

Qiyas (analogical reasoning) and Commodification of Women: Applying Commercial Concepts to Marital Relationship in Orthodox Islamic Law

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Family: The Core Social Institution

- Family as the core social institution is acknowledged.
- In the West, it is under existential threat.
- In the Muslim world, it is either under stress or remains vulnerable.

Women's Rights, as part of Human Rights

- Both Women's Rights and Human Rights are important issues, globally as well as for the Muslim World.
- Muslims should focus on these issues not primarily because of the Western campaign against the Muslim world.
- Instead, Muslims should approach these issues primarily from the Islamic perspective and evaluate themselves based on Islamic ideals and norms.

The Background of this paper

- From Islamic economics and finance to Islamic law
- From Islamic Law in general to Islamic Commercial Law
- This led to the study and research behind my forthcoming book *Toward Our Reformation: From Legalism to Value-oriented Islamic Law and Jurisprudence*.
- This particular paper is based on one of the aspects in the Chapter on *Qiyas* in the book.

Among ongoing tensions ...

- Tension between forces of rigid conservatism and those of modernity and reform
- Orthodox corpus of Islamic law has become asynchronous with the spirit and vision of Islam on one hand and the contemporary challenges and realities on the other
- Even Muslim masses are getting alienated

Projects of implementation of Islamic laws

- Hudood Ordinance as part of Pakistan's implementation of Shariah (Islamic law, in a narrow sense) had profoundly negative and unjust impact on many women.
 - Rape victims ended up in jail as adulterers.
 - Thousands of women suffered as a result
- Marginalization of women in India by the All India Muslim Personal Law Board led to women's initiative for their own board
- The Taliban approach to women led to a great deal of discrimination and even persecution of women, and added to further misunderstanding about Islam and Muslims

The Burden of Legalism

- Much of those problems can be attributed to legalism, where legalistic mentality and approach take precedence over values and humane sensitivity.
- Muslim life is supposed to be governed by *Shariah* in its entirety. However, in much of the details *Shariah* is not divine, but a construct based on human interpretation of divine guidance. Of course, human interpretation is fallible.
- At the level of details, the fundamental principles and values of Islam are not necessarily and always reflected.

Sources of Islamic law

- Qur'an
- Sunnah (hadith)
- Ijma (consensus)
- Qiyas (analogical reasoning)
 - Qiyas is the focus of this paper
 - Qiyas or analogical reasoning is a well established and widely used analytical tool, not just in Islam, but everywhere. Even western standardized tests, such as ACT, SAT, GRE, GMAT, etc. have analogical reasoning as one of the components.

Some basics of Qiyas-1

- Much of the details of Islamic laws are Qiyas-derived.
- Qiyas involves:
 - studying/analyzing the knowns
 - distilling the underlying criteria ('illah) and
 - then extending it to unknown in deriving laws at the detailed levels or in solving problems.
- There is no verse in the Qur'an that the scholars have been able to agree upon which can be clearly discerned as acting as the basis of Qiyas.

Some basics of Qiyas-2

- Historically there were times when qiyas (often associated with ray') provoked strong opposition.
 - *Sahih al-Bukhari* states: “What is said against judging (in religion) made on the basis of one’s own opinion (i.e., ra'y) or by Qiyas” or “Whenever **the Prophet** was asked about something regarding which no verse was revealed, he would either say, ‘I don't know’ or give no reply, but he **never gave a verdict based on opinion or on Qiyas**. [Vol. 9, Book of Holding Fast to the Qur'an and Sunnah]
- Outcomes of Qiyas are speculative or probabilistic (*zanni*)

Marriage in Islam

- Unlike Christianity, where marriage is a sacrament, in Islam marriage is a contract as well as a covenant.
- Yet, the role of legal rulings in shaping the Islamic approach to marriage has rendered the whole thing into a **legalistic exercise**.
- At the core of a marriage contract is *mahr*.
- But what is *mahr*?
- **Is marriage (*nikah*) a sales contract (or similar to it) and is *mahr* a price in that transaction?**

Mahr (dowry)

- While Islam has mandated the provision of a *mahr* it has not set any minimum or maximum and neither has it specified its exact form.
- This is an important notion to grasp when attempting to understand the inability of most theories to explain the Islamic position concerning the *mahr*

Marriage: Little more than a **commercial transaction**?

- “Muslim jurists of later centuries have held the technical view that dowry is enjoined in return for the man’s right, at least potentially, to have legitimate access to cohabitation with the woman in question. She is entitled to dowry because she has consented to marriage and made herself accessible. Much discussion among the jurists has centered on this issue. But the exponents of this view appear to assume or to infer that women have no sexual desires and needs of their own, that gratification is not reciprocal, ... and that **marriage is little more than a commercial transaction**. That list of assumptions and inferences may be extended. Yet, these seem contrary to the bio-psychological facts and to the very idea of marriage which is depicted in the Qur’an (e.g., 30:21) as a shelter of peace and comfort, and as a means of mutual love and mercy.” [Muhammad Al-Ati, *The Family Structure in Islam*, Islamic Trust Publications, 1977]

Views of different Fiqhi Schools-1

- Hanafi View:

“A woman may refuse to admit her husband to a carnal connection until she has received her dower of him, so as that her right may be maintained to the return, in the same manner as that of her husband to the object for which the return is given, *as in sale.*” [*Hedaya*]

- “What is here advanced proceeds upon a supposition of the whole dower, or a certain portion of it, being Moajil, or prompt; but if the whole be Mowjil, or deferred, the woman is not at liberty to refuse the embraces of her husband, as she has dropped her right by agreeing to make her dower Mowjil, – *the same as in the case of sale*, where, if the price of the article sold be made deferrable, the seller is not at liberty to detain the article sold on account of the price.” [*Hedaya*]

Views of different Fiqhi Schools-2

- Maliki View:

“It is not permitted for a man with a very serious illness to get married but if he does get married and consummates the marriage, then his bride's dowry is the first thing to be paid from the third of his wealth he is permitted to leave as he wills. [Or for a sick woman which may prove fatal. *That is because he is restricted in respect of his property and it is connected to all who has a lien on it absolutely...*]

Views of different Fiqhi Schools-3

- Shafi'i View:

THE INTEGRALS OF A MARRIAGE AGREEMENT ... THE SPOKEN FORM

m3.2 The first integral is the explicitly stated spoken form (O: comprising a spoken offer by the guardian and its acceptance by the groom, like other, nonmarital transactions. *Its necessary conditions are the same as those of valid sale.*

Views of different Fiqhi Schools-4

- Hanbali View:

“... separation (*khul*) does not require action by a judge: this is the position of Ahmad [b. Hanbal, school founder, d. 840], ... and also that of Malik, Al-Shafi'i and the party of opinion (*ahl al-ra'y*; the Hanafis) ... *Since it is a transaction (exchange; mu'awada), similar to a sale or a marriage contract*, it does not require a judge.”

Views of different Fiqhi Schools-5

- Shi'a View:

“Unlike a permanent marriage, which has several other objectives, the sole objective of *mut'a* marriage is *istinta'* (enjoyment), Tusi argues. According to him, temporary marriage (*mut'a*) is contract for a specific purpose, in which remuneration (*ajr*) is paid; hence, there is no *mahr* or inheritance. Marriage ends at the appointed term; no *talaq* is pronounced. *Mut'a* is modeled on a sale contract in which the payment of consideration money and specification of the duration of time are essential conditions.”

What is the Qiyas connection?

- Marriage is a form of contract, as is sale and purchase (commercial transactions or exchanges).
- Therefore,
 - in enforcing the right of the husband to have his wife in his bed,
 - in denying maintenance to her when she refuses to share it with him, or
 - in determining the conditions pursuant to a lawful/valid and unlawful/invalid marriage,
- the jurists have identified a tremendous analogical parallel between marriage and commercial transactions.

Marriage, Contract and Lease-1

- “A wife is entitled to lodging in a house unoccupied by members of the husband’s family.” [*Durr-ul-Mukhtar*]
- How many woman knows that? Wouldn’t that be wonderful?
- Well, just in case Muslim women get carried away due to such wonderful legal provisions, there are some mitigating surprises as well.
 - **A husband is at liberty to prevent his wife’s parents**, or other relations, or her children by former marriage, from coming in to her, as her apartment or habitation is **his property**, which he may lawfully prevent any person from entering; but he cannot prevent them from seeing and conversing with her whenever they please ... [*Hedaya*]

Marriage, Contract and Lease-2

- According to Islamic law, wives are entitled to certain maintenance (*nifqa*). But what precisely does this consist of?
 - “*Nafaqa* literally means that which a man spends over his children; in law it means feeding, clothing and lodging; in common use it signifies food.” [*Durr-ul-Mukhtar*]

Marriage, Contract and Lease-3

- What about if the wife is ill?

“If a woman falls sick in her husband’s house, she is still entitled to a maintenance. This is upon a principle of benevolence, as *analogy* would suggest that *she is not entitled to maintenance*, where she falls sick so far as to be incapable of admitting her husband to the conjugal embrace, since in this case she cannot be deemed in custody for the purpose of enjoyment.”

- So, legally the wife is not entitled to support in case of medical needs.

Marriage, Contract and Lease-4

- Even though there are contrary opinions, this is not simply another example of the misapplication of *Qiyas*, but the complete marginalization of the fundamental values of Islam.
- Al-Ati writes that according to the majority of jurists, sick wives are not entitled to the cost of their medical care as well. So, on what basis do the jurists, generally speaking, deny the medical costs and maintenance due to a husband's wife? The answer lies, once again, with *Qiyas*.
 - “Those who exempt the husband from the responsibility do not consider the cost of medical care to be part of the obligatory maintenance. *They draw an analogy between wifedom and leased property*; tenants are not responsible for the repairs and improvement of the premises. Their obligation is to pay only the rent; the rest is the owner's charge. Like a tenant, a husband is not responsible for the cost of any treatment his wife may undergo to restore or improve her health.”

Formalistic interpretations? ...

- Describing such views as “formalistic interpretations,” Al-Ati observes:
 - “The view that a husband may be exempted from the obligation of maintenance and payment for an indisposed wife’s medical care cannot be explained in terms of any authoritative text from the Qur’an or the Traditions. Not only is there no such possible explanation, but also the very view is perhaps one of the clearest instances of ‘**deviation**’ from the orientation of the basic sources of Islamic law.”
 - “*Women, as a rule, became increasingly secluded in the background and excluded from the world of men. ...*”

Confinement? -1

- The legal treatises reflect the tendency toward the “seclusion of women” from active life in their works.
 - When marrying, does the wife regard and the husband expect that she should ‘**surrender**’ to the “**custody**” of her spouse?
 - Or, is there any woman who expects that marriage basically entails her embracing a life of ‘**confinement**’ and ‘**seclusion**’?
- This, unfortunately, is the way the jurists understood marriage and how they presented it in their legal interpretations.
 - “When a woman *surrenders* herself into the *custody* of her husband, it is incumbent upon him thenceforth to supply her with food, clothing, and lodging, whether she be a Muslim or an infidel, because such is the precept both in the Koran and in the traditions; and also, **because maintenance is a recompense for the *matrimonial restraint*.**” [*Hedaya*]

Confinement? -2

- The pertinent Arabic word is *ahbas*, derived from *habasa* (meaning: to block, detain, imprison). This characterization, in the translation of Haskafi's *Durr-ul-Mukhtar*, is still more explicit and vivid.
 - [M]aintenance is compensation for her *confinement*.

Relevance of Sales contracts? -1

- Was invoking sales contracts in case of marriage contracts necessary?
 - “The Islamic marriage contract is a variant of Islamic contracts. ... Unfortunately, little attention has been given to the study of Islamic contract theory, *which arose originally in the commercial context*.

For apart from particulars concerning the subject matter, there is not a great deal of difference among marriage contracts, agreements creating partnerships, claims for debts, or deeds of sale. ... It should be pointed out, in fact, that sale is usually considered the typical contract in Islamic law, after which other contracts are patterned. *Islamic law never developed a general theory of contracts.*” [Azizah al-Hibri]

Relevance of Sales contracts? -2

- Why did the jurists resort to sales contract that ended up commodifying women?
 - Since invoking sales contract may not have been necessary (and, of course, it was undesirable), it is worth exploring why the noble scholars of Islam felt comfortable framing the women's rights and responsibilities in the marital context in terms of *bay'* (sales).
 - One possible explanation is that this becomes a non-issue, once human beings are commodified. There have been scholars who could not think about women except in terms of “commodity.” Interestingly, in a hadith, the Prophet Muhammad said: “*ad-dunya mata' wa khairu mata'id dunya al-mar'atu as-salihah.*”

Relevance of Sales contracts? -3

- The Arabic word *mata'* has a broad range of meaning: enjoyment, pleasure, delight, gratification; object of delight; necessities of life; chattel, possession, property; goods, wares, commodities, merchandise; furniture; implements, utensils, baggage, luggage, equipment, etc.
- Interestingly, while many scholars have translated and understood *mata'* as delight or provision, some scholars have not hesitated to translate it as '**commodity**': "The world, the whole of it, is a **commodity** and the **best of the commodities** of the world is a virtuous wife." Others have translated it as 'provision.'

Is there no similarity between sale and marriage?

- Yes, but as Prof. Kamali has observed:
 - “Marriage differs from other transactions; business transactions are personal matters but marriage concerns the family and the social status of the parents and guardians. Hence an analogy between marriage and other transactions is unjustified.”

Why choose “commodity”?

- There might be a deeper cause
- A commodity is “an article of trade or commerce,” “an exchangeable unit of economic wealth, esp. a primary product or raw material,” “a class of economic good,” or “an economic good.”
- Does ‘commodity’ include other generic meaning, such as something of value, usefulness or benefit? Yes, these meanings are also listed in all the dictionaries.
- However, those generic ones are neither primary nor contextually relevant, because when invoking the sale analogy, the sense in which it is used is obvious.

Commodity, property and possession -1

- Invoking sale analogy is invariably assigning the notion of commodity to women in this context of marital relationship.
- There is a related notion, property, which makes it even more problematic.
- A property is:
 - “something owned or possessed”
 - “the exclusive right to possess, enjoy, and dispose of a thing”
 - “that which a person owns; the possession or possessions of a particular owner”
 - “goods, land, etc., considered as possessions”

Commodity, property and possession -2

- **The notions of commodity and property are related because while all properties are not necessarily commodities, but all the commodities can be properties, and thus, owned.**
- **Invoking sale cannot be separate from treating something as commodity and property that can be owned.**
- **By applying the sales contracts as the basis for Qiyas to marriage contracts, essentially the women are commodified, i.e, reduced to commodities that can be owned and traded.**

Commodity, property and possession -3

- How in the world could the Muslim scholars gloss over this aspect that through such application of commercial concepts they were commodifying women?
- To understand this issue, one has to probe a little deeper to the human level. **In reality, the orthodox or traditional scholars have not commodified just the women, but but also have commodified the human being in general through their view about slavery.**
- The traditional position is that Islam has not prohibited slavery, which commodifies human beings. **With human beings commodified, it was not difficult to commodify women.**
- See an essay of this author: “Fundamental Human Dignity and the Mathematics of Slavery”

Impact of Fiqh

- “Generally, *Fiqh* has been considered the most fundamental of the Islamic sciences.”
- Many of our problems are rooted in the legalistic way our Fiqh has developed and evolved.
- Without being familiar with what we call “Islamic law” and without understanding the deeper impact it has in shaping us – delinked from and eclipsing the values, norms, principles and higher purposes – desired changes cannot be expected.

Past and future

- We must try to connect afresh with the Qur'an in particular and the legacy (sunnah) of the Prophet – without overly mediated through what has been accumulated.
- This does not mean we shun or ignore the contributions of the past, which are valuable, but we must not accept anything uncritically, without validating through the Qur'an and Sunnah.
- In this way, let us be PAST-ENRICHED AND FUTURE-ORIENTED

Conclusions - 1

- Human beings must not be commodified
- Human beings are not commodities, properties or possessions
- Women as human beings are also to be regarded in the same manner. They cannot be commodified.
- Deriving or extracting laws and rulings about marriage and family relationships does not require *qiyas* based on sales contracts.
- Women must be active and full participants in the *fiqhi* discourse.

Conclusions -2

- The gap between the spirit and values or broad objectives of Islam on the one hand and the traditional Islamic law has become too wide. As Prof. Kamali observed:
 - “Wisdom and application of ‘good sense’, rather than a mechanical or fixed set of logical rules, is recommended in the determination of *ratio decidendi*. ... But the rigidity that the Muslim jurist tried to avoid in this instance was visited upon him through the imposition of burdensome technicalities on *Qiyas*. The correct advice in both instances is surely to **avoid rigid conformity** to precedent at the expense of losing sight of the **broad purpose and objective of the law.**”

We are mutual Awliya

وَالْمُؤْمِنُونَ وَالْمُؤْمِنَاتُ بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ يَأْمُرُونَ بِالْمَعْرُوفِ
وَيَنْهَوْنَ عَنِ الْمُنْكَرِ وَيُقِيمُونَ الصَّلَاةَ وَيُؤْتُونَ الزَّكَاةَ وَيُطِيعُونَ اللَّهَ
وَرَسُولَهُ أُولَئِكَ سَيَرْحَمُهُمُ اللَّهُ إِنَّ اللَّهَ عَزِيزٌ حَكِيمٌ ﴿٧١﴾

- The Believers, men and women, are AWLIYA one of another: they enjoin what is just, and forbid what is evil: they observe regular prayers, practise regular charity, and obey Allah and His Messenger. On them will Allah pour His mercy: for Allah is Exalted in power, Wise. [Qur'an 9/at-Tauba/71]
- We are mutual AWLIYA (friend, guardian, protector) of each other before marriage and no less after.

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- Thank you. Wassalamu alaikum.