



How Gender Biased is Islamic Law?

by

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This article was published on: 7 November 2009

Citation: Walker, F., 'How Gender Biased is Islamic Law?', (2009) *The Student Law Journal*, available from <http://www.studentlawjournal.com/articles/2009/ugrad/genislaw.pdf>

Introduction

Contextual analysis of the true spirit of the Qur'an is crucial to justly assess the existence or extent of gender bias in Islamic law.

The promulgation of Islam, in which the Qur'an was revealed, occurred within an Arab tribal society rife with female infanticide, unrestricted polygamy, and an agnatic system (*asaba*) of inheritance through male descent. Many of Allah's most poignant revelations 'were designed to improve the status of women' and focussed on liberating women from the discriminatory nature of the Arab tribal system.¹

However, the patriarchal societies in which Islam has evolved have interpreted the Qur'an contrary to its authentic goal of liberation, equality and the preservation of human dignity.

Distorted interpretations of many verses (*ayat*) of the sacred text originate from the literal readings of conservative Islamic scholars, despite the fact that the Qur'an frequently uses symbolic language to portray its fundamental goal.

In my analysis I will focus on revealing that goal, demonstrating that the Qur'an itself promotes an egalitarian existence in all aspects of life.

*'Never will I suffer to be lost the work of any of you, be he male or female: ye are from one, another.'*²

This verse clarifies that gender equality is not only acknowledged, but insisted upon in Islam. The natural distinction between men and women does not affect an individual's right to human dignity in life and worldly affairs, nor a person's spiritual relationship with Allah.³

This spirit of equality perpetuates throughout Islamic law, as I will demonstrate in relation to the controversial areas of polygamy, divorce, inheritance and female testimony.

¹ Esposito, J. & DeLong-Bas, N.J., *Women in Muslim Family Law*, (New York: Syracuse University Press, 2002: Second Edition), p.4.

² Qur'an, 3:195.

³ Ali, Y., *The Meaning of The Holy Qur'an*, (Beltsville, Maryland: Amana Publications, 2002), p.180.

Polygamy

The institution of polygamy in Islamic law has been the focus of much criticism in relation to gender bias against women. The existence of this legal principle is simply a demonstration of how patriarchal interpretation can influence society.⁴

At the promulgation of Islam the regulation of polygamy was intended to raise the status of women by curtailing the unlimited polygamy previously permitted in pre-Islamic Arabia.

The primary Qur'anic verse (*ayat*) cited in order to justify polygamy has been assigned an orthodox interpretation ignorant of the context in which it was revealed.

*'If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two or three or four, but if ye fear ye shall not be able to deal (with them equitably), then only one, or (a captive) that your right hand possess.'*⁵

The verse does not, as extensively believed due to Qur'anic misinterpretation, confer an infallible right of polygamy on men, but a responsibility to ensure social justice is done to orphans in the prevailing social conditions at the time of the Prophet.⁶ It was revealed in response to the Battle of Uhud in which many Muslim men were killed leaving numerous women and children without support.⁷

Hence the Qur'an resignedly tolerated the principle as an *exception* to monogamy. It was not intended to degrade women, but to conditionally 'provide a moral, practical and humane solution to the problems of widows and orphans', while enabling women to exercise their right to marriage and protecting them from exploitation.⁸ Monogamy however, remained the general rule.⁹

The purpose of verse 4:3 is clear from the repetition of the word 'justice'. Stipulating that 'if ye fear ye shall not be able to deal (with them equitably), then only one' wife should be

⁴ Mashhour, A., *Islamic Law and Gender Equality – Could There be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt.* (2005) 27 Human Rights Quarterly, p.562–596.

⁵ Qur'an: 4:3

⁶ Esposito & DeLong-Bas, *Women in Muslim Family Law*, p.48.

⁷ 'Sisters in Islam, *'Islam and Polygamy'* (1990) available from <http://www.sistersinislam.org.my/ite/20081990.htm> (last accessed 17 April 2008).

⁸ Roald, A., *Women in Islam: The Western Experience*, (New York: Routledge, 2001), p.203.

⁹ Mashhour, *'Islamic Law and Gender Equality'*, p.562–596.

taken. This must be read in conjunction with the qualifying verse 4:129 to establish the true purpose of the Surah (chapter),¹⁰ which states;

*'You are never able to be fair and just between women even if that were your most ardent desire.'*¹¹

The 'Father of Muslim Modernism', Muhammad Abduh, was particularly critical of the institution of polygamy and Muslim women's ignorance to its genuine purpose. He concluded that polygamy was tolerable only where equity of justice could be guaranteed to each wife. However, according to Allah, absolute equity is unattainable (verse 4:129), therefore Abduh determined that 'the Qur'anic ideal must be monogamy.'¹²

Mumtaz Ali, a progressive Muslim scholar, played a fundamental role in the recognition of women's rights in India and Pakistan. He regarded polygamy as 'a tolerated institution that must in contemporary society give way to the Qur'anic ideal – monogamy.'¹³

The suggestion of such progressive jurists is to look deeper than the literal wording of the sacred text, looking instead to the spirit of the Qur'an to extract its intended meaning and apply it to modern society (*ijtihad*). This gradualist perspective focuses on the restrictions that Allah placed on polygamy, interpreting them as a denunciation of the practice and the beginning of a gradual development, with the ultimate intention of prohibiting polygamy altogether.¹⁴

It is clear from this analysis that the Qur'anic intention of sanctioning polygamy was consistent with the liberating spirit of Islam, to protect women's rights in an inequitable society.

Divorce

Marriage in Islam is viewed as a permanent institution and the foundation of society. In line with this perception, the Prophet is purported to have said that 'of all the things permitted by

¹⁰ Sayeh, L.P. & M. Morse, A.M., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 Texas International Law Journal 311, p.328.

¹¹ Qur'an: 4:129.

¹² Esposito & DeLong-Bas, *Women in Muslim Family Law*, p.48.

¹³ Ahmad, A. (1967) *Islamic Modernism in India and Pakistan 1857-1964*, Oxford University Press, New York.

¹⁴ Esposito & DeLong-Bas, *Women in Muslim Family Law*, p.136.

law, divorce is the most hateful in the sight of Allah.¹⁵ Recognition is given to the necessity of divorce as a last resort¹⁶ in cases where reconciliation is impossible, 'and the spouses can no longer live in harmony.'¹⁷

The issue of gender bias concerns the differing procedures of divorce for men and women prescribed by Allah, and their supposed inequity. According to conservative Islamic theory, men have an unbridled and unilateral authority to divorce their wives, regardless of motive.

However, this view, as well as the Islamic legislature regarding Islamic separation, overlooks the numerous and emphatic Qur'anic references highlighting the unattractiveness of divorce and the consequences of exceeding the boundaries set by Allah.¹⁸

*'Those are limits set by Allah: and any who transgresses the limits of Allah, does verily wrong his (own) soul.'*¹⁹

Thus, men may not divorce women 'capriciously'²⁰ on impulse, as the practice of *talaq* and *iddah* must be adhered to,²¹ or they will be subject to Allah's retribution on the day of judgement.

A further constraint placed on a man's right to divorce is the requirement of an 'amicable settlement' favouring neither husband nor wife.²² The obligation of equity in repudiation is reiterated throughout the second Surah and is substantiated further at verse 65:2, in which Allah stipulates that it's a man's duty to 'either take them (women) back on equitable terms or part with them on equitable terms'²³ and 'separate with kindness'.²⁴

It is clear that the feminist theory that men have an 'unconditional right to break the marriage bond' in order to 'ensure a supply of new sexual objects' to deal with the 'instability of the

¹⁵ Ali, *The Meaning of The Holy Qur'an*, p.1482.

¹⁶ Rabia Mills, 'Women's Rights in the Islamic Prenuptial Agreement: Use Them or Lose Them?' <<http://www.islamfortoday.com/prenuptial.htm>> Accessed 19th April 2008.

¹⁷ Esposito & DeLong-Bas, *Women in Muslim Family Law*, p.28.

¹⁸ *Ibid*

¹⁹ Qur'an: 65:1.

²⁰ Mernissi, F. *Beyond the Veil: Male-Female Dynamics in Muslim Society*, (Saqi Books: London, 2003), p.49.

²¹ Divorce can be revoked twice before it becomes absolute on the third pronouncement of *talaq*, although it doesn't have immediate effect. The Qur'an stipulates a period of probation (*iddah*) of four months which follows each pronouncement.

²² Qur'an: 4:128.

²³ *Ibid*, 65:2.

²⁴ *Ibid*, 2:229.

male's sexual drive' is significantly ill-founded.²⁵ In fact, the Qur'an consigns responsibilities and restrictions applicable to limit the instances of divorce and to promote reconciliation.²⁶ Furthermore, contrary to gender discrimination, Allah specifies that where resolution fails, the resulting separation must be equitable.

Many legal scholars believe that Islamic law is discriminatory against women in divorce. They base this theory on the common misconception that women are only permitted to divorce their husbands via one of the three precise routes specified in the Qur'an. Two of which, *khul* and *mubaraah*, are both forms of mutual separation, whereas the third, *talaq al-tafwid*, is a right delegated to the wife to divorce her husband and is stipulated in the marriage contract.

According to Esposito, this viewpoint overlooks the Qur'anic verses which he interprets as indicating an intention to award equal divorce rights to women.²⁷

*'And women shall have rights similar to the rights against them, according to what is equitable.'*²⁸

This does appear to imply equality of rights between the sexes. However, the succeeding line, '...but men have a degree (of advantage) over them,'²⁹ appears to infer the contrary, thus supporting the view that Islam only offers women unequal rights.³⁰

Yusuf Ali on the other hand, interprets this male 'advantage' as referring only to the superior economic position of men in pre-Islamic Arabia, yet the 'sexes are on terms of equality in law.'³¹ However, when considering the following, the true Qur'anic intention of verse 2:228 becomes immaterial.

²⁵ Mernissi, *Beyond the Veil*, Saqi Books, London, p.49-50.

²⁶ Shah, N. *Women, the Koran and International Human Rights Law*, (Martinus Nijhoff Publishers, Leiden/Boston), p.53.

²⁷ Esposito & DeLong-Bas, *Women in Muslim Family Law*, p.32.

²⁸ Qur'an: 2:228.

²⁹ *Ibid*, 2:228

³⁰ Azeem, S.A., 'Women in Islam Versus Women in the Judaeo-Christian Tradition', (1995) 'World Assembly of Muslim Youth' available from <http://www.twf.org/Library/WomenCJ.html> (last accessed 22nd April 2008).

³¹ Ali, *The Meaning of The Holy Qur'an*, p.92.

The fact that the Qur'an does not overtly recognise the female's right to divorce has resulted in the conclusion that it does not exist. This conclusion neglects to acknowledge the element of *usul al-fiqh* (Islamic jurisprudence)³² known as '*urf* (custom), depicted by Rahim;

*'Those customs and usages of the people of Arabia, which were not expressly repealed during the life-time of the Prophet, are held to have been sanctioned by the Lawgiver by His silence.'*³³

Subsequently, as women in pre-Islamic Arabia had the power of repudiation, and the Qur'an doesn't remove such power, Allah must have deemed the practice acceptable.³⁴

Thus, the existence of gender bias in Islamic divorce cannot be ascribed to Allah or the Qur'an, but to the human interpretation and application of the divine sources.

Inheritance

The Islamic law of inheritance is perceived to be gender bias as a result of an interpretation of the following verse:

*'Allah (thus) directs you as regards to your Children's (inheritance); to the male, a portion equal to that of two females.'*³⁵

It is commonly believed that men are entitled to double a woman's share of inheritance due to their inherent superiority.

However, Zainab Chaudhry suggests that the unequal distribution is actually due to their greater economic responsibility to the family, a responsibility not shared by a woman.³⁶ Since her allocation is solely for her own disposal, the half-share that a woman receives should be considered generous, not discriminatory.³⁷

³² Abdal-Haqq, I., '*Islamic Law: An Overview of its Origins and Elements*', (2002) *Journal of Islamic Law and Culture*, 27, p.36.

³³ Rahim, A., *The Principles of Islamic Jurisprudence*, (Kitab Bhaven: Delhi, 1911), p.131.

³⁴ Wadud, A., *Qur'an and Woman, Rereading the Sacred Text from a Woman's Perspective*, (Oxford University Press: New York, 1999), p.80.

³⁵ Qur'an: 4:11.

³⁶ Chaudhry, Z., '*The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law*,' (1997) *61 Albany Law Review* 554, p.540.

³⁷ Lemu, A. & Hereen, F., *Woman in Islam*, (The Islamic Foundation, Derbyshire Print: Derbyshire, 1976).

Revelation of this law shows a 'shift in allegiance' from the agnatic inheritance system of pre-Islamic Arabia, to the individual family unit with equivalent importance placed on both the male and female ability to inherit.³⁸ It is this which Esposito asserts 'significantly raised the status of women in society.'³⁹ Citing this verse as a legal basis for discrimination against women would result in the law of inheritance contravening one of the fundamental purposes of Islam; the establishment of an egalitarian society.

Alison Swicker Gokal takes a gradualist approach, suggesting that contextual analysis is required to fully comprehend the intention of the verse. Considering that women in pre-Islamic Arabia had no inheritance rights whatsoever, she reads the verse with the belief that 'the Qur'an intended the subsequent equality of women.' Guaranteeing her both the financial support of her male relatives, as well as granting her 'her own economic independence' through the revelation of the female right to inherit.⁴⁰

Viewing the verse in its entirety, Amina Wadud concludes that many combinations of inheritance between males and females would be possible. Because not all potential distributions are specified in the Qur'an, it permits for the circumstances of each individual case to be considered, allowing suitable distribution as each situation requires, regardless of gender.⁴¹

Taking this further, it has been argued that 'if women contribute equally to family expenses, or men do not discharge their economic responsibility, women are entitled to an equal share in all inherited estates.'⁴²

Female Testimony

The alleged gender inequality in Islamic criminal law has brought much criticism upon the status of women in Islam. The interpretation that a woman's testimony has only half the evidential value of a male's testimony originates from verse 2:282:

'O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time reduce them to writing (...) And get two

³⁸ Esposito & DeLong-Bas, *Women in Muslim Family Law*, p.38.

³⁹ *Ibid*, p.38.

⁴⁰ Alison Swicker Gokal, 'Human Rights and Shari'a: An Essay on the development and use of Shari'a in Islamic States and its meaning for Women in Iran, a country with a history of criticism from Human Rights groups and the United Nations,' (2007) 5(1) Hertfordshire Law Journal 86-106, p.99.

⁴¹ Wadud, *Qur'an and Woman*, p.87.

⁴² Shah, *Women, the Koran and International Human Rights Law*, p.57.

*witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her.*⁴³

Many Western critics interpret this verse to mean that women are legally and socially inferior, deducing that they are mentally weak, and are consequently more prone to forget than men.⁴⁴

Furthermore, it has been construed by some Islamic scholars as applicable to all cases in which evidential testimony is required, including hudud cases.

This interpretation is ignorant of the context and purpose of the verse. The first issue is that the verse is of narrow application, relating only to 'transactions involving future obligations in a fixed period of time.'⁴⁵ It should not therefore be extended to cover hudud offences.

This is made clear in Surah 24:2 which stipulates alternative guidance specifically relating to the hudud offences of adultery and fornication:

*The woman or the man guilty of fornication, flog each of them with a hundred stripes: Let not compassion move you in their case, in a manner prescribed by Allah, if ye believe in Allah and the Last Day: And let a party of the Believers witness their punishment.*⁴⁶

There is no distinction made between male and female witnesses, Allah merely requires that they must be 'Believers'. This gender indifference is again evident in Surah 24:4:

*And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog each of them with eighty stripes.*⁴⁷

Again there is no justification that one male witness is equal to two females in hudud offences, such an interpretation is therefore groundless and legislation based on it is extra-Qur'anic.

⁴³ Qur'an: 2:282

⁴⁴ Arlandson, J.M., 'Women are Inferior to Men in the Qur'an,' available from http://www.answering-islam.org/Authors/Arlandson/women_inferior.htm (last accessed 29th April 2008).

⁴⁵ Qur'an: 2:282

⁴⁶ *Ibid*, 24:2 (Emphasis Added).

⁴⁷ *Ibid*, 24:4 (Emphasis Added).

In addition, although two female witnesses are required in the attestation of a financial transaction, both women are not actually called to testify. The second is merely required for corroboration and to remind the other (if necessary).⁴⁸

To comprehend why women require corroboration and men do not, it is crucial to consider the context of revelation. Gender specific roles in pre-Islamic Arabia saw men dealing primarily with financial concerns whereas women were mainly occupied with child rearing and domestic affairs. The requirement of a female corroborator can therefore be put down to their contextual lack of experience in contractual matters.

Amina Wadud, taking a progressive approach, suggests that the verse is 'significant to a particular circumstance which can and has become obsolete,'⁴⁹ as women have now become acquainted with such matters.⁵⁰ According to this approach, one woman would therefore have equivalent evidential capability as one man in modern society.

Conservative *and* modern Islamic commentators have consistently adhered to and promoted gender inequality in this area (*taqlid*) and ignored the 'broader intellectual aspects of women's testimony.'⁵¹ In doing so, the overall spirit of gender equality in the Qur'an has been perpetually neglected.

Moreover, the common perception of the inferiority of female witnesses contradicts verse 95:4, which states that Allah 'created man in the best of moulds.'⁵² Claiming that women are lacking in intelligence is to criticise Allah's creation, and contrary to the original Qur'anic intention.

Conclusion

After analysing the foundations which establish the institution of polygamy, a progressive approach to guaranteeing women's rights surfaced. In addition, it became apparent that the principle intention is indeed consistent with the liberating spirit of Islam.

⁴⁸ Wadud, A. (1999) *Qur'an and Woman, Rereading the Sacred Text from a Woman's Perspective*, Oxford University Press, New York, p.85.

⁴⁹ *Ibid*, p.85.

⁵⁰ Rahman, F. (1989) *Major Themes of the Qur'an*, 2nd Ed. Bibliotheca Islamica.

⁵¹ Al-Alwani, T.J., 'The Testimony of Women in Islamic Law,' (1996) 13(2) *The American Journal of Islamic Social Sciences*, available from <http://www.alhewar.com/TahaTestimony.htm> (last accessed 30th April 2008).

⁵² Qur'an: 95:4.

Divorce in Islam is assumed to be discriminatory against women. In fact, when the element of *usul al-fiqh* (Islamic jurisprudence) known as *'urf* (custom) is considered, Allah's silence regarding woman's pre-Islamic right to divorce does not denounce it, but effectively validates it.

Inheritance in Islamic law appears, at first sight, to favour the male heir. Contextually, the right of women to inherit at all was a significant improvement from the pre-Islamic agnatic system, which recognised only men as able to inherit. A gradualist and subjective application of the Islamic principles of inheritance would result in equitable distribution between heirs.

The attitude towards female witnesses has been perpetually negative from both conservative and modern Islamic commentators, often justified by their inadequate intelligence. Making this claim is to criticise Allah's creation, and contrary to the original Qur'anic intention. A progressive approach as described by Amina Wadud suggests that as women gain in knowledge, their status as competent witnesses should be elevated to that of a man.

In summary, I believe it is clear that the existence of gender bias in Islam results not from the divinely revealed Qur'an, but from its unjustified patriarchal interpretation, and the institution of *taqlid*.

Bibliography

Books

- Ahmad, A., *Islamic Modernism in India and Pakistan 1857-1964*, (New York: Oxford University Press, 1967).
- Ali, S.S., *Gender and Human Rights in Islam and International Law, Equal Before Allah, Unequal Before Man?* (Netherlands: Kluwer Law International, 2000).
- Ali, Y., *The Meaning of The Holy Qur'an*, (Beltsville, Maryland, USA: Amana Publications, 2002).
- An-Na'im, A.A., *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, (New York: Syracuse University Press, 1996)
- Bodman, H. & Tohidi, N. *Women in Muslim Societies: Diversity Within Unity*, (Colorado: Lynne Rienner Publications, 1998).
- Esposito, J., *The Oxford Dictionary of Islam*, (New York: Oxford University Press, 2003).
- Esposito, J. & DeLong-Bas, N.J., *Women in Muslim family Law*, (New York: Syracuse University Press, 2001, 2nd Edition).
- Lemu, A. & Hereen, F., *Woman in Islam*, (Derbyshire: The Islamic Foundation, Derbyshire Print, 1976).
- Mernissi, F., *Beyond the Veil: Male-Female Dynamics in Muslim Society*, (London: Saqi Books, 2003).
- Rahim, A., *The Principles of Islamic Jurisprudence*, (Delhi: Kitab Bhaven, 1911).
- Rahman, F., *Major Themes of the Qur'an*, (Bibliotheca Islamica, 1989, 2nd Edition).
- Roald, A.S., *Women in Islam: The Western Experience*, (New York: Routledge, 2001).
- Shah, N., *Women, the Koran and International Human Rights Law*, (Leiden/Boston: Martinus Nijhoff Publishers, 2006).

- Wadud, A., *Qur'an and Woman, Rereading the Sacred Text from a Woman's Perspective*, (New York: Oxford University Press, 1999).

Articles

- Abdal-Haqq, I., '*Islamic Law: An Overview of its Origins and Elements*' (2002) *Journal of Islamic Law and Culture* 27.
- Crane, R., '*The Essence of Islamic Law*', (1998) 3 *Journal of Islamic Law* 191.
- Hasan, Z., '*Islam from Patriarchy to Feminism*', (1998) *Star Weekend Magazine*, Bangladesh.
- Mashhour, A., '*Islamic Law and Gender Equality – Could There be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt.*' (2005) 27 *Human Rights Quarterly* 562.
- Mir-Hosseini, Z. '*Muslim Women's Quest for Equality: Between Islamic Law and Feminism*' (2006) 32 *Critical Inquiry* 629.
- Sayeh, L.P. & Morse, A.M. '*Islam and the Treatment of Women: An Incomplete Understanding of Gradualism,*' 30 *Texas International Law Journal* 311.

Websites

- Al-Alwani, T.J., '*The Testimony of Women in Islamic Law,*' *The American Journal of Islamic Social Sciences*, Volume 13, Number 2 (1996).
<http://www.alhewar.com/TahaTestimony.htm> (last accessed 30 April 2008).
- Asghar Ali Engineer, '*Polygamy in Islam – Concept and Practice*' (2002) available from <http://www.pucl.org/Topics/Gender/2002/polygamy-islam.htm> (last accessed 19 April 2008).
- Ayesha I. Khan, '*A Case for Banning Polygamy*' (2003) available from <http://www.chowk.com/articles/6862> (last accessed 17 April 2008).
- Arlandson, J.M., '*Women are Inferior to Men in the Qur'an,*' http://www.answering-islam.org/Authors/Arlandson/women_inferior.htm (last accessed 29 April 2008).

- Azeem, S.A., *'Women In Islam Versus Women In The Judaeo-Christian Tradition'*, *'World Assembly of Muslim Youth'* (1995) <http://www.twf.org/Library/WomenICJ.html#epil> (last accessed 22 April 2008).
- Hassan, R. *'Members, One of Another, Gender Equality and Justice in Islam'*, The Religious Consultation on Population, Reproductive Health and Ethics, University of Louisville, Kentucky, USA, available from <http://www.religiousconsultation.org/hassan.htm> (last accessed 28 April 2008).
- Keets, M., *'Women's Rights in Islamic Marriage'* (2002) available from http://www.meteck.org/islam_marriage.html (last accessed 19 April 2008).
- Fitzgerald, M.L., *'Some Notes on the Islamic View of Women'* (1996) available from <http://www.sedos.org/english/islam.htm> (last accessed 20 April 2008).
- Mills, R., *'Women's Rights in the Islamic Prenuptial Agreement: Use Them or Lose Them?'* available from <http://www.islamfortoday.com/prenuptial.htm> (last accessed 19 April 2008).
- Sisters in Islam, *'Islam and Polygamy'* (1990) available from <http://www.sistersinislam.org.my/lte/20081990.htm> (last accessed 17 April 2008).