# Fundamentalism and Flexibility in the Islamic Law

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This article deals with the possibilities of development in Islamic law with reference to different sources of Islamic law. Special attention has been paid to custom as a source of Islamic law. The whole issue has been discussed in the light of the rights of Muslim women. In the last part of the article some general practices in the Muslim family law and the influence of custom on it are introduced; therefore the relevance of legal pluralism is discussed. The same sources of law in Islam can provide flexibility on the one hand and rigidity on the other. Islamic law could be interpreted as static and fundamentalistic, but at the same time it could also be interpreted as more flexible and adjustable system of law. In between the two extremes of the spectrum i.e fundamentalist and modernist positions there is wide range of attitudes.

Islamic law differ from place to place, country to country and people to people. This is true not only about the content of the Islamic law but also the procedure of Islamic law. For example in some countries Islamic law is practised, but the typical official known as *Qadi* does not exist. In some Muslim countries *Qadi*'s decisions are found in form of the collection of reported cases or statements about what *Qadi* have done on the concrete issues in particular jurisdictions. In other Muslim countries influence of colonialism on Muslim law is found. For example in the Indian subcontinent, under the influence of British colonialism, Islamic law came to be known as Anglo-Muhammedan law.

Procedure for witnesses could also be practised in accordance with different legal cultures. Usually Oath is a ritual by which Muslims try to conduce witnesses to be truthful. There is a belief that false Oath will definitely incur supernatural sanction, if not immediately then in the long run. This system works in some Muslim societies where oath is attached to the whole culture and is connected with people's relationship. Usually the Islamic oath is taken on the Quran, but in North Africa Muslim swear on the tomb of a saint where special attitude to saints prevail. Islamic law has many methods of adapting itself to the changing demands of social reality. Many of the methods are recognised and have appropriate names others appear to be unspoken and are thus more difficult to determine. Therefore it is very important to see the Islamic legal system as a part of the entire cultural system.

Besides the sources/methods it should also be remembered that there are different schools of Islamic law and one school could be more progressive in granting women more rights in family matters in comparison to the other school. The schools of Islamic law or *Shariah* evolved over several generations following the Prophet Muhammed's death in 632 AD. Four schools of law (the *Hanafi*, the *Hanbali*, the *Malki* and *Shafi*) emerged within the predominantly *Sunni* Muslim community. These schools also differ in their definition of the rights of Muslim women. One of them would excel the others in assigning rights to women in one aspect while another school of law would be better in some other aspect. For example *Hanafi* law absolutely withholds from women the right to divorce, no matter how ill treated they are by their husbands, whereas *Malki* principles are liberal in this regard. In some countries principles from different Muslim schools of law are adopted to introduce reforms in favour of women, one of such examples is The 1939 Dissolution of Muslim Marriage Act in the Indian sub-continent. Based on the *Hanafi* principles *Malki* principles were introduced to grant women more grounds for divorce. Let us look briefly at the sources/methods of Islamic law and see how these sources could serve to explain the flexibility of Islamic law.

In looking at the sources of Islamic law, we may see in more detail how much place is given to the local customs. Fundamentalists do not prescribe much space to custom in Islamic

law while modernists recognise a big role played by customs in different cultures and societies.

## Sources of Islamic Law:

Quran:
Quran is not a law code. Quran contains few rules like statements of law, and those it does contain are recounted and designated as "the claims of God" (Mahmood, 1987). Verses of Quran are more like the commandments of God not the legal rules, therefore there is big room to interpret them in different ways. Let us take the example of polygamy: On polygamy Quran says:

> "If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two or three or four; but if ye fear that ye shall not be able to deal justly (with them) then only one" (Quran, 4:3).

The Quran further says

> "Ye are never able to be fair and just between women even if that were your ardent desire" (Quran, 4:129).

According to the modernist view, the apparent contradiction between these verses in fact shows the undesirability of polygamy for Muslims. Thus polygamy is allowed only under special circumstances; otherwise it is forbidden in Islam. Fundamentalists stand for man's absolute right of polygamy. A common argument used in favour of polygamy is that in the West.

> "the man casts off the mistress when he is weary of her. It is better for a women to live in Islamic polygamy with a legitimate child in her arms than to be reduced, cast out on the street with an illegitimate child" (Afza, 1982:22; Ahmed, 1982).

On the equality of women verses like this from Quran are given:

> "Verily the Muslim men and Muslim women, the believing men and believing women, the devout men and devout women, the men of veracity and the women of veracity, the patient men and patient women, the humble men and

> humble women, the alms-giving men and the alms-giving women, the men who fast and the women who fast, the chaste men and the chaste women, and the men and women who remember God frequently: for them hath God prepared forgiveness and great reward" (35:33).

Further, the Quran says

> "They are garments for you while you are garments for them" (2:187).

As is also mentioned above that Quran is too symbolic and Quran is not a law code therefore Muslims have applied other sources to develop Islamic law.

**Sunnah:**
The sayings and doings of prophet Muhammed became guide line or a source of law for developing rules and regulations for which direct guidance was not provided in Quran. They came to be known as *Sunnah* and *Hadith. Sunnah* are the traditions of the Prophet. They were recorded after the death of the prophet. They centre on oral transmissions through a chain of named relators back to one who may be regarded as a reliable witness of what the Prophet actually said or did. Some of the Muslims believe in *Sunnah* while others challenge the reliability of it. Example of one of the controversial points in this regard is women's circumcision. There is no mention about circumcision for either sex in Quran. This is only derived from the *Sunnah* of the Prophet. It is believed and practised by Muslims in only some parts of the world while others do not believe and practice it at all. The oft quoted Hadith is "if the two circumcised parts have been in touch with one another, *ghusl* (bath) is necessary".

According to another Hadith, where the Prophet is said to have addressed a woman who was reportedly operating on a girl:

> "Just touch the surface lightly and do not cut deep; her face will grow beautiful and her husband will rejoice".

Another Hadith which is quoted is

> "Circumcision is my way for men, but is merely ennobling for women"

and in another *Hadith* where the Prophet is quoted while addressing a newly converted woman to Islam on the subject of circumcision:

"Do not inflict trouble on yourself, because that is painful to a wife, but pleasing to a husband".

The Muslim judicial opinion on *Khitan* (circumcision) differs from total prohibition to the practice being considered *makrumah*, an act of piety, or *wajib*, an obligation (Anees, 1989). In a number of Muslim countries like Afghanistan, Pakistan, Algeria, Morocco, Libya, and Tunisia etc genital mutilation are unknown. It is argued from the Muslim modernist that as the female circumcision was prevalent in the pre-Islamic Arabia, there is no Quranic injunction on circumcision. *Hadith* is the sole source to enact the permissibility of this practice; even the reliability of such *Hadith* is questioned by some Muslims. Therefore it should not related to Islam and should be forbidden.

**Qiyas:**

*Qiyas* is a mode of thought. In other words it means 'analogy`. It is used when there is no direct instruction found in Quran or *Sunnah*. Then an analogy is drawn with the similar type of situations, for which instructions are found. In other words this is in fact a juristic development by analogy. A jurists' law developed in the two or three centuries after the Prophet's time and was promulgated in multi-volumed juristic judgements. Examples of *Qiyas* are fixing the same compensation for injury to teeth as for injury to fingers or fixing of the minimum value of dower money by drawing an analogy with the minimum value of stolen goods for hadd punishment (Hasan, 1976).

The type of problems faced by muslims, for using this source as legal development, are mechanical application of *Qiyas*. The subjective reasons and whatever could be objectively ascertained and measured should be balanced (Yamani, 1979; Rahman, 1979). Other sources such as custom and welfare etc. were employed to avoid mechanical application and to provide balance for the employment of analogy as a source of Islamic law.

**Istihsan and Istislah:**
*Istihsan* means the equitable preference to find a just solution; *Istislah* is seeking the best solution for the general interest of people. These methods dwells on the principle that an analogy may be drawn with a clear eye to the social well being at large rather than to a strict set of logically required results. Examples of such application are that punishment of theft by the amputation of a hand does not apply if theft is committed during a famine.

**Ijma:**
To explain *Ijma* the Prophet said "My people will not agree upon an error". This method gives way to a popular decisionmaking by way of a consensus. However Muslims came to differ on the question whether it refers to the collective consensus of the community or of the legal experts. Moreover a consensus once reached on a given point was ever binding beyond any chance of reconsideration. On the one hand it can provide Islamic law a powerful means of growth and adaptation to changing circumstances but on the other hand it can also become an obstacle to adaptation and change (Nolte, 1958: 302).

**Ijtihad:**
One of the basic issues in Islamic *Shariah* is that the doors of *Ijtihad* (interpretation of Islamic principle according to the requirement of the time) are either open or closed. Fundamentalists preach *Taqlid* (imitation) while modernists stand for the possibility of interpreting *Shariah* according to the needs and requirements of the changing ages. Muslims have used this source to reinterpret *Shariah*.

## The place of custom in Islamic legal theory:

Fundamentalists undermine the effect of customary law on Islam while modernists give more place to custom in Islamic law. Opinions are opinions, in practice customs have effected Islamic law very much. Islamic law has got this flexibility to adjust itself to different societies, cultures and to social arrangements. Whereever Islam has spread, the customary practices within the ambit of the law are drawn (Rosen, 1989). Therefore there are different Muslim legal cultures in Africa and in Asia.

One of the arguments put forward in allowing custom as a source is that the Prophet himself did not abolish all pre-Islamic customs. Islam was not a legislative revolution directed against all that was known and practised by the Arabs before its emergence. On the contrary, the Prophet, in his capacity as Islam's legislator, made innumerable rulings which may be found in almost every area of the legal field legalising Arabian customary practices. In family law, or regarding marriage and divorce, the Prophet approved one of several systems which were known to the Arabs before the emergence of Islam; other systems were disapproved of and hence became illegal. But it can not be said that Islam invented its marriage contract as it was already known beforehand (Mahmood, 1965; Leavy, 1957).

After the death of the Prophet the companions did not close the doors on the adoption of foreign systems, as long as they did not contradict an explicit verdict of the Quran and *Sunnah*. Later the Imams of the law school, facing various types of problems which did not confront the companions of the Prophet, made use of the customary law, which was prevalent before Islam. One such example is that women of the noble birth were exempted by *Malki* from breast-feeding their children on the grounds that this would be contrary to the custom of their social class. This in fact is in contradiction of Quranic verse which commands mothers to do so. Yet custom was enough in Malki's view to limit the application of this verse to mothers whose custom allows it. Muhammed b. al-Hasan, an adherent of Abu Hanifa, upon becoming Chief Justice in the time of Hurun al-Rashid used to call on members of various trades and professions and ask them about their customs before issuing a *fatwa* (decree) dealing with a professional practice.

The role of custom is not only restricted to taking the initiative in law where other sources are silent; it has an important part to play in the application of the standing law. Many rules in Quran and *Sunnah* admit of various interpretations, and the only accepted method of applying such rules is with reference to the locally practised customs of the place. Another example is from the Quranic command that every Muslim should support his family, Quran does not precisely specify what portion of a man's income is to go to his dependents; this is to be decided according to custom. Even those jurists who actually fixed a particular portion did so in view of the custom prevailing in their days (El-

Awa, 1973). Custom might be used as circumstantial evidence in case of a dispute. So when a wife and a husband claim the ownership of the furniture in their house and no evidence is available, the case should be settled according to custom. Thus if what is usually brought to the house by the woman is by custom considered hers and vice versa, that's the rule to be applied.

It was on the grounds outlined above that the Muslim jurists formulated the legal maxim: 'custom ranks as a stipulation'. It is clear that a legal system which has such a recognition of custom is more realistic and flexible than idealistic and fundamentalist.

In its recognition of the custom based on the public or the people's interest, the Islamic legal system has been able to meet the needs and solve the problems of communities completely alien to the homeland of the Islamic religion and its legal system (El-Awa, 1973).

One of the examples of amalgamation of Islamic law and customs can be found in Africa. Islam came into Africa at the time of the conquest of North Africa by the Arabs in the seventh century. During the sixteenth century it penetrated into Western Africa. In the beginning only the traders and ruling families became Muslims. Although there are now many parts of West Africa, where nearly the whole population is Muslim, yet the acceptance of Islam is frequently only nominal in the sense that in many aspects of life local custom is still followed instead of the prescriptions of *Shariah*. In Northern Nigeria, *Shariah* is applied more extensively but even here local tradition is often the main influence determining social conduct.

Though in theory a limited function is assigned to custom by *Shariah*, in practice the *Shariah* was forced to give grounds to customary law and practice. Coulsen gives the example of berber customary law in Morocco, Muslim Africa and the fact that certain Muslim communities previously governed by custom specifically excepted matters relating to agricultural land. He further gives example of Muslim communities of the *Ismai'li Khojas*, the *Bohars* and the *Cutchi Memons*, in the Indian subcontinent, who originally converted from Hinduism and, until comparatively recently, were governed by the Hindu law of testate and intestate succession (Coulson, 1959-61:21). Leavy, while examining the role of custom in different countries, has also shown examples of how in the case of India, custom has

influenced the Islamic law. He observes that because of the influences of Hinduism in some Muslim communities in India, divorce is an occurrence of considerable rarity. Again he says that the *Shariah* laws of inheritance, which are based upon the rules of tribes owning easily divisible property consisting of flocks and herds and movables of other kinds, cannot be successfully applied amongst peoples whose property is chiefly or partly in land. Such laws are therefore disregarded in India (Leavy, 1979:247).

## Legal Pluralism and Muslim Family Laws and Customs

The practice of customary laws brings us close to legal pluralism. Theories of legal pluralism could be appropriate to the understanding of Muslim family laws. The investigation of customary practices is vastly neglected field in the Muslim world. The content of the Islamic law is not as important as the examination of custom in the light of women's lives

## Muslim Family Law and Customs

Let us have a brief look at some of the concepts in Muslim family law. There are different concepts in Muslim law for example *Iddah*. Iddah is a period which women have to observe if she is divorced or has become widow. She should not get married in the *Iddah* period. If women do not menstruate Iddah is three months. If she menstruates *Iddah* is three courses of menstruation. If pregnant, the period of *Iddah* continues until the delivery of the child. If she is widow and pregnant, *Iddah* is until the delivery of the child. If she is not pregnant *Iddah* period is four months and ten days. This period is also stipulated to settle the issue of inheritance. Then there is concept of *Khula*. In Islamic law a woman can divorce as *Khula*. *Khula* is an agreement entered into with regard to allow the dissolution of a marriage, if the woman seeks the divorce by paying an amount of money in compensation or a consideration to her husband. Power to divorce could also be delegated to her in the marriage contract. *Halala* is a situation where a man divorces his wife, but later regrets. He can not get married to her again until she goes through a marriage with another man and the marriage with the second must be consummated. Consequently upon getting

a divorce from him (second man) only then she can re-marry her previous husband. This is not practised by all Muslims. The Muslim Family Laws Ordinance of 1961 in Pakistan has declared this practice to be illegal. *Ila* (Oath of abstinence). *Zihar* (The saying of a husband to his wife: You are to me as the back of my mother). *Lian* is allegation of adultery. But all these concepts be it partial, or total are not necessarily applied by the Muslims. A big leverage is given to the prevalent customs and traditions.

It is important to have a legal pluralist approach towards the situation of women in the Muslim family law. The study of *Shariah* or the study of the state laws of the Muslim countries do not present the real situation of women. The lives of women are regulated in the semi-autonomous social field, i.e. by traditions and customs, in combination with their Islamic way of life, which is relatively independent of state laws and *Shariah*. These practices are unwritten and informal. The situation of Muslim women with reference to family law is a vast field of research. It is a misconception to regard all muslim women in one perspective. There are different interpretations of Islam, and Muslim women have different problems depending on the different social and economic environment in which they live. However, flexibility in Islamic law offers a possibility for Muslim women to reinterpret many of the *Shariah* rules from women's point of view. It should be noted that Muslim feminists are already in a process of interpreting Shariah in their favour. Interpretation of Sariah was until now done by men only.

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