



musawah

For Equality in the Family

***Fiqh* is man-made, laws can change**

KUALA LUMPUR, February 14 – If justice and equality are central to Islam, why are women treated as second-class citizens? And since equality is an accepted part of justice today, why is it hardly reflected in Muslim family laws?

These two vital questions were raised by Islamic scholar and legal anthropologist Dr Ziba Mir-Hosseini at the Musawah Global Meeting for Equality and Justice in the Muslim Family today.

Gender imbalance in many Islamic family laws come about because of the gap between the ideals of the *Shari'ah* and patriarchal or male-dominated social systems. Discrimination against women happens when ideals of the *Shari'ah* are translated into law and regarded as irrefutable for all time.

There is a fundamental contradiction in this process, says Ziba. *Shari'ah* is the totality of God's will as revealed to the Prophet Muhammad. It is therefore sacred, eternal and universal. On the other hand, *fiqh*, is the human effort made to extract legal rules from the sacred sources of Islam: the Qur'an and the *Sunnah*. She stressed that *fiqh* is human, mundane, local and not eternal.

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.

Prof Muhammad Khalid Masud, chairman of the Council of Islamic Ideology in Pakistan, spoke on the critical value of *ikhhtilaf*, or difference of opinion and diversity of views.

While this is widely recognised in the Islamic tradition as a natural phenomenon, current studies of Islamic law generally ignore its implications.

A study of *ikhhtilaf* literature, he said, demonstrates the rich diversity of legal opinion throughout Islamic legal history, which has been a feature of *fiqh* since the days of the Companions of the Prophet.

He gave two broad explanations for *ikhtilaf*. The first is geographical location, which makes for differences in language, customs and different levels of *hadith* knowledge. The second is the different methods of legal reasoning adopted by jurists to arrive at their decisions.

This clearly demonstrates that *fiqh* is human and that legal interpretation is a continuous process. Hence, legal norms *can* change in order to remain relevant to social norms.

Muhammad Khalid's study of historical *fatwa* manuals shows that laymen seeking legal advice are free to choose from a range of differing juristic opinions.

He encouraged research into the history of Muslim family laws, and examination of the development and promotion of schools of law during different historic periods to understand why one school may have been promoted to the exclusion of others in different regions.

Fiqh can change when new times and circumstances emerge, he said. Using a familiar example, he said that slavery was abolished, thus suggesting that future change was possible.

Dr Amina Wadud, a theologian currently conducting research in Indonesia, delivered a paper on an interpretation of Islam that allows for an active partnership of equals between women and men.

This partnership, she said, stemmed from the concept of *tawhid*, the root word of which is the verb *wahhada*, "a dynamic term emphasising the divine power to bring all things into unity or harmony".

All human beings are divinely charged with being moral agents or *khilafa*, with no distinction being made between male and female.

The Qur'an's repeated emphasis of creation in pairs—"the male and the female"—indicates that both must be equal beneficiaries of just laws and policies arising out of Qur'anic interpretations. Equally, both men and women must be considered responsible for the formulation of these laws and policies.

The ultimate criterion for making judgements between human beings is moral excellence or *taqwa*, and not gender.

Her paper also detailed the impact of patriarchy on interpretations of the Qur'an and practices of Muslims. Patriarchy, she pointed out, is not just about men. Rather, it is a narrow presumption that there is only one way of doing things, of being and of knowing.

“Patriarchy is a kind of *shirk* (ultimate violation of divine unity)”, she said, because it denies the equality of all Allah’s creation as it implies that the male is superior and should dominate.

Amina also said that one of the simplest ways to reform laws in accordance with Qur’anic ethics and break the mould of patriarchy was to encourage active and equal public participation by both women and men, especially in legal and policy reform.

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