Gleichheit als kulturelles Phänomen

Herausgegeben von
UWE KISCHEL

Gesellschaft für Rechtsvergleichung e.V.

Rechtsvergleichung
und Rechtsvereinheitlichung
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Ergebnisse der 37. Tagung der Gesellschaft für Rechtsvergleichung vom 19. bis 21. September 2019 in Greifswald

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Vorwort

Mit dem Generalthema „Gleichheit" hat sich die 37. Tagung der Gesellschaft für Rechtsvergleichung, die im September 2019 in Greifswald stattfand, einem in der rechtlichen Praxis besonders konfliktreichen und zugleich dogmatisch besonders anspruchsvollen Konzept gewidmet. Die klassische Behauptung der amerikanischen Unabhängigkeitserklärung „all men are created equal" kann kaum wörtlich verstanden werden kann, steht sie doch im auffälligen Kontrast zu den vielfältigen Unterschieden der Menschen etwa im Hinblick auf Religion, soziale Herkunft, Vermögen, Familie, sexuelle Orientierung oder individuelle Fähigkeiten. Wann zwei Menschen aber hinreichend gleich für eine Gleichbehandlung oder hinreichend ungleich für eine Ungleichbehandlung sind, ist eine Wertungsfrage. Die Antwort darauf hängt nicht zuletzt von den jeweils vorherrschenden Gerechtigkeitsvorstellungen ab und ist somit im Kern kulturell geprägt. Gleichheit ist daher immer auch ein kulturelles Phänomen.

Gerade diese Wechselbeziehungen zwischen Gleichheit, Gerechtigkeit und kulturellem Selbstverständnis sind es, die das Thema einerseits so komplex, andererseits für eine rechtsvergleichende Untersuchung so reizvoll machen. Denn der Vergleich verschiedener Gleichheitsvorstellungen läßt die dahinter stehenden kulturellen Eigenarten der unterschiedlichen Rechtskontexte deutlich hervortreten. Hier setzte die Sitzung der Fachgruppe Öffentliches Recht an, die es sich zur Aufgabe gemacht hat, ein breites Spektrum von Verfassungskontexten zu betrachten und so prima facie eine besonders hohe Vielfalt kontextueller Besonderheiten in den Blick zu nehmen.

Der vorliegende Band dokumentiert die einzelnen Beiträge der Sitzung und macht sie so einer breiten Öffentlichkeit zugänglich: *Nahed Samour* untersucht die Bedeutung formeller und materieller Gleichheitsaspekte im islamischen Recht. *John Osogo Ambani* befaßt sich mit Fragen der Ungleichbehandlung aufgrund der sexuellen Orientierung und traditionellem Recht in Afrika. Für die Darstellung der Gleichheitsvorstellungen in Russland und deren Verhältnis zu traditionellen Werten konnte *Elena Gritsenko* gewonnen werden. *Kyung-Sin Park* erörtert in seinem Beitrag Gemeinsamkeiten und Unterschiede der Gleichheitsdogmatik in Südkorea, den USA und Deutschland. Schließlich stellt *Laura Carlson* die Gleichheitskultur Schwedens sowie ihre Bezüge zum schwedischen Wohlfahrtsstaat vor.

Mein besonderer Dank gilt wie immer den Autoren für ihre engagierten, ertragreichen Referate sowie für die rasche Erstellung der Manuskripte. Gleichermaßen danke ich dem Sekretär unserer Fachgruppe, Prof. Dr. Sebastian von Kielmansegg, ohne dessen ruhige und konstante Unterstützung Vieles nicht möglich gewesen wäre. Für die Hilfe im Ablauf der Fachgruppensitzung ebenso wie bei der Vorbereitung dieses Tagungsbandes danke ich meinen wissenschaftlichen Mitarbeitern Philipp Mende, Christian Pfengler und Max Weber sowie meinen studentischen Hilfskräften Christine Hecker, Anna Keßler, Linda Laabs, Anna Mitzlaff, Philipp Schwadtke und Markus Tenhagen, die die oft schwierigen Aufgaben mit Elan, Kreativität und Einsatz gelöst haben.

Greifswald im März 2020 Uwe Kischel

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Formal and Substantive Equality in Islamic Law

Nahed Samour

Does Islamic law have a concept of equality? And if so, what kind of equality speaks to Islamic legal understandings? The aim of this study is to examine the usefulness of distinguishing between formal and substantive equality and to consider how Western liberal thought which shaped this distinction is productive or problematic for understanding Islamic law. Used in a productive mode, my argument is that while classical Islamic law might not have a consistent perception of formal equality, it does know substantive equality. In particular, there is an acute understanding of linking substantive equality to vulnerable groups. Substantive equality in Islamic law can be explored to mean recognition and redistribution, as financial means are considered a key way of accommodating unequal conditions. Used in a problematic mode, the liberal Western contingency of this distinction, which is unknown to the Islamic legal tradition, poses many questions for the field of equality jurisprudence. While one could well argue for an Islamic meaning of substantive equality, a more vexing question emerges: Can there be substantive equality without formal equality? The Islamic case instead allows us to re-think the relationship between the formal and substantive, and challenges the European chronological understanding from formal to substantive equality. We need to invest more in considering whether the distinction between substantive and formal equality is helpful in the first place and how this relationship is constituted. At the same time, (inter-)national calls for formal equality today, risk overlooking substantive equality matters. While Islamic law has been suffering from patriarchal understandings, formal equality might help little to overcome injustices, and substantive dimensions addressing disadvantage and accommodating differences might be more useful here. To complicate our understanding of equality is to understand the deeper dimensions of injustices. Formal equality as in consistently applying the same rule for all can entrench injustices. Formal equality then expands as hegemonic paradigm, in which a dominant discourse perpetuates the view that Islamic law per se is not capable on delivering on equality.

The story about equality and Islamic law remains relevant not least because of Muslim demands for a richer understanding of equality. In its comparative framing today between "them" and "us", the discourse on equality unfortunately

still too often is abused as justification for military or economic violence, in an attempt to bring "equality" to unequal societies.

A. Introduction

Inquiring about equality in Islamic law is to ask whether pre-modernity has a concept for equality. While Islamic law is much more than the result of Islamic legal hermeneutics anchored in canonical Islamic scriptural texts,[1] this contribution starts by looking at the constitutive text of the Qur'ān.[2] With a view on the Qur'ān, it tackles the challenges of exploring the meanings of a 7th century revelation for a 21st century audience. Legal historian Lena Salaymeh argues that "No legal text from any premodern tradition implements the modern ideal of gender equality"[3] – or equality between any other status group for that matter. It would be wrong to demand that premodern texts conform to modern ideals. In fact, this would be to succumb to anachronism.[4] No scholar wants to fall into the traps of anachronism, misplacing a concept in time and creating a chronological inconsistency, and referring to something that is not in its correct time. Neither would one want to fall into the trap of presentism, i. e. of justifying a present-day concern with referencing it back to the past. And yet, there is clearly something of a "past present" or a pending past over present concerns that necessitates a delicate reading of texts across time. Significantly, historical methods and their proponents who are concerned about what a text meant at the time it was revealed or written and what it meant to its contemporaries should lay this out, yet not shut down thinking about law when it addresses authoritarian, exploitative or unequal effects today.[5]

The complexities of studying religiously revealed texts over time present significant challenges. In dealing with religiously revealed texts, such as the Qur'ān, no exegesis can go against the text. But we can and must contextualize text to

[1] See also *Lena Salaymeh*, Historical Research On Islamic Law, in: Markus D. Dubber/Christopher Tomlins (eds.), The Oxford Handbook of Legal History, 2008, pp. 757–776, p. 757.

[2] Sherman Jackson is right to warn against a "protestant approach" by those who "ignore and supplement scripture with little to no regard of any tradition of how previous generations have understood the holy writ." *Sherman Jackson*, Islam and Affirmative Action, Journal of Law & Religion XIV:2 (1999–2000), pp. 405–431, p. 407.

[3] *Lena Salaymeh*, Imperialist Feminism and Islamic Law, Hawwa – Journal of Women of the Middle East and the Islamic World 17 (2019), pp. 97–134, p. 125.

[4] For a nuanced reading of the meaning of anachronism for the study of international legal history, see *Anne Orford*, On International Legal Method, London Review of International Law 1 (2013), pp. 170–177.

[5] See also the debate on the methods of history in international law *Anne Orford*, International Law and the Limits of History, in: Wouter Werner/Marieke de Hoon/Alexis Galán (eds.), The Law of International Lawyers: Reading Martti Koskenniemi, 2015, pp. 297–320.

understand and develop its meaning. Here we are dealing with the old question of when text is prescriptive (generating normatively binding rules) and when it is descriptive (and thus is not normative). In dealing with Islamic law, a religious-legal order that took its beginning over 1400 years ago, one risks essentializing the normative as much as essentializing the empirical, and additionally risks exoticizing religion.[6] To essentialize the normative would be to reduce Islamic law to one national legal order today, or to one classical legal school, or one scholar, at one particular time or space. And to essentialize the lives of Muslims or non-Muslims living in Muslim societies or Muslims living in non-Muslim societies would mean to not consider other factors such as class, race, age, sexual orientation, and other personal factors. With the modern secular *Zeitgeist*, it seems particularly necessary to not exoticize religion and remember that both equality and inequality can be pursued with religious arguments as well as with secular ones.[7]

While equality in many national and international legal systems remains an "elusive and ever-changing concept"[8], dealing with it in Islamic law as a religio-legal tradition makes it challenging in its own ways. Tackling questions of equality in Islamic law necessitates taking the wider normative, moral and ethical framework encompassing both (non-changeable) divinely revealed texts and (changing) human understandings and articulations. As a value-laden concept, equality is by definition also, or overwhelmingly, an ethical question.[9] It asks whether there can be one overarching understanding of equality, and if so, what it would look like. This contribution attempts to show the intricacies of a non-Western legal tradition that existed prior to the European Enlightenment and that did not distinguish between formal and substantive equality as Western liberal discourse does today.

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[6] See also *Kecia Ali*, Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence, 2006, p. xiii.

[7] For a secular exclusion of women's rights see e. g. *Leslie Francis/Patricia Smith,* Feminist Philosophy of Law, in: Edward N. Zalta (ed.), The Stanford Encyclopedia of Philosophy, Winter 2017 Edition, URL = <https://plato.stanford.edu/archives/win2017/entries/feminism-law/>.

[8] See e. g. *Sandra Fredman*, Substantive Equality Revisited, ICON 14:3 (2016), pp. 712–738, p. 713.

[9] For some scholars Islamic law is better characterized as an ethical system than a legal one, see e. g. Jonathan E. Brockopp (ed.), Islamic Ethics of Life: Abortion, War, and Euthanasia, 2003.

B. Equality in Liberal European Thought: From Formal to Substantive

While equality is one of liberalism's key universal corner stones[10] and central to contemporary constitutional democracies[11], it remains an elusive concept. Pinning down equality remains a challenging and frail subject, which some refer to as an empty concept.[12] With equality having such a prominent position in liberal thought, it merits inquiring how equality developed as a key idea of ordering modern-day society and how European and North-American scholarship has increasingly turned from a formal to a substantive understanding of equality.

Legal scholar Sandra Fredman starts her writing on equality by stressing that "[e]quality as an ideal is a relatively modern construct".[13] Premodern societies were not founded on the principle of equality. Hierarchy and privilege were much more prevalent as ordering principles than equality, which defined broadly as "same rights for all". Classical thinkers such as Aristotle and Aquinas can therefore be both credited for each having developed an approach to (formal) equality – "treat like cases alike" – as well as criticized for not having had difficulties in laying out that women and slaves, by birth and status, were subordinate. Their legal inferiority and need for (white) male supervision were justified by their physical or rational "weakness". Nature ("the empirical"), as they saw it, was drawn upon to justify the normative. The European feudal society's conception was that persons were inherently unequal, depending on their birth, status or vocation, and rested on a hierarchy in which members of the aristocracy and clergy were treated as superiors to commoners, and thus entitled to privileges and prerogatives denied to commoners.[14]

Only with the emergence of mercantile capitalism and the loosening bonds of feudalism, equality began to crystalize as an organizing social principle. Fredman highlights two types of freedom that laid the ground for European equality thought: Greater economic freedom of individuals to pursue trade within a free market and greater political freedom as English parliament gained power from the monarchy. While politically this meant to untie the authority of the monarch, economic liberation was expanded on the notion of the principle

[10] Wendy Brown writes about how liberalism's self-satisfaction sits on the universality of its basic principles: secularism, the rule of law, equal rights, moral autonomy and individual liberty. *Wendy Brown*, Civilizational Delusions: Secularism, Tolerance, Equality, Theory & Event 15:2 (2012), p. 21.

[11] *Norman Dorsen/Michel Rosenfeld/András Sajó/Susanne Baer/Susanna Mancini*, Comparative Constitutionalism, 3rd edition 2016, p. 617.

[12] *Peter Westen*, The Empty Idea of Equality, 95 Harvard Law Review (1982), p. 537. The complexities of equality for the international and interdisciplinary discourse should not divest from its high significance for the lives of the many demanding it.

[13] *Sandra Fredman*, Discrimination Law, 2nd edition 2011, p. 4.

[14] *Dorsen* et al. (n 11), p. 617.

of the freedom of contract. These freedoms allowed for liberalism as an ideology to blossom.[15]

Equality in European legal thought started as formal equality. The concept of formal equality meant that when two persons have equal status in at least one normatively relevant aspect, they must be treated equally with regard to this aspect. This is the generally accepted formal equality principle that Aristotle formulated in reference to Plato: "treat like cases as like".[16] The crucial question is which aspects are normatively relevant and which are not. In fact, formal equality could both characterize women as equal to men (as human beings) and view women and men as unequal (as differences between the sexes exist). Those that are characterized as different could be legitimately treated as better or worse.[17] Formal equality leaves little room to accommodate that men and women are equal as human beings, and yet to some extent have different needs and aspirations.[18] Furthermore, formal equality is based on equality of treatment and this in turn is predicated on the principle that justice inheres in consistency. Hence the old Aristotelian formula sees equality as consistency and fairness as requiring consistent treatment.[19] However, this view is based on a purely abstract view of justice, which does not take into account existing distributions of, for instance, wealth and power. Consistency in treatment of two individuals who appear alike but in fact differ in terms of access to power, opportunities or material benefits results in unequal results. So formal equality is consistent, but also consistently ignoring categories such as class, gender, religion, race, sexual orientation, age and other relevant factors. It is this attempt to include a fuller social context that helped to understand the limits of formal equality. The distinction between formal and substantive aims at understanding deeper structures of injustice, namely those that cannot be solved by applying formal equality.[20]

This is why even if equality before the law as a major historic achievement has been established, it emerged that it was far from sufficient to achieve genuine equality.[21] Dismantling formal legal impediments such as slavery or the exclusion of married women from property rights, rights over their own children, and the suffrage proved not to be enough. Disadvantage persists and this disadvantage tends to be concentrated in groups with a particular status, such as women,

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[15] *Fredman* (n 13), pp. 4–5.

[16] *Aristotle*, Nicomachean Ethics, V. 3. 1131a10–b15; Politics, III.9.1280 a8–15, III. 12. 1282b18–23, as cited in *Stefan Gosepath*, Equality, in: Edward N. Zalta (ed.), The Stanford Encyclopedia of Philosophy, Spring 2011 Edition, ch. 2.1 Formal equality, URL = <https://plato.stanford.edu/archives/spr2011/entries/equality/>.

[17] *Michel Rosenfeld*, Towards a Reconstruction of Constitutional Equality, in: András Sajó (ed.), Western Rights? Post-Communist Application, 1996, pp. 165–166.

[18] Ibid.

[19] *Fredman* (n 13), p. 7.

[20] *Fredman* (n 8), p. 713.

[21] *Fredman* (n 13), p. 6.

people with disabilities, religious and racialized minorities and others.[22] Formal equality leaves out whether laws and policies enforce stereotypes, entrench prejudices or treat anyone effectively unfairly.

Over time, scholarship on equality realized that one should move beyond a formal conception, yet it still was not clear what a substantive conception would mean. Sandra Fredman therefore states that substantive equality resists capture by a single principle until today.[23] Instead, drawing on the strengths of a several principles in the substantive equality discourse, she tries to bring those principles together and proposes a four-dimensional principle: Substantive equality means "to redress disadvantage; to address stigma, stereotyping, prejudice and violence; to enhance voice and participation; and to accommodate difference and achieve structural change".[24] The right to equality should be "responsive to those disadvantaged, demeaned, excluded, or ignored".[25] Equality thus needs to be put into a social context.[26]

In exploring the meanings of substantive equality, closer attention was paid to what came to be known as vulnerability. Vulnerability rethinks that the "autonomy or liberty to mean little more than a mandate for sameness of treatment."[27] Vulnerability is instead posited to underline the interdependency of humans because of their weaker position in society or historical injustices (e. g. minors, women, members of religious minorities, and "others"),[28] similar to the call for substantive equality to be put into a social context.[29] In particular, vulnerability seeks to ensure that the needs of vulnerable individuals and groups are seen and recognized, and receive adequate protection. The European Court of Human Rights has recently come forward recognizing that some groups are considered particularly vulnerable, in the sense that members of certain groups are more likely to suffer harm or experience it to a greater degree.[30] These harms range from misrecognition, to physical injuries and material deprivation.[31]

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[22] *Fredman* (n 8), pp. 712–713.

[23] Ibid, p. 713.

[24] Ibid.

[25] Ibid.

[26] Ibid.

[27] *Martha Albertson Fineman*, Equality, Autonomy, and the Vulnerable Subject in Law and Politics, in: Martha Albertson Fineman/Anna Grear (eds.), Vulnerability. Reflections on a New Ethical Foundation for Law and Politics, 2016, pp. 13–27, p. 13.

[28] Ibid.

[29] *Fredman* (n 8), p. 713.

[30] See *Lourdes Peroni/Alexandra Timmer*, Vulnerable Groups: the Promise of an Emerging Concept in European Human Rights Convention Law, 11 International Journal of Constitutional Law (2013), pp. 1056–1085, esp. pp. 1064–1065.

[31] The first group that was recognized as vulnerable by the Strasbourg Court was the Roma minority who, "as a result of their history" – the Court held – "has become a specific type of disadvantaged and vulnerable minority" in need of special protection. ECtHR (GC), D. H. and Others v. the Czech Republic, 13 November 2007; ECtHR (GC), Oršuš and Others v. Croatia, 16 March 2010. The next group was comprised of persons with mental disabilities. They have

European and North-American scholarship on equality thus mirrors historical experiences with political and societal powers and largely revolves around liberal ideas of the autonomous individual (while there is also a substantial European Marxist critique of "the individual"). In liberal scholarship of equality, the formal, at least initially, was seen as divided from its substantive dimension and until today the relationship between the formal and the substantive is not firmly established. Arguably, a holistic approach to equality developed only late in liberal scholarship.

C. Equality in Islamic Law: Substantive Equality and Vulnerability, not Formal Equality

Premodern Muslim jurists lived in and provided the laws for a society that was hierarchical, from the relationship between ruler and ruled to the relationship between spouses. For Islamic legal scholar Kecia Ali, hierarchy was an ordering principle of Muslim societies in which Muslims were to be dominant over non-Muslims, those that were free were to dictate the lives of slaves, and men were to "stand over" women.[32] And yet, surveying the history of legal practice with a view on women, the equality question stubbornly refuses to give a smooth answer. Islamic legal scholar Wael Hallaq observes that "Muslim women were full participants in the life of the law."[33] However, Kecia Ali critically observes that "this participation does not mean that there was gender equality."[34] And yet, social historian Judith Tucker states that "[w]hile equality was not a key principle here, it would be hard to say that these differences meant to cause or entrench inequality."[35] In fact, despite hierarchies and inequalities, Kecia Ali concludes that "something perceived as substantive justice was consistently delivered by legal institutions."[36] This trio of quotes sets the scene for what is to be discussed: What is the relationship between a lack of formal equality and *substantial justice*, as Kecial Ali calls it? Differently put, can there be substantive equality without formal equality?

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been regarded by the Court as a "particularly vulnerable group in society, who has suffered considerable discrimination in the past". ECtHR, Alajos Kiss v. Hungary, 20 May 2010. The Court has expanded the list of vulnerable groups to asylum seekers and people living with HIV. ECtHR (GC), M. S. S. v. Belgium and Greece, 21 January 2011 (asylum seekers) and ECtHR, Kiyutin v. Russia, 10 March 2011 (HIV-status).

[32] *Kecia Ali*, Marriage and Slavery in Early Islam, 2010, p. 188.

[33] *Wael B. Hallaq*, An Introduction to Islamic Law, 2009, p. 70; see also *Mathieu Tillier*, Women before the qāḍī under the Abbasids, Islamic Law and Society 16 (2009), pp. 280–301. Tillier finds that while women would come to early Islamic courts to request their rights, those who came and those who did not correlates with social hierarchy.

[34] *Ali* (n 32), p. 188.

[35] *Judith Tucker*, Women, Family and Gender in Islamic Law, 2008, p. 27.

[36] *Ali* (n 32), p. 188.

Islamic law does not discern between formal and substantive equality, nor does recent scholarship on Islamic law use this distinction. Formal and substantive are thus not inherently Islamic terms, which makes it challenging to use them. In fact, the term equality in Arabic (e. g. *kafā'a*) in premodern texts would not be generally applied but e. g. used to discuss "equality" as suitability of spouses as a question of social hierarchies.[37] Applying non-inherent concepts to a legal system remains risky, especially when meaning can go lost. For heuristic purposes, these distinctions can make sense if they aid in observing and understanding the complexities of equality, such as to justify legal positions (or rights, in modern parlance) and the ordering of society. I first want to address how one can frame a study of "formal and substantive equality" in Islamic law without committing a historical and/or theoretical anachronism, given that this distinction was articulated as a European intellectual product. As stated in the introduction, premodern texts do not know equality as a right and ordering principle of society as many conceptualize it today. However, demanding justice, though a heavily charged term, would not per se be anachronistic for any religio-legal tradition. In fact, modern Muslim scholars of Islam seem more comfortable discussing questions that first appear as questions of equality as questions of justice.[38] With the Qur'ān invoking justice in multiple verses, justice is a Godly pledge to humans, and the ways of thinking about equality have to align with this pledge. It is here that the "formal and substantive" distinction as well as the idea of vulnerability from equality jurisprudence can be helpful in unfolding concepts of equality as justice in Islamic law.

I. Pledge of Justice: Equal before God

An Islamic law approach to equality needs to start with God's promise to humans that God is just, and that justice prevails, if not in this world but on the day of Judgement and beyond. Several of the 99 names of God in Arabic revolve around the notion of justice (the Just/*al-'adl*, the giver of justice/*al-ḥakam*, the Rightful/*al-ḥaqq*, and many others). It is the Godly pledge that no one will be subjected to any discrimination in regard to the merits of their deeds. The Qur'ān says: "Then shall anyone who has done an atom's weight of good, see its reward, and anyone who has done an atom's weight of evil, shall see its recompense" (Qur'ān al-Zilzāl 99:7–8). It is not birth or status but individual action that God promises to make his basis for reward and punishment.

[37] For an overview of the kafā'a principle in Ḥanafī legal thought (comprising e. g. religion, wealth, education) in premodern and modern marriage law, see *Lama Abu Odeh*, Modernizing Muslim Family Law: The Case of Egypt, Vanderbilt Journal of Transnational Law 37 (2004), pp. 1043–1146, see e. g. p. 1103.

[38] See e. g. "substantive justice", *Ali* (n 32), p. 188; "concrete justice", *Jackson* (n 2), p. 427.

Equality before God, then, is a central theme in Islam. The Qur'ān is empathic on equality in regard to human conduct that transcends the requirements of the law. Qur'ān al-Aḥzāb 33:35 is crucial here, establishing equality that goes beyond gendered equality:

"Indeed, the Muslim men and Muslim women, the believing men and believing women, the compliant men and compliant women, the truthful men and truthful women, the patient men and patient women, the humble men and humble women, the charitable men and charitable women, the fasting men and fasting women, the men who guard their private parts and the women who do so, and the men who remember God often and the women who do so – for them God has prepared forgiveness and a great reward."

Beyond God's promise to treat men and women equally as to their deeds, the verse covers aspects of the relation with fellow human beings as well,[39] equality is not a question of autonomy and independence but one of social context. Equality in this sense does not centralize the abstract individual but the individual as part of a social setting. Further Qur'ānic verses stress that Godly justice consists of treating women and men equally based on their deeds:

"And their God answered them, never will I suffer to be lost the work of any of you, be he male or female" (Qur'ān Āl-'Imrān 3:195).

"If any do deeds of righteousness, be they male or female, and have faith, they will enter Heaven, and not the least injustice will be done to them" (Qur'ān al-Nisā 4:124).

"The believers, men and women, are guardians, one of another" (Qur'ān al-Tawbah 9:71).

These and other Qur'ānic verses promising justice and equal treatment cannot be repeated often enough. They explain why many Muslims, including women from all over the world, hold on to Islam as religion[40] and see in it the pledge of justice that goes beyond man-made promises. These verses are what has inspired Muslim women[41] as well as others seeking social justice in this world. There is a

[39] *Mohammad Hashim Kamali*, Freedom, Equality and Justice in Islam, 2nd edition 2002, p. 63.

[40] *Judith Tucker* in her introduction in Women, Family, and Gender in Islamic Law (n 35), p. 1 provocatively asks how Muslim women can view the discriminatory *sharī'a* as a source of justice, and (next to her nuanced historical analysis), it is God's promise of equality in verses like these that can provide an answer. Kecia Ali sees the answer in a vagueness of religious law, in which Islamic law is a code for "just" and "fair", see *Ali* (n 32) p. 189.

[41] See e. g. *Leila Ahmed*, Women and Gender in Islam: Historical Roots of a Modern Debate, 1992; *Amina Wadud*, Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective, 1999; *Asma Barlas*, "Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an, 2002; *Riffat Hassan*, Equal before Law? Woman-man equality in the Islamic Tradition, WLUML Dossier, 5–6 December 1988/May 1989, p. 4; *Aysha Hidayatullah*, Feminist Edges of the Qur'an, 2014; *Fatima Mernissi*, The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam, 1991; *Ziba Mir Hosseini*, Muslim Women's Quest for Equality: Between Islamic Law and Feminism, Critical Inquiry 32:1 (2006), pp. 629–646; *Sa'diyya Shaikh*, Transforming Feminisms: Islam, Women and Gender Justice, in: Omid Safi (ed.), Progressive Muslims: On Justice, Gender and Pluralism, 2003, pp. 147–162; *Ali* (n 6).

consistent sense that vulnerable people would get protection through *sharīʿa* as "guarantor of justice".[42] It is reasonable to say that the above quoted verses entail a Qur'ānically enshrined understanding of equality – an equality despite or in the face of lack of formal equality in other parts of life, to which I will turn soon. It is these verses that any reformer, modernist, progressive, conservative (or whatever label is in use) would turn to first. Crucially, it is justice and dignity,[43] not equality that serves as their grand narrative, which corresponds to questions not of formal but substantive equality as discussed in this paper.

It is fair to say that these and the list of similar Qur'ānic verses do not per se and not automatically translate into an understanding of equality in a legal sense, i. e. one of rights and obligations enforceable before courts, or even enshrined in today's statutory laws. In fact, in many cases it seems difficult to discern the historic link between the Qur'ān, the writings of the jurists, and the verdicts of the judges.

Clearly, there are some Qur'ānic verses that possess the same validity and legitimacy in the eyes of the believing that entail (formal) inequality, and the question is how to deal with these. When reading the Qur'ān, we do find verses that distinguish between men and women, Muslim and non-Muslim, free and slave.[44] The distinction can turn into discrimination against women, non-Muslims and slaves, i. e. different treatment of people because of certain characteristics tied to a person which cannot simply be stripped of. Here, too, interpretations of the biological nature could turn into legal disadvantage and status could determine law. Formal equality is undermined by referring to verses and many jurisprudential rulings, such as those covering inheritance, testimony, marriage and divorce, which accord men more rights or recognition than women. It is in particular six verses (out of a total of 6.660) in the Qur'ān that position male authority over female authority, namely verses 2:221; 2:228; 4:3; 4:34 and 24:30. Generally speaking, jurists did not need to resort to scriptural text to "find" or "discover" rules. Rather, more often than not, they relied on implicit naturalistic presumptions about human nature and the social good to justify a particular right and its distribution.[45]

The distinction between the pledge of justice that all reward and punishment will be without discrimination and the unequal legal situation especially of women has not gone without theory by Muslim jurists.

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[42] See e. g. *Ali* (n 32), p. 189.

[43] *Ali* (n 32), p. 189, with no further explanation on the link between justice and dignity; *Kamali* (n 39), p. 62, refers equality back to dignity, also with no further explanation.

[44] For an overview see *Kamali* (n 39), pp. 47–102.

[45] *Anver Emon*, A Legal Heuristic for a Natural Rights Regime, Islamic Law and Society 13:3 (2006), pp. 325–391, p. 328; *Ali* (n 32), p. 189.