Islamic Law and Post-*Ijtihadism*

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The term Islamism, according to Asef Bayat, refers to movements that seek to establish an Islamic order, a state that is based on the *shari'a* and moral code.[1] An essential component of Islamism is its vision of establishing a political order based on Islamic principles. Such a broad and generalized definition does not capture the nuances that distinguish and differentiate the various Islamist movements. In fact, it conceals its distinct markers. Bayat also talks of the transformation of Islamism in the Muslim world and maintains that we should not view Islamism as a static phenomenon but rather as dynamic entities that have shifting boundaries due to various internal and external factors.[2]

In contrast to Islamism, Bayat posits post-Islamism as an ideology that fuses religion and rights, faith and freedom, Islam and liberty. For him, post-Islamism is the after-effect of the failure of political Islamism. Incorporated in post-Islamism are notions of democracy, change and individual choice. It also emphasizes "rights instead of duties, plurality in place of a singular authoritative voice, historicity rather than fixed scriptures, and the future instead of the past. Bayat also demonstrates different trajectories and narratives of post-Islamism in different countries. It signifies, he argues, a break from the traditional Islamist paradigm.[3]

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[1] Asef Bayat (ed.), *Post-Islamism: The Changing Faces of Political Islam* (New York: OUP, 2013), 4.

[2] Ibid., x.

[3] Ibid., 10.

This chapter will explore the religious component of post-Islamist discourse. It will argue that, in all probability, the discourse on *ijtihad* will be replaced by the post-*ijtihad* phenomenon and that this transition will impact the religious lives of Muslims all over the world.

Islamic Law in the Classical Period

Muslim jurists in the classical period of Islam formulated Islamic law based on the socio-historical realities of their times. Jurists like Abu Hanifa (d. 767), Malik b. Anas (d. 795) and Shafi'i (d. 820) combined their understanding of the Qur'an, the *sunna*, with the interpretations of previous generation of scholars. When they could not find an answer in the normative textual sources, they incorporated a wide array of interpretive devices to respond to the challenges they encountered. They deployed hermeneutical principles like *maslaha* (derivation and application of a juridical ruling that is in the public interest), *qiyas* (analogy), *ijtihad* (independent reasoning), *istihsan* (preference of a ruling which a jurist deems most appropriate under the circumstances), etc.

Based on the revelatory sources and other principles and rules they developed, classical jurists issued diverse and variant opinions on topics ranging from prayer times and forms, business contracts, a woman's right to divorce and share of inheritance, whether a non-Muslim can testify in a Muslim case to whether a girl can marry without the consent of her guardian. As I shall demonstrate in this paper, some contemporary Muslim reformers have argued that the edicts of erstwhile jurists are no longer applicable in the present age. They have also argued that for Muslims to effectively live in the modern world, there is a need to revise the traditional legal articulations.

Muslim jurists have often revised the law when situations (*mawdu*) or circumstances dictated. There are many examples of this. In 2005, for the first time, the Ayatollah Muntaziri (d. 2009) issued a legal ruling in which he clearly demarcates a separation between the changing of religion and apostasy. For him, the freedom to change one's religion is an inherent right. He further states that changing one's religion as a result of intellectual endeavor and without any hostility or enmity toward the truth (which activates penal provision) would not trigger any temporal punishment and, as such, bears no resemblance to the punishment for apostasy. Changing one's religion based on research and rational proofs overrides any possible linkages to the situational context of apostasy.[4]

Another prominent contemporary jurist, Ayatollah Bujnurdi (b. 1942), argues that Islamic jurisprudence (*fiqh*) does not necessarily reflect the divine law. *Fiqh* consists of the understanding and *ijtihad* of the Shi'i scholars and, depending on circumstances, their rulings can change or be interpreted differently. Bujnurdi further states that in the course of time, jurists have proffered different edicts. On one issue, a *faqih* (jurist) considered a thing as prohibited while another one allowed it. The difference in opinion is due to their individual interpretations of the four sources, i.e., their interpretations of the Qur'an, traditions, intellect, and consensus. He cites the example of an assembly of jurists that ruled that a wife cannot inherit land from her dead husband. It is possible, he states, that their interpretations of the sources can be different from what they have declared.[5] Legal pluralism and heterogeneity in juristic practices indicate that there is much scope for diversity and revision of the law.

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[4] *http://en.kadivar.com/2014/07/23/an-introduction-to-apostasy-blasphemy-religious-freedom-in-islam/*

[5] *http://en.farzanehjournal.com/index.php/articles/no-8/41-no-8-5-interview-with-ayatollah-bojnourdi-qfigh-and-womens-human-rightsq. Accessed July 2016.*

The Failure of *Ijtihad*

This chapter argues that there is a need to move beyond the current form of *ijtihad* to an era of post-*ijtihadism* in Twelver Shi'ism. The present *ijtihad*, which was developed in the medieval ages, has failed to produce a coherent legal system that can effectively respond to the needs of contemporary Muslims. One of the reasons for this failure is that the underlying principles of *ijtihad* are text rather than reason-based. Even though *'aql* (reason) is putatively an independent source of law in Shi'ism, it is hardly ever invoked to generate new laws when the other sources fail to produce an effective ruling. Other devices that Sunnis use like analogy, *maslaha*, *maqasid*, and *istislah* are not seen as a valid basis for issuing legal injunctions by the Shi'is.

At this juncture, it is important to discuss, albeit briefly, Islamic legal theory (*usul al-fiqh*) because it is this discipline that provides a jurist with the resources he needs to derive a ruling on a particular legal case. Issues examined in *usul al-fiqh* manuals include the probative force (*hujjiya*) of particular textual sources, the manner in which these sources should be interpreted, and the means by which the jurist's ruling becomes authoritative.[6] So, for example, *usul al-fiqh* discusses topics like whether the imperative form in a sentence is a commandment to perform an act or whether it connotes a mere recommendation. Thus, depending on the context, *Usuli* scholars have argued that the imperative form can indicate an obligation, recommendation, or indifference.[7] It is because of such variances and divergent interpretations that some traditions

[6] Robert Gleave, *Scripturalist Islam: The History and Doctrines of the Akhbari Shi'i School* (Leiden:Brill, 2007), 62.

[7] See for further details Hallaq, Wael *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1999), 48-9.

command the performance of an act and yet other traditions indicate that the same act does not have to be carried out.[8]

Most juridical rulings are derived from traditions reported from the Imams or the Prophet. Given the fact that most of these traditions are narrated by singular reports (*khabar al-wahid*) and that there are many contradictory reports on an issue, *usul al-fiqh* also poses and answers questions such as how does a *faqih* (jurist) decide which of the traditions to accept in issuing a *fatwa*? How can he be sure that the apparent meaning that a word conveys is binding (*hujjiyya zuhur al-lafz*), i. e., does a word cited in a tradition signify its appropriate linguistic meaning? On what basis does a *faqih* rule when the sources are completely silent on an issue?

To be sure, Shi'i *usul al-fiqh* is divided into two major sections. The first, called the inferential principles *(al-usul al-istinbatiyya),* deals with methods of inferring the precepts and legal norms from the four basic sources, namely the Qur'an, sunna, consensus *(ijma')* and reason *('aql).* The second part posits the interpretive tools that a jurist has recourse to when rulings cannot be deduced from the revealed sources. This section focuses on the premises and the scope of the four general procedural principles (also called *al-usul al-'amaliyya*): the principles of exemption *(bara 'a),* precaution *(ihtiyat),* choice *(takhyir)* and continuity *(istishab).* A jurist has recourse to these tools when the texts are either ambivalent or silent and where the actual ruling is not known to him. These four principles have assumed great importance in modern Shi'i juristic discourse. Considerable scholarly effort has been expended on elaborating the methods and the conditions of their application. This section of *usul al-fiqh* has expanded significantly in the past century. Up to the sixteenth century, only a few pages or even lines were devoted to

[8] 'Ali Rida Fayz, *Vijeghihayi Ijtihad va Fiqh-e Puya* (Tehran: Pijuhghah 'Ulum insani, 1997), 411.

these principles. [9]

Besides the two parts mentioned, *usul* works also contain a chapter on the contrariety between the textual sources and methods of resolving the differences between them. Most treatises also insert a discussion on the qualifications and stipulations of a jurist who issues legal edicts as a result of his intellectual endeavors (*ijtihad*) and the conditions required of a jurist whose legal decisions are binding and should be followed by the laity.[10]

The preceding discussion on *usul al-fiqh* indicates that although Shi'is adamantly argue that the doors of *ijtihad* have remained open in their school, the fact of the matter is that the rulings are centered on textual rather than rational proofs. Thus, in the discourse on *istinbat* (derivation of rulings), there is little or no discussion on inferring rulings based on canonical maxims prescribing justice and Islamic ethics or issuing rulings that accords with the faculty of reason or whether a particular edict accords with overall objectives (*maqasid*) of the Lawgiver or the welfare of the people.

The view that traditional *ijtihad* has failed to meet the challenges facing contemporary Muslims can be discerned from the fact that many Shi'i scholars complain that current legal treatises (*risala* '*amaliyya*) do not discuss issues that are germane to contemporary society. Issues like human rights, the ecology, social welfare, justice, forms of government, and unemployment, bio-medical ethics are absent in these treatises. Instead, more attention is paid to

[9] For details of these see Robert Gleave *Inevitable Doubt*: Two Theories of Shi'i Jurisprudence (Leiden: Brill, 200); Zackery Mirza Heern, "Thou Shalt Emulate the Most Knowledgeable Living Cleric: Redefinition of Islamic Law and Authority in Usuli Shi'ism," *Journal of Shi'a Islamic Studies* 7, no. 3 (2014).

[10] Hossein Modarressi. *An Introduction to Shi'i Law: A Bibliographical Study*. (London: Ithaca Press, 1984), 10-11.

topics like *kurr* (the amount of water that is required to purify an object), details of distance traveled to pray *qasr* (shortened prayers) etc.[11]

The sanctification of and overreliance on traditions and a refusal to historicize or contextualize have been salient features in traditional *ijtihad*. In addition, in the Shi'i case, most jurists have downplayed or invalidated the role of hermeneutical stratagems like *maslaha* (welfare), *maqasid* (objectives), '*aql* (reason) and '*urf* (custom) in legal decision-making. Jurists like Ayatullahs Sane'i, Ibrahim Jannati, Fadlallah, and Mahdi Shams al-Din who have employed such devices in their decision-making have been largely marginalized or ostracized by fellow jurists.[12]

Another weakness in traditional jurisprudence is that there is a disjuncture between the moral and juristic parameters of Islam. The two spheres are distinctly different. At the moral plane, Muslims are not allowed to cheat, lie or deceive non-Muslims. Yet, at the juridical level, the rulings of contemporary jurists like Ayatullah Sistani are discriminatory. He rules, for example, that it is obligatory to save the lives of Muslims, but it is not mandatory to save non-Muslim lives.[13] Similarly, he states that Muslims can receive from but not give body organs to non-Muslims.[14] The discriminatory rules in Shi'i *fiqh* can be further illustrated from the fact that Ayatullah al-Khu'i (d. 1992), who was widely acknowledged as the most learned Shi'i jurist of

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[11] See Mustafa Ashrafi Shahrudi, "Hamsuy-e fiqh ba tahavvulat va Niyazhay-e Jami-e", in *Ijtihād va Zaman va Makan*, 14 vols., 1/119.

[12] See Liyakat Takim, "Maqasid al-Shari'a in Contemporary Shi'i Jurisprudence" in *Maqasid al-Shari'a in Contemporary Reformist Thought: An Examination*, edited by Adis Duderija (Palgrave: New York, 2014), 101-126.

[13] *Current Legal Issues According to the Edicts of Ayatullah al-Sayyid 'Ali al-Seestani* (London: Imam 'Ali Foundation, 1997), 49.

[14] Ibid., 102.

his time, had ruled that it is permissible to steal from a *kafir*.[15] In fact, in the juridical treatises, non-Muslims have often been treated as subhuman species as the question of their purity is discussed along with the impurities of dogs, blood, urine, and human excrements. In the manuals on *usul al-fiqh*, there is little or no discussion on predicating legal edicts on Islamic ethics or on ensuring that juristic rulings do not violate the moral-ethical framework of the Qur'an.

The Post-*Ijtihad* Phenomenon

Given the failure of traditional *ijtihad* it is essential to redraw its parameters and framework. Post-*ijtihadism* seeks to ameliorate the weaknesses in traditional jurisprudence by going beyond the normative texts and procedural principles outlined above. It outlines different exegetical tools that the new jurisprudence should deploy to cater for the specific needs of contemporary times. Post-*ijtihadism* also challenges scholars to rethink the axioms along which their law was developed in the past. Stated differently, circumstances in the contemporary world demand a reading of the Qur'an and *sunna* along moral, egalitarian, and gender equitable lines, ideas that are absent in the classical manuals. Because of this factor, post-*ijtihadism* challenges the notion of a monolithic law that can be applied at all times and places.

Post-*ijtihadists* need to search for a more appropriate interpretation of Islamic revelation to make social interactions more humane and inclusive in those sections of the juridical tradition which accentuates the preponderance of Muslims as a privileged class. The situation is exacerbated by the refusal of the traditional '*ulama*' to address cases of discrimination against

[15] Al-Khu'i's *fatwa* is cited in Sayyid Husayn al-Husayni, *Ahkam al-Mughtaribin*, pg. 400.fatwa #1221 and pg. 400.Fatwa #1224. See Sayyid Husayn al-Husayni, *Ahkam al-Mughtaribin* (Tehran: Markaz al-Taba'a wa'l Nashr lil-Majma' al-'Alami li Ahl al-Bayt, 1999).

women and minorities in the juridical corpus and their unwillingness to undertake a critical review of the historical Islam as preserved in these genre of texts.

The legal ordinances formulated by post-*ijtihadism* has to take into account the relationship between religious edicts, the community of believers, and the socio-political environment of Muslims. Besides dealing with issues like ritual purity and social interactions, post-*ijtihadism* must also address topics like Muslim political involvement in the diaspora, citizenship, domestic and international policies, serving in Western judiciaries and armies, civic duties, etc. Post-*ijtihadism* should not be depicted as an idealist vision of the world that lies in contradistinction with the realities of the world. On the contrary, post-*ijtihadism* must empower Muslims to live as fully-fledged citizens and participate fully in the civic and political institutions in their countries.

Within Shi'i circles, there have been important voices calling for a radical rethinking of the religious tradition and the old *ijtihad*. Such calls have come from religious intellectuals like 'Abdolkarim Soroush, Abdulaziz Sachedina, Mujtahid Shabistari, and Mohsen Kadivar. Significantly, they also emanate from within the religious seminaries itself. Scholars like Ayatullah Sanei, Ibrahim Jannati, Muhaqqiq Damad, Fadlallah, Mahdi Shams al-Din, Mohsen Sa'idzadeh, Mojtahed Shabistari, and Ahmed Qabil can be called post-*ijtihadists*. They have called for a reevaluation of traditional juristic principles on the derivations of rulings. As a matter of fact, in my discussions with some *maraji'*,[16] I detected a distinct silent revolution within in the seminaries in Qum. Scholars like Shabistari and Kadivar have argued that there is a need to

[16] The term *maraji'* refers to the most learned juridical authority in the Shi'i community whose rulings on Islamic law are followed by those who acknowledge him as their source of reference or *marji'*.

change not only rulings but also the methodology upon which traditional *ijtihad* is based, i.e., *usul al-fiqh*.[17]

It should be noted that the term post-ijtihadism does not reflect a singular movement that is led by a thinker or scholar. On the contrary, it reflects the views of a wide array of scholars on reformation and *ijtihad*. What binds them is their desire to go beyond the parameters of traditional *ijtihad* and forge new methodologies or hermeneutical devices that will lead to pragmatic responses facing the contemporary Muslim community.

Post-*Ijtihadism* and the Qur'an

Most juridical edicts are derived from the *hadith* rather than the Qur'an. However, the Qur'an enunciates certain moral and ethical principles that can be invoked to evaluate the moral value of an act. In the past, it was the jurists and exegetes of the Qur'an who were engaged in the interpretation of the Qur'an. Their method was primarily in the form of commenting on Qur'anic verses based on transmitted *hadith* reports, a reliance on historical accounts that were recorded in the Prophet's biographical (*sira*) literature, and statements from the occasions of revelation (*asbab al-nuzul*) literature.

Muslim scholars also employed various methodological techniques, enunciated in *usul al-fiqh* in their exegetical enterprises. These include reconciling apparent contradictory verses by resorting to the principle of abrogation or claiming that a particular verse was conditional or general whereas an opposing one was unconditional or specific to a particular occasion. Exegetes

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[17] See for example, Mohammed Sadri "Sacral Defense of Secularism" in *Shi'ism: Critical Concepts in Islamic Studies*, Paul Luft and Colin Turner ed., (New York: Routledge, 2008), 4/422-4. Ayatullah Muhammad Mujtahid Shabistari, "Religion, Reason and the New Theology," in *Shi'ite Heritage: Essays on Classical and Modern Traditions*, ed. Lynda Clarke (Binghamton: Global, 2001), 249.

also subjected Qur'anic verses to numerous interpretive processes, from *takhsis* (specification of a verse) to other forms of modification on the basis of *hadith*, consensus, abrogation etc. There was little, if any, discussion in the exegetical literature on how Qur'anic verses can be extended to cover modern or newer issues.

It is also important to note that although the Qur'anic message is universal, its legal and historical import are conditioned by the specific socio-political circumstances prevalent in seventh-century Arabia. It is the historicity rather than the sanctity of the Qur'an that is the point of contention here. Stated differently, the Qur'an needs to be seen as both a divine and historical construct, the laws of which were revealed to respond to a particular historical time period and address socio-political issues in the seventh-century Arabia. Just as the early Muslims read the revelation in light of their socio-political world, contemporary Muslims are required to do the same.[18] Otherwise, Muslims would have to follow the same Qur'anic prescriptions as the earlier generation of Muslims did. This would entail having to accept medieval practices like slavery and child marriages today.

In their efforts at reforming the legal system, post-*ijtihadist* scholars need to differentiate between the sacred scripture and its later exegesis that is imbedded in many sacred texts. They need to grapple with the notion that much of the exegetical literature was formulated in a particular socio-political and economic context. Thus, there is a need to reformulate or revise the traditional exegesis. Post-*ijtihadist* scholars have to separate the voice of God from the voice of human beings, and to differentiate between the Qur'anic vision and the socio-political context in which that vision was interpreted and articulated by classical and medieval exegetes.

[18] Michaelle Browers and Charles Kurzman ed., *An Islamic Reformation?* 63-4.

Usul al-Fiqh and Post-*Ijtihadism*

Besides the Qur'an, post-*ijtihadism* discourse needs to also focus on *usul al-fiqh* and its methods and principles, since it is this discipline that jurists rely on in the inference of laws. The science of *usul al-fiqh* has become convoluted, with jurists engaged in stating and validating particular legal points and refuting, in the process, the views articulated by others. There is little, if any, discussion of law as a social or historical entity or the moral basis of Islamic law. A study of *usul al-fiqh* manuals proves the points. There is no chapter on the moral basis for inferring juristic rulings or that the rulings must conform to the ethical framework of the Qur'an. It is important to note that Islamic jurisprudence is based and dependent on Islamic legal theory; unless the methodology in the latter is changed, the genre of rulings in the juridical manuals will remain the same.

The contemporary Shi'i scholar Mohsen Kadivar states that there is a crisis in epistemology and not just a methodology of *ijtihad*. He argues that *usul al-fiqh* needs a complete reconstruction rather than minor changes or mild reforms. Kadivar concedes that the current legal system contains many valuable points, however, there is a need to enrich it and the method of *ijtihad* deployed. He also restates the familiar argument that has been voiced by reformers like Shabistari and Soroush – that there is no singular or monolithic reading of the revelatory sources. Equally, there can be no final or normative reading of texts. Hence, there can be a myriad of valid opinions on a particular issue.[19]

In highlighting the need for a new form of *ijtihad*, Kadivar cites the example of traditional *ijtihad* which is premised on the view that religious conviction is the basis of

[19] "*Ijtihad* in *Usul al-Fiqh*: Reforming Islamic Thought Through Structural *Ijtihad*" in *Iran Nameh*, vol. 30, no. 1 (2015): 5 – 7.

differentiation between the rights of human beings. Muslims enjoyed greater rights and benefits than non-Muslims because of their religion. Under post-*ijtihadism*, all human beings possess equal inalienable rights as human beings. This would entail the revision of the principles and foundations of Islamic thought. As he states, "There is no reason that the rules that fit Arabia in the seventh century should fit the modern time."[20] This means theology, ethics, the interpretation of scripture and even the compilation of *hadith* would have to be revised. Kadivar's theory is clearly breaking new ground as far as the revamping of traditional forms of *ijtihad* is concerned. He states that those rules that are not consonant with commonly acceptable moral principles such as justice, reasonable, ethical and more functional in modern times should be abrogated. He therefore proposes that rules, even if they are mentioned in the sacred texts, can be abrogated by jurists if they do not conform to the needs of modern times.[21]

Post-*ijtihadism* calls for an epistemological transition so that the texts can be understood based on their original social and political contexts that led jurists to rule the way they did. This stance means that newer rulings can be derived based on current socio-political circumstances. It also challenges the notion of the immutability of God's revelation as expressed in traditions. It argues that revelation was couched in a particular social and historical context and when the latter changes, hermeneutical principles must be deployed to interpret the verses in a contemporary context. Legal rulings must factor the social, economic, political, and cultural circumstances of the present community. Based on this line of thinking, even the inheritance laws stated in the Qur'an would have to be revised since, in many instances, women share equal financial responsibilities in a home. In some cases, the woman is the sole bread-earner in the

[20] Ibid. 4.

[21] Ibid. 8.

family. The Qur'anic rules of inheritance was premised on a tribal community where she was financially dependent on her husband. Since this structure is no longer existent, and a woman shares many of the financial responsibilities, the rules of inheritance need to be revised to ensure a more equitable division of all forms of assets. In the interpretive process, post-*ijtihadism* posits that justice be an indispensable component that undergirds Islamic jurisprudence. Laws reflect the values espoused by the Lawgiver; if the Lawgiver is just, His laws cannot possibly oppose His values. This is because God has promised to be just to His creatures.

Scholars like Abdul Karim Soroush argue that legal reforms must be accompanied by an alteration of the fundamental epistemological and ontological presuppositions of traditional legal philosophy, theory and methodology. *Ijtihad* in the derivatives (*furu*') is of no benefit as long as no infiltrating *ijtihad* is attempted in the *usul* of jurisprudence. For Soroush, current *ijtihad* transforms the body of the law but not its spirit. Thus, the spirit rather than the form of Islamic law is maintained.[22] For him, to reform the law requires a rectification of its epistemological basis.

Soroush goes on to state that it is not necessary to follow all Islamic laws minutely. He bases this argumentation on a distinction between values of the first and of the second degree: values of the second degree refer specifically to decrees on the details of faith, which differ among religions. Values of the first degree, such as justice, are the ones that really count, and this is why different religions and the human ratio all agree on their importance. Hence, justice is not just a religious value – but also a universal one. Soroush's line of argument indicates that

[22] Cited in Ashk Dahlen, *Islamic Law, Epistemology and Modernity: Legal Philosophy in Contemporary Iran* (New York: Routledge, 2003), 237-239.

many rulings in Islamic law no longer need to be applied. These include laws such as amputating a hand as a punishment for stealing.[23]

Post-*ijtihadism* Discourse and the Moral Basis in Inferring Legal Rulings

The discourse of post-*ijtihadism* should also center on a re-reading and re-interpretation of sacred texts keeping in mind the overall spirit and objectives rather than the substance of these texts. Rather than restating the views of earlier jurists and suggesting superficial changes, scholars need to synthesize the basic values of Islam with substantive law that can be applied in today's world.[24] Stated differently, post-*ijtihadism* needs to not only reformulate juridical laws especially as they relate to the public realm but also to revisit the theological-ethical basis of juridical sciences. Textual evidence, even if they are epistemologically sound, could be set aside if it opposed these principles.

The basis of an ethical structure has to be the equal and inalienable rights of all human beings and that God's laws cannot contravene the basic ethical precepts that He has ingrained in the conscience of all human beings. Stated differently, the focus of Islamic law has to shift from the primacy of Islamic to human identity. As it currently stands, the two forms of identities are incongruent. Current juridical laws should constantly be measured against divine values rather than the opinions proffered by previous scholars. Legal rulings cannot and should not contravene the dictates of divine morality which are accessible to human beings through reason. A just and benevolent deity cannot oppose moral values that He has instilled in human beings. By

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[23] Nasr Abu Zayd, *Reformation of Islamic Thought: A Critical Historical Analysis* (Amsterdam University Press, Amsterdam 2006), 69-70.
[24] Wael Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1999), 214. See the example of Rashid Rida cited in Hallaq, *A History*, 219

highlighting the incongruence between laws and moral sensibilities, it is hoped that post-*ijtihadist* scholars can rethink and revise some decisions, especially those which are an affront to human dignity.

It is important to bear in mind that jurists often issue rulings pertaining to the public domain based on the needs of their times and social conceptions of justice and equity. With the changes of times, erstwhile rules can undermine Qur'anic such principles. Muslim scholars need to re-think and re-link the connection between ethics and law. The entire juridical tradition, especially the one in the public domain, has to be premised on the ability of the intellect to discern basic ethical values and its application to modern juridical structure. This will also involve a critical examination not only of the sacred texts but also their historicization and the basis on which classical jurists arrived at their rulings. Post-*ijtihadism* entails understanding the text in its original context and understanding the spirit of the text so as to apply it to a new context. This requires a historical and contextualized reading of the sacred texts so as to discover appropriate meanings of texts in modern times.

The disjuncture between Islamic law and ethics can be illustrated by an example cited by Abdulaziz Sachedina. He states that when dolly the sheep was cloned in 1997, there was little public consternation in the Muslim world on the ethical ramifications of cloning and what this may mean for human identity and genealogy.[25] Instead, there was more discussion on the legal reasoning that could justify cloning. Such cases indicate that one of the most formidable challenges confronting Muslims today is to develop a juridical framework that is committed to uphold religious-moral values enunciated in their normative scriptures.

[25] Abdulaziz Sachedina, *Islamic Biomedical Ethics: Principles and Applications* (Oxford: Oxford University Press, 2009), 199.

The need to align Islamic law with Islamic ethics and justice can be illustrated in many cases. For example, Ayatullah Seestani states "As for the case where he does not fully satisfy her sexual needs to the extent that she fears committing *haram*, then based on compulsory precaution, the husband must fulfill her needs or consent to her demand for divorce. However, if he does not do that, then the wife has to bear the situation patiently and wait [for a better future]."[26] This view is challenged by Ayatullah Sane'i who maintains if a woman detests her husband and gives him his *mahr* or reasonable compensation which is mutually agreeable then he is obliged to divorce her. If he refuses then the matter would go to court which would issue the divorce.[27]

Many '*ulama*' reject the view that ethically and rationally derived values can override the scripturally pronounced role of women and minorities which, for them, clearly pronounce the divine will on the topic. Post-*ijtihadism* scholars must attempt to decipher the moral and legal reasoning that led previous jurists to their opinions. In the past, jurists were not writing in abstract; rather, they were responding to certain historical and social circumstances. The ideas and thoughts of a scholar are framed by a larger social context. Thus, contemporary thinkers must ensure that Islamic laws should not contravene Islamic justice. As Mas'udi Aghayi, a contemporary scholar in Iran states, "If a jurist deduces a law that is contrary to justice then that deduction is wrong and must be revised."[28] This point is borne out in a study of the chapters of

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[26] See Abdul Hadi al-Hakim, *A Code of Practice for Muslims in the West in Accordance with the Edicts of Ayatullah al-Udhma as-Sayyid Ali al-Husaini as-Seestani*, translated by Sayyid Muhammad Rizvi (London: Imam 'Ali Foundation, 1999), 212

[27] Ayatullah al-'Uzma al-Shaykh Yusuf al-Sane'i, *Wujub Talaq al-Khul' 'ala al-Rajul* (Qum: Mu'assa Fiqh al-Thaqalayn al-Thaqafiyya, n.d.), 88.

[28] See Mas'udi Aghayi, "Ijtihad va Tahavvol, in *Ijtihad va Zaman va Makan*, 26.

usul al-fiqh where there is little discussion on reason as an independent source of law or the ethical categories that a jurist should base his rulings on. On the contrary, the works on *usul al-fiqh* do not contain a chapter on ethics or justice nor is there a discussion on couching legal rulings on the moral-ethical framework of the Qur'an.

Post-Ijtihadism **and Reason**

An important consideration in the post *ijtihad* discourse is the assertion of a congruity between reason and what God ordains. Like their Mu'tazili counterparts, Shi'i jurists assert that reason is in harmony with God otherwise it would imply that God has created a device in human beings that is in conflict with His purpose. The divine cannot ask human beings to ignore or violate a faculty that He has endowed and asked them to utilize. In fact, Shi'i legal theory posits God to be the *ra'is al-'uqala'* (the epitome of reason). Therefore, it would be logically impossible for God to command what is contrary to rationality or to demand the opposite of what reason dictates.[29]

Shi'is quote a legal maxim (which is also in the form of traditions from the Imams) that *kullama hakama bihi al-'aql hakama bihi shar'* (whatever reason rules the Lawgiver will rule likewise). For them, this is further proof of the role of reason in legislating laws that are not covered by the *shari'a*. In this context, the famous Shi'i jurist Murtada al-Ansari states: "The truth is that there is a real correlation between rational rule and the rule of the *Shari'a*, and our

[29] Amirhassan Boozari, *Shi'i Jurisprudence and Constitution: Revolution in Iran* (New York: Palgrave Macmillan, 2011), 30.

predecessors have strongly supported it…What is meant from the *mulazama* (correlation) is that the divine rule would be proven by rational rule, and the rational rule is a proof for the divine rule." [30] In theory at least, this offers the possibility of the faculty of reason to override textual proof especially when the two conflict. Thus, when texts are silent on an issue reason can be invoked in the deduction of laws of difficult juridical decisions like donating organs to non-Muslims, the equal treatment of all human beings etc.

Scholars like Ahmad Qabil argue that there is a need for a reinterpretation of the *shari'a* based on reason. This is because judgements based on reason, even if we cannot be sure that they reflect the will of the divine, can override apparent (*zahir*) proofs that are derived from *hadith* reports which themselves do not provide certitude (*qat'*) that they reflect God's will. Scholars of *usul al-fiqh* also argue that the methodological tools that are at a jurist's disposal are human. In most cases, a jurist's ruling on a legal case is based on *zann* (conjecture) rather than certitude. His deduction only approximates rather than correctly reflects the will of the Lawgiver.[31] This suggests that statements in the revelatory sources which explicitly contravene commonly acknowledged values like freedom of conscience or that women should have an equal right to divorce cannot be relied upon in the inference of *shari'a* without considering any potentially conflicting judgements of rational morality.[32]

Reason can empower jurists to venture beyond the narrow confines of inherited laws, the consensus of previous jurists, and the context-bound traditions and Qur'anic verses.

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[30] Ibid., 31.

[31] Ulrich von Schwerin, *The Dissident Mullah: Ayatollah Montazeri and the Struggle For Reform in Revolutionary Iran (New York: I.B. Tauris, 2015)*, 214 – 215.

[32] Ali-Reza Bhojani, *Moral Rationalism and Shari'a: Independent Rationality in Modern Shi'i Usul al-Fiqh* (New York: Routledge, 2015), xi.

Unfortunately, reason has had a very limited role to play in Islamic legal theory. This has been admitted by scholars such as Muhammad Baqir al-Sadr (d. 1980) and ‘Ali Rida Fayz who complain that most jurists pay little or no attention to ‘*aql*, which is considered to be the fourth source of law in Shi‘ism.[33] ‘Ali Rida Fayz further claims that although there is much juristic discourse about the role of reasoning, it is barely utilized as an independent source for deriving legal precepts.[34] There is a need to distinguish between ‘*aql* as a potential source of the law and ‘*aql* as an actual tool that is used to infer the law.

To be relevant to the lives of ordinary Muslims, *post-ijtihadists* need to articulate an integrated world-view that can relate and respond to the socio-political and economic needs of the community. Current legal manuals do not resolve many of the challenges that Shi‘is encounter. The hermeneutical principles within *ijtihad* should allow for a different and more flexible interpretation of the Islamic message. It is essential that Muslims continue to review and revise the law in keeping with the dictates of their changing circumstances.

Post Ijtihadism and ‘*Urf*

As I have argued elsewhere, the claim that Islam is a universal religion necessitates that its law expand to cover novel circumstances wherever Muslims reside. Just as previous legal rulings were partially predicated on local customs, contemporary ‘*urf* should be seen as a valid basis for legal prescription. Especially in the western diaspora, scholars must take into consideration diasporic customary norms, because law and custom are intertwined. New interpretations of the

[33] Muhammad al-Baqir al-Sadr, *Durus fi ʻIlm al-Usul* (Beirut: Dar al-Kitab al-Lubnani, 1978), 2/203; see also ʻAli Rida Fayz, *Vijeghihayi Ijtihad va Fiqh Puya* (Tehran: Pijuhghah ʻUlum Insani, 1997), 80-1.

[34] ʻAli Rida Fayz, *Vijeghihayi Ijtihad*, 80-1.

law must be grounded in locally-accepted social norms. The sound `*urf* in the diaspora would be what reasonable people acknowledge as proper and is not antithetical to the interests of Muslims.[35]

There is nothing in the scriptures to indicate that the '*urf* has to be based from Islamic lands. It can be predicated on wherever Muslims reside. Thus, post-*ijtihadists* are not obliged to replicate laws that were premised on eighth-century '*urf*. To be fully engaged in the political and social order, there is a need to articulate rules that interface with customary law. Unfortunately, instead of basing contemporary *fatawa* on the Qur'anic principles of justice and equality, rulings are often based on texts which were influenced and shaped by eighth-century '*urf*.

In the diaspora, based on the principle of local custom, jurists can invoke diasporic customary law as a source of new legislation. Such a reading will mean that '*urf* will often shape rather than merely explicate or specify aspects of Islamic rulings and will necessitate a revision of many laws. Legal pronouncements on slavery, child marriage and custody, women's testimony, inheritance, guardianship of women, women in the judicial system, discriminatory laws against non-Muslim minorities and the Islamic penal code were based on patriarchal and tribal customary laws at the advent of Islam.

Based on the principles outlined above, post-*ijtihadists* also need to address topics such as patent and copyright laws, giving and receiving interest to lending institutions, swearing allegiance to a non-Muslim government, Muslim political involvement, citizenship, working for

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[35] Sherman Jackson, *Islam and the Blackamerican: Looking Toward the Third Resurrection* (New York: Oxford University Press, 2005), 162.

government secret service agencies, and serving in a non-Muslim army especially when it fights a Muslim country.

Conclusion

Even in today's legal manuals, there is discussion on slavery and that the *diyya* (blood money) of women and that of non-Muslims is less than that of men. Rules on inheritance, testimony are skewed against women. Such laws reflect the patrilineal character and male dominance of eighth-ninth century Arabian society when most rulings were devised. They also reflect the hegemonic laws formulated by Muslims when they were the dominant empire that subjugated non-Muslims.

The challenge that post-*ijtihadism* faces is that contemporary hermeneutical enterprises be predicated on current exigencies. Instead, they are often circumvented by the determinacy of past rulings. Post-*ijtihadism* must decipher the rationale behind the rulings of the past jurists and ensure that in revising the inherited juridical traditions, they discern the moral and legal underpinnings that led previous jurists to their opinions. Post-*ijtihadists* must ensure that their rulings accord with the Qur'anic objective of building a just social order and that Islamic laws should not contravene Islamic justice or divine morality.

Post-*ijtihadism* could provide a basis for alternative juristic models offered by eminent jurists and the interplay of the foundational principles of *ijtihad* with various disciplines to reconstruct Islamic thought and legal theory. Precisely how this new *ijtihad* will look and function, the results it will achieve, how it will resolve new challenges without ignoring the role of traditional Islamic legal theory is still in the process of deliberation. Although scholars like Kadivar state that the new *ijtihad* model reconstructs theology and ethics so that the intellect is

given a more expansive role in decision-making, there are many gaps in this theory that remain to be filled. The model of *ijtihad* proposed is conceptually ambiguous and vague, especially as it could form the basis of new legal rulings and could be used to create a polity which would be based on an Islamic ethical-moral vision.