

The Oslo Coalition on Freedom of Religion or Belief

UiO : Norwegian Centre for Human Rights
University of Oslo

Justice Through Equality

Building Religious Knowledge for
Legal Reform in Muslim Family Laws



A report on the Oslo Coalition's
Muslim Family Law project

The Oslo Coalition on Freedom of Religion or Belief

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About This Report

The Oslo Coalition is an international network of experts and representatives from religious and other life-stance communities, academia, NGOs, international organisations and civil society, based at the University of Oslo and funded by the Norwegian government. It carries out a number of projects to promote freedom of religion or belief worldwide. Since 2004, the Oslo Coalition project ‘New Directions in Islamic Thought’ has organised six international workshops and produced two books on burning issues of reform from within the Islamic tradition: *New Directions in Islamic Thought* (ed. Kari Vogt, Lena Larsen and Christian Moe, London: I.B. Tauris, 2009) and *Gender and Equality in Muslim Family Law* (ed. Ziba Mir-Hosseini, Kari Vogt, Lena Larsen and Christian Moe, London: I.B. Tauris, 2013) – referred to below as NDIT and GEMFL respectively.

In 2007–2012, the project brought together a diverse group of Muslim experts to discuss gender equality in Muslim family law. They included religious scholars; experts in the social, human and legal sciences; and NGO activists. All shared a commitment to engaging with the Islamic tradition to bring about

reform consonant with modern understandings of justice. We held three international workshops in Marrakech and Cairo, and published the book GEMFL, on which this report is based.

The report is intended for policy-makers, stakeholders and advocates of reform who are developing knowledge-based arguments for legal reform. It sums up lessons we have learned from the expert discussions and written contributions, and places some of the key arguments into an editorial synthesis.

We have not sought to develop a consensus statement, and the individual authors cited are not responsible for each other’s arguments, for the particular use we have made of their own work, or for any errors in the presentation. For the full version of the key scholarly findings and arguments as developed by the expert participants, and the evidence and literature they cite, please see the book chapters and other key resources referenced under “Further reading” in each section.

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Summary

Muslim family law is a sensitive and contested subject. In recent decades, even as most Muslim countries have taken on international legal obligations to promote women's equality, a political push for 'Islamisation' of the state and its laws has resulted in new discriminatory rules. At the same time, developments such as the reformed Moroccan family code of 2004, based both on Islamic sources and international human rights, show that legal reform towards gender equality is possible.

Muslim family laws are based on a jurisprudence shaped by past societies very different from those of today. A major obstacle to gender equality is the way in which classical Muslim jurists linked a husband's obligation to provide for his family with his wife's duty to obey him, a much-contested link encapsulated in the notion of male guardianship, expressed in the legal terms *qiwama* and *wilaya*.

Justice is a central value in Islam. But what people understand by justice has changed over time. The contest over Muslim family laws involves two radically opposed notions of justice: One found in pre-modern legal discourses and reflected in classical *fiqh* rulings that sanction discrimination on the basis of gender and status, the other based on modern understandings of justice in which equality is inherent.

Social realities have also changed. Legal solutions designed to uphold justice in a tribal or kin-based society no longer do so for female breadwinners in a modern nation-state where both men and women are full citizens.

Those who promote family laws that discriminate against women, claim that Muslims must accept all provisions of these laws as divine and unchangeable. However, Muslim scholars have drawn important distinctions between modern legal codes and the rulings (*ahkam*) of jurists, between divine Shari'a (the Path) and human *fiqh* (understanding of Shari'a), between rules regulating human transactions and those regarding worship, and between different levels in the purposes of Islamic law. These four crucial distinctions allow scholars to recognize family laws as man-made and changeable in light of changing social conditions and understandings of the religious sources.

Those who have interpreted the sacred texts of Islam, the Qur'an and the Sunna of the Prophet, have always done so in light of their own social contexts, common assumptions, and understandings of justice, all of which are subject to change. As realities and conceptions of justice have drastically changed, concerned Muslims are re-reading the texts to discover an ethical and egalitarian message that challenges traditional legal rules, a message of justice and equality for women and men.

To overcome any apparent contradiction between piety and equality, and the gap between secular and religious camps, Muslim women's movements are basing their work on legal reform on three references simultaneously: religion, rights, and the reality of women's lives. They are claiming their own rightful place among the diversity of views within Muslim tradition.

Introduction

New scholarship addresses the tension between Shari'a and fiqh, between patriarchal and egalitarian interpretations of religion, and between being a women's activist and a good Muslim.

Compare these two statements:

The fundamentals of the Shari'a are rooted in wisdom and promotion of the welfare of human beings in this life and the hereafter. Shari'a 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'a.

The wife is her husband's prisoner, a prisoner being akin to a slave. The Prophet directed men to support their wives by feeding them with their own food and clothing them with their own clothes; he said the same about maintaining a slave.

Both statements were made by the same scholar, Ibn Qayyim al-Jawziyya (1292–1350 CE), but through modern eyes they seem poles apart. A law that embraces justice, kindness, and wisdom seems incompat-

ible with the idea of a wife as a prisoner or slave of her husband. The former quotation reflects the ideal of Shari'a as the divine law, the second reflects the realities of how this law came to be understood in medieval jurisprudence (*fiqh*).

Some Muslims celebrate and identify with Ibn Qayyim's idea of Shari'a, which appeals to timeless principles of justice, welfare and reason, but are deeply troubled by his views on marriage, which no longer seem to reflect the justice of the Shari'a and cannot be defended on rational grounds.

As Muslim women organise to press for reforms of gender-discriminatory national family laws modelled on classical *fiqh*, they experience these tensions, and raise questions such as: Why are the justice and equality, which Muslims believe to be inherent to Islam and Shari'a, not reflected in family laws? How can they be reflected? Can Mus-

lim women claim equality before the law without turning their back on Islam?

Here we discuss findings from new Muslim scholarship addressing these questions in an egalitarian perspective informed by Islamic tradition, modern conceptions of justice and human rights, and the social realities of women's lives. Their work goes to the heart of current contests over Muslim family laws, providing knowledge-based arguments for legal reform.

FURTHER READING

- Ziba Mir-Hosseini, "Justice, Equality and Muslim Family Laws"; editors, "Introduction"; both in GEMFL.
- The first quotation from Ibn Qayyim al-Jawziyya is from his *I'lam al-Muwaqqi'in 'an Rabb al-Alamin*; the second is quoted in Yossef Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge: Cambridge U. Press, 2005).

The Contest Over Muslim Family Laws

Family law is a sensitive and contested matter. In recent decades, even as most Muslim countries have taken on international legal obligations to promote women's equality, a political push for 'Islamisation' of the state and its laws has resulted in new discriminatory rules. At the same time, developments such as the new Moroccan family code of 2004, based both on Islamic sources and international human rights, show that legal reform towards gender equality is possible.

Family law is always a sensitive subject, as it regulates the closest ties of men, women and children. In many countries, family law is also the only field of law that retains a tie to traditional Muslim jurisprudence (*fiqh*), and so it has also come to symbolise Muslim collective identity. Muslims are understandably sensitive to outside criticism of such laws, and wary of reforms that go against the apparent meaning of the word of God.

Nevertheless, Muslim family laws have varied in history, according to different schools of law (*madhahib*), local customs, and solutions found by muftis and judges based on the realities of their time and place. They vary widely between different Muslim countries in modern times, from the progressive Tunisian code that outlawed polygamy and

men's unilateral divorce in the 1950s, to the direct application of medieval Hanbali *fiqh* in Saudi Arabia. Piecemeal changes continue to be made, as when Iran in 1992 let divorced wives claim compensation for housework, or when Egypt in 2000 reformed divorce laws to enable a woman to obtain a divorce without requiring her husband's consent but forgoing her financial claims against him.

Since the 1970s, there have been two major, opposing developments. First, women's equality has been firmly enshrined in international law through the UN women's convention (CEDAW), to which all but a handful of Muslim countries have signed up. Second, however, the rise of political movements demanding "Islamisation" of the state and its laws has retarded or set back the struggle for women's equality. Most dra-

matically, reforms in Iranian family law were dismantled after the 1979 revolution.

But elsewhere, too, new laws or amendments have undermined the rights Muslim women already enjoyed. In Malaysia in the 1990s, for instance, a competition for religious legitimacy between the ruling party and the Islamist opposition led to legal amendments that made it easier for men to divorce their wives and to practise polygamy. In response, however, other Muslims, such as the Malaysian group Sisters in Islam, have raised faith-based objections to discrimination against women in the name of their religion.

As initiatives for reform have languished, cracks are showing as laws have grown increasingly out of touch with the realities of rapidly changing societies. The Egyptian women's NGOs studied by Marwa Sharafeldin, for example, complain that the grounds on which women can ask for divorce are limited and difficult to establish; that the courts take up to seven years to grant women divorce; that when husbands fail to pay maintenance, women's claims are limited, and court verdicts are not enforced; that husbands can abuse the 'obedience' clause in the law when their wives seek separation; and that women face economic hardship after the child's custody is completed.

MOROCCO: FROM ETERNAL MINORS TO JOINT MANAGERS OF THE FAMILY

Change, however, is possible. In 2004, the Moroccan family code (*Mudawwana*) took

important steps towards gender equality. As discussed by Aïcha El Hajjami, the family code of 1958 in effect kept women as eternal

“The law changed in 2004 to introduce the joint management of the family by both spouses, sharing equal responsibility.”

minors. When marrying, they were subject to the guardianship of their fathers; once married, they owed obedience to their husbands in exchange for maintenance (*nafaqa*). The husband had unrestricted access to polygamy and unilateral divorce. The wife had the right to judicial divorce, but only on limited grounds and if she could provide evidence; or to separation through compensation (*khul'*), which often allowed a husband to pressure his wife into giving up all her rights, including child custody. Upon divorce, the mother would be given custody (*hadana*) of the children only if she did not remarry or take up residence far from the home of their father.

The law changed in 2004 to introduce the joint management of the family by both spouses, sharing equal responsibility. Matrimonial guardianship was made optional for women who had reached legal majority, and the marriage age was set at 18 for both sexes. Strict conditions were imposed on polygamy, to be assessed by the judge. Divorce was made available to both spouses and placed under judicial control. In case of divorce, the wife could claim a share of the assets acquired during the marriage.

These reforms, developed through a democratic process initiated by the king, were supported by progressive Islamic scholars using scriptural arguments, as well as by women's groups citing international human rights and the needs of modern Moroccan society. Studies since have shown that the law has loopholes, and that its implementation so far leaves much to be desired. Still, it represents a notable step toward equality before the law for men and women.

FURTHER READING

- On Morocco: Aïcha El Hajjami, "The Religious Arguments in the Debate on the Reform of the Moroccan Family Code".
- On Malaysia: Zainah Anwar, "From Local to Global".
- On Egypt: Marwa Sharafeldin, "Egyptian Women's Rights NGOs"; Mulki al-Sharmani, "Qiwāma in Egyptian Family Laws".
(all in *GEMFL*)

For recent overviews of Muslim family laws and reform efforts around the world, see:

- Abdullahi A. An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book* (London and New York: Zed Books, 2002).
- *Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World* (Women Living Under Muslim Laws, 2006, <http://www.wluml.org/node/588>).
- Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam University Press, 2007).

The Background in Traditional Fiqh: the “*Qiwama* Postulate”

Muslim family laws are based on a jurisprudence shaped by past societies very different from those of today. A contested link between the male duty of provision and female duty of obedience is an obstacle to gender equality.

Modern Muslim family laws are based more or less closely on traditional fiqh, the attempts of scholars to understand the law of God by interpreting texts such as the Qur'an's verse 4:34 (see Box 1). However, many of the rules applied today were laid down many centuries ago by scholars who lived in a patriarchal, often tribal social system, in which slavery was accepted, before men's and women's lives were transformed by the scientific and industrial revolutions. Traditional fiqh was shaped by history, and it reflects social circumstances that do not apply today.

The fiqh rules on the family are many and detailed. To see how they fit together, and how gender discrimination is anchored in the structure of fiqh rules, it is helpful to begin with the concept of male guardianship of women: the *qiwama* of the husband over the wife and the *wilaya* of the elder male relative over the woman in marriage.

The notion that men are women's *qawwamun*, protectors and providers, based on

interpretations of 4:34, is described by Ziba Mir-Hosseini as the lynchpin of the patriarchal model of family in classical fiqh, and a stumbling block to gender equality in the present. It can be seen at work in all areas of Muslim law relating to gender rights, but most clearly in the laws that classical jurists devised for the regulation of marriage.

The marriage contract, which is patterned on the contract of sale, establishes the wife's central legal duty of submission (*tamkin*) to the husband, and the husband's duty of maintenance (*nafaqa*) as the right of the wife, which she loses through disobedience (*nushuz*).

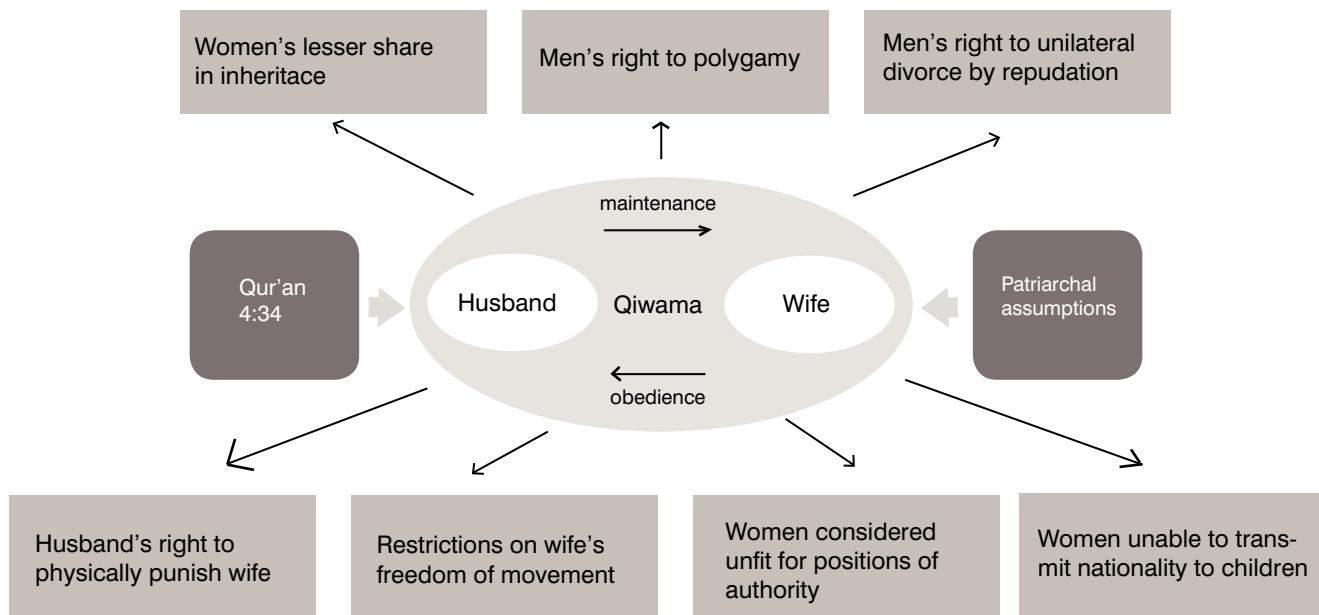
“It even justified the ban on women being judges or political leaders, on the understanding that they were under the authority of their husbands, and not free agents able to deliver impartial justice if placed in positions of authority.”

This “*qiwama* postulate” served as a rationale for inequality in other regards, notably men’s rights to polygamy and to divorce by unilateral repudiation (*talaq*). It justified women’s lesser share in inheritance by men’s duty to provide for their wives. It even justified the ban on women being judges or political leaders, on the understanding that they were under the authority of their husbands, and not free agents able

to deliver impartial justice if placed in positions of authority.

These notions are thus connected, on the one hand, with nearly all the provisions of Muslim family laws (Figure 1). On the other, they derive from the fundamental assumptions made in pre-modern *fiqh* about women’s nature and capabilities, and readings of the Qur’an (tafsir) informed by these assumptions. These assumptions were not

Figure 1: The “*qiwama* postulate” as lynchpin of patriarchal family law



BOX 1: QUR'ANIC VERSES TYPICALLY CITED IN SUPPORT OF GENDER HIERARCHY

Relatively few verses of the Qur'an can be read as indicating fundamental gender inequality: 2:222–3, 2:228, 4:32, 4:34, 43:16–19.

The textual basis for the husband's *qiwama* is the reference to *qawwamun* in 4:34, commonly understood as mandating male authority over women:

Men are qawwamun (protectors/maintainers) in relation to women, according to what God has favored some over others and according to what they spend from their wealth. Righteous women are qanitat (obedient) guarding the unseen according to what God has guarded. Those [women] whose nushuz you fear, admonish them, and abandon them in bed, and adribhunna (strike them). If they obey you, do not pursue a strategy against them. Indeed, God is Exalted, Great. (4:34, trans. Kecia Ali)

Verse 4:34 goes on to speak of righteous women as *qanita* (commonly translated as

obedient), and advises men on dealing with disobedience. Rather than a description of ideal marriage relations, it may be read as dealing with the resolution of discord in marriage, a theme that continues with the egalitarian divorce provisions in 4:35.

Though the word *wali* (guardian) is used many times in the Qur'an in various meanings, it is not mentioned in any of the verses usually cited by the jurists to support the doctrine of marriage guardianship (*wilaya*), namely 2:221, 2:232, 2:234, 2:237, 4:2–3, 4:6, 4:25, 24:32, 60:10; 65:4.

Verse 2:228 states, in Yusuf Ali's translation, that “women shall have rights similar to men to the rights against them, according to what is equitable; but men have a degree (of advantage) over them.”

Verse 2:222 deals with menstrual pollution, whereas 2:223, addressing husbands, compares their wives with a tilth and instructs them to “approach your tilth when or how ye will”. Verses 43:16–19 deal with worship of female deities, rather than human affairs.

unique to *fiqh*, but were largely shared by non-Muslim societies at the time.

Today, the *qiwama* postulate in *fiqh* can be understood as a “social construction”, a seemingly given reality that is actually created and maintained by the interpretations

of people interacting in a certain cultural and social context. It seemed just in the social context from which it sprang, but society has moved on, and the understanding of justice has changed.

FURTHER READING:

- Ziba Mir-Hosseini, “Justice, Equality and Muslim Family Laws”, in GEMFL.
- Lynn Welchman “A Husband’s Authority: Emerging Formulations in Muslim Family Laws,” *International Journal of Law, Policy and the Family* 25 (1) (2011) 1-23.

SEE ALSO:

- Mir-Hosseini, “The Construction of Gender”, *Hawwa* 1 (2003): 1; Mir-Hosseini, “Tamkin: Stories from a family court in Iran”, in *Everyday life in the Muslim Middle East*, eds Donna Lee Bowen and Evelyn A. Early, 136-150 (Bloomington: Indiana University Press, 2002).
- Kecia Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur’an, Hadith and Jurisprudence* (Oxford: Oneworld, 2006).
- Manuela Marin, “Disciplining Wives: A Historical Reading of Qur’an 4:34”, *Studia Islamica* 98 (2003), 5-10.
- Amina Wadud, *Inside the Gender Jihad: Women’s Reform in Islam* (Oxford: Oneworld, 2006), chapter 6, 187-216, “Qur’an, Gender, and Interpretive Possibilities”.
- Sa’diyya Sheikh, “Exegetical Violence: Nushuz in Quranic Gender Ideology”, *Journal for Islamic Studies* 17 (1997), 49-73.

Changing Views of Justice

Justice is a central value in Islam, but the understanding of justice has changed over time. The contest over Muslim family laws involves two radically opposed notions of justice: One found in pre-modern legal discourses and reflected in classical fiqh rulings that sanction discrimination on the basis of gender, faith and status; the other based on modern understandings of justice, in which equality is inherent.

As Muslims brought up to believe in a just God, Zainah Anwar and the other women who formed the Malaysian group Sisters in Islam in the 1980s found it hard to believe that God could sanction any injustice, oppression or violence against women. Yet they recall being told by authorities that a man had a God-given right to beat his wife, or to take a second wife; or that hell was full of women, because they left their heads uncovered and were disobedient to their husbands.

Reading the Qur'an for themselves, Anwar says, they became convinced that it was not Islam that oppressed women, but interpretations of the Qur'an, influenced by the cultural practices and values of a patriarchal society.

Similarly, Sharafeldin's research on Egyptian women's NGOs shows that many activists consider themselves believing women, and may reject women's demands that they believe to go against the Qur'an. But they may also reject religious claims that conflict

with their contemporary Muslim sense of human rights and dignity. These notions have fundamentally changed since the classical age.

FROM PROPORTIONATE TO EQUAL JUSTICE

Before the modern age, notes Mohsen Kadivar, women's rights were limited by a notion of justice supported by the political philosophy of Aristotle, according to which equal rights for unequal people would be unjust. Instead, people had rights in proportion to their capacities, abilities and potentials, which were supposed to be innate in different genders and social groups. For centuries, this view was held to be right and reasonable, and not only by Muslims. Women, slaves and non-Muslims were accorded lower status than men, free people and Muslims.

Today, the understanding of rights, conceptions of justice and what makes a person a rights-holder and what constitutes a just law or practice, have changed. Human

beings are considered to have rights simply as human beings, with equal dignity based on their shared human nature, which is the same in every person, regardless of gender.

This view is often supported with arguments from reason, which raises an old controversy in religious thought: whether reason can tell what is right. Many Muslim scholars also argue that this modern understanding agrees with the egalitarian spirit of Islam, and with the Qur'anic teaching that a single soul is the origin of male and female humans and the subject of divine duties and rights (see Box 2).

Contemporary Islamic jurists have rejected the old reasoning in many regards – slavery is no longer accepted – but gender remains an issue. The old system was based on an understanding of the natures of men and women that is not supported by evidence and lived realities. Experience has shown that given the same education and opportunities, women can do all that men can do in society.

DIFFERENCE AND EQUALITY

Today, human equality is seen as essential to justice, but this leaves much room for different views on the most just way to accommodate differences between persons. In what Anver Emon calls “the paradox of equality”, equality is not merely about being treated the same, it is also about treating different people differently when treating them the

same would be unjust. But when does the fact that two people are different justify different legal treatment, and when does different treatment become discrimination?

This remains a fundamental question, for women's groups in the Muslim world as elsewhere. The debate continues between the defenders of different principles, as advocates of “formal equality” seek enactment of gender-neutral laws, while advocates of “substantive equality” advocate laws to ensure that women have both “equality of opportunity” and “equality of outcomes.” Discussions turn, for example, on whether women need “positive discrimination” to gain actual equality with men after centuries of negative discrimination, or to compensate for the time and risks of pregnancy and childbirth.

By opting for justice as gender equality before the law, then, modern Muslims are not importing a package of ready-made legal solutions. The meaning of equality remains to be fully worked out in different social and cultural contexts. Put simply, there can be no such thing as a uniform and unchanging Muslim family law: A law that can ensure justice in one context might yet be the cause of injustice in another time and context.

Egyptian women's NGOs, for example, are aware that full equality before the law would not only do away with male privilege, but also weaken women's negotiating position in marriage in some regards, since

“The meaning of equality remains to be fully worked out in different social and cultural contexts. Put simply, there can be no such thing as a uniform and unchanging Muslim family law”

certain female privileges, such as their claim to maintenance and *mahr*, would also have to go. The NGOs have not raised their voices against men's duty of maintenance (*nafaqa*), though they are highly critical of women's duty of obedience. This may seem inconsistent. But as Sharafeldin notes, it may also be seen as one way to deal with the paradox of equality, taking into account the difficult social and economic situation many Egyptian women face, and seeking to ensure their substantive equality by a form of positive discrimination. For it is not only the idea of justice that has changed; so have the social conditions for attaining it.

FURTHER READING

- On old and new understandings of justice: Mohsen Kadivar, “Revisiting Women's Rights in Islam”; Hassan Yousefi Eshkevari, “Rethinking Men's Authority over Women”.
- On Malaysia: Zainah Anwar, “From Local to Global”.
- On Egypt, Marwa Sharafeldin, “Egyptian Women's Rights NGOs”.
- On difference and equality: Anver E. Emon, “The Paradox of Equality and the Politics of Difference”.
- (all in GEMFL)

Changing Social Requirements for Justice

Legal solutions designed to uphold justice in a tribal or kin-based society no longer do so for female breadwinners in a modern nation-state where both men and women are citizens.

The rules of *fiqh* originated in a tribal society, a social order based on kinship ties. The tribe or clan guaranteed the rights and security of each member, and of outsiders who became its clients. A strict social hierarchy determined who had what rights based on age, gender and connections. Many verses of the Qur'an suggest a concern to humanise these discriminatory and patriarchal customs, but when *fiqh* was developed, in urban settings where tribal ties were already weakened, scholars came to preserve and defend many patriarchal discriminatory practices, rather than develop the egalitarian impulses.

For example, the *wali* or marriage guardian was required in a tribal context to protect the interest of the ward. Muhammad Khalid Masud argues that marriage guardianship was a measure adopted to promote gender equality by protecting women, the disadvantaged gender. At the same time as it created a balance, however, it also created a hierarchy.

In today's world, it is the state that is expected to protect its citizens and safeguard

their equal rights in an impartial way. This profound change in the social and political order is prompting scholars to reappraise *fiqh* rules geared to tribal society.

Modern concepts of equality before law and justice based on individual rights, rather than on social hierarchy, have also changed the role of parents. In this situation, *wilaya* and *qiwama* have become obstacles rather than means to the purpose of protection. For example, they can be abused by parents and courts to break up a marriage freely contracted by an adult, competent woman, or to force girls into marriage against their will.

FEMALE BREADWINNERS

Studies of court cases in Egypt, Iran, Morocco, and Palestine (see "Further reading") show that actual marriage practices in these countries increasingly diverge from the legal model of an Islamic marriage that is upheld in their family codes. The laws, following classical *fiqh*, assume that the husband is the provider, and the wife is finan-

cially dependent and obedient. In real life, however, husbands are not necessarily the sole providers. Women have always contributed to the upkeep of the household, by working in the fields, in craftwork, in trade, or in other capacities; and in recent times, they are increasingly recognised for the important role they play in the financial upkeep of the family, sometimes as sole breadwinners.

Some argue that the classical division of rights and duties between wives and husbands struck a fair balance at the time. In any case, female breadwinners today will experience the law as unjust if it compels them to obedience and gives them lesser rights e.g. in divorce, based on the fiction that they are dependents, while in reality they are the ones shouldering the family's financial burdens. It may also be seen to be at odds with both Qur'anic and contemporary notions of marriage as companionship and partnership.

If men have authority "...according to what they spend from their wealth ..." (4:34), it might be argued that women, too, are the protectors and heads of their families when they make the money and contribute to family upkeep. The women's groups and studies surveyed here, however, are not calling for a reversal of gender roles, based on the same old *qiwama* postulate that ties power in the household to ability to pay. Rather, they

want the law to place spouses on a footing of equality and mutual responsibility, reflecting the "love and mercy" that the Qur'an says God has placed in their hearts (30:21).

FURTHER READING

- On *wilaya* and *qiwama* as protection in the tribal context, see Muhammad Khalid Masud, "Gender Equality and the Doctrine of Wilāya"; Faqihuddin Abdul Kodir, "Gender Equality and the Hadith of the Prophet Muhammad", both in GEMFL.
- On the gap between legal model and marriage practices, see Mir-Hosseini, "Justice, Equality and Muslim Family Laws"; Al-Sharmani, "Qiwāma in Egyptian Family Laws", both in GEMFL. On issues of parental authority, see again Khalid Masud, "Gender Equality and the Doctrine of Wilaya".
- See also: Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Law* (London and New York: I.B. Tauris, 2002); Nahda Shehadeh, "House of obedience: social norms, individual agency, and historical contingency", *Journal of Middle East Women's Studies* 5/1 (2009), pp. 24-49; Lynn Welchman, *Beyond the Code: Muslim Family Law and the Shar'i Judiciary in the Palestinian West Bank* (The Hague: Kluwer Law International, 2000).

Making Space for Legal Change

Those who promote discriminatory family laws claim that Muslims must understand all their provisions as divinely revealed and unchangeable. However, scholars have made four crucial distinctions that allow the recognition of family laws as man-made and changeable in light of changing social conditions and understandings of religion.

First, modern Muslim family laws are not the same as *fiqh*, the traditional Islamic jurisprudence on which they draw. *Fiqh* is the scholarly work of jurists, whereas modern family laws are selectively codified by the legislatures of modern nation-states, according to the will of those in political power. In the process, the flexibility and diversity of opinion of traditional *fiqh*, which sometimes worked to women's benefit, have been lost.

Second, according to a commonly drawn distinction, *fiqh* is not Shari'a, the divine law. *Fiqh* is literally the "understanding" of the divine law by fallible human beings. As such, it is understood to be only an approximation to what is intended in the divine message. Indeed, contemporary Muslims may well feel that the patriarchal notions of medieval *fiqh* go against the grain of the lofty aims of Shari'a (as illustrated by the words of Ibn Qayyim quoted above in the Introduction).

Third, Muslim scholars have always distinguished between rules that pertain to *'ibadat*, worship, the relationship between human beings and God, and those that pertain to *mu'amalat*, social transactions between human beings. They have admit-

ted a larger scope for changing the latter through independent reasoning (*ijtihad*) according to the needs of the time and place. Matters of marriage and family law fall under *mu'amalat*.

Still, modern Muslim family laws draw their legitimacy from their link with a large body of religious rulings (*ahkam*) that address marriage and family life in considerable detail. This allows opponents of reform to present any rule as a religious issue of paramount importance, defending e.g. polygamy as though it were prayer itself.

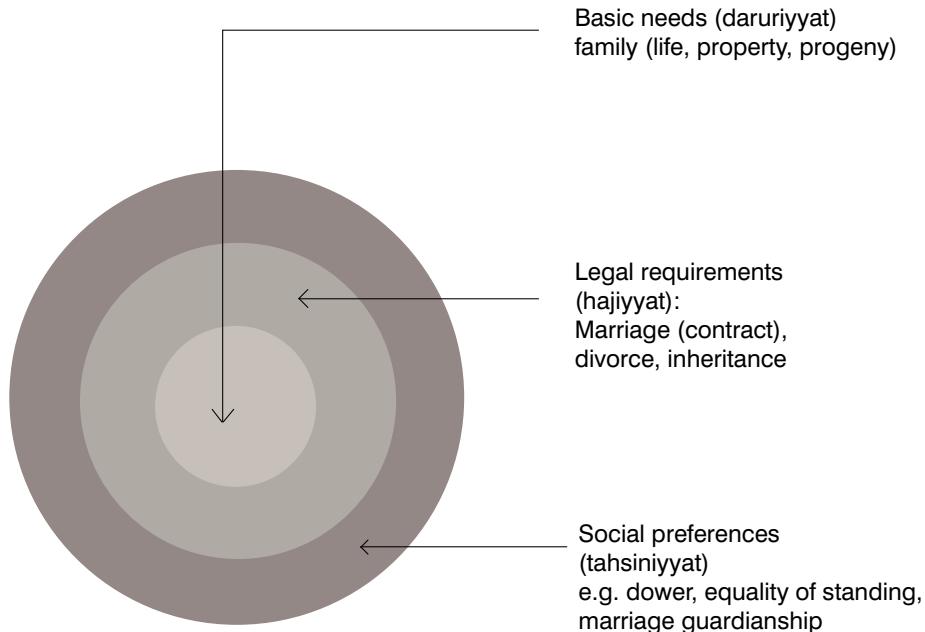
But is every rule of *fiqh* an equally important end in itself in every time and place? A nearly thousand-year-old theory of Islamic law suggests otherwise by drawing a fourth distinction between different levels of norms in the Shari'a. As discussed by modern scholars, it offers a yardstick for sorting out the local and time-bound norms from those that are of central, universal and lasting import.

THE THREE LEVELS OF ISLAMIC NORMS

The theory of the objectives of Islamic law (*maqasid al-shari'a*) was formulated by the scholars al-Ghazali (d. 1111) and al-Shatibi (d. 1388). These objectives were divided into three levels at which different norms apply: *daruriyyat*, *hajiyyat* and *tahsiniyyat*, terms that are hard to translate.

Following al-Shatibi, but rephrasing the argument in modern terms, Muhammad Khalid Masud has discussed the three levels of norms as universal or basic needs, legal requirements, and social preferences, which protect and depend on each other. They may be viewed as three concentric circles (fig. 2).

Figure 2: Three levels of Islamic family norms as protective circles
(adapted from Khalid Masud)



Al-Shatibi places the family in the first circle as a basic, natural need. The legal norms in the second circle, e.g. laws regulating marriage, divorce, and inheritance, are required to protect the family. They are not in themselves basic needs. The social preferences (third circle), such as that marriage partners be of equal social standing (*kafa'a*), or the provision of a proper dower (*mahr al-mithl*), are refinements that help ground the legal norms in local culture. The absence of these social norms and practices, Masud argues, does not violate the legal norms that sustain the institution of the family, i.e. those in the second circle. Hence these values may change with time, and new cultural values may replace old ones.

Al-Shatibi, for example, placed marriage guardianship (*wilaya*) in the third circle. As seen above, it can be argued that marriage guardianship was instituted to protect the interests of the female wards in social circumstances that made them vulnerable, but has come to be at odds with its original purpose, and could be replaced with different institutions.

FURTHER READING

On the purposes of Islamic law: Muhammad Khalid Masud, “Gender Equality and the Doctrine of *wilaya*” in GEMFL.

On *maqasid*, see also:

- Muhammad Khalid Masud, *Shatibi's Philosophy of Islamic Law* (Islamabad: Islamic Research Institute, 1995).
- Mohammad Hashim Kamali, “Law and Ethics in Islam: The Role of the *Maqasid*,” in NDIT; Kamali, *Maqasid Al-shari'ah Made Simple* (London: The International Institute of Islamic Thought, 2008).
- Jasser Auda, *Maqasid Al-Shari'ah: A Beginners Guide* (The International Institute of Islamic Thought, 2008).

On the impact of codification of family law, see also:

- Amira Sonbol (ed.), *Women, the Family, and Divorce Laws in Islamic History* (Syracuse: Syracuse University Press, 1996).

New Approaches to Sacred Texts

The sacred texts of Islam, the Qur'an and the Sunna of the Prophet, have always been interpreted in light of the interpreters' social contexts, common assumptions, and understandings of justice, all of which are subject to change. As realities and conceptions of justice have drastically changed, concerned Muslims are re-reading the texts to discover an ethical and egalitarian message that challenges traditional legal rules, a message of justice and equality for women and men.

Taken literally, the norms in the Qur'an and Sunna directly address questions that occupied the first generations of Muslims in a language they could understand, often urging them to change their social practices. The texts have come down to modern Muslims wrapped in layers of interpretation by pre-modern scholars. In seeking to interpret the word of God, the *tafsir* literature draws on a rich store of human knowledge and assumptions that were widespread in the medieval world.

Among these assumptions from outside the Qur'an, Hasan Yousefi Eshkevari notes, were the ideas that men are created superior to women; that women are connected with evil and must therefore be controlled; that the patriarchal family is the basic unit of society; and Aristotle's conception of justice as "maintaining everything in its

proper place", a hierarchical social order in which humans are divided into masters and slaves. Modern scholars, therefore, have highlighted the importance of understanding the texts and interpretations in their social contexts, old and new, when Muslims seek their guidance today.

For example, al-Tahir al-Haddad (1899–1935) argued that legislation in the Qur'an and Sunna was governed by a 'policy of

"The texts have come down to modern Muslims wrapped in layers of interpretation by pre-modern scholars."

gradualism', exemplified in the gradual prohibition on drinking wine. The highest aim in Islam is full equality, but it could not be achieved in the lifetime of the Prophet or in

the seventh century. Both slavery and gender hierarchy were tolerated, but laws were introduced to reform them and to point us the way to full freedom and equality. Al-Haddad further made a clear distinction between those legal norms that are essential to Islam as a religion, and those that are contingent and bound by time and context, such as polygamy.

Likewise, Fazlur Rahman (1919–1988) criticised patriarchal readings of the Qur'an, and contended that its legislation on women was part of an effort to strengthen the position of the weaker segments of the com-

“Advocates of gender discrimination often quote isolated verses and hadith in support, and seek to silence reformers by claiming that it is a matter of “clear text” that leaves no space for independent reasoning, ijtiḥad”

munity, removing certain abuses against women and expanding their rights. The economic roles of men and women are not inherent in the sexes, but change as women gain education and enter the workplace. Law reforms must give women equality in marriage, divorce and inheritance.

To understand the Qur'anic principles and bring them to bear on our contemporary situation, Rahman proposed a “double movement” process that entails moving “from the present situation to Qur'anic

times, then back to the present”. The process begins with understanding the socio-historical context of the revelation in order to be able to extract the general principles, values and long-range objectives behind the specific rules. It is only then, Rahman argued, that Muslims can understand and translate the Qur'anic principles to law and apply them to the issues at hand, by means adapted to the current context.

Advocates of gender discrimination often quote isolated verses and hadith in support, and seek to silence reformers by claiming that it is a matter of “clear text” (*nass qat'i*) that leaves no space for independent reasoning, *ijtiḥad*. The late Nasr Hamid Abu-Zayd (1943–2010) urged reformers not to be intimidated by such claims. Already in the classical age, he pointed out, Islamic scholars realised that there are few if any “clear texts”, and they differed over what those texts were. Moreover, the Qur'an may be read on more levels than the dominant *fiqh* reading with its narrow focus on proof-texts for legal rules.

Modern scholarship on gender in the sacred texts has advocated a holistic reading of all the texts in their context to discover overall principles on the ethical level, such as justice as a universal principle in the Qur'an, relating to both women and men; marriage as a loving relationship of shared responsibility; and the ‘purposes of Islamic law’ discussed above.

REREADING THE HADITH

The hadith, reports of the practice of the Prophet (and in Shi'i tradition, the Imams), have played an important role as a source of Islamic norms throughout Muslim history. Today, some scholars are seeking to re-evaluate texts used to justify discrimination against women and to highlight texts that promote equality. Scholars are also seeking to interpret hadith in context, by studying them as historical records, in light of the social dynamics of Arab society at the time, and gleaning their essential purposes from the circumstances that prompted them (*'ilm asbab al-wurud*).

Hadith criticism is not new; it flourished in the classical age, when scholars of hadith exerted their independent reasoning (*ijtihad*) to critically select or reject reports according to their chain of transmitters (*sanad*) and their content (*matn*). The tradition suggests that already the Companions of the Prophet rejected each other's hadith if they felt they were not credible, went against the Qur'an, or were inconsistent with reason or historical fact, says Faqihuddin Abdul Kodir. He points out that the science of hadith itself provides a striking argument for gender equality: Even though *fiqh* considers two women equal to one man for the purpose of witnessing financial contracts, one woman is considered equal to one man for the far more responsible testimony of transmitting hadith.

QIWAMA AS AN ETHIC OF RESPONSIBILITY

The following hadith, for example, is often cited together with verse 4:34 to justify male guardianship in the home:

"I heard Allah's Apostle saying, 'All of you are guardians and responsible for your wards and the things under your care. The Imam (i.e. the ruler) is the guardian of his subjects and is responsible for them and a man is the guardian of his family and is responsible for them.'"

A woman is the guardian of her husband's house and is responsible for it. A servant is the guardian of his master's belongings and is responsible for them.'...

However, Faqihuddin Abdul Kodir outlines how a contextual reading can look beyond the literal ruling of guardianship to focus on the ethic of responsibility that is expressed in the hadith, and distinguish it from the scope of responsibility attributed to each, which depends on the conditions of the social context and may be subject to change. According to the hadith, in the absence of the husband, the wife in practice becomes the guardian of the whole family. Today, with both husbands and wives working outside the home, it may be argued that the scope of guardianship should be changed accordingly.

BOX 2: GENDER EQUALITY IN THE QUR'AN

Many verses of the Qur'an may be read as indicating fundamental gender equality. Women and men are equal in creation (4:1, 49:13), and equally eligible for salvation and the afterlife (4:123, 3:195, 16:97, 33:35, 40:40).

They are responsible for their actions and face equal rewards and punishments in this life and the next (5:38, 24:2, 24:26, 24:31, 48:5–6, 48:25, 57:12–13).

Importantly, women and men are ascribed equality in rights and responsibilities for protecting each other and carrying out the public duty of commanding good and forbidding evil: “The believers, men and women,

are protectors, one of another: they enjoy what is just, and forbid what is evil...” (9:71).

The Qur'an describes marital life in terms of equality and mutual affection: “...They are your garments and ye are their garments...” (2:187). “And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect.” (30:21). In deciding on the weaning of a child, “mutual consent and ... consultation” is required (2:233).

(Trans. Yusuf Ali)

FURTHER READING

- On reading the Qur'an on multiple levels: Nasr Abu-Zayd, “The Status of Women Between the Qur'an and Fiqh”.
- On hadith in general, and for the contextual reading cited above: Faqihuddin Abdul Kodir, “Gender Equality and the Hadith of the Prophet Muhammad”.
- On the assumptions of medieval scholars: Hassan Yousefi Eshkevari, “Rethinking Men's Authority over Women”.
- On Fazlur Rahman and al-Tahir al-Haddad: Ziba Mir-Hosseini, “Justice, Equality and Muslim Family Laws”.
- (all in GEMFL)
- On hadith and gender, see also: Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld, 2001); Abou El Fadl, “Islamic Authority”, in NDIT.
- On the Qur'an and gender, see also: Asma Barlas, *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur'an* (Austin: University of Texas Press, 2002); Barlas, “‘Hold(ing) fast by the best in the precepts’ – The Qur'an and method”, in NDIT; Amina Wadud, *Qur'an and Women* (Oxford: Oxford University Press, 1999).

Three Bases of Reform

Muslim women's movements are trying to make religion, rights, and reality come together, overcoming the apparent dilemma between piety and equality.

Many Muslim scholars and social activists sense an acute need to achieve gender equality before the law, through reform from within the Islamic tradition to which they are committed. They are seeking to bridge the gap between the secular and religious camps in women's issues.

From pious women's NGOs in Egypt to the international Musawah movement for equality in the family, such activists have identified the need to base their work on all the following three references simultaneously:

- The lived reality of Muslim women 'on the ground', taking into account the experience of NGOs, social scientists and other experts on social reality
- The religion of Islam, its sacred texts and normative tradition
- Human rights, as formulated in CEDAW and other instruments of international law, and in national constitutions This is not always easy. Muslim women challenging patriarchal family laws from within, calling for the equality of men and women, face doubts and dilemmas: Can they go against what is perceived as a sacred law and still be good Muslims?

However, there is nothing especially Muslim or Islamic about gender discrimination in family law. The problem is historically common to all societies, and women's struggle for equality cuts across religious and cultural divides.

“Muslim women challenging patriarchal family laws from within, calling for the equality of men and women, face doubts and dilemmas: Can they go against what is perceived as a sacred law and still be good Muslims?”

The different directions taken by Muslim countries in recent years, and the heated debate between Muslim reformers and Muslim conservatives, show that however sensitive the topic, Muslim family laws are increasingly contested. They are contested because of new social circumstances, new knowledge about men and women and new understandings of justice, and because of the serious problems women face in their real day-to-day experience with laws that fail to reflect these modern realities.

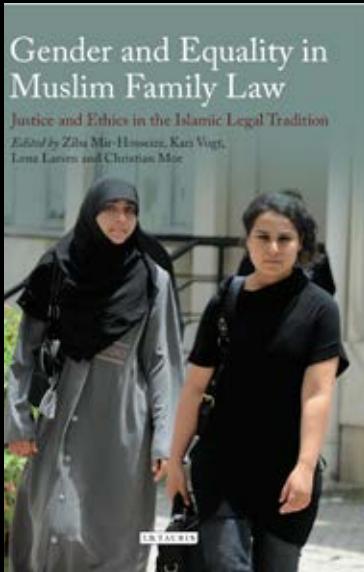
Historically, Islamic law was able to meet the needs of many different societies by adopting and adapting new solutions. And indeed, Muslim mainstream scholars today have swiftly come up with complex, creative legal instruments adapted to the international environment in fields such as Islamic finance. Why should Muslim women not benefit from *ijtihad*, if bankers do?

Moreover, the scholarly arguments discussed here show that there is no one Islamic position on family law and gender equality. There are widely different positions, all argued by believers based on their sincere efforts to understand their sacred texts in the modern world. Muslim women's groups demanding equality through reform of family law are claiming their own rightful place within Islamic tradition.

FURTHER READING

- Musawah Framework for Action, website, <http://www.musawah.org>.
- On Musawah: Zainah Anwar, "From Local to Global", in GEMFL.
- On Egypt: Marwa Sharafeldin, "Egyptian Women's Rights NGOs", in GEMFL.
- For an elaboration of the triple reference: Collectif 95 Maghreb-Egalité, *Guide to Equality in the Family in the Maghreb*, <http://learningpartnership.org/guide-to-equality>.
- Ziba Mir-Hosseini, 'Women in Search of Common Ground: Between Islamic and International Human Rights Law,' in Anver Emon (ed), *Islamic and International Human Rights Law: Searching for Common Ground?* (Oxford University

“There are widely different positions, all argued by believers based on their sincere efforts to understand their sacred texts in the modern world. Muslim women’s groups demanding equality through reform of family law are claiming their own rightful place within Islamic tradition.”



Report on the Oslo Coalition's Muslim Family Law project

The Oslo Coalition on Freedom of Religion or Belief is an international network of experts and representatives from religious and other life-stance communities, academia, NGOs, international organisations and civil society, based at the University of Oslo and funded by the Norwegian government. It carries out a number of projects to promote freedom of religion or belief worldwide.

Since 2004, the Oslo Coalition project 'New Directions in Islamic Thought' has organised six international workshops and produced two books on burning issues of reform from within the Islamic tradition.

In 2007-2012, the project brought together a diverse group of Muslim experts to discuss gender equality in Muslim family law. Three international workshops were held in Marrakech and Cairo, resulting in the book *Gender and Equality in Muslim Family Law*, on which this report is based.

The report is intended for policy-makers, stakeholders and advocates of reform who are developing knowledge-based arguments for legal reform. It sums up lessons learned from the expert discussions and written contributions, and places some of the key arguments into an editorial synthesis.



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