



musawah

For Equality in the Family

TOWARDS GENDER EQUALITY: MUSLIM FAMILY LAWS AND THE SHARI'AH

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THEORETICAL PAPER SUMMARY*

This paper examines conceptions of gender in Islamic legal thought and the challenges that these conceptions present to the development of egalitarian Muslim family laws.

This paper provides some answers to two vital questions: if justice and equality are values central to Islam, why are women treated as second-class citizens in Islamic jurisprudential texts? If equality has become part of today's understanding of justice, as many Muslims now recognise, how can it be reflected in Muslim family laws?

The main points of the paper are:

1. *Shari'ah* is the totality of God's will as revealed to the Prophet Muhammad. *Fiqh* is the process of human effort to identify and extract legal rules from the sacred sources of Islam: the Qur'an and the *Sunnah*. Thus, the *Shari'ah* in Muslim belief is sacred, eternal and universal, whereas *fiqh*, consisting of the vast literature produced by Muslim jurists, **is like any other system of jurisprudence: human, mundane, not eternal, and local.**
2. Jurists agree that the concept of justice is deeply rooted in Islamic teaching, and is integral to the basic outlook of the *Shari'ah*. **Many verses in the Qur'an condemn women's subjugation**, affirm the principle of equality between genders and aim to reform existing practices in that direction.
3. **But there have been long debates about what justice requires and permits, its scope and its manifestation in laws, and its roots in Islam's sacred texts.** The dominant *Ashari* school holds that our notion of justice depends on revealed texts and is not subject to rationality that exists beyond religion. The *Mutazili* school, on the other hand, argues that our notion of justice is inborn, has a rational basis and exists independently of revealed texts. The paper's author belongs to this second school of thought.
4. **There are two distinct categories of legal rulings in *fiqh*: 'ibadat and mu'amalat.** The former defines the relationship between humans and God and is thus immutable. The latter defines the relationship between human beings and is open to reinterpretation given changing circumstances. Legal reforms are intended to reflect changing realities. The understanding of gender found in family law in the Islamic legal tradition is man-made, like other laws in the realm of *mu'amalat*. It is shaped by political, economic, social and cultural forces.
5. The revelatory texts and the Prophet altered only some of the existing patriarchal practices of the time (such as burying infant girls alive) and left others intact (such as polygamy). The Qur'an and the *Hadith* set in motion a reform of family laws in the direction of justice that was halted after the Prophet's death. **What the Prophet did was to rectify injustice and to introduce justice, as these were understood in his day.**

* This is a summary prepared by Musawah. For direct quotes, please refer to the original paper in the Musawah resource book, *Wanted: Equality and Justice in the Muslim Family*, edited by Zainah Anwar.

6. **The various *fiqh* schools all share the same inner logic and patriarchal conception of marriage.** The paper cites examples from classical scholars in which ‘ownership’ (*tamlīk*) shapes their conception of marriage and defines the rights and duties of each spouse. *Tamkin*, (sexual submission) is a man’s right and thus a woman’s duty; whereas *nafaqa* (shelter, food and clothing) became a woman’s right and a man’s duty. This classical *fiqh* model of marriage is based on the ‘marriage of dominion’—a type of marriage prevalent in pre-Islamic Arabia. Although the classical jurists redefined and reformed certain aspects of the ‘marriage of dominion’ they did not change its essence.
7. **In their understanding of the sacred texts, these jurists were constrained by a set of gender assumptions and legal theories that reflected the social and political realities of their age.** Patriarchy and slavery were seen as the natural order of things. The concepts of gender equality and human rights—as we mean them today—had no place and little relevance to the classical jurists’ conceptions of justice.
8. **Gender inequality in the Islamic legal tradition arises because of the contradictions between the ideals of the *Shari’ah* and the patriarchal structures in which these ideals were translated into legal norms.** Unfortunately, these legal norms came to be treated by subsequent generations as though they were unchanging and as part of the *Shari’ah*.
9. In the early twentieth century, *fiqh* provisions relating to the family were partially reformed and codified, but in a way that created hybrid family laws that were neither classical *fiqh* nor Western. Family law became the concern of legislative assemblies which had neither the legitimacy nor the inclination to challenge premodern interpretations of the *Shari’ah*. Deprived of the power to define and administer law, *fiqh* and its practitioners were no longer accountable to the community; they lost touch with changing political realities and new knowledge such as the idea of gender equality. These developments in practice worked against women. *Fiqh* became a closed book, removed from public debate and critical examination.
10. In the second half of the twentieth century, **attempts by Islamists to bring *fiqh* notions of gender into public policy provoked criticism and spurred women to respond.** The Islamist defence of premodern patriarchal interpretations of the *Shari’ah* as ‘God’s Law’ and as the authentic ‘Islamic’ way of life brought the classical *fiqh* books out of the closet and exposed them to critical scrutiny and public debate.
11. **By the early 1990s a new way of thinking had emerged:** a gender discourse that is ‘feminist’ in its aspiration and demands, yet ‘Islamic’ in its language and sources of legitimacy. For many Muslims, the premodern notions of marriage in Islamic legal theory had lost their power to convince. Instead, feminism and human rights have combined to bring a new consciousness and a new point of reference for Muslim women and reformist thinkers.
12. Unlike earlier reformers who had searched for an Islamic origin for modern concepts like gender equality, human rights and democracy, the **new thinkers focus on how societies produce religious knowledge.** They revive the rationalist approach and emphasise the spirit of law rather than its form. The works of thinkers such as Mohammad Arkoun, Khaled Abu El Fadl, Nasr Abu Zayd, Mohammad Mojtahed Shabestari and Abdolkarim Soroush are of immense importance.
13. Meanwhile, **gender equality has become part of global conceptions of justice.** It has gained a legal mandate through international human rights instruments, notably the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). CEDAW has been ratified by all Muslim states except Iran, Qatar, Somalia and Sudan (even though with reservations in most cases).
14. Even those who support classical *fiqh* rulings on marriage and gender roles now talk about ‘Women’s Rights in Islam’ and ‘Gender Equity in Islam’, and cannot afford to acknowledge that the classical jurists drew a parallel between sale and the marriage contract. This is proof

that the classical *fiqh* definition of marriage has become irrelevant to the contemporary experiences and ethical values of Muslims, and that a 'paradigm shift' in Islamic law and politics is well underway.

15. Legal systems and jurisprudential theories must be understood in the cultural, political and social contexts in which they operate. The new feminist voices in Islam indicate the coming of a new legal egalitarianism. The 2004 Moroccan family code which establishes equality between spouses is evidence of the new trend in family law reform.
16. **Arguments and strategies for Muslim family law reform need to be concurrently placed within Islamic and human rights frameworks.** The distinction between *Shari'ah* and *fiqh*, and the demand for legal justice allow us to see the link between the two frameworks. We can then defuse the opposition to gender equality from defenders of traditional *fiqh* and from Islamists who use Islamic terminology to protect their views from critique.
17. Understandings of justice and injustice change over time. **In the twenty-first century, the provisions of CEDAW—which stands for justice and equality for women in the family and in society—are more in line with the *Shari'ah* than are the provisions of family laws in many contemporary Muslim countries.**