



# musawah

For Equality in the Family

## **IKHTILAF AL-FUQAHA: DIVERSITY IN FIQH AS A SOCIAL CONSTRUCTION**

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### **THEORETICAL PAPER SUMMARY\***

*Ikhtilaf*, which means disagreement, difference of opinion and diversity of views, is widely recognised in the Islamic tradition as a natural phenomenon. Diversity is also a recurring theme in the Qur'an. Yet current studies of Islamic law generally ignore the implications of *ikhtilaf al-fuqaha* (disagreement among the jurists) for the development of *fiqh* (Muslim jurisprudence) and its relevance regarding law reform in the modern context.

This paper highlights the doctrine of *ikhtilaf al-fuqaha* as an “important juristic tool” in attempts to reinterpret Muslim family laws within the context of “today’s globalised world in which difference is increasingly valued”.

The main points of the paper are:

1. There has been a continuous history of scholarly works on *ikhtilaf* from the early periods of Islamic legal thought until today. This paper provides an historical overview of this literature from 798 to 1987. ***Ikhtilaf* literature demonstrates the rich diversity of legal opinion throughout Islamic legal history.**
2. **These works emphasise diversity as a “divine blessing because humans differ in their levels of understanding and social settings”.** Even when a jurisprudential book supported *taqlid* (adherence to a particular school of thought), it nonetheless described “in detail the diversity of opinion and disagreement among the jurists on most legal doctrines”.
3. *Ikhtilaf* has been a prominent characteristic of *fiqh* since the days of the Companions of the Prophet Muhammad. Differences, even among the Companions, occurred mostly when there was no clear guidance from the Qur'an and *Sunnah*, but **there were differences in interpreting the language of Qur'anic injunctions.** For instance, the Qur'an prescribes that a divorced woman wait for three *quru'* after the divorce before entering into another marriage contract (*Al-Baqarah* 2:228). Jurists are divided on how to translate “*quru'*” and calculate this period. Interpretation of Qur'anic provisions regarding inheritance is another example (see p.15).
4. **There is also *ikhtilaf* or difference regarding the process of understanding the Qur'anic text.** For example, do we take the Qur'an literally, or understand the verses with reference to the history of their revelation? How to deal with disagreements regarding the meaning of *Hadith*? Do the sayings (*Hadith*) and the actions (*Sunnah*) of the Prophet have the same legal implications, and what is to be done if they appear contradictory? What are the criteria for an authentic *Hadith*? What are the criteria for abrogation (dealing with apparently contradictory verses of the Qur'an)? What are the acceptable sources of Islamic law?
5. **There are two main explanations for *ikhtilaf*:** (1) geographical location making for differences in language, customs and different levels of *Hadith* knowledge; (2) different methods of legal reasoning adopted by jurists to arrive at their decisions. **These both**

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\* 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.

**suggest that *fiqh* is human and that legal interpretation is a continuous process so legal norms can change in order to remain relevant to social norms.**

6. Fatwa manuals advise that when muftis disagree in their opinion, the layman who consults the muftis is free to choose which to follow. In other words, these manuals regard disagreement as a positive process of legal development.
7. However, *ikhtilaf* has also been seen as negative in Muslim history. The formation of the different schools in Islam (*madhhab*) was partly designed to regulate diversity, but ended up institutionalising *ikhtilaf* in ways that led to conflicts and clashes among the followers of the different schools. Jurists inflated differences in order to defend and prove the superiority of their own school.
8. **Discussion of *ikhtilaf* is relevant to current debates about Muslim family laws.** For instance, the scope for *ijtihad* (reasoning) in the development of Muslim laws was historically limited by referring to *ikhtilaf* (diversity) and *ijma'* (consensus). In practice, consensus came to mean the absence of *ikhtilaf*. A jurist could justify the need for reinterpretation only by pointing to differences among the jurists. In recent debates also, **traditional jurists have often justified reinterpretation, especially in matters relating to family laws, on the grounds of this diversity of opinion.**
9. The paper calls for the re-writing of the history of Islamic law and greater research into the actual laws and practices used in the earlier Islamic period. The persistence of *ikhtilaf* suggests it is wrong to assume *fiqh* was the only law regulating the lives of Muslims. *Fiqh* may have developed as an alternate set of laws parallel to the then-existing legal system. **In other words, *ikhtilaf* recognises multiculturalism and legal pluralism.**
10. The disagreement among the jurists, particularly on matters relating to family laws, indicates the importance of going behind the text to find universal legal principles that can accommodate social change.
11. The way forward in Muslim family law reform is to:
  - Understand *fiqh* texts and judgements of the classical times within their social context. We need to understand the issues addressed in Qur'anic revelation and the *Sunnah* not as theology, but as social problems that existed at that time and to which the Qur'an and the Prophet were responding.
  - Research the history of Muslim family laws. We need to examine the development and promotion of schools of law during different historic periods to better understand what led to one school being promoted to the exclusion of others in different regions. Also, considering Muslim family laws to be the same as personal laws is actually a colonial invention.
  - Understand that the jurists were functioning in their own era based on what they thought was just and were reading and interpreting the Qur'an from their own social perspectives. For instance, in interpreting *An-Nisa* 4:34, all of them tried to qualify what kind of beating should take place. This shows that they were already embarrassed that the idea of beating a wife was in the Qur'an.
  - Acknowledge that change, such as the abolition of slavery, has taken place and therefore future change is possible. *Fiqh* can change when new times and circumstances emerge.
  - Ensure that demands for reform by women's groups must go beyond anecdotes and be supported with data and statistics of the nature and extent of the problems. Concrete data about the problems, would mean opponents of reform would have to agree with the analysis of the situation, and justice could then be used as a principle and guide for developing the appropriate solution.