



MUSLIM FAMILY LAWS:

What Makes Reform Possible?

As human affairs change and evolve, laws and social norms that shape family relations also need to be adjusted and refined to reflect these changes. Most contemporary Muslim family laws are based on a centuries-old juristic (*fiqh*) framework that no longer responds to contemporary Muslim realities. Law reform is one method for addressing social and economic changes and making our legal systems compatible with the actual needs of individuals and families today.

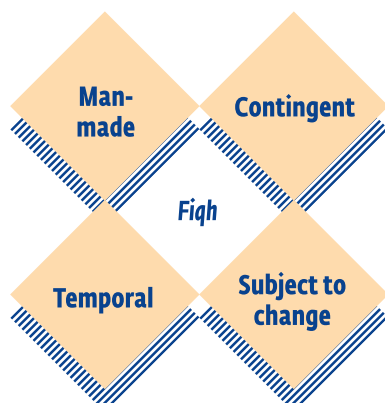
Reform is often resisted on the grounds that Muslim family laws are divine and thus not open to change. Yet in reality change and reform have been inherent in Muslim legal tradition. Islamic legal theory is rich with concepts and tools that have been continually used in the past and that can pave the way for family laws that are more in line with contemporary Muslim realities, as well as with modern notions of justice which, in the course of the twentieth century, have come to include gender equality.



Usul al-fiqh (principles of jurisprudence) is the ethico-legal methodology developed during the formative period of Islamic thought (from the death of the Prophet in 632 to 950 CE) for extracting laws from Islam's sacred sources.

Here are brief explanations of some key concepts in this methodology and how they can be used as tools for reform.

Shari'ah versus Fiqh

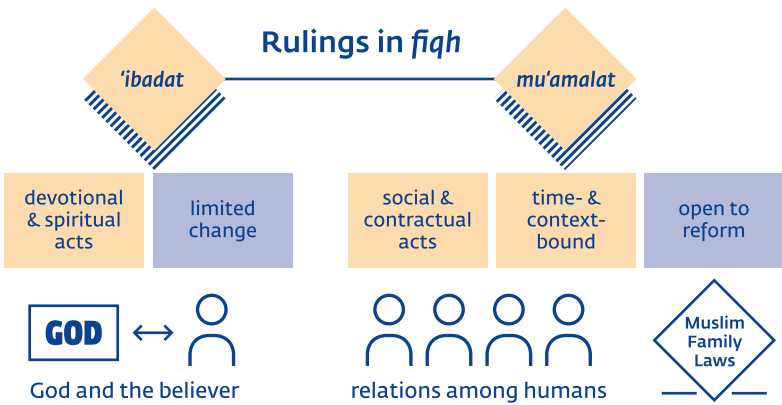


Shari'ah is the totality of religious values that God revealed to the Prophet Muhammad (pbuh) to guide human beings to truth and justice. *Fiqh* is the process of humans endeavouring to discern the terms of *Shari'ah* from the sacred sources of Islam – the Qur'an and the *Sunnah* (the sayings and practice of the Prophet) – and to extract legal rulings (*ahkam*) from these sources.

***Shari'ah* is the sum total of religious values and principles that can guide Muslims' lives. It is divine and eternal. In contrast, *fiqh* is the process by which humans attempt to derive concrete legal rulings from *Shari'ah*. Like any other system of jurisprudence, *fiqh* is man-made, contingent, temporal, and thus subject to change.**

'Ibadat versus Mu'amalat

Muslim scholars divided legal rulings (*ahkam*) in *fiqh* into two main categories: *'ibadat* (devotional and spiritual acts) and *mu'amalat* (social and contractual acts). Rulings in the first category (*'ibadat*) regulate relations between God and the believer, and thus offer limited scope for change. Rulings in the second (*mu'amalat*) regulate relations among humans and thus have always been open to reform, given changing times, contexts, and circumstances.



Muslim family laws fall in the category of *mu'amalat*. These social and contractual rulings are time- and context-bound, and thus can and must change in accordance with the changing realities of time and place and the requirements of justice.

Ijtihad

Ijtihad (lit. exertion) is the process of exerting one's utmost in an effort to deduce new laws or novel legal solutions in unprecedented cases. Traditionally, the right to *ijtihad* was confined to religious scholars and was considered a craft that required only sound knowledge of the Qur'an and *Sunnah*, as well as skills to implement the criteria for deducing rulings from the texts. Yet later scholars such as Shatibi believed that a strong knowledge of lived realities – which religious scholars often do not possess – is necessary for *ijtihad*. *Ijtihad* in this sense requires the involvement of a variety of people who possess knowledge of the subject matter of the legal rulings that Muslim scholars attempt to deduce from Islam's sacred texts.

***Ijtihad* refers to human efforts to understand and interpret Shari'ah and derive rules that offer solutions to existing and emerging problems.**

Darurah

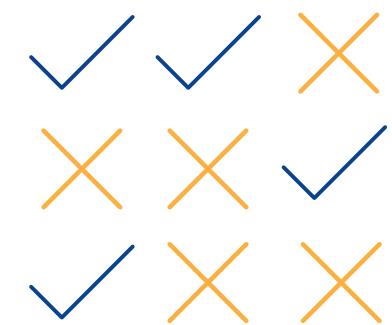
In Islamic jurisprudence, *darurah* (lit. overriding necessity) is a situation in which someone is compelled to do something or is in a state of vital need, thus allowing that person to deviate or depart from the original rule. This principle is ruled by two main legal maxims: 'Necessity makes the unlawful lawful' (*'Ad-daruratu tubihu al-mahzurat*) and 'Necessity is measured in accordance with its true proportions' (*'Ad-daruratu tuqdaru bi qadriha*). This principle is derived from *Surah al-Baqarah* 2:173: 'He hath only forbidden to you dead meat, and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of Allah. But whoever is forced by necessity, without wilful disobedience, nor transgressing due limits, - then is he guiltless. For Allah is Oft-forgiving Most Merciful.'

***Darurah* is an important principle that recognizes new and urgent situations and allows for legal flexibility in order to avoid serious harm.**

Ikhtilaf

Ikhtilaf refers to juristic disagreement and diversity of opinions or views. According to a saying of the Prophet Muhammad (pbuh), diversity of opinion in the (Muslim) community is a blessing for people (*'ikhtilaf uummati rahmatun li al-nas*'). In Islamic jurisprudence (*fiqh*), *ikhtilaf al-fuqaha* (disagreement among the jurists) is a rich source for understanding the development of Muslim legal tradition and has always been valued and respected.

***Ikhtilaf*, disagreement or diversity of opinions, is a core concept in Muslim legal tradition that attests to the fact that, like any other system of jurisprudence, *fiqh* is human-made, rich, flexible, and allows for the evolution and divergence of interpretations.**



Maslahah

Maslahah (lit. benefit or interest) is a juristic concept that is used to inductively derive a ruling based on the interest of the individual or the community. *Maslahah*, in Islamic legal theory, is understood to be a basic and necessary (*daruri*) principle of *Shari'ah*.

***Maslahah* is a concept that can be used to reform existing rulings and laws and formulate new ones that benefit and secure the welfare of individuals and communities by promoting their interests and protecting them from harm.**



An example:

How can these concepts help in advocacy for reform?

The distinctions between *Shari'ah* and *fiqh* and between *'ibadat* and *mu'amalat* provide solid foundations for reforming unequal and discriminatory spousal and parental rights in contemporary Muslim family laws.

Family laws are human-made and relate to social and contractual matters, thus are open to change. Unequal and discriminatory laws also contravene the spirit of justice in the *Shari'ah*, given that women, men, and children suffer as a result of such inequalities.

Here are some examples of how these concepts from Islamic legal theory (*usul al-fiqh*) can contribute to reforming aspects of Muslim family laws:

Unilateral divorce (*talaq*)

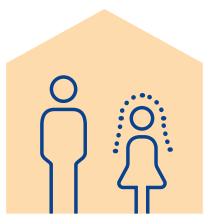


***Ijtihad* can be used to revisit family laws that sanction men's right to unilateral repudiation and women's restricted access to divorce, as these contravene the logic of Islamic marriage as a contract based on the mutual agreement of both parties.**

Male guardianship in marriage (*wilayah*)

Schools of jurisprudence diverge in their positions on male guardianship in marriage. For example, the Hanafi school grants women of majority age the right to conclude their own marriages without the need for a (male) guardian, unlike other schools. This juristic *ikhtilaf* affirms that male guardianship in marriage is not God-given and hence is open for reform in the context of changing realities.

Child marriage



Applying the principle of **maslahah** provides a strong case for reforming laws that sanction child marriage. A wealth of empirical research shows that underage marriage is detrimental to the

health of young mothers and their offspring. Child marriage also deprives girls of education, which negatively impacts the resources and well-being of families as well as the economic prosperity of countries.

Parental guardianship (*wilayah*)

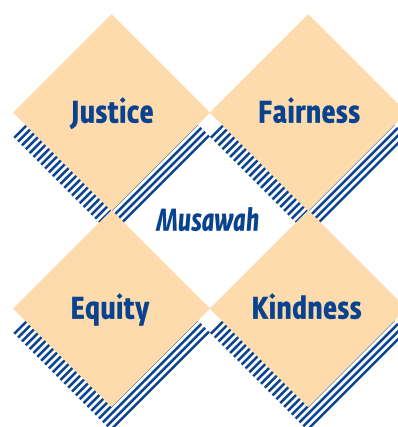
Family laws that pre-emptively grant guardianship to male relatives without considering the best interests of the child can be reformed by applying the principles of **maslahah**. Research shows that fathers' claims to guardianship over children often work against the interests of the children, particularly in divorce disputes. Custodial mothers who do not have the legal authority to manage their children's affairs are unable to provide the care that their children may need in different situations (e.g. opening a bank account for them, dealing with medical problems, attending to education needs, etc.).

The Way Forward

Rethinking and reforming Muslim family laws requires understanding and applying Islamic principles and methodologies in light of today's realities and contemporary conceptions of justice. This process can be guided by several core Qur'anic values such as justice, fairness, and equity (*'adl, qist, insaf*), kindness (*ihsan*), and that which is commonly known to be right (*ma'ruf*). Just as the Qur'an is rich with values and principles that promote a more egalitarian vision of family relations, so is Islamic ethico-legal theory (*usul al-fiqh*), as demonstrated by the concepts and principles listed above.

Muslim legal tradition is rich, flexible, and dynamic; it provides the conceptual tools for reform and the legal methods for a shift towards egalitarian gender relations in the family and society.

How can we work together to build egalitarian Muslim societies?



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