

# **A SOCIALIST FEMINIST CRITIQUE OF WOMEN'S MARITAL RIGHTS IN ISLAM AND AN EXAMINATION OF THE FEASIBILITY OF MUSLIM SAME-SEX MARRIAGE**

**CAITLIN HANAN ALADHAM**

## **ABSTRACT**

*This Note examines a new understanding of women's marital rights in Islam, as under a socialist feminist critique, and the subsequent feasibility of Muslim same-sex marriage. In so doing, it will focus largely on Islamic legal theories, socialist feminist theory, and queer theory. Overall, this Note finds that Muslim women's marital rights currently exist under an asymmetrical rights paradigm. Following a socialist feminist critique, all but one of these rights, the right to provisions from one's husband, would survive. In addition, Muslim same-sex marriage remains feasible under the socialist feminist critique following the destruction of the asymmetrical rights paradigm.*

## I. INTRODUCTION

This Note utilizes socialist feminism as its primary mode of analysis. Socialist feminism focuses on the relation of women to the worlds of production and reproduction. Like other socialist ideologies, it advocates against capitalism, arguing in particular that capitalism props up the subjugation of women.<sup>1</sup> In so doing, it decries the separate spheres ideology and upholds sexual equality.<sup>2</sup>

Islamic legal theory or jurisprudence, sometimes referred to as *usul al-fiqh*,<sup>3</sup> encompasses a large body of work deriving from multiple disciplines. This includes the traditional legal schools of Islamic thought, like the *Shafi'i*, *Hanafi*, *Hanbali*, *Ja'fari*, and *Ismaili* schools. These schools contribute to *usul al-fiqh* and thus make up traditional *fiqh* interpretations of Islamic sources and law. In recent decades, however, Islamic jurisprudence has broadened to include Islamic feminist jurisprudence, though this latter sub-discipline is not customarily understood as contributing to *usul al-fiqh*, the scholarship of which is dominated by the musings of men.

Given the focus of *usul al-fiqh* on men's interpretations of *shari'a*,<sup>4</sup> it may come as no surprise that women's Islamic rights are a topic of frequent debate. These rights address women's lives in both the public and private spheres, and in the West, they are widely considered as being antiquated. However, this is largely the result of misconception. Islam granted all women, not just those of the upper classes, various rights over fourteen-hundred years ago. Nevertheless, traditional Islamic legal theories of women's rights have been critiqued by Muslim women's rights activists. These activists have taken reformist views of these rights and assert that because Islam sought to improve the rights and lives of all people, including women, at its introduction, these rights should be reevaluated and reformed again.

Though Muslim same-sex marriage is often treated as a hypothetical prospect for the future, to be examined for its possibility or permissibility in the present, already, same-sex couples have been married by Muslim *imams*.<sup>5</sup> This simple fact does not take away from this Note's forthcoming

---

1. See Hernández-Truyol, *infra* note 19, at 32.  
2. See Andrea L. Miller & Eugene Borgida, *The Separate Spheres Model of Gender Inequality*, PLOS ONE, Jan. 22, 2016.  
3. Literally, the meaning of this term is “principles of jurisprudence.”  
4. *Shari'a* refers to the teachings of the Holy texts of Islam to which all Muslims must adhere.  
5. Imam Abdullah Antepli, for instance, has married several same-sex Muslim couples. Video Conference Interview with Abdullah Antepli, Assoc. Professor of the Practice of Interfaith Relations, Duke Univ. (Apr. 13, 2021).

analysis, considering that the real world is ubiquitously more complicated than the purity of theory. Most Muslim, same-sex, married couples likely do not consider their marriage as something that needs to comport perfectly with a socialist feminist critique or any other single way of thinking. Nonetheless, this Note examines the feasibility of such marriages following the socialist feminist critique contained herein.

In examining the two questions this Note poses—what women’s marital rights in Islam look like under a socialist feminist critique and whether Muslim same-sex marriage remains feasible following this critique—this Note will begin by laying the foundations of the various legal and philosophical theories and historical backgrounds at issue. Section Two will explore socialist feminism. It will discuss the ideals of socialist feminism, as well as how socialist feminism is distinct from other feminist theories. There will also be a discussion of Islamic socialism and how it fits into this Note and the analysis herein. In Section Three, the introduction of Islam and the development of Islamic legal theories will be explored. This will include discussions of both traditional Islamic jurisprudence and Islamic feminist jurisprudence. In Section Four, this Note will take a closer look at women’s marital rights in Islam, examining solely the traditional *fiqh* notions of these rights.<sup>6</sup>

In Section Five, the analysis will begin by questioning whether the marital rights of women in Islam, in the frameworks of both traditionalist Islamic legal theories and alternative viewpoints, can stand up to a socialist feminist critique, and if not, how they should be revolutionized to do so. In keeping with socialist feminist theory, these rights will be examined with the understanding that the separation of the economic sphere, or public life, and the family, the private sphere,<sup>7</sup> has been manufactured for the purpose of subjugating women so as to exploit our labors.<sup>8</sup> As such, the line of questioning contained in the analysis herein will examine how Muslims

6. *Fiqh*, generally meaning “understanding” in Arabic, is the common term for Islamic jurisprudence, a field premised on the understanding and knowledge of the text and spirit of its source material.

7. See Miller & Borgida, *supra* note 2.

8. In her seminal work, *the Second Sex*, Simone de Beauvoir argued that for women to throw off our subordination to men, we must refer to ourselves as subjects, not objects.

If a woman discovers herself as the inessential and never turns into the essential, it is because she does not bring about this transformation herself. Proletarians say ‘we.’ So do blacks. Positing themselves as subjects, they thus transform the bourgeois or whites into ‘others.’ Women—except in certain abstract gatherings such as conferences—do not use ‘we;’ men say ‘women,’ and women adopt this word to refer to themselves; but they do not posit themselves authentically as Subjects.

SIMONE DE BEAUVOIR, *THE SECOND SEX* 8 (Constance Borde & Sheila Malovany-Chevallier trans., Alfred A. Knopf 2009) (1949). As this Note advocates for an end to the subordination of women to men, it will employ personal pronouns when referring to both Muslim women and women in general.

might achieve sexual equality within marriage in accordance with the destruction of these separate public and private spheres. So, too, will this analysis contemplate the effects of the gender binary and gender essentialism on the justifications for the asymmetrical construction of these rights.

In Section Six, the analysis will continue with the question of whether, in keeping with the socialist feminist critique of women's marital rights in Islam, same-sex Muslim marriages are feasible. Queer theory will be utilized to determine whether relevant socialist feminist marital rights should apply at all. This will include applications of the right of divorce, the right of remarriage, and other rights to the not-so-hypothetical same-sex union. Most simply, this analysis will begin by looking at couples of two persons of the same biological sex. This will be followed by an examination of a marriage with more than two participants.

Ultimately, this Note finds that marital rights in Islam currently exist under an *asymmetrical* rights paradigm, skewed in men's favor. This is largely the result of a woman's right to provisions from her husband and a man's right to submission from his wife. These reciprocal rights come together to produce a trade-off largely at the benefit of the husband, which in turn unbalances the entire scheme of marital rights. In order to rectify this, as socialist feminism demands, balance is struck through the destruction of the aforementioned trade-off, thus creating a *symmetrical* rights paradigm. It is under this subsequent, improved paradigm that one can more feasibly apply Islamic marital rights to a same-sex marriage, regardless of the fact that these rights were initially introduced alongside a presumption of the gender binary.

The inquiries within this Note are significant as Muslim society reflects on the changing world of today and reimagines the world of tomorrow. Presently, when considering the condition of women, rarely do people look beyond liberal feminism and the existing traditional Islamic legal theories. Progress, as a result, is slow-going. In order to galvanize the world into the communist future, the equality of women—more than half of the proletariat class—must be secured from the hegemonic threats of patriarchy and capitalism. This progress must occur in all parts of the world, including the Muslim world, which encompasses nearly one-fourth of the world's population.<sup>9</sup> Furthermore, the understandings of the forms of oppression at issue in this Note are incomplete without examining the full brunt of cis-

---

9. In 2010, there were approximately 1.6 billion Muslims in the world out of a total 6.9 billion global population. This placed Muslims as approximately 23.4% of the global population. *Pew F. on Religion & Pub. Life, The Future of the Global Muslim Population*, PEW RESEARCH CENTER (Jan. 27, 2011), <https://www.pewresearch.org/religion/2011/01/27/the-future-of-the-global-muslim-population/>.

heteropatriarchy and its threat against Muslim women, queer Muslims, and genderqueer Muslims. Though Islamic feminists have already commenced this endeavor by crafting reformist frameworks of Muslim women’s marital rights, the need will soon arise for a move from *reform* to *revolution* as we anticipate the fall of the capitalist system.

## II. SOCIALIST FEMINISM

This Note looks to socialist feminism for its critique of Muslim women’s marital rights. Already, these rights have been examined under other feminist models, as will be discussed in Section Three. Often, critiques of traditional *fiqh* notions of women’s rights and equality are considered to be feminist-apologist.<sup>10</sup> These critiques are just shy of being reformist. Although they challenge Western objections to *fiqh* interpretations of women’s rights on account of their innate xenophobia and Islamophobia, they fall short of pushing for genuine gender justice. These critiques often gloss over sexist, traditional ideals in an effort to make themselves more palatable for Western observers.<sup>11</sup> Feminist readings that push for reformed views of these rights are truer to their feminist purpose, challenging the patriarchal *status quo* within Islamic jurisprudence. Socialist feminism allows for a yet more radical perspective—the necessary move beyond reform to revolution.

### A. What Is Socialist Feminism?

Socialist feminism, as aforementioned, focuses on the relation of women to the worlds of production and reproduction. This focus makes it distinct from other feminist theories. It is unlike liberal feminism, which is the mainstream brand of feminism in the modern world.<sup>12</sup> Liberal feminism embraces ideals of liberal ideology, including individualism and formal equality.<sup>13</sup> Socialist feminists like American political theorist Zillah Eisenstein observe that the modern-day impositions of patriarchy and capitalism have women “working overtime doing labor necessitated by

---

10. ANISA BUCKLEY, NOT ‘COMPLETELY’ DIVORCED: MUSLIM WOMEN IN AUSTRALIA NAVIGATING MUSLIM FAMILY LAWS 37 (2019).

11. *Id.*; see also Kecia Ali, *Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law*, PROGRESSIVE MUSLIMS: ON JUSTICE, GENDER AND PLURALISM 163, 178 (Omid Safi ed., 2003).

12. 7 *Types of Feminism: A Brief History of Feminism*, MASTERCLASS, <https://www.masterclass.com/articles/types-of-feminism> (last updated Aug. 2, 2022).

13. ROBIN WEST, *Introduction to the Research Handbook on Feminist Jurisprudence*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 1, 1-2 (Robin West & Cynthia Grant Bowman eds., 2019).

misogyny *and* they also occupy sites that were once closed to them within [the] system of male privilege.”<sup>14</sup> This phenomenon, in large part, comports with liberal feminism, which advocates primarily for women’s equality in the public sphere but does little to directly alter women’s burdens in the privacy of the home. This idea is well illustrated by American legal scholar Robin West:

[M]odern liberalism has adhered to the conviction that the private sphere, largely construed – including our intimate lives, our familial lives and our commercial lives – is a realm of interactions between free and autonomously self-determined individuals, while the public sphere – the sphere of regulation, politics and government – albeit necessary, poses a potential danger to the freedom of the individual and of the private sphere. The public arm of the state, therefore, is a potential source of oppression, while the private realms of intimacy, family and commerce are places of freedom and nurturance. The private sphere must be protected against possible encroachments from the public sphere.<sup>15</sup>

Here, West limits the understanding of the public sphere to exclude commercial life, whereas the private sphere is not typically understood as including it. Socialist feminism pushes back against the deceptive assertion of equality proposed by liberal feminism, insisting that in order for there to be sexual equality as between women and men, women require support in the areas of our lives that exist within both of the fabricated public and private spheres.<sup>16</sup> Women require political and economic support in order to participate in the workforce in equal force and measure as do men. For there to be equality in the household, men and fathers must be held just as responsible for the care and maintenance of children and families as are women and mothers. This would require the dissolution of the constructed, separate spheres of public and private life.

Socialist feminism rejects another core tenet of liberal feminism, personal choice. This is not to say that socialist feminism does not permit individual rights and decision-making. Rather, it cautions against conforming with the hegemonic, patriarchal models of society for the sake of comfort, a personal choice that many women often make. For instance, as will be discussed later in this section, some socialist feminists argue

---

14. ZILLAH R. EISENSTEIN, *ABOLITIONIST SOCIALIST FEMINISM: RADICALIZING THE NEXT REVOLUTION* 22 (2019).

15. WEST, *supra* note 13, at 6.

16. EISENSTEIN, *supra* note 14, at 48-49.

against the institution of marriage.<sup>17</sup> They caution against participating in the institution of marriage regardless of the benefits doing so would confer unto one in modern society, as doing so would ultimately serve to reinforce an oppressive institution that is better seen abolished.

Socialist feminism is most closely related to radical feminism and Marxist feminism. One might say that it sits at the crossroads of these two ideologies and that its differences from them are just as important as their similarities. Though Marxist and socialist feminists agree that women's subordination is rooted in economic forces, namely the creation of private property and the phenomenon of invisible labor,<sup>18</sup> Marxist feminism limits the scope of women's oppression to capitalism and earlier, oppressive economic models.<sup>19</sup> Socialist feminism argues that not only must capitalism be eradicated for women to achieve equality, but so, too, must patriarchy. This is where socialist feminism's connection to radical feminism becomes important. Radical feminist theory is devoted to the "exploration of the nature of sexual exploitation suffered by women."<sup>20</sup> It calls for a complete overhaul of the patriarchal system, a *radical* change from the *status quo*. Considered a radical feminist, American political theorist Catharine MacKinnon perfectly distills the cross-section of concern felt by socialist feminists: "Sexuality is to feminism what work is to Marxism: that which is most one's own, yet most taken away."<sup>21</sup>

At its core, socialist feminism recognizes different axes of power and oppression as being not separate, but intertwined with one another.<sup>22</sup> As such, sex and class cannot be distinguished in a manner suggesting they do not affect one another in the lives of both women and men. This idea confronts another, that of the separation of the public and private spheres. In times past and a modern era characterized by liberal feminism, there is the common conception of the world as being split into two separate spheres: the public and the private.<sup>23</sup> There is public, economic life, and there is private, domestic life. Separating the roles of women into these two

17. See Rubin, *infra* notes 28-30.

18. Naomi Ishisaka, *It's more than past time we talk about the invisible labor of women*, SEATTLE TIMES (May 17, 2021, 6:00AM), <https://www.seattletimes.com/seattle-news/its-more-than-past-time-we-talk-about-the-invisible-labor-of-women/>.

19. Berta Esperanza Hernández-Truyol, *Talking back: From feminist history and theory to feminist legal methods and judgments*, in FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 24, 32 (Kathryn M. Stanchi, Linda L. Berger, & Bridget J. Crawford eds., 2016).

20. WEST, *supra* note 13, at 2.

21. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 516-17 (1982).

22. EISENSTEIN, *supra* note 14, at 46.

23. WEST, *supra* note 13, at 6.

spheres undermines substantive equality in all areas of our lives. It results in the disparity of labor performed by women and men in both the so-called public and private spheres.

When women perform the lion's share of labor in the home—sexual labor, reproductive labor, affective labor, agricultural labor, domestic labor,<sup>24</sup> all of which are *invisible* labor, supporting men's ability to go out into the public sphere well-rested and unencumbered by other responsibilities—we are silently discouraged from going into the public sphere ourselves. The invisible labor of women, necessary to uphold the economic activity of the public sphere and thus maintain the separation of the public and private spheres, is unpaid. Non-waged labor facilitates the creation and continuation of waged labor, and both patriarchy and capitalism depend upon it to survive. Furthermore, even as women have crowded our way into the public sphere, patriarchy and capitalism have adapted to allow for the continued existence of invisible labor by further privatizing the home and insulating it from interference by the state.<sup>25</sup>

Socialist feminism also recognizes sexual violence, a tool of patriarchy wielded within both the public, economic sphere and the private, domestic sphere. Sexual violence “exists alongside other forms of gendered exploitation and affects all women.”<sup>26</sup> The socialist feminist response to sexual violence is to reveal and remedy it “not [through] retribution or punishment but reconciliation, rehabilitation, and restorative justice.”<sup>27</sup> Thus, abolishing these separate public and private spheres would be a solid step toward achieving sexual equality, one of the foremost goals of all brands of feminism.

Some socialist feminists question whether marriage should continue to exist at all. Like radical feminists, socialist feminists consider marriage to be an institution constructed by and for the cis-heteropatriarchy. Though some socialist feminists believe it can be reformed to comport with women's substantive equality, others argue that it must be abolished as it serves only to insulate the similarly constructed private sphere. In her work, *the Traffic in Women*,<sup>28</sup> anthropologist Gayle Rubin suggests that marriage reinforces the historical sex/gender system,<sup>29</sup> and as such, it must be

---

24. EISENSTEIN, *supra* note 14, at 84.

25. See Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for A Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006 (1987).

26. EISENSTEIN, *supra* note 14, at 42.

27. EISENSTEIN, *supra* note 14, at 42.

28. Gayle Rubin, *The Traffic in Women: Notes on the “Political Economy” of Sex*, in TOWARD AN ANTHROPOLOGY OF WOMEN 157 (Rayna R. Reiter ed., 1975).

29. Rubin defines a sex/gender system as “the set of arrangements by which a society transforms biological sexuality into products of human activity, and in which these transformed sexual



abolished in anticipation of female liberation.<sup>30</sup> However, because consideration of just how Muslim women’s marital rights would be impacted by the abolition of marriage would first require an examination as to whether Islam permits the abolition of the institution,<sup>31</sup> this prong of socialist feminism will not be examined in this Note.

Some intersectional feminists critique socialist feminism as being an ideology of bourgeois white women who ignore issues of race.<sup>32</sup> While this reputation of socialist feminists as being ignorant to the effects of race on the already downtrodden proletariat is certainly well-deserved<sup>33</sup>—some socialist feminists call for a radicalization of socialist feminism itself,<sup>34</sup> advocating for the infusion of anti-racist ideals into the movement—this is perhaps more of a criticism of communists. Within the communist movement, Marxist gender essentialism—“the belief that gender is a discrete and dichotomous social category” according to the gender binary, “and that gender is inborn, biologically determined, immutable, and informative of categorical properties”<sup>35</sup>—is a widely-accepted ideal, with Western communists often ignoring additional considerations as to race. This Note endeavors to not conform to this reputation, not only on the basis that it contains an exploration of rights in Muslim societies, which are predominantly non-white and heavily impacted by global racism, but because, as intersectionality increasingly recognizes, “nobody’s free until everybody’s free.”<sup>36</sup>

---

needs are satisfied.” *Id.* at 159.

30. According to Rubin, the part of societal life that consists of the sex/gender system relies on marriage and thus on the traffic of women as vessels of wealth and sexuality. For this reason, it is implied that in order to rid societies of the sex/gender system and patriarchy, marriage must be abolished. *Id.* at 207.

31. Marriage is important within Islam and Islamic doctrine, as evinced by how many of women’s Islamic rights fall under the purview of marriage. Furthermore, marriage is seen as the legitimizing force of families, as it is in many other belief systems. The modesty requirements placed on both men and women in Islam demand relation between persons of the opposite sex, and if marriage is removed as a potential avenue, that leaves only close blood relations of the opposite sex with whom one can fully relax, even in one’s own home. This latter concern might be mitigated by the fact that a socialist feminist critique would decry the gender binary, but again, this is outside the scope of this Note. Thus, though it is an interesting line of thought for one to wonder at Islamic rights in the absence of marriage, it would require a great deal of *ijtihad*, see *infra* note 66, to fully consider, and as it is incidental to the purposes of this Note, it will not be an avenue this Note addresses.

32. BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 63 (2d ed. 2000); see also Chela Sandoval, *U.S. Third World Feminism: The Theory and Method of Oppositional Consciousness in the Postmodern World*, 10 *GENDERS* 1, 8-9 (1991).

33. See HOOKS, *supra* note 32.

34. EISENSTEIN, *supra* note 14.

35. Selin Gülgöz, Madeleine DeMeules, Susan A. Gelman, & Kristina R. Olson, *Gender essentialism in transgender and cisgender children*, PLOS ONE, Nov. 13, 2019, at 1.

36. Fannie Lou Hamer, “Nobody’s Free Until Everybody’s Free,” *Speech Delivered at the Founding of the National Women’s Political Caucus, Washington, D.C., July 10, 1971*, in *THE SPEECHES OF FANNIE LOU HAMER: TO TELL IT LIKE IT IS* 134 (Maegan Parker Brooks & Davis W. Houck eds.,

### B. Islamic Socialism

Despite its socialist feminist purpose, this Note would not be properly complete without calling to Islamic socialism. Socialist feminism is an ideology developed and maintained in the West, whereas this Note examines rights and obligations central to an Eastern religion. Islamic socialism is not as progressive as some other strands of socialist or communist thought. As such, this paper will take steps further than those taken by Islamic socialists in its analysis of the current state of affairs of Muslim women's marital rights. Nonetheless, it will incorporate into its analysis the basic tenets of Islamic socialism.

Muslim socialists support the implementation of a social welfare state, stemming from one of the five pillars of Islam, *zakat*. *Zakat*, or almsgiving, is obligatory and principled on providing for those who are less fortunate.

In fact, the sadaqât (*Zakah - Obligatory Charity*) collection is for the poor, the helpless, those employed to administer the funds, those whose hearts need to be won over *to the truth*, ransoming the captives, helping the destitute who is in debt, in the Way of Allah and for the wayfarer. This is a duty enjoined by Allah; and Allah is All-Knowledgeable, All-Wise.<sup>37</sup>

This Note will include this idea of a social welfare state deriving from *zakat* in its analysis of Muslim women's marital rights. It is also worth noting that the Islamic socialist movement has at its roots anti-imperialism,<sup>38</sup> much like the emerging calls for anti-racism within the socialist feminist movement, with which this Note strives to accord.

Perhaps the foremost Islamic socialist thinker is Muammar Al-Gadhafi. In his famous work, *the Green Book*,<sup>39</sup> he wrote of direct democracy, which he called *Jamahiriyah*, economic revolution, and social revolution. This Note

2011).

37. QUR'AN 9:60 (Muhammad Farooq-i-Azam Malik trans., THE INSTITUTE OF ISLAMIC KNOWLEDGE 1997) [hereinafter QUR'AN]. This version of the Qur'an has been translated into modern English from the original Classical Arabic, which Muslims believe is the only authentic language in which the Qur'an can be read as it was delivered in that state. Such translations into English vary from source to source, though this Note strives to provide those translations that are the clearest and most authentic. Because the text cited herein is simply one iteration of the original, infallible Holy Text, it will hereinafter be cited simply as QUR'AN with the understanding that it does not fully compare to the true text. Note that any emphasis within the text has been added by the publisher. Furthermore, as a seminal religious text, the Qur'an is being cited in the closest simulation of the form that *The Bluebook* prescribes for the Bible. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 15.8(c)(iii), at 154 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020).

38. Donald M. Reid, *The Syrian Christians and Early Socialism in the Arab World*, 5 INT'L J. MIDDLE EAST STUD. 177 (1974).

39. MUAMMAR AL-GATHAFI, *THE GREEN BOOK* (2005).

is most principally concerned with Al-Gadhafi's work on the lattermost of these ideas, as it dealt with the relations between the sexes and minorities. It is the least revolutionary section of *the Green Book*, as Al-Gadhafi reflects mostly traditionalist ideas of gender.

When writing of women, Al-Gadhafi could have been more progressive, though his views certainly align with Marxist gender essentialism. He began by emphasizing women's humanity and the equality of women and men.<sup>40</sup> From there, he relegated women to the role of the sole child-rearer for a period of at least two years following the birth of a child, citing "the natural difference between the two sexes."<sup>41</sup> He went on to rally against daycare, further emphasizing the natural role of women as mothers and suggesting that human society would fall apart if women abandoned this role to any extent.<sup>42</sup> He advocated for keeping women from "disagreeable job[s]" that would taint our femininity, distract us from our true nature as mothers, or unjustly encumber us while pregnant or breastfeeding.<sup>43</sup> Oddly enough, in line with this reductive way of thinking, he claimed that women should be the rightful owners of the home, but only because our natural role is within the *private sphere* of the home.<sup>44</sup> Largely, he thought of dialectical materialism<sup>45</sup> as being the basis for women pursuing our so-called natural roles in life.<sup>46</sup>

There are many who would critique Islamic socialism beyond the usual suspects of capitalists, Islamophobes, and capitalist Islamophobes. One such scholar is Ali Shari'ati, a twentieth-century Iranian revolutionary and sociologist. Though he was of a revolutionary mindset, Shari'ati did not look to Marxism for liberation. Rather, he regarded Karl Marx's political ideology and use of dialectical materialism as lacking the essential aspects of morality and humanism required for liberation.<sup>47</sup> As such, he was not generally supportive of Islamic socialism. For Shari'ati, "human liberation . . . depend[ed] on the removal of . . . the constraints that the religious establishment in Islam and Christianity, as well as Judaism, Hinduism, and

40. *Id.* at 64.

41. *Id.* at 65.

42. *Id.* at 66.

43. *Id.* at 69.

44. AL-GATHAFI, *supra* note 39, at 56.

45. Dialectical materialism, as understood by Karl Marx and Friedrich Engels, "meant that the material world, perceptible to the senses, has objective reality independent of mind or spirit. They did not deny the reality of mental or spiritual processes but affirmed that ideas could arise, therefore, only as products and reflections of material conditions." *dialectical materialism*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/dialectical-materialism> (last visited Jan. 5, 2023).

46. AL-GATHAFI, *supra* note 39, at 71.

47. ALI SHARI'ATI, *MARXISM AND OTHER WESTERN FALLACIES: AN ISLAMIC CRITIQUE* 15-31 (R. Campbell trans., 1980).

all the faiths, have imposed on human thought.”<sup>48</sup> That said, he did look to Islam in general as being supportive of revolution, noting the manner in which Islam *revolutionized* medieval Arabia at its introduction. This approach, as this Note will explore, is not uncommon, and it is heavily reflected within Islamic feminist jurisprudence.

*C. Demands of a Socialist Feminist Critique for the Purposes of This Note*

This leaves us with a burning question: what does a socialist feminist critique demand? Principally, there are three answers to this question. First, there must be found sexual equality within the public and private spheres. This can be considered the first step under socialist feminism. The second answer, however, demands that these separate spheres be abolished as their constructed binary inherently degrades sexual equality and reinforces the gender binary, the destruction of which is the third demand of a socialist feminist critique. The gender binary and gender essentialism have no place within socialist feminist ideals, and this will prove doubly true when the socialist feminist critique herein is applied to the question of same-sex Muslim marriage.

III. THE INTRODUCTION OF ISLAM AND THE DEVELOPMENT OF ISLAMIC  
LEGAL THEORIES

One may ask why this Note examines Muslim women’s marital rights under Islamic legal theories. Simply put, there are two reasons for this approach. First, *shari’a* and interpretation of the Qur’an and other Holy Islamic texts have their background primarily in Islamic jurisprudence. After the introduction of Islam, literacy rates greatly increased in Southwestern Asia, leading to the development of Muslim theology and early political philosophy. However, after the transcription of the Qur’an was completed in the eighth century, within one-hundred years of the introduction of Islam, so began the inscription of other theological texts, primarily pieces of Islamic jurisprudence, such as the decrees of *imams* and early *ahadith*.<sup>49</sup> So began the transition away from Muslim theology to Islamic jurisprudence,<sup>50</sup> resulting largely from the development of the

---

48. *Id.* at 102.

49. The term *ahadith*, meaning “talk” or “discourse,” refers to the records of the life and teachings of the Prophet Muhammad (PBUH). *Ahadith* is also the plural of *hadith*, which are narrations of the Prophet (PBUH) and other early Islamic figures. As *ahadith* were written by men, they are not considered to be as reliable as the Qur’an, though many *ahadith* are taken as law in Islamic jurisprudence according to the strength of their legitimacy, or *isnad*.

50. Josef van Ess, *The Beginnings of Islamic Theology, in* CULTURAL CONTEXT OF

political structures of the medieval Islamic world. As caliphs reigned, they appointed *imams*, *sheikhs*, and other Islamic scholars as *cadis*, Islamic judges. The decrees of *cadis*, put forth in response to a mixture of religious and legal controversies, grew over time into the bodies of Islamic law, *shari'a*, and Islamic jurisprudence, thereby facilitating the primary modes of interpreting Muslim religious practice and thought.

Second, as recognized by all legal theories, rights are understood as having legal remedies. This ties back to *cadis* and the development of Islamic jurisprudence. Over the centuries, as women brought forth legal complaints before *cadis*, these jurists teased out the rights of Muslim women from the Qur'an and the Hadith. Of course, this interpretation of women's rights from Holy Islamic texts was not seamless. Patriarchy predates the Islamic Golden Age, and it was alive and well during this period. Many Muslim jurists, also being philosophers and polymaths, drew considerable inspiration from Greek thinkers like Aristotle, who was famously unfond of women.<sup>51</sup> Nonetheless, there were jurists who valued women's role in Muslim society. The medieval Arab scholar and *cadi* Ibn Rushd, a follower of Aristotle himself, called for women to be evaluated based on the same virtues as men.<sup>52</sup> This idea likely sprang from Islamic jurisprudence rather than political theory, which had a Hellenistic background at the time. Directions for living according to Islam are explicitly given to both men and women in the Qur'an and the Hadith, and the Prophet Muhammad (PBUH) praised women and our role in society at length. Furthermore, Ibn Rushd cited the use of polysemous terms in Classical Arabic and the Qur'an to support an equal view of women and men.<sup>53</sup>

#### *A. Traditional Islamic Jurisprudence*

Islamic jurisprudence makes up a significant portion of Islamic philosophy. In large part, Islamic philosophy addresses other topics, like the

MEDIEVAL LEARNING: PROCEEDINGS OF 1ST INTERNATIONAL COLLOQUIUM ON PHILOSOPHY, SCIENCE & THEOLOGY IN MIDDLE AGES, 1973 87, 87 (John Emery Murdoch & Edith Dudley Sylla eds., 1975).

51. Aristotle made clear throughout his writings that he viewed women as being distinctly lesser than men. He decried "the lack of control of Spartan women [as being] detrimental both to the attainment of the aims of the constitution and to the happiness of the state," implying that women who were marginally liberated were actively impeding the attainment of *eudaimonia*, or collective happiness. ARISTOTLE, THE POLITICS, 142 (T. A. Sinclair trans. & T. J. Saunders ed., Penguin Books 1981) (n.d.). He also considered women to be incomplete or deformed men, as well as ugly where men were beautiful. Catarina Belo, *Some Considerations on Averroes' Views Regarding Women and Their Role in Society*, 20 J. ISLAMIC STUD. 1, 3-4 (2009).

52. AVERROES, AVERROES ON PLATO'S "REPUBLIC" 57 (Ralph Lerner ed., Cornell Univ. Press 2014) (n.d.).

53. ASMA LAMRABET, WOMEN IN THE QUR'AN: AN EMANCIPATORY READING 92 (Myriam Francois-Cerrah trans., 2016).

existence of the human soul, whether humans have free will, and more, but even these subjects are discussed using the methodologies outlined in this section. As with the split in the religion, there is a split within Islamic legal theory. There are the Sunni *Shafi'i*, *Hanafi*, *Hanbali*, and *Maliki* schools, better known as the four *madhahib*.<sup>54</sup> There are also the Shi'a Twelver,<sup>55</sup> *Ismaili*,<sup>56</sup> and *Zaidi* schools. This is not an exhaustive list of Islamic *madhahib*, and even at that, they will not be discussed in equal measure in this Note. Across the *madhahib*, there is widespread agreement regarding the traditional marital rights of women, and thus there is little need for differentiation for the purposes of this Note. Primarily, this section will focus on the jurisprudential methods employed by the *madhahib* in examining a given topic, as well as the methods employed within Islamic feminist jurisprudence.

The four Sunni *madhahib* agree on the method of settling legal disputes through jurisprudential decisions.<sup>57</sup> Some schools are less organized than others, resulting in less deference being paid to them and a smaller body of their work in *usul al-fiqh*.<sup>58</sup> American Islamic scholar Christopher Melchert identifies the *Shafi'i*, *Hanafi*, and *Hanbali madhahib* as the most important of the jurisprudence in the Islamic East,<sup>59</sup> whereas the *Maliki madhab* is generally less influential.<sup>60</sup>

The Shi'a schools behave differently than the Sunni *madhahib*. This is due, in part, to the split in the religion, leading to the development of two different sects and, in turn, the development of different legal theories and methods. Like the Sunni *Maliki madhab*, the Shi'a schools started off differently than the other Sunni *madhahib* and were slower to develop a *usul*

54. Here, a *madhab* is a school of law. *Madhahib* is the plural form of this noun.

55. The Shi'a Twelver school, unlike the other Shi'a legal schools, is sometimes referred to as a *madhab*. This is due to its adoption of *Shafi'i* methodology. DEVIN J. STEWART, ISLAMIC LEGAL ORTHODOXY: TWELVER SHIITE RESPONSES TO THE SUNNI LEGAL SYSTEM 62 (1998). Additionally, the Twelver school is sometimes referred to as the *Ja'fari* school for the eighth century Arab jurist and theologian Ja'far al-Sadiq.

56. Like the Twelver school, the *Ismaili* school incorporates *Ja'fari* jurisprudence.

57. AL-QĀDĪ AL-NU'MĀN, DISAGREEMENTS OF THE JURISTS: A MANUAL OF ISLAMIC LEGAL THEORY 13 (Devin J. Stewart trans., 2017).

58. *Id.* at xxxii; see also CHRISTOPHER MELCHERT, THE FORMATION OF THE SUNNI SCHOOLS OF LAW, 9TH-10TH CENTURIES C.E. (1997).

59. AL-NU'MĀN, *supra* note 57, at xxxii; see also MELCHERT, *supra* note 58.

60. The *Maliki madhab*, founded by eighth century Arab jurist and theologian Malik ibn Anas, is seen by some as less influential than the other Sunni *madhahib*, largely dying out in the East in the early eleventh century and later having a revival in the West. AL-NU'MĀN, *supra* note 57, at xxxii; see also MELCHERT, *supra* note 58. The *Maliki madhab* started out without a uniform *usul al-fiqh*, its scholarship more legal and less philosophical in nature. Jonathan E. Brockopp, *Competing Theories of Authority in Early Maliki Texts*, in STUDIES IN ISLAMIC LEGAL THEORY 3, 8, 11 (Bernard G. Weiss ed., 2002). This was perhaps due to the early start of the *Maliki madhab*, as the Qur'an was not likely yet written out. *Id.* at 5.

*al-fiqh*. Nevertheless, the *Ismaili* and some other Shi'a schools began to actively participate in Islamic legal jurisprudence by the tenth century.<sup>61</sup> Shi'a jurisprudence has a more "authoritarian" quality to it than does Sunni jurisprudence,<sup>62</sup> due to the more ecclesiastical nature of the Shi'a sect. Nonetheless, in part to broaden the appeal of their brand of jurisprudence, Shi'a schools, particularly the Twelver school, have conformed to the consensus of the Sunni *madhahib*, particularly the *Shafi'i madhab*.

The foremost method by which Islamic jurisprudence is conducted is the Four Sources theory. This theory originates from the founder of the *Shafi'i madhab*, early ninth-century Arab theologian Muḥammad ibn Idris al-Shafi'i, known as the father of Islamic jurisprudence. In his work *Risālah*, Shafi'i based his jurisprudence in the Four Sources theory, the validity of which is debated among modern scholars.<sup>63</sup> The four sources undergirding his jurisprudence were the Qur'an, the Sunnah,<sup>64</sup> *ijmā*,<sup>65</sup> and *ijtihad*,<sup>66</sup> the weight of these authorities presented in descending order. There is unanimous agreement that Qur'anic exegesis is given the most weight out of these four sources.<sup>67</sup> Less deference is given for the Sunnah, as many *ahadith* were transcribed after the death of the Prophet (PBUH).<sup>68</sup> Additionally, the Sunnah, as well as *ijmā* and *ijtihad*, are fallible sources, deriving completely from humankind. The Qur'an, by contrast, was revealed by Allah (SWT) to the Prophet (PBUH), thus making it an undeniably Holy source.<sup>69</sup> Furthermore, there is historical and jurisprudential disagreement as to the lattermost source. Some scholars

61. AL-NU'MĀN, *supra* note 57, at xxiii.

62. STEWART, *supra* note 55, at 7.

63. Joseph E. Lowry, *Does Shāfi'ī Have a Theory of "Four Sources" of Law?*, in *STUDIES IN ISLAMIC LEGAL THEORY* 23, 25 (Bernard G. Weiss ed., 2002).

64. Sunnah is the more commonly-used, alternative term for *ahadith*, *see supra* note 49, that relates to the life and teachings of the Prophet Muhammad (PBUH).

65. Literally, *ijmā* means "consensus." In the context of Islamic legal interpretation, this consensus refers to the consensus of legal scholars. Thus, the weight of this source depends on one's legal school and unanimity, i.e., how controversial a given topic is. DAVID F. FORTE, *STUDIES IN ISLAMIC LAW: CLASSICAL AND CONTEMPORARY APPLICATION* 41 (1999).

66. The term *ijtihad* refers to individual interpretation of Holy Islamic texts and Islamic doctrine through legal reasoning. This concept is very important for the purposes of this Note. Many scholars take issue with *ijtihad* as it is not considered as formalized as Qur'anic exegesis or study of the Sunnah, as well as the fact that it is more susceptible to personal opinion, or *ra'y*, *see infra* note 71. However, *ijtihad* is a historically significant concept within Islamic jurisprudence, and many consider it as being necessary for Islamic feminist interpretation as female scholars have long been kept from the legal profession. ALI HUSSAIN AL-HAKIM, *ISLAMIC FEMINISM: THEORY AND APPLICATIONS* 148 (2013).

67. AL-NU'MĀN, *supra* note 57, at 13.

68. AL-NU'MĀN, *supra* note 57, at 192.

69. Many *ahadith* are also considered Holy in nature, though this is not a ubiquitous trait of the category, and even when considered as such, they are still subject to more rigorous scrutiny as to their material than a Qur'anic verse.

prefer the concepts of *istihsān*,<sup>70</sup> *ra'y*,<sup>71</sup> or *qiyās*<sup>72</sup> to *ijtihad*. These terms all have similar meanings, excepting *qiyās*, though some are more individualistic in nature than others. Generally, when applying the lattermost source in the Four Sources theory, the more one relies on another source, like the Qur'an or the Sunnah, not mere reason or personal opinion, the more respect one's interpretation garners.

### *B. Islamic Feminist Jurisprudence*

In applying the canons of Islamic jurisprudence, Islamic feminists view Islamic doctrine in a different light than do many traditional *fiqh* scholars. They promote newer critiques of Islamic texts and jurisprudence, thereby allowing for more nuanced, feminist interpretations of *shari'a*. This subsection will feature some of the methods of feminist Islamic jurisprudence, which will, in turn, be employed in this Note's socialist feminist critique. As socialist feminism has been criticized for its focus on Western, white, bourgeois women, it is important to center Islamic feminism, to which Muslims are far more likely to ascribe. As a result of this Note's focus on women's Islamic rights, it can perhaps be said that this Note utilizes socialist, *Islamic* feminism as its mode of analysis.

Islamic feminism, the term for which was coined in the late twentieth century,<sup>73</sup> is principally concerned with women in Islam. It has been described as “a new consciousness, a new way of thinking, a gender discourse that was and is feminist in its aspirations and demands, yet Islamic in its language and sources.”<sup>74</sup> With this new understanding comes a call to reexamine Islamic law as it relates to women,<sup>75</sup> just as Islamic jurists reexamined slavery.<sup>76</sup> Its central tenet is equality, drawn from Islamic

70. *Istihsān* refers to preference, or free human reasoning. Though some put it forward as a fourth source for Islamic legal interpretation, Shafi'i himself abhorred *istihsān*, considering it on par with *ra'y*, see *infra* note 71. MUHAMMAD MUSLEHUDDIN, PHILOSOPHY OF ISLAMIC LAW AND THE ORIENTALISTS: A COMPARATIVE STUDY OF ISLAMIC LEGAL SYSTEM 151 (1913).

71. *Ra'y* refers to personal opinion.

72. *Qiyās* is a “method of analogy by which rules are applied to new situations by reference to other previous rulings.” FORTE, *supra* note 65, at 41. Essentially, it is precedent within Islamic jurisprudence.

73. Raja Rhouni, *Deconstructing Islamic Feminism: A Look at Fatima Mernissi*, in GENDER AND ISLAM IN AFRICA: RIGHTS, SEXUALITY, AND LAW 69, 69 (Margot Badran ed., 2011).

74. Ziba Mir-Hosseini, *Muslim Women's Quest for Equality: Between Islamic Law and Feminism*, 32 CRITICAL INQUIRY 629, 640 (2006).

75. ASGHAR ALI ENGINEER, THE RIGHTS OF WOMEN IN ISLAM 10 (1992).

76. Throughout the twentieth century, various bodies of Islamic scholars came together to discuss the issue of slavery within Islamic law and ultimately proscribed it. Tom Lindsay, *'After All, Didn't America Invent Slavery?'*, FORBES (Aug. 30, 2019, 10:35 AM), <https://www.forbes.com/sites/tomlindsay/2019/08/30/after-all-didnt-america-invent-slavery/?sh=610eb22a7ef6>.



tradition and doctrine spanning all the way back to early Islamic theology. Advocacy for sexual equality and social justice as being grounded in Islamic doctrine is one side of the coin that is Islamic feminism.<sup>77</sup> The other side features the reinterpretation of Holy Islamic texts away from patriarchal notions that offend equality.<sup>78</sup>

One of the central ideas underpinning Islamic feminism is that Islam is an evolutionary force. When it was introduced, Islam radically changed the *modus vivendi* in medieval Arabia. This was particularly true for women, as we gained a slew of new rights. Unfortunately, these rights were not entirely equal to those of men. Some feminist scholars argue that this was because Arabian culture, to which Islam was introduced, was already on the path to patriarchy at the time, resulting in discordant rights reflecting sexual inequality, even in a religion that improved the condition of women.<sup>79</sup> This suggests that context is important when reading the Qur'an and other Islamic dogma. It is well accepted within *ijmā* that the Qur'an was revealed to the Arabs due to our misconduct, and as such, it was crafted to make sense to us.<sup>80</sup> Thus, the Qur'an must be understood as "two documents," posits Palestinian academic Ghada Karmi.<sup>81</sup> Karmi suggests that the first document was a "response to the contemporary socio-political situation. It [was] legalistic and regulatory in content."<sup>82</sup> The second document was "concerned with universal spiritual, moral and philosophical issues [and] embodie[d] the eternal message of Islam."<sup>83</sup>

Academic Aysha Hidayatullah goes into great detail as to the new interpretive ideas and methods for understanding Islamic jurisprudence under a feminist lens in her work *Feminist Edges of the Qur'an*.<sup>84</sup> Ultimately, the methods therein prop up underlying premises going to the purpose of the Qur'an as a whole. One such premise is that "God created women fully human. Anything, anyone, or any system that treats them *privately or in public* as anything less than that is destroying the potential harmony of the entire universe."<sup>85</sup>

---

77. See MUSAWAH, *infra* note 104.

78. See HIDAYATULLAH, *infra* note 84.

79. Ghada Karmi, *Women, Islam and Patriarchalism*, in FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES 69, 79 (Mai Yamani ed., 1996).

80. ENGINEER, *supra* note 75, at 12.

81. Karmi, *supra* note 79, at 81.

82. Karmi, *supra* note 79, at 81.

83. Karmi, *supra* note 79, at 81.

84. AYSHA A. HIDAYATULLAH, FEMINIST EDGES OF THE QUR'AN (2014).

85. AMINA WADUD, INSIDE THE GENDER JIHAD: WOMEN'S REFORM IN ISLAM 254 (2006) (emphasis added). Note that, similar to bell hooks, amina wadud prefers that the first letters of her name not be capitalized as the Arabic language does not use capitalization. See Hera Diani, *Meet amina wadud: The Rock Star of Islamic Feminists*, MAGDALENE (Feb. 20, 2020), <https://magdalene.co/story/meet-amina-wadud-the-rock-star-of-islamic-feminist-2/>.

The first method that Hidayatullah outlines is the historical contextualization method.<sup>86</sup> In Islamic jurisprudence, there is a noted lack of distinction from Arabian culture that many scholars criticize.<sup>87</sup> This comes out primarily in examinations using particular verses of the Qur'an,<sup>88</sup> the Sunnah, and informal practical reason. The historical contextualization method addresses this issue.<sup>89</sup> Historical contextualization requires one to research the occasion of the revelation of a verse of the Qur'an, or *sabab al-nuzul*,<sup>90</sup> in order to undo the dehistoricization of the Qur'an. This includes distinguishing between descriptive verses<sup>91</sup> and prescriptive verses of the Qur'an,<sup>92</sup> as well as distinguishing between particular verses and universal verses.<sup>93</sup> One must also identify historical situations that shaped the context of *sabab al-nuzul* and any relevant, subsequent exegesis of the Qur'an.<sup>94</sup> Descriptive and particular verses, or *khass* verses,<sup>95</sup> are dangerous when treated the same as prescriptive and universal verses, or *'amm* verses.<sup>96</sup> This is because *khass* verses were contextually significant for the people to whom the Qur'an was revealed. Ultimately, they were put forth so that universal principles could be extracted from them. Scholars' practice of universalizing *khass* verses, or dehistoricizing the Qur'an, has resulted in missing the true purposes of the verses.<sup>97</sup>

Second, Hidayatullah writes about the intratextual method of Qur'anic

86. HIDAYATULLAH, *supra* note 84, at 65.

87. Mohammed Fadel, "Istihṣān is Nine-Tenths of the Law": the Puzzling Relationship of Uṣūl to Furū' in the Mālikī Madhab, in *STUDIES IN ISLAMIC LEGAL THEORY* 161 (Bernard G. Weiss ed., 2002).

88. Particular verses are those that apply only to specific historical situations. HIDAYATULLAH, *supra* note 84, at 65.

89. Fadel, *supra* note 87, at 161.

90. *Sabab al-nuzul* can be defined as a report, usually transmitted by a companion of the Prophet (PBUH), detailing the cause, time, and place of the revelation of a portion of the Qur'an.

91. Descriptive verses describe the practices of the seventh-century Arabian audience to whom the Qur'an was revealed. HIDAYATULLAH, *supra* note 84, at 65; *see also* ENGINEER, *supra* note 75, at 12.

92. Prescriptive verses are those that prescribe certain practices to all of the Qur'an's intended audiences. HIDAYATULLAH, *supra* note 84, at 65.

93. Universal verses are those that apply to human beings generally. HIDAYATULLAH, *supra* note 84, at 65.

94. This method is primarily applied only to the foremost source of Islamic jurisprudence, the Qur'an, though it can be applied with less effectiveness to the latter three sources, particularly *ahadith*, *ijmā*, and *qiyās*. For *ahadith*, for instance, scholars often give more weight to *isnad* than *matn*. *Isnad* refers to the series of persons who narrate the *ahadith*. *Matn* refers to the narration itself. Thus, because the text of a *hadith* itself is given less weight than its narrator(s), which is done in part because the text of a *hadith* cannot contradict the exegesis of a Qur'anic verse, attempting to dehistoricize it is often a fruitless endeavor, and other methods of interpretation are better applied to *ahadith* and other non-Qur'anic sources.

95. *Khass*, meaning "specific." HIDAYATULLAH, *supra* note 84, at 67.

96. *'Amm*, meaning "general." HIDAYATULLAH, *supra* note 84, at 67.

97. HIDAYATULLAH, *supra* note 84, at 67.

exegesis.<sup>98</sup> This method is not commonly used in modern discourse—it was most popular during the pre-modern era. Using this method, one interprets the Qur’an—and, to a lesser extent, the Sunnah—using only one source, the Qur’an. In reading the Qur’an intratextually in view of its textual holism, one may compare verses of the Qur’an to one another, rather than reading them in isolation. Here, the goal is to look for coherence amongst a given set of interrelated verses. To do this, one must keep in mind that which exegetes have identified as the Qur’an’s overall aim: advocating for justice and equality, two of the foremost *‘amm* principles for all human beings. Essentially, when looking at a given set of interrelated verses, any one that accords the least with the others may be given less deference.

Finally, Hidayatullah reiterates the tawhidic paradigm.<sup>99</sup> This method is predicated on the principle of *tawhid*,<sup>100</sup> “the doctrine of God’s unity and incomparability.”<sup>101</sup> The tawhidic paradigm emphasizes deference to Allah (SWT) before men. It identifies and condemns sexism and patriarchy as forms of idolatry, which Islam was introduced to combat. In attributing a godlike role to men over women, so is thus fomented the idolization of men within Muslim societies. The tawhidic paradigm also criticizes the male characterization of Allah (SWT).<sup>102</sup> Islamic jurisprudence overwhelmingly refers to Allah (SWT) using masculine language, as Arabic is a gendered language, and this is reflected in the translations of the Qur’an into other languages. Scholars justify this by pointing to the fact that the Qur’an was presented to humanity in a human language so that we could understand the message of Islam.<sup>103</sup> Moreover, human language cannot fully capture the Qur’an, which was conveyed by Allah (SWT).

Applying these and other methods of Islamic feminist jurisprudence, in tandem with interpretive methods of traditional *fiqh*, is the reformist framework of women’s rights in Islam. Musawah is a champion within this framework.<sup>104</sup> Musawah purports that cultural practices like child marriage

98. HIDAYATULLAH, *supra* note 84, at 87.

99. HIDAYATULLAH, *supra* note 84, at 110; *see also* ZIBA MIR-HOSSEINI, JOURNEYS TOWARD GENDER EQUALITY IN ISLAM 103 (2022).

100. *Tawhid* more literally means “asserting oneness,” and thus *tawhid* also refers to Oneness with Allah (SWT).

101. HIDAYATULLAH, *supra* note 84, at 110.

102. For this reason, some scholars choose to refer to Allah (SWT) using the agendered, singular, personal pronoun of *It* or *They*, or using all of the singular, personal pronouns. HIDAYATULLAH, *supra* note 84, at 111.

103. HIDAYATULLAH, *supra* note 84, at 111.

104. Musawah describes itself as “a global movement of women and men who believe that equality and justice in the Muslim family are necessary and possible. . . . [It] is led by Muslim women, who seek publicly to reclaim Islam’s spirit of justice for all. [It] acts together with individuals and groups to grow the movement, build knowledge and advocate for change on multiple levels.” MUSAWAH, CEDAW AND MUSLIM FAMILY LAWS: IN SEARCH OF COMMON GROUND 1 (2011).

and forced marriage are incompatible with Islam and must be eradicated.<sup>105</sup> Musawah principally examines three of Muslim women's marital rights.

First, in speaking about the Islamic right to negotiate a marriage of one's choice, Musawah rallies against the practice of guardianship in many modern Muslim-majority states.<sup>106</sup> In these circumstances, it is a woman's male guardian, usually her closest male relative, who truly gives consent to her marriage and even makes the choice of partner. Musawah notes that this practice is impermissible according to any source of Islamic jurisprudence, whether it be the Qur'an, the Sunnah, or *qiyās*.<sup>107</sup> Musawah also speaks of a conditional right of women given the practice of polygynous marriages.<sup>108</sup> Here, Musawah argues a progressive reformist stance, advocating for a total ban of polygyny.<sup>109</sup> This is predicated on Qur'anic exegesis, particularly using the historical contextualization method. Musawah's arguments to this extent are largely in line with the socialist feminist critique herein and will be discussed at length in Section Five of this Note.

Second, Musawah decries *fiqh* understandings of obedience within marriage and financial submission, which relates to the right of a woman to provisions from her husband.<sup>110</sup> The trade-off between a husband's maintenance and a wife's obedience is seen as being unequal and not in accordance with Islamic doctrine. Musawah advocates that because women, in fact, support the household, too, in modern society, there should be a correction of this discordance and systems created for the equitable division of marital property.<sup>111</sup> Finally, Musawah attacks the *fiqh* understanding of women's right to inheritance.<sup>112</sup> Musawah advocates for a more equitable apportionment of inheritance according to the improved condition of women in the modern world and the separate public and private spheres, as there are more women who now contribute to the maintenance of the household and the family.<sup>113</sup>

As will be apparent in the forthcoming analysis, the reformist framework outlined by Musawah is not so revolutionary as are the purposes of this

105. *Id.* at 30-31.

106. *Id.* at 32.

107. *Id.*

108. It is worth noting that this form of Muslim marriage is *polygynous*, not *polygamous*. The women in such a marriage are not married to each other as they are married to the man, nor are they entitled to take multiple husbands themselves. This distinction will be discussed further in Section Six of this Note, which will examine Muslim marriages as between queer and genderqueer Muslims—including those which include Muslims with polyamorous romantic orientations—within the framework of this socialist feminist critique.

109. MUSAWAH, *supra* note 104, at 33.

110. MUSAWAH, *supra* note 104, at 36.

111. MUSAWAH, *supra* note 104, at 37.

112. MUSAWAH, *supra* note 104, at 38.

113. MUSAWAH, *supra* note 104, at 39.

Note. It does not consider a socialist feminist world, in which there would be sexual equality and a demolition of the separate spheres. Of course, this is done for the sake of practicality. Socialist feminism, like all other brands of feminism, recognizes that though feminist theory may speak to a post-patriarchal, feminist world, there are first steps that must be taken to reach such a utopia. These are the aims of modern feminist movements, and for such purposes, Musawah fits perfectly into—and, indeed, stands at the forefront of—the Islamic feminist movement. This Note merely intends to go a step further and question how Muslim women’s marital rights may look, not in the modern world, but in a socialist feminist future.

#### IV. TRADITIONAL *FIQH* UNDERSTANDINGS OF WOMEN’S MARITAL RIGHTS

The marital rights of a Muslim woman include the right to property ownership, the right of inheritance, the right to express her opinions, the right to negotiate a marriage of her choice, the right of divorce, the right of custody of her children, the right of remarriage, and the right to provisions from her husband.<sup>114</sup> Though this Note focuses solely on marital rights, Muslim women have other rights guaranteed by Islam.<sup>115</sup> Moreover, some of the aforementioned rights exist outside of the realm of marriage and will thus be examined here despite their non-marital implications. As aforementioned, most, if not all, traditional Islamic legal theories agree on these rights. That being said, these agreements are not without qualification, and there exists some minute quibbling that will not be discussed at length in this Note.

All legal theories recognize that as with rights, there are obligations. Within Islamic jurisprudence, this remains true. For instance, as a woman has the right to keep all of her own money and property while married, thus obligating her husband to financially provide for the household, she is obligated, in turn, to manage child-rearing and the household. This includes various smaller obligations, including breastfeeding one’s “offspring for two whole years if *the father* wishes the breast-feeding to be completed.”<sup>116</sup>

---

114. See HAIFAA A. JAWAD, *THE RIGHTS OF WOMEN IN ISLAM: AN AUTHENTIC APPROACH* 33-36 (1998).

115. Entirely outside of the realm of marriage is the right to receive an education. Outside of marriage, the right to express one’s opinions commonly translates to the right to advocate for a cause. The right of inheritance applies not only to one’s inheritance from one’s husband, but one’s parents and other relatives, as well. The right to property ownership, too, is enjoyed by unmarried women. The right to work and earn money, as well as the right of equal reward for equal work, are enjoyed by all persons, and these rights affect the right of a married woman to keep all of her own money and property.

116. QUR’AN 2:233.

As seen here, many of a married woman's obligations adhere her to her husband's will, which is not an uncommon trend in traditional *fiqh* understandings of women's rights. This will be further explored towards the end of this section and critiqued in the next section.

Women have the right to property ownership in all forms. This right predates Islam, existing prior to the seventh century in medieval Arabia.<sup>117</sup> Under this right, a woman may own a tract of land or a business just as she would own a piece of jewelry or a sum of money. This is an unqualifiable right in the sense that a woman's property is not subject to the will of her husband.<sup>118</sup> A man has no controlling interest or right to his wife's property, even that of a house in which he himself lives, other than the rights of an heir. She may convey any property by her will alone, as well as purchase any personal or real property she wants without his approval. As such, under traditional *fiqh* understandings, there is no marital property within a Muslim marriage. Furthermore, the right to property ownership accords Muslim women the right of inheritance and the right to keep all of our own money.<sup>119</sup> For instance, if a woman was to inherit a house from her father, that house would be solely under her ownership, as well as any other heirs her father might have had. Additionally, if she was to earn enough money to buy herself a house, it would be hers alone. In either case, her husband would have no claim to the house.

A woman has the right of inheritance from her husband. This right is impacted by whether a woman is divorced by said husband, whether she has had children by him, what other heirs he might have had, and more, all of which the various legal schools debate.<sup>120</sup> Generally, however, a wife receives either a fourth or an eighth of her husband's estate, depending on whether or not the union begot children. Women also have the right to bequeath property onto our own heirs. Children receive the same measure of inheritance from either parent. By contrast, a husband receives either half or a quarter of his wife's estate, depending, too, upon whether their union begot children.

---

117. ENGINEER, *supra* note 75, at 32.

118. Jane Connors, *The Women's Convention in the Muslim World*, in FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES 351, 359 (Mai Yamani ed., 1996).

119. JAWAD, *supra* note 114, at 66.

120. For instance, if a woman's husband divorces her while ill and subsequently dies from that same sickness, the four *madhahib* have different opinions as to whether she maintains her right to inherit. The *Hanbali madhab* posits that so long as she remains unmarried thereafter, she is entitled to her inheritance from her late husband, whereas the *Maliki madhab* sees no cause to preclude inheritance in this instance, regardless of her marital status. The *Hanafi madhab* would place certain conditions on her inheritance, and the *Shafi'i madhab* permits inheritance only under certain circumstances. ENGINEER, *supra* note 75, at 138-39.

You shall inherit one half of your wives' estate if they leave no child, but if they leave behind a child then you will get one fourth of their estate, after fulfilling the terms of their *last* will and payment of debts. Your wives shall inherit one fourth if you leave no child behind you; but if you leave a child, then they shall get one-eighth of your estate; after fulfilling the terms of your *last* will and the payment of debts.<sup>121</sup>

Evidently, this is not an equal right under traditional *fiqh* frameworks. Rather, the Qur'an details an equitable means by which to split inheritance amongst the various heirs of an intestate, based upon the perception that men have greater financial responsibilities than do women.

In the spirit of the Islamic '*amm* ideal of equality, women and men are thought to be equal beings.<sup>122</sup> This is a well-recognized concept within *ijmā*. As such, just as a man does, a woman has the right to express her opinions. Another '*amm* ideal is at play here, that of the importance of education, which is another right of both women and men.<sup>123</sup> Islam encourages education, which instills one with knowledge. Thus, as women share equally with men the right of education, we share equally with men the right to share our knowledge. Within marriage, this manifests as directing one's own household. Given their respective educations and knowledge, a wife and a husband may differ as to how to manage their household and raise their children. Moreover, though a woman's husband has a greater say in decision-making for the family, he may not discourage or renounce her opinion. She has a right to it, even if he does not care for it.

Another marital right of women is the right to negotiate a marriage of one's own choice. This right, too, is one enjoyed by both women and men, and it contains several elements. First, there is the choice of one's spouse. A marriage of one's own choice necessarily includes the ability to pick a particular person to whom one wants to be married. *Ahadith* speak explicitly of obtaining the consent of a woman to be married:

It was narrated from Abu Hurairah that: the Messenger of Allah said: 'A previously-married woman should not be married until she is consulted, and a virgin should not be married until her consent is sought, and her consent is her silence.'<sup>124</sup>

The Qur'an discusses the approach by which one should go about choosing a spouse in its second chapter.

---

121. QUR'AN 4:12.

122. See *infra* note 179.

123. JAWAD, *supra* note 114.

124. SUNAN IBN MAJAH, HADITH 9:27.

Do not marry mushrik women until they become believers; a believing slave woman is better than a free mushrik woman even though she may be more attractive to you. *Likewise*, do not marry mushrik men until they become believers: a believing slave is better than a free mushrik even though he may be more pleasing to you.<sup>125</sup>

Though the text here regarding the choice of a spouse for a Muslim man and for a Muslim woman is the same—both parts of this verse use the word *mushrik*, meaning non-believing—interpretation has varied. In traditional Islamic legal theories, this verse is understood to convey that Muslim men may wed women who follow any of the teachings of Allah (SWT), meaning that their wives may be Jewish, Christian, or Muslim. By contrast, Muslim women are traditionally understood as being permitted to wed only Muslim men.<sup>126</sup>

The second element of negotiating a marriage of one's choice is the dower right, or the right to *mahr*.<sup>127</sup> Every Islamic legal school agrees that *mahr* is a right of a wife, though there are differences in practice between the Sunni and the Shi'a, as well as within different ethnic groups.<sup>128</sup> The Qur'an refers to the *nikkah* in its second chapter, referring to it as "the marriage tie."<sup>129</sup> The practice of *nikkah* today involves the signing of the Islamic marriage contract.<sup>130</sup> This contract is essential to a legitimate marriage under Islamic law. Thus, its existence in each Muslim marriage is obligatory. This contract contains a provision for the *mahr*, which is decided by the wife. The fourth chapter of the Qur'an, *Surah an-Nisaa'*, meaning Chapter of Women, discusses the practice of *mahr*.

Give the women (*whom you marry*) their dowries willingly *as an obligation*; but if they, by their own free will, give up to you a portion

125. QUR'AN 2:221.

126. See Sri Pujianti, *Interfaith Marriage in International and Islamic Laws*, THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA (Jun. 28, 2022, 10:41 AM), <https://en.mkri.id/news/details/2022-06-28/Interfaith%20Marriage%20in%20International%20and%20Islamic%20Laws>.

127. *Mahr* is a payment made to the bride in Muslim marriages.

128. Jihan Safar, *The Dower (Mahr) and Wedding Ceremony among the Shi'a of Oman: Religion, Class, and Ethnicity*, in GLOBAL DYNAMICS OF SHI'A MARRIAGES: RELIGION, GENDER, AND BELONGING 59 (Yafa Shanneik & Annelies Moors eds., 2022).

129. QUR'AN 2:235.

130. *Nikkah* also colloquially refers to the initial Islamic marriage ceremony, during which the marriage contract is signed. *Nikkah* is not a ubiquitous term. In some cultures, the formal signing of the marriage contract is referred to as *katb el-kitaab*. See BUCKLEY, *supra* note 10, at 279. *Nikkah* can also refer to the consummation of a marriage.



of it then you may enjoy it with pleasure.<sup>131</sup>

Here, it is clear that *mahr* is obligatory. Thus, there must be a *mahr* provision in each Islamic marriage contract.<sup>132</sup> Moreover, though this verse refers to *mahr* as dowry, a non-Muslim custom, this is simply a deficit of the translation from Classical Arabic to modern English. Dowries consist of property or money that a bride brings her husband upon their marriage, whereas *mahr* is a payment that a husband makes to his bride. *Mahr* may consist of anything that has a value, and it is commonly split into advanced and postposed payments. Advanced *mahr* is usually paid before the *nikkah*, typically in the form of jewelry or another intrinsically valuable item. Postponed *mahr* usually consists of currency and is paid at the conclusion of the marriage.<sup>133</sup> There is some disagreement as to whether it can be paid on the occasion of divorce, depending upon who sues for divorce and what causes there are for the divorce.<sup>134</sup> It may also be paid at the time of the husband's death, along with his wife's measure of inheritance. When a Muslim woman finds herself divorced, it is important that she be able to support herself and any children under her care. As such, both Islamic culture and the doctrine of Islamic law acknowledge the importance and necessity of *mahr*. Within Islamic marital practice, *mahr* exists as a safeguard for women and is recognized as one of the core marital rights of women. The purpose behind *mahr* is enshrined in another of Muslim women's marital rights, the right to financial independence, which combines the right to property ownership and the right to keep all of our own earnings. In mandating the payment of *mahr*, Islam ensures that marriage fosters, rather than destroys, a woman's financial independence.<sup>135</sup>

Finally, the third aspect of the right to negotiate a marriage of one's choice is a conditional right of women predicated on the right of a man to have multiple wives concurrently. According to the Qur'an, 4:3, and as reinforced by many *ahadith*, a man may concurrently have up to, but no more than, four wives.<sup>136</sup> This right of Muslim men is not absolute.

131. QUR'AN 4:4.

132. See Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 200 (2002).

133. Azizah Y. al-Hibri, *An Introduction to Muslim Women's Rights*, in WINDOWS OF FAITH 51, 60 (Gisela Webb ed. Syr. Univ. Press 2000).

134. See, for instance, *Divorced wife wants her Mahr*, Fatwa No: 87693, ISLAMWEB.NET (May 11, 2004) <https://www.islamweb.net/en/fatwa/87693/divorced-wife-wants-her-mahr>.

135. al-Hibri, *supra* note 133, at 58.

136. Though traditional Islamic legal theories support the possibility of polygyny, it is increasingly rare and even illegal in some nation-states with large Muslim populations. Stephanie Kramer, *Polygamy Is Rare Around The World And Mostly Confined To A Few Regions*, PEW RESEARCH

Not only is it an alienable right, it is a qualified right. First, a man must be able to fulfill the right to provisions of *each* of his wives, which includes any children they may share. Second, a man must be able to treat each of his wives *equally*.<sup>137</sup> The final and perhaps most important qualification to the right of a man to have multiple wives is the conditional right of women who partake in this practice of polygyny. This Note uses the words *who partake in* rather than *are subjected to* because this conditional right of women is incorporated within the right of a woman to negotiate a marriage of her choice, which includes the polygynous marriage. The *gift of permission* of a first, second, or third wife to her husband to seek another wife is required. A compounded marriage between her husband and another second, third, or fourth woman is invalid absent her consent. Like the amount of *mahr*, it can be made a term of the marriage contract.<sup>138</sup>

Islam conferred unto all people the right of divorce. Divorce is viewed as an essential practice in Islam, though this sentiment is qualified by the abhorrence for divorce in Muslim societies. In most instances, the parties must at least attempt to reconcile, compromise, or halt any harmful behaviors before proceeding to a divorce. Under traditional frameworks, women have the right to *initiate* divorce, as do men, though not the power to *execute* the divorce, which men alone possess. Additionally, men may pursue a no-fault divorce, whereas a woman may pursue only an at-fault divorce,<sup>139</sup> excepting when she and her husband agree to part ways. If a woman's husband denies her a divorce, she may go to an *imam* or religious court to acquire it,<sup>140</sup> whereas men have the nearly unassailable right of *talaq*, or repudiation.<sup>141</sup>

---

CENTER (Dec. 7, 2020), <https://www.pewresearch.org/short-reads/2020/12/07/polygamy-is-rare-around-the-world-and-mostly-confined-to-a-few-regions/#:~:text=many%20of%20the%20countries%20that,legal%20at%20least%20for%20muslims.>

137. J. Chamie, *Polygyny among Arabs*, 40 POPULATION STUD. 55, 55 (1986).

138. This is contested within Islamic jurisprudence. Some scholars insist that it is *sunnah*—meaning a favorable action given the Prophet's and/or early scholars' approval—for a man to have multiple wives concurrently as the Prophet (PBUH) exercised this right, and thus it should not be alienable.

139. See Ivanova, *infra* note 143.

140. BUCKLEY, *supra* note 10, at 209.

141. The right of divorce held by men is considered *nearly unassailable* because though a husband requires no reason to initiate a divorce from his wife—essentially, he enjoys the unqualified right to a no-fault divorce, whereas she does not—there are reasons why he *should not* divorce her. Without a compelling reason, early scholars often considered *talaq* as being reprehensible. WAEL B. HALLAQ, *SHAR'AH: THEORY, PRACTICE, TRANSFORMATIONS* (2009). Sometimes even with a valid reason, divorce may be discouraged by an *imam* or a religious court. For instance, if a man marries a woman who has already gone through menopause, and knowing as much, he cannot later divorce her for infertility.

The pronouncement of *revocable* divorce is only allowed twice: then, she should be allowed to stay with honor or let go with kindness. It is not lawful for you to take anything back which you have given them except when both parties fear that they may not be able to follow the limits set by Allah; then, if you fear that they both will not be able to keep the limits of Allah, there is no blame, if, by mutual agreement the wife compensates the husband to obtain divorce. These are the limits set by Allah; do not transgress them, and those who transgress the limits of Allah are the wrongdoers. So, if a husband divorces his wife *three times*, it is not lawful for him to remarry her until after she has married another man. In case he divorces her, there is no blame on either of them if they reunite in marriage, provided they feel that they can keep the limits of Allah. These are the limits of Allah which He makes clear to the people of understanding.<sup>142</sup>

Herein lies the right of a man to execute his own divorce. By repudiating his wife, he performs the divorce, and this is often called husband's performativity. Some of the valid reasons that a woman may raise for a divorce are, in no particular order, infertility, insanity, incurable disease, or failure of a husband to give his wife provisions.<sup>143</sup>

The right of custody of one's children crops up following a divorce. This was a change from pre-Islamic Arabia, where women had no right to parenting time or parental decision-making of their children following the dissolution of a marriage.<sup>144</sup> Under Islamic law, women only retain custody until their children reach a certain age. This age differs depending on the *madhab* to which one ascribes.<sup>145</sup> Female children may be retained by their mothers longer than may their brothers, but typically before adolescence, both are placed in the custody of their fathers.<sup>146</sup> When the father of one's children dies, it is agreed that one receives full custody of one's children among most *madhahib*, barring extenuating circumstances.<sup>147</sup> A father can desert his children, giving the mother full custody.<sup>148</sup> Furthermore, remarriage can cause the loss of custody of one's children, as some

---

142. QUR'AN 2:229-30.

143. Svetlana Ivanova, *The Divorce Between Zubaida Hatun and Esseid Osman Ağa: Women in the Eighteenth-Century Shari'a Court of Rumelia*, in *WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY* 112, 118 (Amira El Azhary Sonbol ed., 1996).

144. ENGINEER, *supra* note 75, at 30-31.

145. Abdal-Rehim Abdal-Rahman Abdal-Rehim, *The Family and Gender Laws in Egypt During the Ottoman Period*, in *WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY* 96, 108 (Amira El Azhary Sonbol ed., 1996).

146. Karmi, *supra* note 79, at 75.

147. Abdal-Rehim, *supra* note 145, at 109.

148. Interview with Mohammed Amer Khan, Mufti, Islamic Foundation of Greater St. Louis (Feb. 19, 2023).

*madhahib* consider it improper for a man to raise another man's children.<sup>149</sup> In such cases, a female relative may take custody of the children.

Like the right of custody of one's children, the right of remarriage is an issue that arises following a divorce. Unlike the right of custody of one's children, however, this right is enjoyed in equal measure by both women and men, though it does have certain obstacles for women. The foremost obstacle is a woman's *'idda* period.<sup>150</sup> This is a period following a dissolved marriage, lasting for three turns of one's menstrual cycle, before one can remarry. It is observed to allow men to take back a pregnant spouse, as any pregnancy would supposedly be readily apparent by this time. During the *'idda* period, a woman has a right of maintenance from her ex-husband, just as she would have had in their marriage. The second obstacle derives from the right of men to wed multiple wives. Some men may choose to deny an earlier wife a divorce—and thus the right to remarry—whilst enjoying the right to marry again themselves as an act of cruelty.<sup>151</sup> This is not a formal limitation on a woman's right to remarry, like the *'idda* period, but it creates problems for her all the same. Furthermore, as aforementioned, recall that remarriage can result in losing custody of one's children, leading many women to reconsider an otherwise desirable, subsequent marriage.

Finally, a woman has the right to provisions from her husband, or *nafaqah*.<sup>152</sup> This right is created by the obligation of a man to provide for his wife, both during the marriage and as necessary afterward in the form of maintenance.<sup>153</sup> Thus, it is an exchange of obligations and rights. A husband receives from his wife *tamkin*, meaning submission or unhampered sexual access, and she receives *nafaqah*.<sup>154</sup> This exchange of obligations and rights, the *nafaqah-tamkin* trade-off, was extracted through Qur'anic exegesis from the following *Surah*:

Men are overseers over women because Allah has made the one of them to excel the other, and because men *are required to* spend their wealth *for the maintenance of women*. Righteous women are, therefore, devoutly obedient and guard in *the husband's* absence what Allah requires them to guard (*their husbands property and their own honor*). As to those women from whom you fear disobedience, *first* admonish them, *then* refuse to share your bed with them, *and then, if necessary*, beat them. Then if they obey you, take no further

149. Karmi, *supra* note 79, at 75.

150. ENGINEER, *supra* note 75, at 127.

151. BUCKLEY, *supra* note 10, at 214-15.

152. This term encapsulates shelter, food, clothing, and more.

153. JAWAD, *supra* note 114, at 66.

154. MIR-HOSSEINI, *supra* note 99, at 24.

actions against them and do not make excuses to punish them. Allah is Supremely Great and is aware of your actions.<sup>155</sup>

There is also support within interpretations of the Sunnah, *ijmā*, and *qiyās* for this exchange. A man's *tamkin* includes his right to advise his wife, as told by the reciprocal obligation on her to submit to him and listen, and it is reinforced by his conditional right to discipline her.

The right of a woman to keep all of her own money is contained within her right to provisions from her husband. Traditional Islamic legal theories have an essentialist view of gender, which extends to the family. Accordingly, husbands and fathers are seen as the providers, and thus the right of men to work and make money is subject to their accordant obligation of financially supporting their families. This obligation does not extend to women. Though we, too, have the right to work and make our own money, we are not obligated to support our husbands or children. This responsibility lies solely with our husbands.

As will be readily apparent in the following section, the *nafaqah-tamkin* trade-off heavily influences the traditional *fiqh* interpretations of the marital rights of women, as well as their execution. Thus, this exchange is perhaps the most important aspect of the marital rights paradigm.

#### V. SOCIALIST FEMINIST CRITIQUE OF WOMEN'S MARITAL RIGHTS IN ISLAM

In a growing body of Islamic feminist work, this Note seeks to apply a socialist feminist critique to women's marital rights in Islam. In so doing, it addresses what can be termed the *asymmetrical rights paradigm*. This paradigm can be understood as the resulting framework of marital rights produced by the "asymmetrical relationships between the spouses" predicated on "patriarchal and fixed ideas of gender roles and rights," as described by Islamic feminists like Iranian anthropologist Ziba Mir-Hosseini.<sup>156</sup> Overall, upon applying the canons of Islamic jurisprudence, this socialist feminist critique does not comport with the asymmetrical rights paradigm. Rather, in order to comport with socialist feminism and Islamic feminist jurisprudence, it finds that this paradigm must be corrected to one that is *symmetrical* as between the rights of women and the rights of men.

In order to survive the socialist feminist critique, the rights discussed herein must align with the inception of sexual equality in the private and

---

155. QUR'AN 4:34.

156. ZIBA MIR-HOSSEINI, MULKI AL-SHARMANI, JANA RUMMINGER & SARAH MARSSO, *Introduction: Towards Marriage as a Partnership of Equals*, in JUSTICE AND BEAUTY IN MUSLIM MARRIAGE: TOWARDS EGALITARIAN ETHICS AND LAWS 1, 8 (2022).

public spheres, sexual equality following the subsequent destruction of the separate private and public spheres, and the destruction of the gender binary and gender essentialism. Accordingly, in their traditional forms—and by some accounts, even reformed forms—Muslim women’s marital rights fall short of this ideal. As a result, they must evolve in order to conform with both Islamic jurisprudence and socialist feminism. Thus, most of women’s marital rights—the right to property ownership, the right of inheritance, the right to express one’s opinion, the right to negotiate for a marriage of one’s choice, the right of divorce, the right of remarriage, and the right of custody of one’s children—simply require better societies and more equitable applications of Islamic law. By contrast, the remaining marital right of women, the right to provisions from one’s husband, would need be abolished.

This is to push the conversation a step further beyond advocacy for reform. Within the study of Islamic jurisprudence, reformists and traditionalists both consider Islam to have *revolutionized* life in seventh-century Arabia and, later, across the Eastern world as the religion spread. Gone were entire structures of belief surrounding the worship of idols within the Fertile Crescent, brought down by conquest and the spread of ideas.<sup>157</sup> People banded together behind a new way of thinking, and the new way of life that resulted therefrom included a more robust system of women’s rights. Evolution and change are thus very important in considering Islamic rights, and it is for that reason that this Note applies a *socialist* feminist critique. In striving toward the final goal of socialism, Polish revolutionary socialist Rosa Luxemburg posited that there was only one true method for change, not reform, but revolution.<sup>158</sup> It is important to note, however, that this is not an examination of what Muslim women’s marital rights should look like under real communism, but rather under socialist feminism as the path to get there.<sup>159</sup>

There does exist a conflict within the socialist feminist critique of Muslim women’s marital rights, and it lies within the conceptualizations of the gender binary and gender essentialism. Under the asymmetrical rights paradigm, these rights are clearly split between women and men, displaying the embrace of the gender binary within *shari’a*. The claim for complete

---

157. See Faysal Burhan, *Focus on the Early History of Islam: A Refreshing Look at the Seerah (Part 5)*, ISLAMONLINE, <https://islamonline.net/en/focus-on-the-early-history-of-islam-a-refreshing-look-at-the-seerah-part-5/> (last accessed Sept. 2, 2023).

158. ROSA LUXEMBURG, *REFORM OR REVOLUTION* (1900).

159. Recall the socialist feminist consideration of doing away with marriage, and thus the possibility of doing away with all marital rights. This might be a closer vision of revolution, whereas the results herein could merely be considered more radical reform. However, it is important to note that revolutionary movements begin within current systems.

equality as between women and men posed within socialist feminism challenges the strict divide between women and men in traditional Islamic law, which posits that there are fundamental differences between women and men that cannot go ignored in the name of equality. Equalizing the respective rights and obligations of women and men would therefore be a fallacy.<sup>160</sup> Though this view exists within Islamic jurisprudence, it is contrary to the edict of sexual equality as found in the Qur'an, the primary source for Islamic jurisprudence.<sup>161</sup> Finally, as the understanding of Muslim women's marital rights under a symmetrical rights paradigm requires addressing the gender binary and advocating for its destruction, one must recognize that this socialist feminist critique has been queered. Queering can be understood as challenging heteronormativity and the gender binary, as developed by theorists like Eve Sedgwick.<sup>162</sup> Moreover, it is not uncommon for socialist feminist theory to be considered queered, as much of it is impacted by queer theory.<sup>163</sup>

This critique must start off by analyzing the right to provisions from one's husband. This is because the Qur'anic verse from which it derives, 4:34, and the ideals undergirding it play a critical role in the asymmetrical rights paradigm identified and defined herein. Some of women's marital rights are near-perfect as-is and blundered only in execution and effect. This is because *Aya* 4:34 preserves the separate spheres ideology and its historical implications.<sup>164</sup> In analyzing it, one must consider a move away from the gender binary—which assigns strict roles to women and men—and looking to *'amm* principles and not the text, alone, of *khass* verses.<sup>165</sup>

Starting with Qur'anic exegesis, the historical contextualization method allows one to put the relevant verse into perspective. Recall that the beginning of the verse states that “[m]en are overseers over women because Allah has made the one of them to excel the other, and because men *are required to spend their wealth for the maintenance of women.*”<sup>166</sup> This line is a *khass* verse because it reflects the societal view of the time and place that there existed separate public and private spheres, the latter of which was the place of women per gender essentialism and the gender binary, and the former of which was, in part, where the duties of men originated. Thus,

---

160. Raga' El-Nimr, *Women in Islamic Law*, in *FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES* 87, 88-89 (Mai Yamani ed., 1996).

161. Karmi, *supra* note 79, at 73; *see also* ENGINEER, *supra* note 75, at 42-57.

162. Brenda Cossman, *Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)*, 6 *CRITICAL ANALYSIS L.* 23, 24-26 (2019).

163. *See* Rubin, *supra* note 28.

164. *Aya* means “verse” in Arabic.

165. Hidayatullah, *supra* note 84, at 71.

166. QUR'AN 4:34.

when applying a socialist feminist critique, which demands revolt from and the ultimate destruction of these separate spheres, as well as the abandonment of gender essentialism, one finds no ground to adhere so strictly to the plain text of this verse. Rather, as a *khass* verse, it should be interpreted for any ‘*amm* principles that may lie within it.

Another demand of the socialist feminist critique, the achievement of sexual equality, is significant here, too. Using the intratextual method for Qur’anic exegesis, it is clear that sexual equality is a recurrent theme throughout Islamic doctrine. *Surah at-Tawbah* starts off with this message:<sup>167</sup>

The true believers, both men and women, are protectors of one another. They enjoin what is good and forbid what is evil; they establish Salah (*prayers*), pay Zakah (*obligatory Charity*), and obey Allah and His Rasool. It is they on whom Allah will have His mercy; surely, Allah is Mighty, Wise. Allah has promised the believers, both men and women, gardens beneath with rivers flow, to live therein forever, and *they will have* beautiful mansions in these gardens of everlasting bliss. *Best of all*, they will have the good pleasure of Allah. Now that is the highest achievement.<sup>168</sup>

In speaking of punishment, particularly for fornication, *Surah an-Nur* states:<sup>169</sup>

As for the fornicatoress and fornicator (*female and male guilty of illegal sexual intercourse*), flog each of them one hundred lashes and do not take pity and in enforcing the law ordained by Allah, if you believe in Allah[]and the Last Day, and let a party of the believers witness their punishment.<sup>170</sup>

This can also be done with *ahadith*, though *ahadith* tend to have a sexist slant as they were all written by men and derived almost entirely from the speech of men. The primary focus here, however, is the discord between verses prescribing sexual equality and verses like *Aya 4:34*. In deducing which way to lean, one may also look to the Islamic ‘*amm* principle of equality as enshrined in another important Islamic ‘*amm* ideal, that of justice, as is agreed in the *ijmā*.<sup>171</sup> Recall that *Aya 4:34* itself demands that

167. *Surah at-Tawbah* is the ninth chapter of the Qur’an, meaning Chapter of Repentance.

168. QUR’AN 9:71-72.

169. *Surah an-Nur* is the twenty-fourth chapter of the Qur’an, meaning Chapter of Light.

170. QUR’AN 24:2.

171. Caitlin H. Aladham, *The Evolution of Justice from Aristotle to Medieval Islamic Scholars and Beyond* (May 4, 2021) (B.A. thesis, University of California, Berkeley) (on file with Honors Thesis Library, Travers Department of Political Science at the University of California, Berkeley).



a man not be *unjust* to his wife. One might say, then, that sexual equality is implicitly required in adherence to this verse and thus the relationship between wife and husband, further decrying the asymmetrical rights paradigm that results from traditional *fiqh* interpretation of the verse.

Utilizing *ijtihad*, it is readily apparent that the tawhidic paradigm also discredits a reading of this verse that promotes sexual inequality and the enforcement of an asymmetrical rights paradigm. Under the tawhidic paradigm, it is considered *shirk* to regard men with some higher authority over women.<sup>172</sup> As equal adherents to Islam, the only higher authority over women is the same as that over men: Allah (SWT). Thus, for a woman to be obligated to be subservient to her husband's advice or discipline, however stringently that obligation is judged, is an act of *shirk*, and it should hold no weight within *qiyās* or *ijmā*. Given its failure to hold up against *ijtihad* through the tawhidic paradigm and Qur'anic exegesis through the historical contextualization and intratextual methods, the right to provisions from one's husband must be dispatched in sight of the evolutionary quality of Islam and the Islamic ideal of equality. A woman would no longer have the right to maintenance from her husband, but so would she no longer be obligated to submit to him in a manner that infantilizes her.<sup>173</sup>

Also incidental in discarding the right to provisions from one's husband is the lesser right of women to keep all of our own earnings. The lack of an obligation on the part of women to financially support our families threatens the sexual equality that exists within the rights to work and of equal reward for equal work. This lack of an obligation for Muslim women to financially support our families is predicated on the practice of Muslim women providing nearly all of the child-rearing labor required to uphold the private sphere and, by extension, the public sphere. Therefore, equality must first be struck in the private sphere.<sup>174</sup> Men and fathers must be obligated to take on half of the labor associated with child-rearing, just as women and mothers must be obligated to take on half of the financial labor associated with maintaining a household. Otherwise, the difficulty of advancement in the public sphere will continue to burden women. Already, we are tired from the additional labor of raising our children and otherwise maintaining the home, labors and pains from which men do not suffer. However, should it not be the sole responsibility of the husband to provide for his family, he is freed up to contribute to household labor, and his wife is freed up to pursue an occupation and step into the provider role. Thus, the right of women to keep all of our own earnings must be discarded in order to reinforce the

---

172. *Shirk* is a sin of idolatry.

173. Karmi, *supra* note 79, at 79.

174. Musawah supports this viewpoint. MUSAWAH, *supra* note 104, at 36.

ideals of socialist feminism and comport with an understanding of Islamic marital rights under a *symmetrical* rights paradigm. Additionally, the right to work and earn money, a right shared in equal measure by women and men, would be more easily enjoyed following the dispatch of the rights of women to provisions from one's husband and keeping all of one's own earnings, further supporting the establishment of a symmetrical rights paradigm.

Perhaps the right to provisions from one's husband need not be *completely* destroyed, however. Though socialist feminism champions sexual equality and a demolition of the separate spheres ideology, it recognizes that women and men are not the *same*. Liberal feminism insists on treating everyone according to a standard of Aristotelian equality, which does not take into account equitable treatment of unequal persons.<sup>175</sup> Like radical feminism, socialist feminism recognizes the particular sexual exploitation of women, particularly in the realm of reproductive labor. Thus, there would need be exceptions made for the natural, fundamental differences between the sexes on account of the different physical roles females and males have in procreation, as is well recognized by Islamic doctrine.<sup>176</sup> Under traditional Islamic legal theories, the need to give women respite from certain duties due to menstruation, pregnancy, and mothering is well recognized. During menstruation, for instance, women are not required to fast, pray, or perform sexual labor to make up for our physical, mental, and emotional distress.<sup>177</sup> Thus, under a socialist feminist model of marital rights, there would need be exceptions taken for these same conditions. Perhaps a husband would be obligated to maintain his wife when she is otherwise occupied with the reproductive labor that he cannot perform. Perhaps the state could intervene. Islamic socialism champions the welfare state. When women perform reproductive—as opposed to productive—labor, the state could subsidize maternal leave. So, too, could the state establish universal daycare, allowing women more freedom of

---

175. See Aladham, *supra* note 171, at 9.

176. El-Nimr, *supra* note 160, at 88-89.

177. This practice is derived from the Qur'an, which includes the following instruction to men: "keep away from women (*do not have sexual intercourse*) during their menstrual periods and do not approach them until they are clean again." QUR'AN 2:222. Unfortunately, there is a perception within *ijmā*, though contested, that menstruating women are unclean. This stems from not only from this verse, but from the requirement of cleanliness for prayer. See QUR'AN 5:6. For that reason, many scholars argue that prayers and fasts made during menstruation are invalid, and there is consensus that fasting must be required. However, the overwhelming justification behind recusal from fasting, prayer, or performance of sexual labor is often considered to be women's health concerns. This is further supported by the fact that there is no issue of cleanliness when it comes to fasting, though it is because of menstruation that women are given dispensation. See Daniele Selby, *Muslim Women Are Over Period Shaming During Ramadan*, GLOBAL CITIZEN (May 30, 2018), <https://www.globalcitizen.org/en/content/period-shame-ramadan-twitter-menstruation/>.

choice and sidestepping the issue of reinforcing the separate spheres ideology.

As with the near-complete dispatch of the right of a woman to provisions from her husband, so goes with it the right of a man to advise his wife. This latter right of men taints the majority of women's marital rights as one might say it serves as the basis for the asymmetrical rights paradigm. Under this paradigm, a woman receives provisions from her husband in exchange for her submission. As a result of this asymmetrical relationship, he gains the right to advise and even discipline her.<sup>178</sup> Thus, when it comes to Islamic rights colored by sexual equality—though by all accounts, women and men should, in a sense, have joint tenancy over these rights<sup>179</sup>—women are reduced to mere beneficiaries of our own rights with our husbands as their trustees. Let us look at how the loss of men's right of advice affects women's surviving marital rights and what other ways they need be improved.

There are several marital rights that, when no longer confronted by the *nafaqah-tamkin* trade-off relating to the right to provisions from one's husband, fall out of the asymmetrical rights paradigm. These are rights that women and men share in equal measure, which have unfortunately been impacted by patriarchy, the separate spheres ideology, and the gender binary. They include the right to property ownership, the right to express one's opinion, the right to negotiate for a marriage of one's choice, and the right of remarriage. Though the asymmetrical rights paradigm enforces the asymmetry of the unequal enjoyment of these rights within Islamic law, which is subsequently incorporated into states' positive laws, it is important to remember that patriarchal societies themselves contribute to this asymmetry. This is backed up by the fact that Islam was introduced at a time when patriarchy was present and mounting in medieval Arabian society, hence the need for the historical contextualization method of Islamic jurisprudence. This sort of latitude afforded to men in their enjoyment of these rights is otherwise unfounded. Patriarchy is the way of the world, and under Islamic patriarchy, men are considered to be the overseers of women,

---

178. Though there is textual support for a man to discipline his wife, QUR'AN 4:34, there is significant debate as to what this entails within *shari'a*. There is also significant linguistic debate around the meaning of this word, "وَأَضْرِبُوهُنَّ." QUR'AN 4:34. Recall that the Qur'an was delivered over a thousand years ago and remains unchanged. Undoubtedly, the medieval meanings of some words have been lost.

179. As women and men were created by Allah (SWT) from the same human soul, see *The Story Of Adam and Eve*, MASJID AL-MUSLIMIIN, [https://www.almasjid.com/content/story\\_adam\\_and\\_eve](https://www.almasjid.com/content/story_adam_and_eve) (last accessed Feb. 22, 2023); see also QUR'AN 4:1, it can be said that they came into their equally-shared rights at the same time and through the same title. Furthermore, they would both have the right to the possession of the whole of each right in equal, undivided shares.

affording them the license to influence their wives' control over their own property or inhibit their remarriage. However, under the model of socialist feminism, as we move to destroy the separate spheres of social life and gender essentialism, there must be a recognition of these rights that reflects the *'amm* ideal of sexual equality. Furthermore, without the gender binary, there is no need to distinguish between who exercises any of these rights. Thus, equal rights can be enjoyed easily by either sex.

The right of property ownership is meant to be enjoyed by women and men on equal grounds. However, as a result of the asymmetrical rights paradigm, men are granted a controlling interest over their wives' property that they should otherwise not enjoy, and this has been true throughout history. In Ottoman Aleppo, though women enjoyed their rights to property and inheritance, they often were unable to exercise significant control over their own property due to economic, familial, or social pressures.<sup>180</sup> In modern-day Jordan, a Muslim-majority state that has Islamic law incorporated into its civil code, though a woman enjoys the right to purchase a car or a house, she often may not do so without the permission of a close male relative, thus impacting equal enjoyment of the right to property ownership.<sup>181</sup> Already, given the efforts of Islamic feminist movements, this practice is beginning to change, though progress is slow.<sup>182</sup> However, if a given society was to dispatch the idea that men may *advise* women on property ownership and management, the trend would likely shift a lot faster, ultimately culminating in an equal share of property as between women and men in said society.

The right to express one's opinion is another right that women share equal to men. However, much like with the right to property ownership, due to unfair cultural practice, women are often precluded from full enjoyment of this right. Take, for instance, advocacy around sensitization projects regarding women's rights in Muslim-majority regions of Nigeria.<sup>183</sup> The sensitization theory of dialogic democracy requires dialogue within communities that challenges domination and oppression whilst simultaneously encouraging the state recognition, empowerment, and

---

180. Margaret L. Meriwether, *The Rights of Children and the Responsibilities of Women: Women as Wasis in Ottoman Aleppo*, in *WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY* 219, 220 (Amira El Azhary Sonbol ed., 1996).

181. See *'Women's property ownership increases, but still lags behind men's'*, THE JORDAN TIMES (Feb. 20, 2017), <https://jordantimes.com/news/local/women%E2%80%99s-property-ownership-increases-still-lags-behind-men%E2%80%99s-%E2%80%98>.

182. *Id.*

183. See Aniekwu Nkolika Ijeoma, *The Convention on the Elimination of All Forms of Discrimination Against Women and the Status of Implementation on the Right to Health Care in Nigeria*, 13 HUM. RTS. BRIEF 34 (2006).

accommodation of women.<sup>184</sup> This model allows for societal change to occur by giving a woman the resources to secure a platform and advocate for her rights within her own community. Projects such as these are slow-going, due in part to the customary reluctance of male community leaders to give women a platform to speak in spite of the teachings of Islam. Within a marriage, this right usually comes out in the control of the house, which is made discordant by the *nafaqah-tamkin* trade-off. The trade-off makes men the masters of the finances and gives them the right to advise their wives, despite the fact that under the separate spheres ideology, women's domain is the home. Just as with the right to property ownership, when one applies a socialist feminist critique, this right no longer falls under the purview of the *nafaqah-tamkin* trade-off and the asymmetrical rights paradigm. Upon gaining sexual equality and being freed from the private sphere, women enjoy this right equal to men and have just as much license to determine how their shared household should be run.

The right to negotiate for a marriage of one's choice is made up of three lesser rights, each of which is impacted in some part by the dispatch of the *nafaqah-tamkin* trade-off. The first lesser right is the right to choose a particular spouse. This right first requires giving one's consent to a marriage, an aspect of this right that, as Musawah addresses, is sometimes denied to women according to cultural custom.<sup>185</sup> This custom does not comport with Islamic law, as is explicitly noted in several sources of Islamic jurisprudence, including *ijmā* and the Sunnah,<sup>186</sup> and, indeed, any respectable Islamic scholar would decry this practice. Moreover, though the *nafaqah-tamkin* trade-off does not apply directly here, there being no husband as a woman is still *considering* marriage, patriarchy's general proposition that men should direct women interferes with women's ability to properly enjoy this aspect of the right to choose a particular spouse. If society was to disregard this gender essentialist view of men's role in certain societies—namely, choosing a spouse on the part and potentially over the objections of their close female relatives—and adhere to Islamic law, Muslim women would no longer fall victim to the deprivation of this aspect of the right to choose a particular spouse.

Another aspect of the right to choose a particular spouse is what sort of person one may choose according to *shari'a*. Recall that in *Surah Al-Baqarah*,<sup>187</sup> in discussing the acceptable spouses for a Muslim, the Qur'an

---

184. Susan H. Williams, *Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption*, 18 IND. J. GLOB. LEGAL. STUD. 65 (2011).

185. MUSAWAH, *supra* note 104, at 33.

186. SUNAN IBN MAJAH, HADITH 9:27.

187. *Surah al-Baqarah* is the second and longest chapter of the Qur'an, meaning Chapter of the

specifically denotes “believers” for both women and men.<sup>188</sup> Recall, too, that though these words are used in regard to both women and men, Muslim women are constrained to marriage with only Muslim men. By contrast, Muslim men enjoy the right to marry women of any Book, whether it be the Qur’an, the Torah, or the Bible. Under a socialist feminist critique, this interpretation of the right to negotiate a marriage of one’s choice easily falls short of the goal of sexual equality and, indeed, common sense. Similarly, it is only in *qiyās*, and consequently, *ijmā*, that the traditional *fiqh* interpretation comes out.<sup>189</sup> *Ahadith* speak only of marrying “religious” women and make no mention of any particular faith.<sup>190</sup>

Some try to rationalize this interpretation with the claim that it is because men are meant to *advise* their wives, per *Aya* 4:34, that it is important for a Muslim woman to marry a Muslim man, whereas the concerns underlying that idea do not subsist for a Muslim man. Essentially, because men are the “overseers” of women,<sup>191</sup> only a Muslim man can properly advise a Muslim woman according to the teachings of Islam. Similarly, a Muslim man would do well to advise non-Muslim women, perhaps encouraging their conversion to Islam. This is an improper interpretation as, given equal enjoyment of the right to express one’s opinion and the destruction of the *nafaqah-tamkin* trade-off under the tawhidic paradigm, a man’s advice is no better than that which a woman can give to herself or her non-Muslim husband. Thus, this discord is satisfied either by permitting Muslim women to wed Jewish, Christian, and Muslim men, or by permitting Muslim men to wed only Muslim women.

Next, the dower right will likely need be dispensed with, as well, much like the right to provisions from one’s husband. If a woman’s financial independence depends not upon her husband, but rather upon herself and the security afforded by an equitable society, it stands to reason that he need not supply her with *mahr*. Once the separate spheres are abolished and there exists sexual equality, women would have no more need of a safety net than would men. Thus, Islam’s requirement for it would give way.

In accordance with this critique, the gift of permission—the conditional right of a woman to permit or forbid her husband from wedding another woman during their own marriage—may be addressed by a split approach. At the very least, the gift of permission should be totally respected. This would mean that a man should not take a subsequent wife, whether in secret

---

Cow.

188. QUR’AN 2:221.

189. See Pujianti, *supra* note 126.

190. SUNAN IBN MAJAH, HADITH 9:14-15.

191. QUR’AN 4:34.

or openly, without his present wife's consent, as some men currently do.<sup>192</sup> Islam implicitly forbids secretive marriage as it goes against the '*amm* principle of justice.<sup>193</sup> The relevant verse requires that a man treat each of his wives *justly*, and that if he cannot, he should not take multiple wives concurrently. As aforementioned, Islamic justice contains within it the '*amm* principle of equality. This implies that if a man cannot treat each of his wives *equally*, he should not take multiple wives concurrently.<sup>194</sup>

A more stringent approach under this critique would be to forbid the practice of polygyny altogether. Musawah's critique relating hereto, like the first approach explored in this Note, relies on Qur'anic exegesis.

If you fear that you shall not be able to treat the orphans with fairness, then marry other women of your choice: two, three or four. But if you fear that you will not be able to maintain justice *between your wives*, then *marry* only one or any slave girl you may own. That will be more suitable, so that you may not deviate *from the Right Way*.<sup>195</sup>

Again, the idea of promoting justice as being one of the purposes of Islam is supported by this verse, and equality is a very important piece of justice. One could argue that treating any two, three, or four people *equally* is strictly impossible.<sup>196</sup> It is human nature, after all, to pick favorites.<sup>197</sup> It therefore stands to reason that given the greater call to adhere to such important '*amm* principles as equality and justice, the voluntary practice of polygyny, as propounded by the Qur'an, might be considered technically impossible and thus better left by the wayside.

Additionally, using the historical contextualization method, one can appreciate the reasons for which the practice of polygyny was preserved in the Qur'an. Islam was introduced first to the Arabs. As a result of the practice in pre-Islamic Arabia of men taking dozens of wives, many of whom they neglected, this modified practice of polygyny was prescribed to give women more dignity and allow us to be treated with justice. The practice of polygyny at the time was also justified by the frequent

192. Zainab bint Younus, *Husband Wants to Keep His Second Marriage in Secret: I Feel Angry*, ABOUTISLAM (Jul. 5, 2021), <https://aboutislam.net/counseling/ask-the-counselor/polygamy/husband-wants-to-keep-his-second-marriage-in-secret-i-feel-angry/>.

193. *See id.*

194. Rajab Abu Meleeh, *Having a Second wife Abroad*, ISLAMONLINE, <https://fiqh.islamonline.net/en/having-a-second-wife-abroad/#:~:text=Yes%2C%20it%20is%20permissible%20for,giving%20both%20wives%20equal%20rights> (last accessed Feb. 25, 2023).

195. QUR'AN 4:3.

196. *See* MUSAWAH, *supra* note 104, at 34.

197. Haoying Xu, Jingzhou Pan, & Xiaotong Zheng, *The Upsides of Playing Favorites*, HARVARD BUSINESS REVIEW (Jul. 28, 2022), <https://hbr.org/2022/07/the-upside-of-playing-favorites>.

occurrence of war in the region, leaving many women as widows without the means to provide for themselves.<sup>198</sup> Thus, Musawah and this Note posit, now that women are on more equal footing with men, there is no need to continue this practice.

This split approach could allow for a happy middle, not allowing for the practice of polygyny as it is observed now but permitting a practice of polygamy in which all partners enjoy their marital rights equally under a symmetrical rights paradigm. In essence, though there could exist a polygynous marriage wherein the women in the marriage are not wedded to each other as they are wedded to the man in the union, it would not be polygynous in nature. This would mean that should a woman choose to bring on another spouse for herself, she would have leave to do so should her current husband permit it with his own gift of permission.<sup>199</sup> Furthermore, recall that this Note contains a socialist feminist critique that has been queered. It will thus explore the potential of polygamous Muslim marriage under a queer lens in Section Six.

The final right that, *on its face*, does not suffer from the asymmetrical rights paradigm is the right of remarriage. Remarriage does not appear to be impacted by this paradigm as at the time when one typically contemplates remarriage, one does not have a husband. Rather, one merely has the intention to pursue a new marriage following the conclusion of a previous marriage. No *nafaqah-tamkin* trade-off presently exists. Nevertheless, the impact of the asymmetrical rights paradigm on the right of remarriage becomes apparent when one considers the effects of the right to divorce. Because divorce is elusive for women in Islam, it is often difficult for women to get to the point of remarriage, which is easy for us to attain where a divorce is not. Even when allowed a divorce, a former husband may still create obstacles for a woman, demanding the return of *mahr* or trying to lower any maintenance provisions that he is obliged to give her.<sup>200</sup> These practices, however, are impermissible given the verse that describes *talaq*. When dissolving the marriage tie, it is “not lawful for [a husband] to take anything back which [he has] given [his wives].”<sup>201</sup> Thus, this form of coercion, pressuring a former wife to remain unmarried, is impermissible.

The *’idda* period also interferes with the equal enjoyment of this right as between women and men. Though it merely presents a delay to remarriage in most cases, this hardly comports with sexual equality. Moreover, the

198. MUSAWAH, *supra* note 104, at 34.

199. The feasibility of this approach is tremulous, as one might wonder how wide a web any group of intermarried persons could spin.

200. Ivanova, *supra* note 143, at 124; *see also* BUCKLEY, *supra* note 10, at 214-15.

201. QUR’AN 2:229.



reasoning behind the *'idda* period—that in case of a pregnancy, a man who has completed a divorce against his wife should be able to take her back—aligns with gender essentialist rhetoric, namely that it is the natural duty of women to provide men with children.<sup>202</sup> Furthermore, should a pregnancy result within this period, the woman's rights of both remarriage and divorce would be hindered. For the foregoing reasons, one might argue that the *'idda* period should be dispatched. At the very least, it should be shortened. No longer do we live in a time when warmth or coldness determined the sex of a fetus.<sup>203</sup> Pregnancies can be determined far earlier than three months, with some definitively detected as early as four weeks.<sup>204</sup> Thus, as soon as a pregnancy test might return an accurate result, the *'idda* period should conclude.

However, this is too demanding of a woman under socialist feminism. It impinges on her right to equality, as well as reinforces both gender essentialism and the separate spheres ideology by keeping her tied to a given man for the purpose of giving him children regardless of any wishes she may have to be free of him. Another justification of the *'idda* period lurks within the reasoning underlying the unequal right of a woman to custody of her children: a man should not have to raise another man's child. This is an antiquated idea and one that certainly reinforces the ideals of gender essentialism. We need not live under the standards of proper conduct deriving from seventh-century Arabia any longer. Thus, this reasoning should not preclude a woman from remarriage to a man who is not the father of her forthcoming child, especially considering that this child was not conceived out of wedlock. It is worth noting that waiting periods exist for non-menstruating women,<sup>205</sup> as well, seemingly only for the purpose of allowing a man to reconsider his decision to complete a divorce against his wife. This gives a man far too much latitude over his former wife and impinges on her right to a marriage of her choice. Though she is already divorced, her consent to recommence the marriage is irrelevant, and the matter rests alone on the man's inclinations. This veneration of men's decision-making reeks of paternalism, and as we have dispatched the *nafaqah-tamkin* trade-off, it deserves no place in a socialist feminist conceptualization of Muslim marriage.

---

202. *Feminist Perspectives on Reproduction and the Family*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 21, 2013), <https://plato.stanford.edu/entries/feminism-family/>.

203. Sara Verskin, *Barren Women: The Intersection of Biology, Medicine, and Religion in the Treatment of Infertile Women in the Medieval Middle East* 169 (Nov. 2017) (Ph.D. Dissertation, Princeton University) (on file with Mudd Manuscript Library at Princeton University).

204. *How Soon Can You Tell You're Pregnant?*, CLEVELAND CLINIC (Sep. 28, 2022), <https://health.clevelandclinic.org/how-early-can-you-tell-if-you-are-pregnant/>.

205. QUR'AN 65:4.

The potential loss of the custody of one's children is another deterrent for remarriage for women, as the children's father would, most likely, automatically have the right to custody under Islamic law. However, given how the rights of divorce and custody for women might be reshaped under a socialist feminist critique, these problems should wash away, and remarriage should be as easy for women to contemplate as it is for men.

The remainder of this socialist feminist critique addresses rights that are plainly asymmetrical under even the most generous readings of sources of Islamic jurisprudence. These include the right of inheritance, the right of divorce, and the right of custody of one's children. An Islamic feminist interpretation of these rights demands a greater adherence to *'amm* principles of equality, justice, and revolution.

The right of inheritance, under the reformist view touted by Islamic feminists, is already moving in the right direction towards emulating the ideals of socialist feminism. Advocating for sexual equality and acknowledging that the line between the public and private spheres is not so thick as it once was, groups like Musawah argue for a more equitable distribution of inheritance in light of the evolutionary spirit of Islam. Under this critique, which has dispensed with husbands' obligation to financially support the family, there is simply no need for anything but a completely equal distribution of inheritance.

The right to divorce is still largely skewed towards men. Most divorces performed today are *khul'*, or mutual, divorces. Nevertheless, they frequently turn on the husband's performativity, at least in religious courts. As with the decision of a man to take back his former wife during an *'idda* period, the idea that the ability—and, indeed, the *decision*—to execute divorce lies only with men is unjustifiable given the ideal of sexual equality and the dispatch of the *nafaqah-tamkin* trade-off. There is no defensible reason that this power should lie solely with men if women and men are equal beings, which Islam long recognizes.<sup>206</sup> Additionally, allowing the sole power of decision-making—executing a divorce or taking back a former wife during her *'idda* period—to lie with men violates the tawhidic paradigm. Essentially, this makes women subservient to our husbands, whereas we should be subservient only to Allah (SWT). Therefore, either both women and men should possess no-fault performativity, or neither should.

As with the right of divorce, the right of custody of one's children lies principally with men, conforming completely to the asymmetrical rights paradigm. This right is perhaps one of the most unequal rights as between

---

206. See *supra* note 179.

the sexes, save for the right of divorce. It is a very limited right. One might say that it can only be considered a right in the sense that it is better than having no entitlement to one's children whatsoever. The right of custody is predicated—much like the right of men under traditional *fiqh* interpretations of the right to negotiate a marriage of one's choice that he be permitted to wed non-Muslim, monotheistic women—on the patriarchy's general proposition that men are leaders, and thus it should be they who lead the next generation. So does the justification for this right rely on the gender essentialist view of a man as the protector, and thus it is he who can best protect his children. Similarly, under the *nafaqah-tamkin* trade-off, man is the provider, and thus it is he who can best provide for his children. These views, again, are antiquated and should have no bearing on the enjoyment of our rights in the post-modern era and certainly not in the socialist feminist future. In light of the evolutionary essence of Islam and the destruction of the separate spheres ideology under this socialist feminist critique, the right of custody of one's children should be enjoyed equally as between women and men.

In conclusion, under a socialist feminist critique of women's marital rights in Islam, it is apparent that most of these rights are compatible with socialist feminism with only minor tweaking necessary. Rather than dispensing with them entirely, there simply<sup>207</sup> need exist a society that does not aim to construct separate private and public spheres. Once women are no longer beleaguered by our dual responsibilities and the inequalities that stem therefrom, we can enjoy substantive sexual equality. With that equality and liberation will thus come equal enjoyment of marital rights as between women and men, as well as a more equal share in obligations.

#### VI. THE FEASIBILITY OF MUSLIM SAME-SEX MARRIAGE UNDER THE SOCIALIST FEMINIST CRITIQUE

While there is overwhelming consensus within *ijmā* that same-sex relations are not compatible with the teachings of Islam,<sup>208</sup> this idea is not without contest. There exists a body of queer Islamic jurisprudence that theorizes not only as to whether Muslim same-sex relations and marriage are permissible—they are—but as to the degree of their feasibility. This Note seeks to do the same, focusing primarily on the latter inquiry.

---

207. Theoretically simply, of course. In practice, demolishing patriarchy and capitalism has been and will be a centuries-long effort.

208. Aleardo Zanghellini, *Neither Homophobic nor (Hetero) Sexually Pure: Contextualizing Islam's Objections to Same-Sex Sexuality*, in 2 ISLAM AND HOMOSEXUALITY 269, 273 (Samar Habib ed., 2010).

Ultimately, it finds that Muslim same-sex marriage is exceptionally feasible under the socialist feminist model.

#### *A. The History of Same-Sex Relations in the Muslim World*

It is often thought that same-sex relations are inherently repugnant to Islamic thought, by both non-Muslims and Muslims alike. However, this is hardly the case. The wave of homophobia that colors modern Islamic thought began in the nineteenth century, following the start of another wave of European colonialism. During this period, imperialists observed rife homosexual activity in Southwestern Asia and postulated homosexuality to have been invented in the region and spread from there.<sup>209</sup> During the later colonization of Southwestern Asia by European powers, conformation to Western sexual ideals was a centerpiece of the colonial strategy, resulting in widespread homophobia and pressure on women to display more modesty. Both of these pernicious effects persist today.<sup>210</sup>

In spite of recent history, many early Islamic scholars were remarkably supportive of homosexuality. Take Yahya bin Aktham, for instance, a ninth-century Islamic scholar from Baghdad. As a jurist, he condemned fornication but favored homosexuality.<sup>211</sup> In particular, homosexual behavior between women was viewed favorably. Ahmad Ibn Yusuf Tifashi, a thirteenth-century scholar from Tunis, found such behavior tolerable and said that wise men considered *grinding* a natural desire of women.<sup>212</sup>

Literature from the Islamic Golden Age also sheds a tremendous amount of light on the acceptance of homosexual behavior throughout Islamic history. Arab literary tradition during the time of the Abbasid Empire discussed sexuality liberally.<sup>213</sup> There was a great deal of erotic poetry during the Islamic Golden Age, accompanied by stories of great love.<sup>214</sup> Poets spoke of the female grinders, or *tharifa*, who found more pleasure in sex with women than with men. There were the grinders who did not hate the penis, as well as grinders who resembled men from birth.<sup>215</sup> The former grinders might be considered bisexual women today. The latter description of grinders might have been simply of lesbians, or of gender-nonconforming

209. SAMAR HABIB, ARABO-ISLAMIC TEXTS ON FEMALE HOMOSEXUALITY, 850-1780 A.D. 20 (2009); see also Zanghellini, *supra* note 208, at 273.

210. MIR-HOSSEINI, *supra* note 99, at 23-25.

211. HABIB, *supra* note 209, at 17.

212. HABIB, *supra* note 209, at 26.

213. See THE ARABIAN NIGHTS (Richard F. Burton trans., 2009) (n.d.).

214. See HAYĀT ABĪ AL-FARAJ AL-ĀSFĀHĀNĪ, KITĀB AL-AGHĀNĪ: DIRĀSAH NAQDIYAH TAHLĪLIYAH LIL-RIWĀYĀT AL-TĀRIKHĪYAH FĪ KITĀB AL-AGHĀNĪ (Muḥammad ‘Abd al-‘Āl ed., 2021) (n.d.).

215. HABIB, *supra* note 209, at 42.

persons with female reproductive organs.

*B. Present-Day Considerations of Muslim Same-Sex Relations and Marriage*

Despite the overwhelming agreement amongst Islamic scholars that homosexual relations are forbidden, there are scholars who advocate for a more tolerant approach to the issue.<sup>216</sup> Historian Khaled El-Rouayheb, for instance, argues that Islam could not have proscribed *homosexuality* because homosexuality is a nineteenth-century Western construct.<sup>217</sup> British academic Barbara Zollner also challenges the widely-held idea that Islam and Islamic law condemn homosexuality.<sup>218</sup> She writes that because Islamic law is the interpretation of *shari'a* by proper Islamic jurists,<sup>219</sup> like *sheikhs*, *muftis*,<sup>220</sup> and *imams*, it is only the establishment that shapes Islamic law. This excludes *ijtihad* from modern discourse, thereby precluding reformist views—as with Islamic feminism—from shaping Islamic law.<sup>221</sup> Furthermore, the establishment to which modern Islamic jurists belong largely denies innate sexual orientation,<sup>222</sup> a view that has been shown to promote acceptance of homosexuality in Muslim-majority states.<sup>223</sup>

Insofar as same-sex Muslim marriages go, as they already exist,<sup>224</sup> scholars who are generally tolerant of homosexual behavior have conflicting views as to how to proceed regarding the marriages' permissibility. Some argue that there is no need for same-sex couples to wed as procreation cannot be a possible goal of the marriage, and procreation is one of the foremost reasons for marriage. Others say that there is simply no

216. See SCOTT SIRAJ AL-HAQQ KUGLE, *HOMOSEXUALITY IN ISLAM: CRITICAL REFLECTION ON GAY, LESBIAN AND TRANSGENDER MUSLIMS* (2010).

217. KHALED EL-ROUAYHEB, *BEFORE HOMOSEXUALITY IN THE ARAB-ISLAMIC WORLD, 1500-1800* (2005).

218. This Note will not discuss at length homosexuality as this model for sexual conduct and queerness are Western constructs. There is an incongruity between homosexuality and homosexual behavior that exists in Muslim societies prior to and following the advent of homosexuality. 1 SAMAR HABIB, *Introduction: Islam and Homosexuality*, in *ISLAM AND HOMOSEXUALITY* xvii (2010); see also EL-ROUAYHEB, *supra* note 217.

219. See Barbara Zollner, *Mithliyyun or Lutiyyun? Neo-Orthodoxy and the Debate on the Unlawfulness of Same-Sex Relations in Islam*, in 1 *ISLAM AND HOMOSEXUALITY* 193 (Samar Habib ed., 2010).

220. A *mufti* is a Muslim legal expert who is empowered to give rulings on religious matters.

221. Zollner, *supra* note 219, at 197.

222. Zanghellini, *supra* note 208, at 272.

223. Statistics in Muslim-majority countries show that those more likely to be accepting of homosexuality are those in the 15-24 age group and those with mid-level education, with Malaysia and Mali having highest rates of acceptance. Tilo Beckers, *Islam and the Acceptance of Homosexuality: The Shortage of Socioeconomic Well-Being and Responsive Democracy*, in 1 *ISLAM AND HOMOSEXUALITY* 57, 83 (Samar Habib ed., 2010).

224. See Antepi, *supra* note 5.

need to bar same-sex marriages as Muslims in such marriages can behave just as piously as Muslims in opposite-sex marriages.<sup>225</sup> There are various obstacles to either of these approaches, relating foremost to whether homosexual relations are acceptable under Islam at all.

The first obstruction is a verse in the Qur'an that supposedly forbids same-sex relations, though there is debate as to whether it addresses the issue at all.<sup>226</sup>

The people of Lût (*Lot*), also, disbelieved the Rasools. Remember when their brother Lût asked them: "Have you no fear of *Allah*? Rest assured that I am a trustworthy Rasool of *Allah* towards you. So fear *Allah* and obey me. I do not ask you for any reward for my services, for my reward will be given by the Rabb of the Worlds. will you fornicate with males from among the creatures of the worlds and leave those whom your Rabb has created for you to be your mates? Nay! You are a people who have transgressed all limits." They replied: "If you do not stop, O Lût, you shall become one of the expelled." Lût said: "I am certainly one of those who abhor your actions. O my Rabb! Deliver me and my family from their wicked deeds." So we delivered him and all his family except an old woman who was left among those who remained behind. Then we utterly destroyed the rest. We rained down on them the rain of *brimstones*: and evil was the rain which fell on those who were forewarned. Surely, in this story there is a great lesson, but most of these people do not learn a lesson and become believers. Surely, your Rabb is the One Who is the All-Mighty, the Most Merciful.<sup>227</sup>

The Story of Lut, contained in the above *Aya*, is the only verse in the Qur'an that seems to discuss homosexual relations. Every other verse in the Holy Book describes and addresses opposite-sex relations. Ibn Hazm, an eleventh-century jurist, proclaimed that the Story of Lut was a condemnation of infidelity, not homosexual behavior.<sup>228</sup> In analyzing it, Ibn Hazm's focus was on the word "fornicate," which he did not believe to be referring to homosexual behavior.

Modern scholars also challenge the prevailing reading of this verse, claiming that, in truth, it condemns pederasty, rape,<sup>229</sup> or other behavior.

---

225. Zanghellini, *supra* note 208, at 269.

226. Scott Siraj al-Haqq Kugle, *Sexuality, Diversity, and Ethics in the Agenda of Progressive Muslims*, in PROGRESSIVE MUSLIMS: ON JUSTICE, GENDER AND PLURALISM 190, 200-03 (Omid Safi ed., 2003).

227. QUR'AN 26:160-75.

228. HABIB, *supra* note 209, at 17.

229. Zanghellini, *supra* note 208, at 276, 285.

Legal theorist Aleardo Zanghellini, for instance, posits that the verse only proscribed anal sex between two men as it was deemed subordination per the patriarchal standards of the time. Thus, under the historical contextualization method, it no longer need be considered undesirable so long as men retain their masculinity in spite of being penetrated.<sup>230</sup> Furthermore, considering that the Story of Lut is the only verse in the Qur'an that *conceivably* addressed same-sex relations, and during a time that so far preceded the introduction of Islam,<sup>231</sup> under the intratextual method of Qur'anic exegesis, the verse may be considered a weak prohibition on same-sex relations. Surely, as many queer Islamic scholars profess,<sup>232</sup> if Islam had meant to *forbid* same-sex relations, the Qur'an would have stated so explicitly.

There *is* mention of homosexual behavior within *ahadith*, though not the Sunnah. The Prophet Muhammad (PBUH) never addressed the issue of same-sex relations, and thus he certainly never proscribed it. The earliest mention of sexual diversity is from a *hadith* with weak *isnad*,<sup>233</sup> narrated by Ali Ibn Abi Talib.<sup>234</sup> Presented with two men accused of homosexual behavior, with no guidance from the Prophet (PBUH) or any Holy texts, Ali ordered that the men be thrown from a rooftop and followed by rocks. Unfortunately, this *hadith* has stood as the justification for modern-day condemnation of and punishment for homosexuality. Furthermore, there are other, weaker *ahadith* addressing sexual diversity, both of which follow Ali Ibn Abi Talib's edict. A severed *hadith* described grinding as the fornication of two women, as was allegedly proclaimed by the Prophet (PBUH).<sup>235</sup> The Doer and the Done *hadith* claimed that both men involved in a homosexual act were to be executed, again allegedly by proclamation of the Prophet (PBUH).<sup>236</sup> Given the weak *isnad* and *matn* of these three *ahadith*, queer Islamic scholars regard them with little deference.

With the issue of sexual diversity out of the way, we turn to gender diversity. Gender diversity was possibly mentioned in the Qur'an. In *Surah an-Nur*, reference is made to "male attendants who lack sexual desires."<sup>237</sup>

---

230. Zanghellini, *supra* note 208, at 277-84.

231. The Story of Lut is also featured in the Bible and the Torah. It is worth noting that in early versions of these texts, it is suggested that the relations forbidden are those between a man and a *boy*, not two men. This reinforces the reading of the Story of Lut that forbids pederasty. HABIB, *supra* note 209, at 19.

232. See HABIB, *supra* note 209, at 16.

233. HABIB, *supra* note 209, at 16.

234. Ali Ibn Abi Talib was the leader of Islamic *umma* at the time of his narration, which did not draw from the Qur'an or Sunnah.

235. HABIB, *supra* note 209, at 16.

236. HABIB, *supra* note 209, at 16.

237. QUR'AN 24:31; cf. Kugle, *supra* note 226.

This most likely refers to eunuchs, of whom there is a rich tradition within Islamic history.<sup>238</sup> Furthermore, gender diversity was considered by the Prophet (PBUH). The source used for condemnation of gender queerness is a *hadith* from the time of the Prophet (PBUH). The traditionalist text reads:

Ibn Abbas reported: The Prophet, peace and blessings be upon him, cursed men who imitate women and women who imitate men.

In another narration, Ibn Abbas said: The Prophet cursed men who copy women and women who copy men.<sup>239</sup>

This is an abridged version of this *hadith*, however, descended from the full, unperverted story:

There is another *hadith* that speaks about an effeminate man in the home of Um Salma. In this *hadith*, the prophet bans the effeminate man from entering into the women's quarters as he was previously permitted to do. The reason the prophet rejected him was because he was able to give a sexualizing description of one of the women to whom he was privy in her private quarters. It is obvious the prophet turned away this man not for his gender atypical behaviors, that is, his effeminacy, but rather for his heterosexualization of a woman to another heterosexual man.<sup>240</sup>

Given the strong *isnad* of both *ahadith* and the stronger *matn* of the original *hadith*, the vendetta against gender queerness within Islamic jurisprudence defies reason. It is clear from a reading of the original version of the *hadith* that the Prophet Muhammad (PBUH) understood gender diversity and regarded it without scorn. Thus, the transphobic arguments that tout the derivative *hadith* are very weak.

Therefore, given the limited address of sexual and gender diversity within Islamic sources, there is no reason to believe that such diversity is proscribed. Furthermore, the activities that result from having a diverse sexual or gender identity should not bear with them some sin, as this would unnecessarily condemn a not insignificant portion of the global population.<sup>241</sup>

---

238. See SHAUN ELIZABETH MARMON, *EUNUCHS AND SACRED BOUNDARIES IN ISLAMIC SOCIETY* (1995).

239. SAHĪH AL-BUKHĀRĪ, HADITH 6445.

240. HABIB, *supra* note 209, at 18.

241. Through a 27-country survey, Ipsos has gleaned that millions of people self-identify as being diverse in terms of sexuality and/or gender. *LGBT+ Pride 2021 Global Survey*, IPSOS, [https://www.ipsos.com/sites/default/files/ct/news/documents/2021-06/LGBT%20Pride%202021%20Global%20Survey%20Report\\_3.pdf](https://www.ipsos.com/sites/default/files/ct/news/documents/2021-06/LGBT%20Pride%202021%20Global%20Survey%20Report_3.pdf), (last accessed Feb. 26, 2023).



*C. The Future of Muslim Same-Sex Marriage Under a Socialist Feminist Model*

Assuming that there is no general ban on sexual or gender diversity, as discussed above, the very paradigm of Islamic marital rights remains as an obstacle to same-sex unions.<sup>242</sup> The primary conflict between the asymmetrical rights paradigm and the feasibility of same-sex marriage lies within the gender binary. Islamic marital rights are clearly split between women and men, portraying the embrace of the gender binary by *shari'a*.

This Note applies a socialist feminist critique that decries the gender binary and the asymmetrical rights paradigm's gender essentialist underpinnings. Thus, when these rights are applied to women and men in equal measure, as explored above, there should be no issue in applying them in female-female or male-male marital relations. With the inception of sexual equality and a dispatch of the separate spheres ideology, women and men would share full, equal enjoyment of all Islamic marital rights. The right to property ownership, the right of inheritance, the right to express one's opinion, and the right to negotiate a marriage of one's choice, to start, would pose no issue within a same-sex marriage. Furthermore, without the *nafaqah-tamkin* trade-off, there would exist no need for a woman to have a man to advise her, thus allowing her to marry a woman without conflict. So, too, would there be no issue with financial obligations. If either spouse, female or male, need contribute to the household through outside earnings, this would remain true within same-sex marital relations.

The feasibility of rights relating to the termination of marriages is also significant. As already discussed, the right of divorce is important in Muslim marriages. Under the socialist feminist critique, the right of divorce would be shared equally, meaning that either both women and men would have no-fault performativity, or that neither would. Under the former possibility, the gender of either spouse would be irrelevant as to the right of divorce. Thus, same-sex married couples would enjoy this right just as would opposite-sex married couples.

Let us also explore the latter possibility of a marriage in which neither spouse possesses performativity. If a spouse, female or male, wished to terminate their marriage without their spouse's consent, they would need cause in a religious court. Under this model, it is unlikely that infertility could serve as a reason for divorce for same-sex couples as it would not have been an expectation of the marriage from the union's inception. This

---

242. Jonathan AC Brown, *Muslim Scholar on How Islam Really Views Homosexuality*, VARIETY (Jun. 30, 2015, 12:30 PM), <https://variety.com/2015/voices/opinion/islam-gay-marriage-beliefs-muslim-religion-1201531047/>.

is clear when looking to the model of opposite-sex marriage. Suppose a man, for instance, enters into a marriage with a woman who he knows to be incapable of procreation. He cannot at a later date claim infertility as the reason for a divorce as he was aware at the undertaking that the two could not have biological children together.<sup>243</sup> Similarly, a man who marries a woman who has already undergone menopause cannot later sue for divorce on the ground of infertility as he would have known that no biological children could result from the marriage.<sup>244</sup> Furthermore, it is often considered the duty of a husband to take care of his elderly wife and dishonorable for him to abandon her. Other causes for divorce, like insanity and abuse, do not relate to biological sex and reproduction. Thus, it stands to reason that they would be applied just the same to same-sex marriages as they would to opposite-sex marriages under the socialist feminist model.

Regarding the right of remarriage, it could also be enjoyed equally as between spouses within same-sex marriages. That said, there would remain some obstacles to the full enjoyment of this right as between the sexes. A cisgender man who wishes to marry solely other men would face no difficulty in attaining remarriage. However, a cisgender woman going from a female-male marriage to a female-female marriage may face some issue. A reading of the socialist feminist critique that is generous to traditional *fiqh* would shorten the *'idda* period but nevertheless preserve it. Thus, such a woman may need wait to remarry until she can determine that she is not pregnant by her former husband. This issue can be replicated with transgender and gender-nonconforming individuals, so long as an individual with female reproductive organs was previously married to an individual with male reproductive organs.

The right of custody of one's children would also be enjoyed equally as between same-sex spouses as it would be as between opposite-sex spouses under the socialist feminist model. As discussed in Section Five, when the gender binary and gender essentialism may no longer serve as the justification for unequal enjoyment of this right, there no longer exists a reason for which a man should not have to help raise his step-children. After all, under the asymmetrical rights paradigm, a woman is expected to take up the care of her step-children, especially as the biological mother loses

---

243. This example and the proposition it supports are perhaps tempered by the jurisprudential debate that might ensue were the roles to be reversed. Under traditional Islamic legal theories, as well as the socialist feminist critique herein, a man may wed multiple wives, thereby essentially excusing infertile wives from the indignity of an at-fault divorce. Additionally, it is considered *summah* to have children in Islam, SUNAN ABU DAWOOD, HADITH 23:3522, so perhaps in instances of either party being infertile, there may be an allowance for divorce so that the so-called innocent party may pursue a more *productive* marriage.

244. See *supra* note 141.

out on custody after the children reach puberty. Thus, if both biological parents retain the right of custody *and* neither step-parent may shirk their responsibility, there is no reason why those within a same-sex marriage cannot exercise their right of custody.

The topic of children does become murky as to same-sex couples, however, as such couples cannot procreate *together*. This problem is solved when one or both parties was party to a previous marriage which begot children, but this is not always the case. Furthermore, Islamic law traditionally proscribes adoption.<sup>245</sup> Should same-sex couples want to raise children, there would be the option to assume the care of an orphan, which is *sunnah* and mentioned repeatedly in the Qur'an.<sup>246</sup> Presumably, the method by which same-sex couples take in orphans would be no different than the method by which opposite-sex couples do.

Recall that the right to negotiate a marriage of one's choice includes the right to consent to a polygamous marriage. As previously discussed, should each spouse, female or male, have the ability to grant the gift of permission, there is no reason why there could not be polyamorous, polygamous marriages given the recognition of gender, sexual, and romantic diversity. These marriages, in fact, may be considered more equal than any possibility of polygynous marriage under traditional *fiqh* understandings of men's right to have multiple wives concurrently. These polyamorous marriages would be better off for the fact that *all* of the involved parties would be married *to each other*. Participants would consider each person to whom they are married—not merely the one woman married to the man, or the man married to multiple women who have no legal relation between them—and treat them with fairness, equality, and justice, as the relevant verse prescribes.<sup>247</sup>

Therefore, given the socialist, Islamic feminist interpretation of marital rights, Muslim same-sex marriages should not be any less feasible than their opposite-sex counterparts. All of the surviving rights are to be enjoyed equally as between women and men, so it should not matter who exercises any of them within any form marriage including any person of any gender orientation.

## VII. CONCLUSION

After undergoing a socialist feminist critique, it is perhaps surprising that the marital rights of women under Islam do not fall to pieces. Rather, while

---

245. See SUSAN FRELICH APPLETON & D. KELLY WEISBERG, *FAMILIES UNDER CONSTRUCTION: PARENTAGE, ADOPTION, AND ASSISTED REPRODUCTION* 5 (2nd ed. 2021).

246. QUR'AN 2:215, 4:3, 76:8, 89:17, 107:2.

247. QUR'AN 4:3.

one of them, the right to provisions from one's husband, requires dispatch and the others require thorough rethinking, they hold up in large part, according to the *'amm* principles that underlie them. Moreover, Muslim same-sex marriage, which is permissible under other analyses, does well within the symmetrical rights paradigm prescribed by a socialist, Islamic feminist reading of women's marital rights. Under a model of Islamic marital rights that touts sexual equality and dispatches the gender binary, many of the concerns about the feasibility of a same-sex Muslim union simply fade away. Furthermore, the idea that Islam stands contrary to the diverse spectrum of gender and sexuality that exists in-fact is not a reading of the Qur'an that comports with the tenets of Islamic feminist jurisprudence.

As the body of feminist examinations of women's Islamic rights continues to grow, it is important that we, as Muslims, as feminists, and as communists consider how our own worldviews intertwine. Socialist feminism is an important theory for examining the world, and Muslim societies, communities, and individuals continue to contribute to and be a part of this world. Thus, for socialist feminists, looking beyond Western schools of thought and of being is essential. As for Muslims, as we continue to expand our ways of thinking and examine religious texts and doctrine from new angles, we must consider how reform may be turned into revolution. Thus, one of the purposes of this Note is to express that Islamic rights and the Islamic way of life need not be locked into the current system of global capitalism. Rather, there is a way forward for Islam that does not denigrate the religion under socialist feminism or, ultimately, communism. It does not denigrate the religion to give women equal enjoyment to the rights conferred unto all of humanity by Islam, and any assertion to the contrary ignores the very universal principles that underlie Islam.