

Women and Sharia in the Constitution and Possibilities for Opening Horizons¹

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As a citizen whose female gender has led her to have certain rights and duties and to be deprived of others, I want to raise some questions that may help us write a better constitution.

As we write a new revolutionary constitution, we should keep in mind that the strength of nations is now measured by the extent to which marginalized citizens are treated. Are the poor, the followers of other religions, the disabled, the unemployed, the pregnant women, the elderly, the children and the sick given rights to guarantee them a decent life?

Such nations do not follow the law of the jungle where the strong survives at the expense of the weak. To the contrary, they place a greater value on sense and mercy, just as Prophet Muhammad did when he opened Mecca and became stronger in the political balance of power. Why can we not follow his example today?

Creating awareness

In his book *Pedagogy of the Oppressed*, which inspired several countries to change their school curricula, Brazilian educator Paulo Friere helps us to understand the reasons why a person who had been oppressed in relationship of unequal power cannot be automatically expected to be merciful to his oppressed colleagues or play a role in their liberation when he or she is granted some power. On the contrary, this person will most likely oppress his or her colleagues like he or she had been oppressed before.

To escape that destiny, we should engage in what Freire calls the “conscientization” process, which is to become conscious of why we are caught in a circle of oppression, and how to get out of it. All of us in post-revolution Egypt need to enter into that process of creating awareness, particularly as we write our new constitution. I repeat, all of us.

¹ A longer version of this article was published in the weekly *Egypt Independent* on November 6, 2012: <http://www.egyptindependent.com/opinion/my-problem-your-problem>.

My question is: if we decide not to act similarly to other nations, but rather to let those who think they are stronger take over on the pretext of abiding by religion, then why do we insist on sticking to an oppressive interpretation and understanding of religion? Why do we think that in order to follow religion correctly, we need to have oppression and inequality? Why is it that whenever a sheikh or priest or rabbi preaches and fuels discrimination and oppression, we grant him greater respect and see him as being closer to God? Are those qualities really encouraged by your God and mine? We know that the answer is an emphatic no.

As we have been taught before, Sharia is supposed to be the divine message which does not change with time or place, and it aims to help people lead a better life in this world and in the afterlife. Jurisprudence, on the other hand, is the continuous human effort to understand and implement this divine message.

For jurists to understand the divine message, they developed the science of *usul al-fiqh*, the sources of jurisprudence, which consist of rules and tools, such as *qiyas* or analogy, which are used by jurists to elicit rulings from the Quran and Sunnah.

Therefore, those rulings are a human effort to understand the divine will. This effort is essentially influenced by the development, or lack thereof, in various realms of life.

There is, for example, a ruling which gives a father the right to marry off his prepubescent daughters. Several scholars agree that a father has the right to marry off his daughter without soliciting her consent. They only disagree on whether her approval is necessary when the female in question has reached the age of puberty. Today, knowing the associated physical dangers to young girls and that some fathers marry their daughters to rich men from the Gulf for monetary gains, do we still want this ruling to remain in post-revolution Egypt?

I want to give some examples that might broaden our horizons, while at the same time not deny religion its ability to establish gender equality. For instance, in Muslim majority countries like Libya and Algeria, to avoid the incidence and ills of unregistered divorces, divorce has to take place in court and a husband cannot unilaterally divorce his wife.

Morocco has promulgated what they term “divorce for discord,” which is based on the Quran, whereby both the husband and wife apply for divorce due to disagreements. The judge would grant the divorce and order the payment of compensation to the aggrieved party, even if it is the husband.

Polygamy, the incidence of which is already decreasing due to economic conditions and the change in society's view of the practice, has been conditioned in several countries, such as Jordan, Syria, Algeria, and Morocco.

Regarding inheritance, Egypt has come up with the creative idea of the "obligatory will," which allows a grandson whose father dies within his grandfather's lifetime to receive inheritance, not otherwise possible if inheritance rulings are applied literally and in a rigid manner.

These examples show that Sharia does not have to be synonymous with inequality for it to be "authentic." There is ample room for coming up with creative solutions that help us come closer to equality if only we nurture a kind of awareness that resists oppression and discrimination and encourages equality and freedom.

However, concerning alimony, we do have a serious problem. We know that today women are the sole breadwinners in a third of Egyptian households, and in the remaining two thirds they almost inevitably have to share in household income in light of the grueling economic conditions. Wives also share in household maintenance by doing the housework for free, and thus saving expenditures on such services.

We are aware that courts have issued rulings in favor of women obliging husbands to pay alimony that are not implemented in Egypt today. So, which alimony are we talking about that women supposedly enjoy and for which social class exactly?

The Singaporean Muslim Family Law sought to solve this problem by giving a divorced Muslim wife at least one third of the wealth accumulated during marriage, excluding money and real estate inherited by either spouse. This allocation is subject to increases commensurate with the wife's expenditure during the marriage, in order to protect her and her children's rights.

My problem, your problem

Classical Muslim jurists did not witness these changes in spousal roles and problems when they produced their rulings. Anyone studying Islamic law today knows that Islamic jurisprudence currently faces an epistemological crisis, particularly when it comes to women. This is largely because Islamic jurisprudence, with its classical knowledge and assumptions, is facing new realities. However, contemporary jurists do have the tools of *usul al-fiqh* that they can utilize to better apply religious laws to everyday lived reality. But, first we have to exhibit willingness to reject oppression and inequality and rid ourselves of fear.

It remains for us to acknowledge that throughout history, before the establishment of the modern state, the Islamic legal system was a flexible one that actively interacts with the changing realities on the ground. Differences in legal opinions were normal and seen as positive. It was a system that refused to have one guardian dictating to what Sharia should be for everyone in order to protect itself and the religion it represents from authoritarianism. It was a living system that breathed with its society which therefore respected it.

But when we try to enclose the Islamic legal tradition in rigid, positive laws, which are issued by elected parliaments on the basis of limited constitutional articles, it loses its ability to breathe and adequately address people's needs. Until we succeed in addressing such developments, some suggest that the new constitution today should only refer to the “principles,” rather than the “rulings” whenever Sharia is mentioned.

I do not know if this is a solution or not, but I am presenting it here for discussion. What I do know is that after the revolution we deserve much better than what we are now offered in the draft constitution. I also know that not so long ago, in January 2011, we all firmly believed that my problem is your problem and we were actually prepared to give our lives for that principle.

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