



SHARI'AH,

FIQH,

AND

**STATE
LAWS**

**CLARIFYING
THE
TERMS**

The boundaries between some key terms such as *Shari'ah*, *fiqh* and Islamic law are often blurred and confused in everyday language. This confusion contributes to gender inequality in modern family laws in ways that are detrimental to women. Attempts to reform state laws in the direction of justice and equality for women have been opposed by those who perceive them as going against *Shari'ah*. It is essential to distinguish between these terms in order to set the divine and eternal apart from the human and temporal.

What is **SHARI'AH?**

Shari'ah literally means 'the path or the road leading to the water source'. In Muslim belief it is the totality of God's will as revealed to the Prophet Muhammad (pbuh), which is continuously unfolding for humanity. *Shari'ah* comprises moral and ethical values that embody the spirit and trajectory of Islam's sacred texts, a path to guide Muslims on how to live in this world and to prepare for the next. It cannot be reduced to a set of legal rulings or a book of statutes.

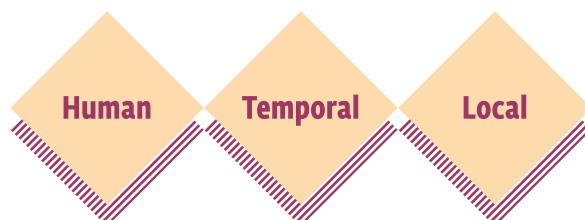


***Shari'ah* is God's will for humanity as revealed to the Prophet Muhammad — the sum total of religious values and principles that can guide Muslims' lives. *Shari'ah* is different from *tafsir*, the interpretation of Islam's sacred texts, as well as from *fiqh*, the deduction of legal rules from the texts. Human-made laws and policies are not the same as *Shari'ah*.**

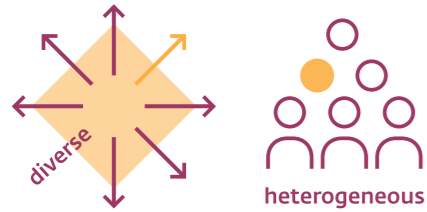
What is **FIQH?**

Fiqh literally means 'understanding' or 'knowledge'. Commonly called 'Islamic jurisprudence' in English, *fiqh* is the human understanding of *Shari'ah* and the process by which Muslim jurists (*fuqaha*) extract legal rulings (*ahkam*) from the sacred sources of Islam: the Qur'an and the *Sunnah* (the sayings and practice of the Prophet). *Fiqh* refers not only to these legal rulings but also to the vast corpus of juristic scholarship and jurisprudential texts produced by Muslim jurists.

***Fiqh* is the human process of seeking an understanding of *Shari'ah*. Like any other system of jurisprudence, *fiqh* is human, temporal and local.**



What is ISLAMIC LAW?



The terms 'Islamic law' and *Shari'ah* are often mistakenly used interchangeably. But 'Islamic law' cannot be equated with *Shari'ah*. Rather, Islamic law refers to a varied, heterogeneous body of human-made interpretations of Islam's sacred texts. These include legal principles and doctrines formulated by early jurists, as well as diverse rulings implemented by pre-modern *Shari'ah* courts (which often departed from classical *fiqh*). Some of these were later selectively included in contemporary *fiqh*-based Muslim family laws. In other words, there was, and is, no uniform and immutable set of 'Islamic' rules or laws that apply to all Muslims around the world. Rather, there is an accumulation of all these human efforts into a rich Muslim legal tradition.

There is no single, universal 'Islamic law'. Instead there are many human-made theories, interpretations, customs, laws, and policies that make up the diverse, heterogeneous Muslim legal tradition.

What are CONTEMPORARY MUSLIM FAMILY LAWS?

Just as there is a diversity of human understandings of *Shari'ah*, so there are significant variations among family laws, whether codified or not, in Muslim contexts today.

During the twentieth century, each Muslim-majority state followed **one of three paths** in the establishment of its political and legal system:

- 1** Selectively reforming and codifying parts of *fiqh*, including family laws, and later amending these codes through the same selective process

Examples: most Muslim-majority countries
- 2** Continuing to use particular versions of classical *fiqh* without codification

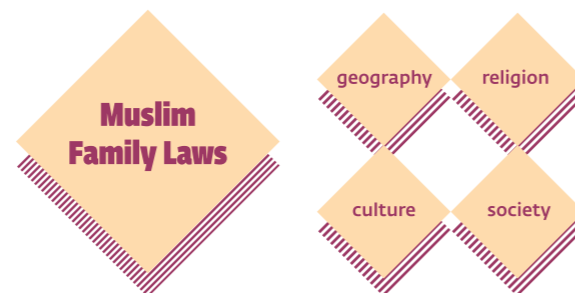
Example: Saudi Arabia
- 3** Setting *fiqh* aside and drawing on a 'Western' legal system

Example: Turkey, based on the Swiss model

Contemporary Muslim family laws are thus diverse in form and content. Some are codified and some are not. They draw upon varying religious and non-religious foundations. This diversity reflects the geographical, cultural and social differences among Muslim communities throughout the world.

While *fiqh* as an interpretive tradition produced by early jurists was developed and operated separately from the state, it was flexible and dynamic and allowed diversity of juristic opinion. But the selective adoption of classical rulings into the legal systems of modern states through the process of codification not only changed the nature of *fiqh* but also privileged and froze particular juristic opinions as they were incorporated into statute books.

There is no single 'Islamic family law' that applies to all Muslims in all places. Rather, Muslim family laws differ between countries and communities, drawing on religious foundations as well as diverse cultures, customs, and norms.



An example:

What do SHARI'AH, FIQH and STATE LAWS say about polygamy (polygyny)?

SHARI'AH

Surah an-Nisa'4:3 – 'Marry women of your choice, two, or three, or four...'

Surah an-Nisa'4:3 – '... but if ye fear that ye shall not be able to deal justly (with them), then only one.'

Surah an-Nisa'4:129 – 'Ye are never able to be fair and just as between women, even if it is your ardent desire.'

CLASSICAL FIQH

Polygamy is allowed; for most classical jurists it was a right of man that could not be curtailed through conditions. Some jurists saw it as permissible for a wife to put a stipulation in the marriage contract to deter the husband from exercising this right.

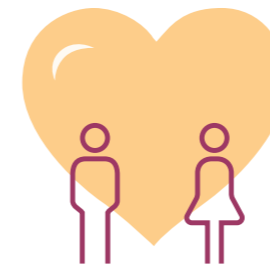


STATE LAWS

Polygamy is allowed: Examples: Most Muslim-majority states in the Middle East, Asia, and Africa

Polygamy is subject to restrictions, such as fair treatment of all co-wives in the allocation of time, maintenance, sexual rights, etc. Examples: Algeria, Bahrain, Malaysia, Morocco

Polygamy is prohibited: Examples: Tunisia, Turkey, Kyrgyz Republic, Tajikistan, and Uzbekistan



The Qur'an, the primary source of *Shari'ah*, is clear when it says that a man can never be just and equal to more than one wife (*Surah an-Nisa' 4:129*). Polygamy existed before Islam, and the Qur'an restricted it to a maximum of four wives. This was done in order to set the trajectory for reforming this pre-Islamic practice in the direction of justice. If this trajectory had been followed, polygamy would have been abolished by now.

The Way Forward

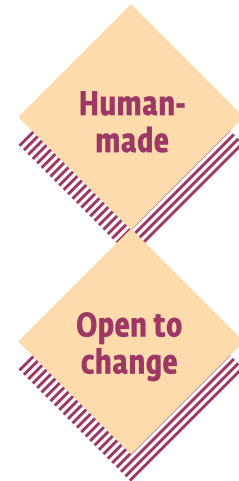
"*Shari'a* is the eternal, immutable, and unchanging law as it exists in the mind of God. *Shari'a* is the Way of truth and justice as it exists in God's mind. In essence, *Shari'a* is the ideal law as it ought to be in the Divine realm, and as such it is by definition unknown to human beings on this earth. Thus human beings must strive and struggle to realize *Shari'a* law to the best of their abilities. In contrast, *fiqh* is the human law—it is the human attempt to reach and fulfill the eternal law as it exists in God's mind. As such, *fiqh* is not itself Divine, because it is the product of human efforts. *Fiqh*, unlike *Shari'a*, is not eternal, immutable, or unchanging. By definition, *fiqh* is human and therefore subject to error, alterable, and contingent."

— Khaled Abou El Fadl (b. 1963)

"The fundamentals of the *Shari'ah* are rooted in wisdom and promotion of the welfare of human beings in this life and the Hereafter. *Shari'ah* embraces Justice, Kindness, the Common Good and Wisdom. Any rule that departs from justice to injustice, from kindness to harshness, from the common good to harm, or from rationality to absurdity cannot be part of *Shari'ah*."

— Ibn Qayyim al-Jawziyya (1292–1350)

The conflation of 'Shari'ah', 'fiqh', and 'Islamic law' is a recent phenomenon that has been used to silence voices of reform and change. To move towards gender equality inspired by Qur'anic ideas, we must distinguish between these concepts. This includes recognising that *Shari'ah* is both divine and eternal, while *fiqh* and Islamic law — including contemporary Muslim family laws — are human-made and open to change.



EQUALITY AND JUSTICE



are inherent in *Shari'ah*, and Muslims on earth must strive to realize these values.

How can we work together to build egalitarian Muslim societies?



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