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.
Mashalah

Mashalah (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. Mashalah, in Islamic legal theory, is understood to be a basic and necessary (daruri) principle of Shari'ah. Mashalah 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.

Istihsan and Istislah

Istihsan and istislah are two legal principles of reasoning, attributed respectively to the Hanafi and Maliki schools, that are often used as interchangeable terms. Istihsan refers to preferring one from several solutions, deduced from a text, based on what is a better (hasan) solution in the eyes of a jurist. Istislah refers to a solution derived from the perspective of mashalah (common good) that is more suitable (munsib) to Shar'i'ah in the absence of textual evidence. Istihsan and istislah are juristic tools that can be used to expand the formulation of rulings and laws based on what is seen as better solutions for individuals and communities.

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 reform. Unequal and discriminatory laws also contravene the spirit of justice in the Shar'i'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 contraven 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 istihsan affirms that male guardianship in marriage is not God-given and hence is open for reform in the context of changing realities.
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.

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.).

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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?