Hossein 'Ali Montazeri Najafabadi gave a juristic exposition of (deserts-based) justice when he said, 'all rights and duties for men and women must be based on justice, and justice does not mean equality of men and women in all matters, rather it means giving rights to each according to their deserts, and duties to each according to their abilities'.¹⁵

b. Formulation of the arguments in the school of deserts-based justice

The textual and rational arguments of all these thinkers, who have been my teachers directly or indirectly, can, in effect, be stated as follows.

First, the textual arguments for legal equality are the starting point, in the sense of the context for discussion of legal equality between men and women, unless there are valid arguments for inequality.

Secondly, the textual arguments against legal equality are those valid arguments that allow a specific case to deviate from the context. In such a case, a specific or contingent argument is considered as definite contextual evidence (*qarīna qat'iyya*) that allows the jurist to disregard the general and absolute, and there is no room to appeal to arguments for legal equality.

Thirdly, the rationale of this perspective is as follows: justice, which independent reason rules to be good, means treating people according to their natural

deserts. Natural rights are revealed in innate capacities. Justice is the fulfilment of natural rights. In cases where men's and women's capacities are alike, they are entitled to the same natural and *shar'i* rights. In cases in which their capacities differ, they are evidently entitled to different natural rights and, consequently, to unequal *shar'i* rights. It is the essence of justice for equals to be treated equally, and for unequals to be treated unequally. It is the essence of injustice if women, who lack certain abilities and capacities, though they may possess others, are given the same rights and duties as men. This difference in rights is not discrimination; it is true justice.

In this perspective, existing juristic rulings on women are essential to justice; both text and reason support this. Correct application of these rulings will lead to happiness in this world and the next. Legal equality of men and women is rationally and religiously unacceptable.

3. Egalitarian justice and fundamental equality in the light of the Qur'anic spirit and Islamic standards

Now it is time to criticise the perspective of traditional thinkers on women's rights. In this section we shall discuss their rational arguments, and in the next section, their textual arguments. This section has three parts; first, having probed the roots of 'deserts-based justice', we shall analyse the notion of 'egalitarian justice'. We shall present the rational arguments for the superiority of egalitarian justice, and finally argue for the greater compatibility of both egalitarian justice and fundamental equality with the spirit of the Qur'an and with Islamic standards.

a. From deserts-based justice to egalitarian justice

Those in favour of deserts-based justice argue as follows: equal persons must be treated equally. They are entitled to equal rights. Those who are unequal must be treated according to their deserts. It is evident that everyone's rights are commensurate with their capacities, abilities and potentials, and equal rights for those who are unequal is injustice. In this perspective, humans are equal, but this equality is proportional, and people have rights in proportion to their abilities. This notion of justice goes with 'proportional equality'.

This, the oldest and best-known notion of justice, is close to Aristotle's 'distributive justice',¹⁶ which Muslims have approved as the one that is acceptable in the Qur'an and Islam.¹⁷ The definition of justice as 'putting everything in its place and giving everyone their proper rights'¹⁸ reflects Muslim philosophers' understanding of the Aristotelian notion, which justifies slavery and gender inequality.

After the publication of the American Declaration of Independence (1776) and the Declaration of the Rights of Man and the Citizen in the French Revolution (1789), 'proportional equality' gave way to the notion, in several constitutions, of the equality of all human beings as a divine or natural right, that is, 'fundamental equality'. This view gradually brought about a new formulation of 'distributive justice';¹⁹ although people have different abilities and potentials they are all human beings, and are therefore entitled to equal status and respect.²⁰ In other words, all human beings have equal rights. This too rests on two premises: first, treat unequal cases in an equal way; secondly, the foundation of distributive justice is legal equality, unless there is sufficient reason for unequal treatment.²¹

Comparison of the older and newer notions of distributive justice in the field of women's rights shows that: a) there is no doubt that there are biological and psychological differences between men and women; b) women's biological and psychological characteristics were the justification for their having fewer rights according to the older notion; c) women's humanity is the reason for their equal rights with men on the basis of fundamental equality; d) these equal rights can be overruled only when there is sufficient reason to consider unequal rights just, such as women's right to protection (positive discrimination).

In this chapter, I refer to Muslim thinkers' understanding of distributive justice and proportional equality, that is, the Aristotelian perspective,²² as 'deserts-based justice', and to the notion of distributive justice based on fundamental equality as 'egalitarian justice'.

b. Rational arguments for the primacy of egalitarian justice over deserts-based justice

Why are egalitarian justice and fundamental equality more reasonable than deserts-based justice and proportional equality? Here I answer this question without reference to Islam, Qur'an or Sunna, but through the following propositions.

Proposition One: Justice is a pre-religious concept. Human beings understand justice through their intellect. Everyone can recognise justice and injustice, in the broadest sense. Human beings define justice on the basis of experience and collective and historical reason. For a long time, deserts-based justice and proportional equality were dominant ideas, which accorded women, slaves and blacks lower status than men, freemen and whites. This legal inferiority was, for centuries, seen as justice and was justified rationally.

But these ideas have, for some time, been seriously criticised. People today no longer find deserts-based justice and proportional equality acceptable; the understanding of humans and their rights has changed. Human beings have rights as human beings, not as members of social categories such as females, slaves or blacks. Humanity is in the human spirit and nature, which is the same in every

person, and a basis for dignity and respect. Human spirit or nature has no gender, race, colour, religion, political ideology, social status or any other attribute. In other words, the meaning of 'rights-holder' has changed, and all human beings, because they are human, deserve equal rights. If proportional equality was reasonable at the time when rights were based on such social categories, now that human beings have rights by virtue of their humanity, the notion of fundamental equality is certainly valid, and proportional equality, which entails legal inequality, can no longer be justified.

Proposition Two: The conventional contemporary understanding of justice is egalitarian justice. In other words, justice means treating all human beings equally, and no human attribute is a barrier to legal equality or a cause of legal discrimination. Legal equality is the foundation, to be set aside only for a sufficient reason. Just as being black is no justification for legal inferiority, so being female is not a valid reason for legal inequality.

Proposition Three: Deserts-based justice is built on the notion of proportional equality. It can be constructed only by 'deducing ought from is', for example, that a woman must have fewer rights because she differs from a man in biology and psychology. But deducing 'ought' from 'is' is seriously problematic;²³ it requires philosophical substantiation, yet no substantiation has yet been proposed. Note that differences between men and women are not denied; rather, what is denied is that they can be the basis of unequal rights. What philosophical argument can demonstrate that 'is' justifies 'ought'? What is the rational argument for femaleness being the basis for fewer rights? How can physical weakness or emotional strength justify fewer rights or none?

Proposition Four: Legal equality is justice, and discrimination is injustice. Further, there is no doubt that justice is essentially good and injustice essentially bad. Why is equality just and discrimination unjust? Traditional thinkers neither recognise equality as essentially good nor count it a particular of justice. In their belief, justice is linked to deserts, not to equality; people's deserts do not necessarily lead to equality. Deserts means that each person gets rights to match their capacities, no more, no less: women, slaves and non-Muslims get the rights they deserve. The equality of man and woman, of slave and free, and of Muslim and non-Muslim, is opposed to justice. However, human reason today does not see such distinctions as differences of deserts, and considers justice based on them to be oppression.

For centuries, justice based on deserts served to justify slavery, gender discrimination and the like. How, in reality, were these deserts established? Whence, and on what undisputed evidence, did we establish that a woman deserves this much and a man that much? Does the kind of anthropology that, for centuries, assumed differences of deserts and accordingly made legal discriminations have any rational evidence for its claims? I will deal with textual evidence separately. The idea of deserts is based on unfounded assumptions.

Legal discrimination is, itself, unjust, because human beings are similar in dignity and in human spirit, and, given similar opportunities, have a similar potential to grow and to attain perfection. The basis for equality in rights is the unitary human essence of all human beings; humans have equal rights because they share this divine essence. Human dignity derives from this shared essence, which is also the cause of equal rights. Human beings deserve the same rights because they share the same essence. The similarity is in their essential capacities, not in how they are realised.

The People of Justice believe in divine justice.²⁴ They believe that justice is prior to religion. Justice is not confined to dogma and theology. The Shari'a of a just God is just. The *fiqh* of this school is justice-centred. Justice-centredness means necessarily deriving religious rulings in accordance with the principle of justice. Justice demands legal equality for men and women, and discrimination constitutes injustice. 'Justice' here means egalitarian justice, and deserts-based justice in our time is tantamount to legal discrimination and evidence of injustice.

Proposition Five: Human dignity and legal equality are mutually consistent. If human beings have dignity because of their humanity, this means that the human essence shared by men and women is dignified (*karim*). Legal discrimination is the denial of the principle of dignity. If, in the past, the patriarchal order in practice left no space for the principle of dignity, today that principle leaves no space for patriarchy and its demands. From the perspective of contemporary rationality, dignity and justice are meaningless without legal equality; that is to say, there is a correlation between dignity and egalitarian justice.

Proposition Six: Wisdom always means choosing the superior and rejecting the inferior. Choosing the inferior when the superior is available is unwise. If yesterday's rationality saw merit and justice in legal discrimination between men and women, today's rationality considers such discrimination to be pure oppression and a denial of human rights. A review of traditional *fiqh* rulings relating to women that are premised on legal gender discrimination reveals their definite inferiority to legal gender equality. If we leave any fair person alone with their conscience, they will inevitably prefer egalitarian justice and fundamental equality to the discriminatory rulings of traditional thinkers. This rational preference is certain.

c. Why egalitarian justice and fundamental equality are more consistent with the spirit of the Qur'an and Islamic standards

Why are egalitarian justice and fundamental equality more consistent with the spirit of the Qur'an and Islamic standards?²⁵ Here I shall attempt to answer this question in the context of theology.

If justice is prior to religion, clearly what comes after cannot define and determine what comes before. Being prior to religion correlates with being rational; justice is

defined by rational rulings; its concepts, discourses and dominant views change in accordance with rational methods and procedures. It is undeniable that justice has a central role in Islam, the Qur'an and the Sunna. In Shi'a and Mu'tazili theology, it has a key role, in the sense that people choose their religion on the basis of justice. God is just, the world is founded on justice, and divine law-making is done justly. Human beings are capable of understanding the standards of justice, even if they are only partially able to discern its manifestations.

Justice (*'adala*), equity (*qist*) and fairness (*inṣāf*) are not defined in the Qur'an and the Sunna, but they have been strongly advocated and endorsed. Clearly, God supports the kind of justice that human beings understand with their God-given reason. If God intended another meaning of justice, different from ordinary meanings, then He would have informed Muslims of this new meaning. In this way, we can attribute the existing language and logic to the Qur'an.

If egalitarian justice is the dominant paradigm of our time, then, without doubt, justice in the Qur'an and Sunna should be understood in this context, unless there is definite contextual evidence to the contrary.

Egalitarian justice and fundamental equality are more consistent with the spirit of the Qur'an and Islamic standards because, according to Islamic teaching, God is addressing the self or human spirit, which accepted the divine covenant and carries the 'trust' (*amāna*). A person's virtue and identity is in his soul, while the cells in the human body are naturally totally changed every few years. If physical resurrection is debatable, there is no doubt about spiritual resurrection or that the soul will receive its rewards and punishments.

It is this soul, a breath of the divine spirit, which makes human beings human and distinct from other animals; the angels bowed to humans because of this divine gift. Human dignity undoubtedly belongs to this divine spirit, not to the earthly body. Respect is due to this soul, for which the body is but a cover. This single soul is the origin of male and female humans; the human soul is subject to divine duties and rights. The soul has no gender. The foundation of human duties and rights is equality. Any unequal duty or right needs definite evidence; this is what the spirit of the Qur'an and Islamic standards requires.

4. Rereading the textual evidence on legal differentiation between men and women from the perspective of egalitarian justice

Some of the *shar'ī* rulings deduced on the basis of deserts-based justice weaken Islam and, at least according to today's rationality, are unjust, unethical, inferior and unacceptable; in other words, by the standards of egalitarian justice they are discriminatory and oppressive. To those who consider these rulings unproblematic,²⁶ we have nothing to say, but those who are aware of the problem must admit that there are drawbacks in the notion of deserts-based justice. What are they?

Scholars (i) reach their conclusions (ii) based on specific assumptions (iii) with a specific understanding (iv) of religious arguments. We have already assessed the patriarchal approach and the assumptions and rational understanding on which deserts-based justice is based; we now assess its religious arguments.

At the time of revelation, Islam took a giant step forward on the path of women's rights, and, given the condition of women then, raised their status in the world. This advance had two elements: one was complete equality of men's and women's rights; the other was advancing women's rights but not as far as full equality. Are the rulings denoting inequality the final word of Islam? In other words, are they among the unchangeable and eternal rulings, or the changeable and temporary ones? If the former, then we are compelled to interpret them as proportionate to women's innate deserts, and the result will be deserts-based justice. But if we come to believe that the world at that time, and for centuries after, was not ready to accept egalitarian justice – just as it was unprepared for the total abolition of slavery – then we see that the Lawgiver adopted a policy of gradualism to reach the desired conditions. First, in general terms, he indicated the direction towards equality of rights, and, in arenas where public acceptance was not yet possible, he took the level of rights half a step forward, until public opinion was ready for the second half-step. Deserts-based justice was the first half-step and egalitarian justice the second.

Traditional Muslim thinkers assumed that all or most laws legislated in early Islam were fixed and eternal. If this were so, then these laws should still be producing justice and ethics that are superior to other methods, and contemporary human wisdom would not reject them. But this is not the case. This is strong evidence that these laws are not of the fixed kind. A fixed and immutable ruling is always just, ethical, superior and reasonable. However, men's privilege and *qiwāma* over women, corporal punishment of a disobedient wife, permitting the marriage of an underage girl, men's right to unilateral divorce, two women's testimony being equal to one man's, a woman's blood money (*diya*) being equal to half a man's, a son's inheritance being twice that of a daughter, men's obligation to pay maintenance and dower – these rulings are all debatable. The Holy Qur'an (4:34) gave two causes for men's *qiwāma* over women: one is that 'Allah has given the one more' and the other that 'they support them from their means'. That 'men have a degree over them (women)' (2:228) was, without doubt, a function of these two causes. When God provided justification, it meant that the ruling was neither unquestioned (*ta'abbudi*) nor scripture-bound (*tawqifi*). While the two causes remain, so does the effect, that is, men's *qiwāma*; but when the causes go, so also does the effect. Traditional thinkers, as we said, interpreted the first cause as men's innate superiority over women, and the second as mandating men's obligation to pay maintenance and dower; with the first cause, they mention men's superior mental and physical powers and women's emotional intensity and bodily weakness. But is

men's pre-eminence permanent and indicative of women's lesser deserts? We must consider the following three points.

(i) In the Qur'an, God favours the children of Israel over other peoples: 'Children of Israel! Call to mind the (special) favours which I bestowed upon you, and that I preferred you to all others' (2:47, 122). Similarly, the supremacy of Israelites over the world is mentioned in 45:16 and 7:140. There is no doubt that the Israelites are not superior to the followers of Jesus Christ or the *umma* of Muhammad, and that 'other peoples' here means people before the calling of these two prophets. These verses are situational premises (*al-qaḍāyā al-khārijīyya*) not absolute premises (*al-qaḍāyā al-ḥaqīqīyya*), that is, they denote superiority in a specific time and place, not superiority innate and inherent in the children of Israel.

By exactly the same logic, men's superiority to women can relate to a specific era and is a situational premise; that is, it was relevant to a past situation when almost all women, because they were regarded as inferior, did not receive adequate upbringing and education. It does not relate to a time when, in spite of physical differences, women, like men, are counted as humans with equal rights.

(ii) The Holy Qur'an hails Blessed Mary as superior to all other women. 'Behold! The angels said: O Mary! Allah hath chosen thee and purified thee – chosen thee above the women of all nations' (3:42). Does 'women of all nations' mean women at that time, as a situational premise, or all women in the world from creation until the end of the world, even Fatima and Khadija, as an absolute premise?

The apparent meaning (*zuhūr*) of both verses is permanent superiority, but the superiority of Blessed Mary and the Children of Israel becomes time-bound, on the basis of 'assured disjunctive context'; and the same method limits the scope of reference of the verses discussed relating to the superiority of men over women. The context was one in which reasonable people, because they were reasonable, considered men's physical and intellectual superiority to be virtues deserving superior rights; this was the same time-bound context in which women could not live without male physical and financial protection. Naturally, in such a context women themselves accepted men's greater rights; and reasonable people (*sīra al-'uqalā'*) also considered men's superior rights to be just and fair.

But when reasonable people no longer recognise the biological, physical and psychological differences between men and women as a cause for men's superior rights; when fair-minded men and women themselves regard such a difference in rights not as justice, but as pure discrimination; and when both men and women share economic activities in the family and society, then there is no longer any doubt that such verses, like those relating to slavery, denote temporary rulings, not permanent ones.

The fact that such verses contain causes indicates that they are cause-based, and in a context when the cause is not realised, then the effect of the ruling is likewise

annulled. If the issue were unquestioning imitation (*ta'abbudī*), the cause would not have been given; if the cause was stated, then the way is open for rational discussion.

(iii) The Holy Qur'an speaks of inequality in the distribution of material wealth and the superiority of some people over others as facts of social life:

Is it they who would portion out the Mercy of thy Lord? It is We Who portion out between them their livelihood in the life of this world: And We raise some of them above others in ranks, so that some may command work for others. But the Mercy of thy Lord is better than the (wealth) which they amass. (43:32)

Allah has bestowed His gifts of sustenance more freely on some of you than on others. (16:71)

See how We bestowed more on some than on others; but verily the Hereafter is more in rank and gradation and more in excellence. (17:21)

There is no doubt that these verses attribute socio-economic inequalities to God. Likewise, human differences in talents and abilities cannot be denied. But the basic question is as follows: are these obvious socio-economic inequalities, which are actually rooted in the difference in human temperaments, the basis for unequal rights among these different human beings? The Qur'anic and Islamic answer is, definitely not. In that case, how can we say that gender difference is the cause of unequal *shar'ī* rights? Above all, in a time and context when women, like men, share in household expenses, and have proved their human capacities in the scientific fields. In the last few decades, women have shown that, when they enjoy the same opportunities and facilities as men, there is no noticeable difference between them in science and intellectual endeavours. At the very least, according to contemporary rationality, legal discrimination seems unjustifiable.

Given the above three points, we can conclude that, although we accept that the apparent meaning of the verses discussed is deserts-based justice and proportional equality, we must reject their invocation as immutable and eternal rulings in the form of absolute premises.

All verses and hadiths that imply legal discrimination against women are, first, situational and not absolute premises, that is, they refer to a specific time and place and do not affirm innate characteristics of men and women for all time and all places; ultimately, they refer to women's secondary and temporary dispositions in a specific era. Secondly, these rulings are mutable and temporal, not fixed and eternal. Thirdly, even if the temporality of these rulings is not accepted, the arguments for egalitarian justice and fundamental equality are strong enough to lead to their provisional abrogation, in the sense that as long as the arguments for egalitarian justice enjoy solid rational validity, rulings denoting inequality are considered abrogated on the basis that their validity has expired. We say 'provisional' out of extreme

caution, but, according to contemporary rationality, we cannot imagine that past rationality will return.

In reality, of the three kinds of existing arguments in the realm of women's rights, the rational arguments for deserts-based justice have reinforced the textual arguments for equal rights as the spirit of the Qur'an and Islamic standards. These two kinds of rational and textual arguments have restricted (*taqyid*) the textual arguments for inequality in terms of their time frame. On the basis of these two types of textual and rational arguments as the contextual evidence, the textual arguments against equality are temporal rulings that become situational premises whose validity has expired.

5. Response to two predictable objections

Some may object that the wise Lawgiver of the world could have legislated fundamental equality of rights between men and women from the outset, clearly and explicitly, as a permanent ruling, to avoid the need for complex logical arguments for abrogation. Or do equal rights, which contradict the apparent meaning of the Book and Sunna, not throw a question mark around other *shar'i* rulings?

In response we can say: the problem is in the assumption that the *shar'i* rulings in the Qur'an and Sunna are all fixed and permanent. Has this assumption been proven? Is it so obvious that it needs no verification? This assumption is neither obvious nor has a valid argument been offered to prove it. Rather, there are valid arguments against it. There is no question that social, cultural, economic and political conditions in human societies change greatly over time, and, consequently, the subject matter of many rulings changes. Besides, the conduct of reasonable people can change in the course of history: a revealing example of a transformation in the conduct of reasonable people took place in the dominant views of thinkers and societies, past and present, with regard to slavery. This also applies to women's rights; until a century ago, the common sense view was totally different from that of today.

Yesterday's human mindset did not have to face today's conditions. Further, until a century ago *shar'i* rulings in the Qur'an and Sunna regarding women's rights were – according to the common sense of the time – just, ethical, rational and defensible, and capable of meeting the demands of human societies. Had the Qur'an and Sunna issued rulings according to a human mindset that was not established until centuries later, the Muslims, who were the first addressees, would not have accepted them. It cannot be denied that the Qur'an declares the licence to abrogate rulings, and that provisional and abrogated rules exist alongside permanent and abrogating ones in the text of the Qur'an and the Sunna. 'What God Revealed' (*mā anzala Allāh*) must be accepted as it was legislated; if it was legislated as permanent, it must be considered an immutable ruling, and if it was legislated as

provisional, then it must be accepted as a changeable ruling. Denial of the immutability of provisional *shar'i* rulings is not a denial of 'What God Revealed'. Likewise, anything the Prophet legislated as permitted or forbidden (*halāl wa ḥarām*) remains so until the day of resurrection, provided such instructions were legislated as permanent. In other words, not all the Prophet's rulings are permanently valid; some were meant to be temporal.

The *shar'i* rulings in the Qur'an and Sunna, which Muslims at the time of revelation saw as just, ethical, reasonable and superior, are valid as long as they fulfil these criteria. Once we discern with certainty – not conjecture – that a ruling is no longer just, ethical, reasonable and superior, this means that it was a temporary ruling whose validity has expired. This discernment is a specialist matter and must be done by a *mujtahid* who, in addition to his knowledge of jurisprudence, is also aware of the conditions of time and place. Besides slavery and women's rights, *shar'i* penal laws are among those in need of fundamental revision.

This '*ijtihad* in foundations' allows a disciplined rethinking of such temporary rulings. By *foundation* we refer to anthropology, cosmology, linguistics, hermeneutics and the methodology of jurisprudence (*uṣūl al-fiqh*). If there were revisions in these foundations, without doubt the outcome of the jurisprudence of the *mujtahids* would have been different. We must not fear disciplined change in *shar'i* rulings. On the contrary, we should fear presenting temporary rulings as permanent, and thereby weakening Islam. We cannot deduce *shar'i* rulings for the people of today on the basis of the anthropology of the past.

6. Conclusion

There are two types of verses and hadiths regarding women's rights in the Qur'an and Sunna. The first type designates full human rights for women, and recognises equal rights for men and women as humans, despite bodily differences between them. The second type considers that women, because of their lesser capacities, are entitled to fewer rights than men in managing the home and in society. At the same time, reason and Shari'a required that women be treated with justice and according to what is commonly accepted as good or right (*ma'rūf*).

Muslim scholars, following Aristotle, construed justice as deserts-based on the basis of proportional equality, and considered women as entitled to fewer rights because of what they considered to be women's inherent lesser capacity. They took the first type of verses and hadith as the basis for equal rights, and the second type as the standard for women's rights and duties, and defended patriarchy as consistent with justice and Shari'a.

Both proportional equality and deserts-based justice are indefensible and unjustified. Contemporary rationality recognises humans, as they are humans, as rights-holders, and thus upholds fundamental equality and egalitarian justice. This

notion of justice is very close to human dignity and Qur'anic anthropology. The first type of verses and hadiths, on grounds of contextual rational argument, imply fixed and permanent rulings, and, by analogy, verses that apparently imply legal inequality and greater legal rights for men are considered temporary rulings whose validity has expired.

According to egalitarian justice and fundamental equality, although women differ from men physically and psychologically, they are entitled to equal rights because they are human, and it is humanity – not gender, colour, race, class, religion, political ideology – that carries rights, duties, dignity, and trust and divine vicegerency. This position is more consistent with the Qur'anic spirit and Islamic standards; evidence for legal inequality, because of its temporariness, cannot be counted an obstacle to the realisation of legal equality.

Notes

- 1 This is my third article on the issue of women's rights. The previous ones are: 'Religious intellectuals and the rights of women', written in 2003, and 'Women's rights in the hereafter', written in 2005; both appeared as chapters in my book *Haqq al-Nass: Islam va Hoquq-e Bashār* [The Right of Humans: Islam and Human Rights] (Tehran: Kavir, 2008), pp. 287–314 and 315–37 respectively. I would like to thank the Oslo Coalition for inviting me to contribute this chapter, and Dr Ziba Mir-Hosseini for her comments, and, most importantly, for translating it into English.
- 2 The Usuli (rationalists) are the majority school of Shi'i jurisprudence, which, in contrast to the minority Akhbari (traditionalists), recognises reason ('aql) as a source for the derivation of law. Akhbaris gained influence in the seventeenth century but by the late eighteenth century the Usulis had crushed them.
- 3 Translations of the Qur'anic verses are from Yusuf 'Ali.
- 4 The same theme is repeated in other verses, including 40:40, 4:123, 3:195.
- 5 In such an analysis, justice and injustice, and the rational discernment of good and bad, are matters of dispute between the 'People of Justice' (Shi'a and Mu'tazila) and the Ash'aris, or in other words, between rationalists and voluntarists. The Mu'tazila school, which flourished in the ninth and tenth centuries, has influenced Shi'i thought, but was marginalised among Sunnis, where the Ash'ari school, in particular, became prevalent instead.
- 6 See previous footnote.
- 7 For the arguments for 'independent reason', I have drawn on the chapter on *al-mulāzamāt al-'aqliyya* (rational accompaniments) in Shaykh Mohammad Reza al-Muzaffar's valuable book *Uṣūl al-Fiqh* (Beirut: Al-'Alami, 1999), Vol. 2, pp. 261–97.

- 8 *Ṣaḥīḥ al-Bukhārī*, Vol. 5, book 59, no. 709.
- 9 *Nahj al-Balāgha*, ed. Subhi Saleh (Beirut, 1967), Sermon 80, p. 125.
- 10 This was written separately, after the commentary on Qur'an 2:228–42, in *Al-Mizān fī tafsīr al-Qur'ān* (3rd edn, Beirut: al-'A'lami, 1974), Vol. 2, pp. 260–77.
- 11 *Ibid.*, pp. 276–7.
- 12 *Ibid.*, from the summary of his commentary on Qur'an 4:32–5, in Vol. 4, pp. 335–9 and his separate discussion of the meaning of *qiwāma* (guardianship) of men over women, p. 346.
- 13 *Ibid.*, Vol. 18, p. 90.
- 14 Motahhari, Morteza, *Nezam-e Huquq-e Zan dar Islam* [The System of Women's Rights in Islam] (Tehran: Sadra, 1990), pp. 144, 155 and 180.
- 15 Montazeri Najafabadi, Hossein 'Ali, *Hokumat-e Dini va Hoquq-e Ensan* [Religious Government and Human Rights] (Qom, 2007), pp. 119–20. This book (pp. 119–29) contains his last views on the matter; for his earlier views, see *Dirāsāt fī Wilāya al-Faqīh wa Fiqh al-Dawla al-Islāmiyya* [Lessons in the Rule of the Jurist and the Jurisprudence of an Islamic Government] (Qom, 2003), Vol. 1, pp. 335–62, where he invokes the hadith from Bukhari and *Nahj al-Balāgha* that we mentioned above. Also noteworthy is Montazeri's explanation of Sermon 80 of *Nahj al-Balāgha*, which he begins with 'probably Imam 'Ali in this Sermon is referring to 'A'isha [because of her role in rebelling against him in the Battle of the Camel] and those similar to 'A'isha, not to all women in the world'. *Sharha-ye Nahj al-Balagheh* (Tehran: Sara'i, 2003), Vol. 3, pp. 234–7.
- 16 In chapter 2 of *The Nicomachean Ethics*, distributive justice is one of the three kinds of specific justice that is distinct from general justice. Aristotle defines the relationship between distributive justice and proportional equality in the following two works: *Politics*, 1282b, lines 16–21; *The Nicomachean Ethics*, 1331a, lines 10–28.
- 17 *The Nicomachean Ethics*, translated into Arabic by Ishaq ibn Hunayn in the tenth century, was available to Muslim philosophers. I refer to the 1979 edition by Abdulrahman Badawi, published in Kuwait. Aristotle's *Politics* was not translated at that time, though some Muslim scholars were partially familiar with it, including al-Kindi, *Rasā'il al-Kindi al-Falsafiyya* (Cairo, 1956), Vol. 1, p. 384; al-Mas'udi, *al-Tanbih wa al-Ishrāf* [The Book of Notification and Verification] (Linden, 1956), p. 118; Miskawayh, *Tartīb al-Sa'āda*, cited in the footnote of Mulla Sadra's *al-Mabda' wa al-Ma'ād* [The Origin and the Return] (Tehran, 1896), pp. 458–9; and Ibn Sina, *Risāla al-Aqṣal al-Hikma* [Treatise on the Divisions of Philosophy] (Tehran, 2009).
- 18 As an example, Mulla Hadi Sabzevari mentioned this phrase as the definition of justice in his book *Sharḥ al-Asmā' al-Husnā wa-Sharḥ du'ā' al-ṣabāḥ* [Commentary on the Beautiful Names] (Tehran: Maktabat Basirati, n.d.), p. 54.

- 19 John Rawls is the best-known thinker on this notion of justice; the important discussion of conceptions of, and approaches to, justice as fairness cannot be dealt with here and requires another chapter.
- 20 Tawney, R. H., *Equality* (New York: Capricorn, 1961), pp. 35, 37, 90.
- 21 Berlin, Isaiah, 'Equality', in *idem*, *Concepts and Categories: Philosophical Essays* (Oxford University Press, 1980), pp. 82–4.
- 22 It must be said that the notion of Aristotelian justice has been revised by some neo-Aristotelian philosophers, such as Martha Nussbaum and Alasdair McIntyre; in her reading, Nussbaum distances herself from Aristotle's proportional equality and comes closer to fundamental equality. For a discussion, see McKerlie, Dennis, 'Aristotle's theory of justice', *Southern Journal of Philosophy* 39 (2001), pp. 119–41.
- 23 Popper, Karl, *The Open Society and Its Enemies* (4th edn, London: Routledge and Kegan Paul, 1962), Vol. 1, p. 62.
- 24 Shi'ite Muslims and Mu'tazili Sunni Muslims.
- 25 Fazlur Rahman has used the phrase 'harmony with the Qur'anic spirit' in discussing women's rights; see his 'Status of women in Islam: a Modernist Interpretation', in Hanna Papanek and Gail Minault (eds), *Separate Worlds: Studies of Purdah in South Asia* (Delhi: Chanakya Publications, 1982), pp. 285–310.
- 26 I have referred to some of these rulings in a chapter, 'Religious intellectualism and human rights', in my *Haqq al-Nass*, pp. 94–9.

Part III

Instead of a Conclusion