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ISLAMIC LAW REFORM: IT'S EASIER AND HARDER THAN YOU MIGHT THINK

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Law reform is popular. From healthcare to gun control to immigration, law reform is one of the ways we address shortcomings in our legal system and make our society better. So it is not surprising that when something in Islamic law appears problematic, there is an interest in reforming it. This interest often comes from Muslims experiencing the effects of rules that seem unfair, such as women having to go through more hurdles for an Islamic divorce than do men. Non-Muslims, too, have displayed an interest in Islamic law reform, as seen, for example, when established Islamic legal rules are cited as obstacles to consensus-building in international human rights work.

But is Islamic law reform even possible? Can something based on divine law be changed by human beings? The answer is "yes," but the details are not easy to understand if one is not a specialist in Islamic law. This document provides non-specialists with a brief summary of how Islamic legal reform is possible, and why many popular calls for Islamic law reform lack sophistication and credibility. This is a very advanced topic of Islamic legal theory, and readers will find it helpful to first review introductory materials on Islamic law generally.[1]

WHAT IS BEING REFORMED?

Islamic law reform is not and should not be called "sharia reform." Sharia, which literally means "road," refers to the ideal divine way or the perfect divine law of God. Speaking of "sharia reform" implies that divine law is in need of improvement, as if God has made mistakes. Understandably, this idea is completely unacceptable for Muslims who believe in God as perfect justice. Thus the phrase "sharia reform" generates unnecessary resistance from Muslim audiences even before one gets to any specifics.

Nevertheless, Islamic law reform is both possible and inevitable. Islamic jurisprudence is built on the idea that every human effort to articulate sharia (divine Law) in specific legal rules is a human, and therefore unavoidably fallible, process. This process is called *ijtihad*, and the rules it produces are called *fiqh* (understanding). *Fiqh* rules can be criticized without questioning God's infallibility, because they are merely the result of fallible human efforts to understand and elaborate sharia (divine law).[2] In short, whereas *sharia* is perfect and is not in need of reform, *fiqh* rules are always fallible and therefore can be wrong. Thus, *fiqh* reform (but not sharia reform) is not only possible, but inevitable.

Legislative reform in Muslim-majority countries is not the same thing as *fiqh* reform. No matter how much the legislative process in a Muslim-majority country mentions sharia, Islamic law, or even *ijtihad*, it is crucial to recognize that state legislation is a political process that creates government-made law. It is not *ijtihad*, and thus cannot create the *fiqh* that is looked to by Muslims around the world as legitimate articulations of God's law (sharia). Thus, when legal reforms are made to legal

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codes in Muslim-majority countries (such as Pakistan's Muslim Family Law, which requires men to register their divorce declarations), they have no reformative impact on the scholarly body of *fiqh* that Muslims regard as Islamic law. Achieving reform in one does not achieve it in the other.

HOW IS REFORM POSSIBLE?

Islamic jurisprudence is based on the following principle: Given that only God knows which *ijtihad* conclusions are correct understandings of God's Law (sharia), all *ijtihad* conclusions must be treated as equally valid even if they disagree with each other. This is why there are so many schools of *fiqh*, for all *fiqh* rules are the product of *ijtihad*. Even more significant for reform advocates, new *ijtihad* can produce new *fiqh* rules to old questions.

This sounds simple: new *ijtihad*, new rule. But the execution is not so easy. First, *ijtihad* is no small task. It is a complicated and exhaustive process that requires years of training. Many prerequisites of language, history, and legal reasoning must be mastered before a legal scholar can begin to craft *fiqh* rules based on the scriptural source texts. This complex, layered, soul-searching process of *ijtihad* is not for amateurs, no matter how well-intentioned or socially conscious they might be. Most importantly, those who have not undertaken the proper *ijtihad* training and yet propose a new *fiqh* rule as a legitimate alternative to the existing one are unlikely to be taken seriously by most Muslims.

WHO CAN REFORM IT?

Not everyone promoting Islamic law reform has the best interests of Muslims at heart. From colonialist rhetoric to contemporary globalization movements, Islamic law reform is often a tool used to achieve a larger agenda set by outsiders. Many Muslims are painfully aware of these hidden agendas and mixed motives,

and therefore justifiably view many reform efforts with suspicion. The field of Islamic law reform is thus fraught with many difficulties, the primary one being credibility.

For a new fiqh rule to be credible as a new rule of Islamic law, it must be the product of ijtihad, and anything that requires ijtihad can only be done by highly trained scholars of Islamic law. Any proposed reform that is not the result of *ijtihad* by a credible Muslim legal scholar will likely be discarded by most Muslims. Simply put, the actual work of Islamic legal reform can be effectively accomplished only by Muslim *fiqh* scholars working within the world of Islamic legal discourse.

Islamic law reform advocates who do not belong to that world can only request (maybe even pressure) such work to be done. However, they will not be able to actually engage in the process themselves with any significant credibility among Muslims. Even worse, aggressively advocating for a new Islamic rule that is not supported by scholarly *ijtihad* could cause that rule to be labeled as an external intrusion upon authentic Muslim practice. Such a label could jeopardize its future success, even if it can be supported by *ijtihad*.[3]

WHAT DOES ISLAMIC LAW REFORM LOOK LIKE?

Although only Islamic law experts can create new fiqh rules, it is important for non-specialist advocates of Islamic legal reform to understand the complex process of ijtihad that is necessary to create new rules. *Ijtihad* is not like legislative lawmaking, where the central question is "What is the best policy?" Instead, it is more like judicial lawmaking, where the job is to extrapolate the meaning of existing texts and elaborate upon them as new challenges arise. When the Supreme Court elaborates on the constitutional boundaries of free speech, for example, it begins with the text of the First Amendment, not its opinions about good speech policy. Likewise, Muslim jurists performing *ijtihad* begin with the text of the Qur'an and the Prophetic traditions, not with their opinions about what a good rule would be. The process of *ijtihad* involves many tools that can be used in many ways. Below is a short summary of some of the essential tools that are most relevant to Islamic law reform.

There are essentially two ways for new ijtihad to produce a new rule: (1) use the established ijtihad tools in a new context, and (2) change or discard them for new ones. To appreciate the difference between these two approaches, think of Islamic law as a tree. The tools of *ijtihad* are its roots, and the specific doctrinal rules are its branches. If the light or space around the tree changes, then new branches will naturally grow. Similarly, the first type of "new *ijtihad*" creates new rules (branches) by simply applying the existing tools (roots) of *ijtihad* in a changed environment. But what if one were to uproot and replant the entire tree, thereby creating new roots to replace the old ones and hoping for new branches to grow? This is what is involved in the second type of "new *ijtihad*": it seeks to create new rules (branches) by replacing the very tools (roots) of the legal system (tree) and hoping it can survive the drastic change. Not surprisingly, this approach is likely to generate far more resistance than the first – at least from those concerned about stability and predictability in the rule of law. This approach has perhaps the greatest potential for change and improvement, but it also runs the risk (as replanting often does to a tree) of destabilizing the entire structure of Islamic jurisprudence.

Below are more details on how each type of "new *ijtihad*" operates.

1. *New Rules with Old Tools*

   The easiest way for new *ijtihad* to create a new *fiqh* rule arises when the old rule was based on an *ijtihad* tool that factored in social contexts that have now changed. For example, the established *fiqh* rule that excludes the courtroom testimony of women relies ultimately not on the scriptural text, but on the *ijtihad* tool of the "public good." Specifically, Muslim jurists living in earlier

gender-divided societies concluded that the public good would be harmed by women's public testimony because it would disrupt the gendered division of (male) public and (female) private space.[4] Today, however, many societies (including Muslim ones) no longer practice such segregation and so this activity would not disrupt public order. Thus, a new *ijtihad* analysis of the admissibility of women's testimony in this new context using the very same *ijtihad* tool of the public good would produce a different *fiqh* rule.

Analogical reasoning (*qiyas*) is another long-established *ijtihad* tool that could have significant legal reform potential. Analogical reasoning expands the reach of an original textual rule by applying it to analogous situations in which the same cause (*'illa*) of the original scriptural rule is found. New *ijtihad* could significantly change analogy-based *fiqh* rules simply by identifying different causes (*'illas*) for existing scriptural rules. For example, the cause (*'illa*) of the Qur'anic prohibition of wine-drinking is usually understood to be "intoxicating drinks" but it could alternatively be "intoxicating substances," which would expand the prohibition to drugs.

Another way to find new rules without changing the existing *ijtihad* structure of Islamic law is to focus on *fiqh* rules that are documented in the classical *fiqh* literature but were held by only a minority of *fiqh* scholars. Although rarely discussed in Muslim public discourse, these minority-held rules are perfectly legitimate articulations of Islamic law. Moreover, some of these rules fit better with modern Muslim norms than do some of the majority-held rules. For example, a majority of classical Islamic law scholars concluded that a bride must have a male guardian represent her in drafting her marriage contract and that the witnesses and officiant at the wedding must be men. But there were minority *fiqh* scholars who disagreed on all of these points. Many modern Muslim activists are actively digging up and popularizing these minority rules, giving them new life in modern times as an alternative to the established majority rules. Because established minority *fiqh* has a classical pedigree that new *ijtihad* can never have, this type of Islamic law "reform" has a strategic advantage over the more cumbersome project of conducting new *itjihad*. In other words, skeptics of Islamic law reform are far more likely to accept an unfamiliar rule if it can be located in classically established *fiqh* (even of the minority) rather than new reformist *ijtihad*.

Finally, it should be noted that all classically established *fiqh* allows suspensions of established *fiqh* rules in situations of necessity or need. (One is, for example, allowed to eat pork to avoid starving to death.) This approach is not effective as a long-term solution to a problematic *fiqh* rule, however, because the adjustment ends when the emergency ends. But in circumstances where an established *fiqh* rule is causing acute hardship, appealing to the classical exceptions can provide an effective, short-term solution.

2. *New Rules with New Tools*

A more extreme approach to Islamic legal reform would be to change the *ijtihad* tools themselves, thus altering the very building blocks of Islamic jurisprudence. For example, new *ijtihad* taking this approach could choose to depart from the established norms regarding general and specific Quranic[5] terms to conclude that verses previously understood to apply only to men could be read to apply to women too. Among many others, this change

would impact the rule holding that only men have a right to unilateral divorce and to marry "People of the Book." Relatedly, this type of new *ijtihad* could choose to depart from established *itjihad* rules of how to rank various Prophetic traditions (hadith) and when and if they affect the meaning of a Quranic text.

One *ijtihad* tool in particular could, if changed, dramatically open up the potential for Islamic law reform. That tool is consensus (*ijma*). According to classically established Islamic legal theory, reaching juristic consensus on a given *fiqh* rule changes that rule from being merely one of many valid *fiqh* rules to being *the* correct rule. Thus no new rules may be created on that question. For entirely new questions, such as bioethics or new technology-based issues, consensus (*ijma*) poses no obstacle to new *ijtihad* because no classical jurist could have imagined the possibility of, say, in vitro fertilization or using the Internet to conduct business. But the situation is far different for such age-old issues as women's access to divorce and child custody, where there is already much established law on the books. Changing or even deleting the classical *ijtihad* tool of consensus could dramatically open the field to new rules on these issues.

However, it should be recognized that altering this particular tool would be an extreme move and may not necessarily achieve the desired outcome. Consensus is a long-established concept in Islamic legal theory. Purging it would render all *ijtihad* tools vulnerable to change or deletion. Without an accompanying package of a fully formed new *ijtihad* process in all of its particulars (i.e., which tools would stay and which would go, and what new tools would come in their place), it is likely that any new *ijtihad* freed of the tool of past consensus would be rejected by the large numbers of Muslims who prefer stability over uncertainty, thus defeating the purpose of the reform effort in the first place.

LAW REFORM IS NOT EVERYTHING

Legal reform is not the only way to change things. Rather than legally regulating a given practice, it is possible—and sometimes more feasible—to change practices by changing social attitudes about them. For example, there has been no effective abolition of slavery as a matter of Islamic law, but the practice has fallen so out of favor among Muslims that it has virtually disappeared in the Muslim world. Similarly, polygamy is socially unpopular in many (if not most) Muslim cultures even without laws prohibiting it. (In fact, efforts to abolish polygamy through Islamic [and secular] legal reform in many Muslim countries have repeatedly met with stiff resistance; however, this resistance does not seem to be due to widespread polygamous practice.) These examples illustrate the phenomenon that changes in social attitudes are quite often more effective in changing behavior than top-down regulation. More importantly for non-Muslims and non-experts in Islamic law, one does not have to be a specialist in Islamic law to create social reform. This is, therefore, an especially productive area for advocates and their allies to engage.

CONCLUSION

Islamic law reform is exciting because it facilitates Islamically valid legal responses to the new social, technological, and economic contexts in which contemporary Muslims live. As a matter of legal theory, Islamic law reform is easy because new *ijtihad* can always create new *fiqh* rules. But as a matter of real life, Islamic law reform is difficult because it can be created only by *fiqh* experts qualified to undertake new *ijtihad*, and locating these scholars (and convincing them to undertake

this work) is not easy. Moreover, when non-specialists attempt to create new Islamic rules they may actually weaken and ultimately undermine the success of the reforms they seek to introduce.

Nevertheless, effective Islamic legal reform is possible if advocates are careful to understand what part of the job belongs to specialist scholars of Islamic law and what part is within the realm of advocacy expertise and influence. Although new *ijtihad* must be done by qualified *fiqh* experts, non-specialists still have an important role to play. Non-scholars can be instrumental in making scholars aware of those topics that are most in need of new *ijtihad* and encouraging them to make the effort. Lay advocates can also be very effective in disseminating and popularizing these new *fiqh* rules to the public. They can also dig up and popularize minority *fiqh* opinions that differ from the mainstream majority *fiqh* rules, especially when they offer more effective solutions to current problems. Finally, they are well-placed to generate social change by appealing to commonly held values and cultural practices when legal reform is not feasible.

RECOMMENDATIONS

1. Recognize the importance of *ijtihad* training to create credible Islamic legal reform.

   The process of creating new *fiqh* that is legitimate in the eyes of the Muslim public requires high-level training in *ijtihad* skills. Advocates of Islamic legal reform who are not specialists in Islamic law must recognize their limitations and refrain from creating new *fiqh* when they are not qualified to do so. Otherwise, they can negatively impact the future of all Islamic law reform, even that done by credible *ijtihad*-trained scholars.
2. Pressure *fiqh* scholars to address important social issues with new *ijtihad*.

   Activists with intimate knowledge of the real-life challenges faced by average Muslims are crucial to making scholars aware of the possibility that developing new *fiqh* could help alleviate these problems. They can also use their powerful channels of social action to disseminate and popularize these new *fiqh* conclusions in the public sphere.
3. Consider social reform when legal reform is not feasible.

   Consider whether it is possible to change social attitudes without touching the law. If it is possible to change the popularity of a problematic *fiqh* rule, an advocate can accomplish the desired change with social activism and by-pass the complex (and often resisted) route of legal reform.
4. Respect Islamic legal pluralism.

   Whenever dealing with Islamic law, remember that it is inherently pluralistic. Its respect for any *ijtihad*-based *fiqh* rule makes it relatively easy to create new *fiqh* rules; however, it also means that all existing rules remain equally valid. (Recall that a foundational principle of Islamic jurisprudence is that every *ijtihad*-based rule is a valid articulation of Islamic law.) Thus the most that Islamic legal reform can do is create more options in the *fiqh* marketplace; it cannot eliminate old *fiqh* rules. Advocates of new *fiqh* must operate with an understanding that their proposed new rule is only one of many equally valid *fiqh* choices and that Muslims always retain the right to choose the one—new or old—that best fits their own particular situation.

ENDNOTES

1 One place to start is Asifa Quraishi-Landes, "Sharia and Diversity: Why Some Americans are Missing the Point," available at www.ispu.org.

2 For a fuller explanation of the difference between *sharia* and *fiqh*, see "Sharia and Diversity," supra note 1, at 10-13.

3For more on how this phenomenon has impacted women's rights, see Asifa Quraishi, "What if Sharia Weren't the Enemy? Rethinking International Women's Rights Advocacy on Islamic Law," 25 *Columbia Journal of Gender and Law* 173 (2011).

4 For more details on this, see Mohammad Fadel, "Two Women, One Man: Knowledge, Power and Gender in Medieval Sunni Legal Thought," 29 *International Journal of Middle East Studies* 185 (1997).

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