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Notes and Comments

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Comments on "Progressive Muslims and Islamic Jurisprudence," by Kecia Ali

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Abstract

This is a review of Kecia Ali's book chapter "Progressive Muslims and Islamic Jurisprudence." Ali argues for a need to reform Islamic family law, such that it is representative of the contemporary context. Her argument is based on her research on Islamic family law in Islamic jurisprudence manuals in which she found a significant influence of gender norms in the formative period of Islam (until the third century AH) in shaping its content. She concludes by highlighting that as the gender norms in the formative period influenced Islamic family law, we need to reform Islamic family law for it to reflect contemporary gender norms. This write-up explores Ali's argument and methodology and situates her argument within other scholarship on rethinking Islamic family law. It concludes by providing an evaluation of Ali's argument.

Keywords

Islamic family law, progressive Muslims, rethinking Islam.

In her book chapter, "Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Laws,"[1] Kecia Ali argues for the need to reform Islamic family law by highlighting historical factors in shaping its content. She demonstrates how Islamic family law is not divine or God-given as the context in the formative period of Islam (until the third century AH) had a significant role in shaping it. Ali's work is influenced by Leila Ahmed's research on the conception of women in the early Islamic period in which Ahmed shed light on the impact of the spread of the Islamic empire on the conception of women. With the spread of the Islamic empire, women of the occupied lands were

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[1] Kecia Ali, "Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Laws," in *Progressive Muslims: On Justice, Gender and Pluralism*, ed. Omid Safi (Oxford: Oneworld Publications, 2008), 163-90.

considered war booty and were subsequently displayed in female slave markets as commodities to be bought and sold by men for sexual use. In these markets, the concubines were priced based on their age, colour, virginity, and talents. The practice of keeping female concubines was widespread.[2] In many cases, the interaction of men at that time with women was only with concubines, which severely disrupted their understanding of women and relegated their understanding of women as objects for sexual use than as their equal counterparts.[3] For Ali, this understanding of women significantly shaped Islamic laws on marriage emerging during that period.

Ali's research reveals a parallel between the laws on marriage and the laws on the female slave trade in juristic literature. To shed light on these parallels, she specifically explores the concept of dowry and the duties of the spouses in marriage. In Islamic law, marriage is a contract and involves similar procedures in initiating and concluding the contract as required by a contract of sales, and both contracts involve an offer, acceptance and an exchange of the commodity in return for a price. The marriage contract involves an offer (*ījāb*) by the man, the acceptance (*qabūl*) by the woman or her guardian (*walī*), and the payment of dower (*mahr*) by the husband after the consummation of the marriage. According to Ali's research, the dower is a payment made by the husband for "*milk*" (possession) of the woman, and in particular, it is a payment for the ownership of her sexual organs (*farj, buḍʿ*).[4] This conception of dower (*mahr*) was revealed in the juristic discussions on the value of the minimum dower. Ḥanafī scholars set the value of the minimum dower at ten dirhams based on two proofs. The first proof stemmed from the *ḥadīth* of the Prophet (peace be on him) which articulates that the value of *mahr* cannot be less than ten dirhams. The other proof was based on analogy. Ḥanafī scholars analogized marriage with theft and linked the minimum dower to the lowest amount for which a thief's hand will be amputated. The minimum dower was set as ten dirhams because a body part is valued at ten dirhams, as evidenced by the punishment for theft that a thief's hand is amputated only when he/she steals something for more than ten dirhams. Similar commodification of women was seen in the reasoning given by the Shāfiʿīs for setting the *mahr* according to the will of the

[2] Ali, *Marriage and Slavery in Early Islam* (Cambridge, MA: Harvard University Press, 2010), 20-23.
[3] Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: Yale University Press, 1992), 41-63.
[4] Ali, "Progressive Muslims and Islamic Jurisprudence," 169.

woman. For the Shāfiʿīs, the *mahr* needs to be decided by the woman because she is allowing possession of her sexual organ (*milk al-buḍʿ*).[5]

A similar conception of women is seen in the juristic discussions on duties and responsibilities arising out of a marriage contract, where women are relegated as objects of sexual use in return for monetary compensation. The duties and responsibilities arising out of the contract revolve around the twin concept of maintenance *versus* obedience. The husband is responsible for financially maintaining the wife, whereas the wife is required to be obedient. Across all Sunni schools of jurisprudence, sexual availability features as the most important criterion of obedience.[6] This is seen in the juristic discussions on the time when maintenance becomes due and the cases when maintenance should be withheld. Maintenance becomes due on the husband right after the first intercourse. After this time, the wife also has the right to ask for maintenance if she is not provided with it. In case the husband is unable to provide for maintenance or refuses to provide maintenance for his wife, the wife has a legal right to refuse to have sexual intercourse with the husband. A woman's part in marriage as an object available for sexual use also features in juristic discussions on cases when the husband is allowed to withhold maintenance. If the marriage contract was concluded, and the couple did not have intercourse or valid privacy,[7] then the husband has no obligation to maintain her. Similarly, if the wife is young, such that she is incapable of having sexual intercourse, then the husband does not have the obligation to maintain her.

Central to Ali's argument are the sources she employs for her research. She uses the works of Sunni legal scholars in second-century AH to shed light on their understanding of marriage in Islam. This century was part of the formative period of Islamic law (first to third centuries AH), and it proved itself as a critical stage because legal theorization started emerging in this period. Muḥammad b. Idrīs al-Shāfiʿī (d. 204/820), who is called the "master architect of Islamic jurisprudence,"[8] also wrote in this period. In the fourth century AH, there was no significant development in the field, and from the fifth century onwards, Islamic law developed on the pattern

[5] Ali, *Marriage and Slavery*, 54-56.
[6] Ali, "Progressive Muslims and Islamic Jurisprudence," 170.
[7] Valid privacy (*al-khalwah al-ṣaḥīḥah*) is attained when the couple is in a private setting such that they do not have any impediment towards having sexual intercourse. Mona Siddiqui, "Mahr: Legal Obligation or Rightful Demand?" *Journal of Islamic Studies* 6, no. 1 (1995): 18.
[8] Noel James Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 53.

set by scholars in previous centuries and specifically by al-Shāfiʿī.[9] Ali considerably draws on sources written by al-Shāfiʿī.

Ali also attempts to engage with other scholars working on gender relations in Islam. She highlights the perspectives of neoconservatives and feminists as not engaging with the core of the subject. The neoconservatives have a conception of gender roles in Islam which explains gender differences based on the "nature" of the sexes. As such, they highlight biological features as determinants of gender roles. Even though the neoconservatives present their views as reflecting the classical Islamic perspective on gender relations in Islam, Ali sees these views as being borrowed from the West. In the 1950s, these same ideas were circulated in the American media regarding gender roles in a marriage, and Ali sees the neoconservatives as adopting a Western understanding of gender roles. As such, for Ali, the neoconservatives are modernizing without realization.

Moreover, the view held by feminists "misses the forest of the tree,"[10] as it substantiates from the same structure established by traditional jurists. The feminists find alternatives within the dissenting voices in classical Islamic law. As the majority view in classical Islamic law reflects a backward view regarding gender roles, these feminists look for minority views. For instance, to make a case for regulating polygamy, the feminists prefer the Ḥanbalī view which allows the wife to add a stipulation in her marriage contract.[11] To counter the feminists, Ali shows how the laws within the juristic structure are inconsistent even within a particular school of jurisprudence, therefore, for Ali, using some of those laws, while not using others is not engaging with the subject proper.

Ali's argument represents a modern approach to Islamic law. One of the threads which connect these modern trends is their lay approach towards Islamic texts in that it does not engage with classical Islamic legal texts and focuses on reading the text without the lens of traditional authority figures. This approach became dominant especially when the '*ulamā*', who were the "carriers" of Islamic law, failed to respond to

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[9] Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997), 36.

[10] Ali, "Progressive Muslims and Islamic Jurisprudence," 164.

[11] All four Sunni schools of jurisprudence allow for four wives. However, within the Ḥanbalī school, there is a view which allows the first wife to add a stipulation in the marriage contract to allow her the right to divorce if her husband marries another woman. Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative View of Textual Development and Advocacy* (Amsterdam: Amsterdam University Press, 2007), 77.

modernity comprehensively.[12] Modern scholars on Islam, those who are not necessarily trained in traditional Islamic law, have come forward to fill this gap so that Islam does not end up becoming a "dead" religion. Furthermore, these modernists represent a very specific trend within modern Islam. For these scholars, the epistemic basis of law is not based on scripture, but it is based on human reason.[13]

In this piece, Ali is proposing a need to rethink Islamic family law precisely because of the impact of gender norms in the formative period in shaping its content. Ali proposes to rethink Islamic family law such that it is representative of the modern conception of gender norms. What Ali does not respond to in her piece is how "Islamic" would this rethinking be. Ali does not engage with the scripture to provide a scriptural basis for allowing to dispel the idea of the universal *sharīʿah* and going towards a contextually driven *sharīʿah*. What if this contextually driven *sharīʿah* that Ali proposes does not have any basis in the scripture, as the traditionalists like to argue?

Mahmoud Mohamed Taha's (d. 1985) work is useful in providing a reading of the Qur'ān which allows for the idea of a non-universal *sharīʿah*. He divides the Qur'ānic message into a historical message and a universal message. The historical message is called the Medinan message of the Qur'ān, and this message was revealed after the Prophet migrated to Medina. As the Prophet's mission in Medina was aimed at building a political community, the Qur'ānic verses revealed were mainly legal in nature, to aid the Prophet in his mission. For Taha, these verses carried legal injunctions aimed at uplifting the Prophetic society from a state of utter disbelief. They were not universal in nature and did not form part of the "original" message of Islam. By highlighting Medinan verses as historical verses, Taha makes Islamic law redundant, as the "legal" verses of the Qur'ān which the jurists employed in formulating Islamic law, were mainly Medinan verses of the Qur'ān.

For Taha, the "original" message of the Qur'ān is embedded in the verses revealed in Mecca, and subsequently, the Meccan message is the universal message of the Qur'ān. The Meccan message mainly comprises verses on perfecting the otherworldly life. For Taha, the Prophetic society was not capable of embracing the verses on otherworldly life, and this message will be embraced by later Muslims. The Muslim community will eventually become ready to embrace this message after they have morally

[12] Aharon Layish, "The Contribution of the Modernists to the Secularization of Islamic Law," *Middle Eastern Studies* 14, no. 3 (1978): 263.
[13] Omid Safi, introduction to *Progressive Muslims: On Justice, Gender and Pluralism*, ed. Omid Safi (Oxford: Oneworld Publications, 2008), 16.

evolved to the extent that they do not need a law to maintain their conduct. Until the time Muslims reach that stage, Muslims should adopt whichever laws are considered befitting according to their times, even if these laws are provided by the West.[14]

Ali's piece is nonetheless a significant contribution to the field of Islamic family law. By engaging in historical analysis of the laws on dowry and duties and responsibilities in marriage, Ali's work demystifies the status of Islamic family law as divine. In contemporary times, in states such as Pakistan, Islamic family law has also contributed to certain clauses in the drafting of the Muslim Family Laws Ordinance, 1961, and the reasoning behind this incorporation is the wider perception of the Pakistani population about Islamic family law as being divine in nature. In parallel, these laws which are incorporated are also critiqued for limiting women's autonomy and freedom in a familial setting, but because of the wider perception of these laws as being divine in nature, amending these laws is always met with resistance. Perhaps Ali's work, because it identifies non-divine elements in the construction of laws on dowry and duties and responsibilities in marriage, can invite debates and discussions on amending these laws in favour of contextually driven laws, those which provide equal rights to both genders in a familial setting.

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[14] Mahmoud Mohamad Taha, *The Second Message of Islam*, trans. Abdullahi Ahmed An-Na'im (New York: Syracuse University Press, 1987).