

The Applicability of the Shari'a in Contemporary Times

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Abstract

In recent times, there has been much debate in academic circles concerning the *shari'a*, as it was posited in the classical period, and its applicability to contemporary times. More specifically, questions that have been posed include: how can a religion, which is believed to be immutable and constant, regulate and serve the needs of a changing community? How can a legal system that was formulated in the eighth and ninth centuries respond to the requirements of twenty-first century Muslims? Is there a need for reformation in Islam? If so, where should it begin and in which direction should it proceed?

This paper will explore how modernity has impinged on the classical formulation of Islamic law and how the intersection of *shari'a* and modernity has forced Muslim jurists to resort to various hermeneutical and exegetical strategies to respond to the challenges of our times.

Key words: Shari'a; Fiqh; Maslaha; Maqasid; Dar al-Islam; Bujnurdi

INTRODUCTION

In recent times, there has been much discussion on the application of the Shari'a in public life. Attempts by various Islamic groups like the Islamic State, al-Qai'da, Taliban, and countries like Iran, Saudi Arabia and Somalia and even in the province of Ontario, Canada, to enforce the Shari'a have intensified the debate on the relevance

and application of the Shari'a in modern societies. This paper has the limited aim of examining the formulation of the Shari'a in the classical period of Islam, the problems of applying it in modern times, the claim for reforming the Shari'a and the use of various methodological devices in attempts at such a reformation.

1. THE ESTABLISHMENT OF THE SCHOOLS OF LAW (MADHAHIB)

During the eighth and ninth centuries, jurists in the Islamic world were private individuals who were keen to discern God's intent on a particular ruling. The goal of the jurists' endeavor was to reach an understanding (*fiqh*) of the *shari'a* i.e., to comprehend in precise terms the law of God. Guided by a corpus of precepts and laws and their own independent reasoning, the jurists, especially in the 'Abbasid period, attempted to construct a legal edifice by developing and elaborating a system of *shari'a* law binding on all Muslims. They began to interpret and develop Islamic law, invoking various 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) and other innovative interpretive principles to respond to the needs of the times and to go beyond the rulings stated in the revealed texts while at the same time paying respect to the very texts that had empowered them. Gradually, the *shari'a*, as articulated by these jurists, became a structured normative praxis and a comprehensive system that governed personal and public demeanor.¹

¹ Liyakat Takim, *The Heirs of the Prophet: Charisma and Religious Authority in Shi'ite Islam* (Albany: SUNY, 2006), chapter one.

2. DISCRIMINATORY POINTS IN THE SHARI'A

It is important to bear in mind that the Shari'a, as formulated by these jurists, was not always based on the revelatory texts, Qur'an and *sunna*. Use of various hermeneutical devices, exposure to diverse cultural influences and a variegated understanding of the sources, derivation and contents of the *sunna* were important factors that precipitated differences between the schools and impacted the rulings that were issued by them. Hence, there were many occasions when the juridical rulings deviated from the general moral and tolerant ethos of the Qur'an.

For example, the Qur'an allowed the evidence of non-Muslims when no Muslim was available to witness the will of a Muslim who died on a journey (5:106). Abu Hanifa (d. 767), however, rejected the evidence of non-Muslims in this case and Abu Yusuf (d. 798) declared the Qur'anic passage to have been abrogated by verse 65:2. The Medinese jurists went even further, rejecting the evidence of non-Muslims altogether, even against one another (Schacht, 1950).

Similarly, according to the jurists, the people of the book were to live in houses that were smaller than Muslim houses. They were not permitted to ride a horse, which was a public proof of one's affluence. Most schools, apart from the Hanafis, paid a lower blood price for a *dhimmi* who was killed. *Jizya*, says the Qur'anic exegete Zamakhshari, should be taken from them with belittlement and humiliation. The *dhimmi* is to come to walk, not riding. When he pays the *jizya*, he shall be slapped on the nape of his neck (Lewis, 1984). Others added symbolic acts of humiliation – for example that the *dhimmi*'s hand was to be lower than the tax collector's hand when he pays the *jizya*. These regulations were incorporated in the jurisprudence as a divinely sanctioned system of discriminatory provisions.² Not all jurists agreed with such acts of humiliation. Abu Yusuf, for example, states that *dhimmi*s should not be treated harshly or humiliated, rather, they should be treated with considerable leniency. The tendency among jurists of the eighth and ninth centuries was to seek justification for the discriminatory rulings by claiming that the unbelievers had chosen to refuse the offer to convert. Hence, their inferior status was the product of their own choice.³

The laws also discriminated against women. This can be discerned from the laws over the question of a missing husband. Maliki law was more favorable to women in this instance. Malik held that the wife of a missing husband may

seek judicial separation after a four-year waiting period. If he does not reappear within this time, she will observe the *'idda* of a widow and is then free to remarry. The Hanafis, Shafi'is, and Hanbalis, on the other hand, state that the wife of a missing husband may not remarry as long as he may be considered alive based on the average life span of a person. The Hanafis fix this at one hundred and twenty years, the Shafi'is and Hanbalis at ninety years. Such laws reflected the patrilineal character and male dominance of eighth-ninth century Arabian society when many of the juridical rulings were formulated (Takim, 2004).

3. SUBJUGATION OF NON-MUSLIM GROUPS IN THE SHARI'A

Being universal in its outlook, Islam had to contend not only with non-Muslims living in its dominion but also with those living outside its borders. The classical Muslim jurists divided the world into the abode of Islam (*dar al-Islam*) and the abode of war (*dar al-harb*). The territory of Islam signifies a political entity that acknowledges and upholds Islamic values and laws. As it purportedly upholds the *shari'a* (Islamic law), this abode is seen as the territory of peace and justice. The jurists' concern was to universalize application of the *shari'a*, their ultimate goal being to propagate the Islamic faith.

Based on the jurists' bifurcation of the world, peace was possible only when everyone lived under the protection of an Islamic state. *Dar al-harb* was to be infused with Islamic ideals by extending the boundaries of *dar al-Islam*. By accentuating the *shari'a* as the only source of legal prescription and validity, the jurists constructed a perpetual ideological contest between *dar al-Islam* and *dar al-harb*. Through this construction, the jurists were able to formulate rulings legitimizing Muslim expansion and ascendancy over the non-Muslim world (Takim, 2006, p.205).

It is important to note that these spheres in Islamic jurisprudence do not occur in the Qur'an. Unlike the jurists, the Qur'an does not suggest a perpetual state of war between *dar al-Islam* and *dar al-harb*. Rather than reflecting the Qur'anic pronouncement on interfaith relations, the legal construction of the world into *dar al-Islam* and *dar al-harb* are indicative of the historical realities that the 'Abbasid jurists had to contend with. As the proponents of the universal state based on the *shari'a*, Muslims could not grant equal status to those who did not share the ideals of Islam.

Besides the people of the book, the jurists were confronted with another category of unbelievers who were not conquered and were not subject to Muslim power. They resided in *dar al-harb*, which was viewed as a potential danger to the Islamic polity. The territory of Islam could not be a secure place unless and until Islamic

² For other restrictions and acts of humiliation inflicted on the *dhimmi*s see, Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: The Johns Hopkins Press, 1955), pp.197-98.

³ Abu Yusuf, Ya'qub b. Ibrahim, *Kitab al-Kharaj* (Cairo: n.d.), pp.122-25.

hegemony was acknowledged everywhere. To secure such hegemony was the goal of *jihad*.

Jurists linked the universal ideals of Islam with *jihad* so as to justify the extension of the boundaries of *dar al-Islam*. Paradoxically, the purpose of *jihad* was peace since this could only be achieved when the divine law that is imprinted on the human conscience was accessible to everyone, believers and unbelievers. At this point, there would be no confrontation between *dar al-Islam* and *dar al-harb*. According to the jurists, Muslims are obliged to propagate this divine law, through peaceful means if possible, through violent means if necessary (Takim, 2007).

The jurists had few guidelines to follow in their pronouncements of the justifications and rules of engagement of war. This can be discerned from the fact that they expressed a myriad of opinions on *siyar* (rules of warfare) and *jihad*. They differed among themselves as to whether Muslims could fight non-Muslims due merely to their disbelief or because of the possible threat they posed. Many argued that they could only be fought if they posed a danger to the Muslim polity. Early jurists like Abu Hanifa and al-Shaybani did not state that *jihad* was to be waged against non-Muslims based on their disbelief (Khadduri, 1984, p.165). They advised the imam that war was to be waged only when the inhabitants of *dar al-harb* were in conflict with *dar al-Islam*. Sufyan al-Thawri, an eminent jurist of the eighth century, concurred with this ruling.⁴

Al-Shafi'i, however, saw things differently. He claimed that *jihad* was to be waged on unbelievers for their disbelief.⁵ Thus, for him, the distinction between offensive and defensive war was non-existent. Al-Sarakhsi, the commentator on al-Shaybani's work, concurred with al-Shafi'i. He states that fighting the unbelievers was, "a duty enjoined until the end of time."⁶ Al-Sarakhsi further maintains that *jihad* and the commandment to fight had been revealed in stages... (the final stage being) the absolute order to fight (nonbelievers)... this means an obligation, but this obligation is meant to exalt the religion (of Islam) and to subdue the associators.⁷ Another Shafi'i jurist, Abu Ishaq Shirazi (d. 1083) states that Muslims should wage a war at least once a year against non-Muslims so as to stop them from transgressing against Muslims.⁸

The preceding discussion suggests that the medieval juristic literature is characterized by fundamental

disagreements on the grounds for war. There is a lack of consensus among Muslim scholars juridical pronouncements concerning interaction with minorities and other states. Evidently, issues such as *dar al-Islam* and *dar al-harb* and the treatment of minorities were still in the formative stages in the eighth and ninth centuries.

I contend that there is a need for revising many aspects of the *Shari'a* keeping in mind the needs of the times. This is the only way that the *Shari'a* can be relevant to our times. Most of the revisions pertain to gender and minority issues. This is because Islamic law was formulated under patriarchal and hegemonic conditions which assumed the supremacy of Islam and the inferiority of other religions.

Attempts at establishing an Islamic state in modern times and the imposition of the *Shari'a* have shown the inadequacy of the Islamic law at addressing modern issues. This can be seen in attempts in Afghanistan, the Islamic State (IS), Iran, in Pakistan, Sudan, Somalia, Nigeria etc where the rights of individuals have been curtailed and gross human right abuses have been committed in the name of Islam. In most of these countries, democracy and freedom of expression are non-existent.

4. THE SHARI'A REVISITED

As I have stated, Islamic law developed in a particular milieu in which Muslim jurists developed different stratagems in order to respond to the juristic challenges of their times. Some contemporary Muslim scholars have argued that there is a need to articulate a jurisprudence that addresses contemporary concerns and issues. They argue that what is essential to a proper understanding of Islam is not the letter of the text but instead the spirit of the Qur'an and the Prophetic tradition. They maintain that there is no single, valid interpretation of the Qur'an or the *hadith* (Kamrava, 2006, p.15). It is within the framework of Islamic jurisprudence that the discussion of reformation in Islam and the role of *ijtihad* in the reformation process are to be predicated.

Discourse on reformation indicates that previous *shari'* rulings were inadequate or not applicable in modern times. Jurists have gone back to principles established in *usul al-fiqh* to revise some of the rulings, keeping in mind the general moral tenor of the Qur'an.

Shi'i scholars have also argued that there is a need to expand the scope of their juristic vision and revisit some of the earlier rulings based on the need of the times and interests of the community. As the socio-political situations change, juridical rulings issued must reflect the newer circumstances. Many Shi'i scholars lament the fact that current legal treatises (*risala 'amaliyya*) do not discuss issues that are relevant today. Thus, issues like human rights, *mustahdathat* (new issues), socio-political issues are largely avoided in these treatises. Instead they

⁴ Abu Sulayman, "Islamic Jurisprudence and Modern Needs," in *Peace and Conflict Resolution in Islam*, ed. Said et al., p.66.

⁵ Muhammad al-Idris al-Shafi'i, *Kitab al-Umm* (Beirut: Dar al-Fikr, 1990), 4, 84-85.

⁶ Al-Sarakhsi, *Kitab al-Mabsut*, pp.2-3.

⁷ Abu Sulayman, "Islamic Jurisprudence and Modern Needs," in *Peace and Conflict Resolution*, ed. Said et al., p.66.

⁸ Abu Ishaq Firuzabadhi al-Shirazi, *al-Muhadhdhab fi fiqh al-Imam al-Shafi'i* (Cairo: Matba 'at Mustafa al-Babi al-Halabi, 1976), p.2, 291.

complain that more attention is paid to topics like *kurr* (the amount of water that is required to purify an object), details of distance traveled to pray *qasr* (shortened prayers) etc.⁹

Similarly, a prominent contemporary jurist, Ayatollah Bujnurdī argues that it should not be stipulated that whatever is stated in *fiqh* is 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. Bujnurdī further states that in the course of time, jurists have had different viewpoints. On one issue, one *faqih* has considered a thing as prohibited while another one has allowed it. The difference is due to their independent interpretations of the four sources, i.e., their interpretations of the Qur'an, traditions, intellect, and consensus. As an example, he says that if an assembly of jurists tells us that the wife of the deceased cannot inherit land from her dead husband it is possible that their rulings of the sources can be different from what they have declared.¹⁰ In an interview he gave to *Farzaneh*, an Iranian magazine, Bujnurdī states:

In my personal opinion, many of the laws referenced to in *fiqh* and specific laws for men and women which seem to be discriminatory in nature, can be revised. Such issues as women providing evidence as a witness, inheritance from the deceased, retribution, *diyyat* (blood money) judgment in civil and penal codes, which are all considered as areas of discrimination by the outside world, can be looked upon in a broader perspective. In my opinion, if these issues are examined and revised by the jurists and law experts with an open view, a great number of these laws can be revised.[...] Therefore, I believe, in many of the cases which seem discriminatory between men and women, we can apply certain revisions from the point of view of *fiqh*. I believe many of the existing laws and rights of women in the Shia *fiqh* are not unalterable rules and can be interpreted and revised.¹¹

Other scholars, such as Mohsen Kadivar,¹² have argued for freedom of religious thought and belief. He states that there is no Qur'anic basis for the killing of apostates and the imposition of religion on infidels. Restrictions in religious liberty and the persecution of heathens, he argues, contradict the essence of freedom of conscience in the Qur'an. There is a need for freedom to enter a religion and leave it. The choice between a particular religion and death is tantamount to denying people their freedom.

⁹ See Mustafa Ashrafi Shahrudi, "Hamsuy-e fiqh ba tahavvulat va Niyazhay-e Jami-e", in *Ijtihad va Zaman va Makan* 14 vols. (Qum: Mu'assi Chap va Nashr Uruj, 1995), vol 1, 119.

¹⁰ <http://en.farzanehjournals.com/index.php/articles/no-8/41-no-8-5-interview-with-ayatollah-bojnourdi-qfigh-and-womens-human-rightsq>. Accessed November 2011.

¹¹ <http://en.farzanehjournals.com/index.php/articles/no-8/41-no-8-5-interview-with-ayatollah-bojnourdi-qfigh-and-womens-human-rightsq>. Accessed November 2011.

¹² Mohsen Kadivar is an Iranian philosopher, University lecturer, cleric and activist. A political dissident, Kadivar has been a vocal critic of the doctrine of clerical rule, also known as Velayat-e Faqih (*guardianship of the Jurist*), and a strong advocate of democratic and liberal reforms in Iran.

The Qur'an endorses the logic of freedom of religion and creed, Kadivar concludes, "There is no doubt, therefore, that the administration of capital punishment for an apostate, or forcing infidels to choose between Islam or death has no sanction in Islam and, in fact, contradicts the above verse (2, p.256)."¹³

Ideas like those expounded by Ayatullahs Sanei, Bujnurdī, Jannati and Mohaqeq Damad clearly represent a major break from the current understanding in the laws of divorce among many jurists. Sanei has gone further than most other scholars. In my discussions with him in Qum, 2004, he allowed women to lead men in prayers, even in a public setting. Most *maraji* "have insisted that only men can lead other men in prayers. Sanei admits that there are petrified fossilized devout ignoramuses who prevent such reforms in the law to take place."¹⁴

5. ACCEPTANCE OF MAŞLAḤA IN SHI'ISM

An important tool that is often used in revising previous *Shari'* ruling is that of *maslaha*. However, as will become apparent, Shi'i scholars have not generally accepted *maslaha* as a valid tool for deducing juridical rulings. Contemporary Shi'i thinkers like Ayatullah Sanei, Shabistari, Kadivar, and Mohagheg Damad believe that the lawgiver has granted recognition to the interests of humanity in the laws of the *Shari'a*. Thus, they rely on the principle of *maşlahā* and other rationally derived rules like forestalling harm in deriving new rulings and to accommodate the needs of a modern society. In their view, the need to respond to people's religious and worldly interests is in accordance with the belief that God's guidance for humanity in Islamic revelation applies to all times and places. This view implies that the laws enacted with regards to the welfare of the community are necessarily mutable. There is an intrinsic relationship between public good and the most effective and just formulation of laws. Thus, certain Islamic legal rulings may change according to the harm or benefit involved.

For instance, Islamic law forbids dismembering a believer's body or removing his/her organs. Thus, any kind of organ transplant is religiously prohibited. However, by invoking the principle of *maşlahā*, and contextualizing the reason for its prohibition, jurists would be able to override traditions that prohibit organ transplantation on the ground that the benefit accruing from such a procedure to save a life far outweighs the utility obtained by preserving and burying the dead body in its entirety.

It should also be noted, however, that, in the Shi'i school of law, the principles of benefit and harm are

¹³ See Mohsen Kadivar. Freedom of Religion and Belief in Islam. In M. Kamrava (Ed.), *The New Voices of Islam: Rethinking Politics and Religion*, (p.62).

¹⁴ Ziba Mir-Hosseini, *Islam and Gender*, p.160.

determined on the basis of textual evidence of legal rules (*adilla*) taken from the sacred texts (*nuṣuṣ*). It is only when a jurist distinguishes the considerations of benefit and harm that are rooted in the textual sources that he can be sure that the rule revolves around those considerations.¹⁵ Sunni jurists, on the other hand, have greater scope for determining the purpose of a law; they do not require, as Shi'i scholars do, that the legal ruling be based on explicit proof in the text. In their view, a jurist can issue a legal ruling regardless of the method used to determine the cause of the ruling and the benefit or harm on which it depends. Thus, they consider methods such as analogy (*qiyas*) and discerning the public interest (*istiṣlah*) as actual sources of law.¹⁶

Ayatullah Muhammad Husayn Fadlallah (d. 2010) was an important Lebanese cleric who was followed by millions of Shi'is throughout the world. He maintains that acts of worship (*ibadat*) are constant and are not subject to change. However, he also subscribes to the view that this did not preclude the possibility of understanding the reasons behind the acts. In the realm of human inter-relationships, he argues, legal rulings can be modified since it is possible to ascertain the rationale behind a religious ruling by having recourse to the precept's text, contextual evidence or signs, and indications (*qara'in*) (al-Husayni, 1998, pp.44-45).

Another scholar, Shams al-Din, bemoans the atomistic nature of Shi'i law which has been designed by jurists for individuals rather than communities (*din al-afraad wa laysa din al-jama'a*). For him, we need a *fiqh* that is connected to the surroundings (*fiqh al-bi'a*) and whose laws should be derived with social, political, economic, and medical benefits in mind. Furthermore when *fiqh* is formulated without a clear context or site of application in mind it becomes *al-tajrid al-nazari* (abstract thinking) and the context and place of application are lost.¹⁷ In other words, jurisprudence becomes overly cerebral. Thus, Shams al-Din argues, *fiqh* must be contextual - and its derivation must involve a clear awareness of its application. This approach involves interacting with the spirit of the Qur'an and Sunna. It is a problem which plagues contemporary *fiqh* and the jurists (*fuqaha*).¹⁸

He then lays out the problems of the contemporary method of derivation (*istinbat*) more clearly: The study of *fiqh* is done in an atomistic fashion (*al-fardiyya al-tajzi'iyya*). Juridical discourse is directed at individuals and in doing so jurists lose sight of the message directed to the *umma*. They express the *Shari'a* in terms of the

hereafter- i.e., with a focus on the next world. The process of deriving the law is disconnected from the realization of its changing context i.e., where and for whom it will be implemented, and thus they do not interact with *ṭabi'a* (what is 'normal' and people are accustomed to). Observing the *maqasid* of the *Shari'a* is absent in many parts of jurisprudence. Thus, the process of *istinbat* itself does not take into account the broader picture of the public good.¹⁹

For Shams al-din the process of deriving laws should not be restricted to the derivation of rulings from texts. On the contrary, there must be an understanding of the *waqi* (actual situation) and a contemplation over it (*tadabaruhu*). This contemplation involves being aware of the relationship between the context and the text and the context and the issues that matter in people's lives. *Ijtihad* will not be proper without contemplating and grappling this contextual relationship.²⁰ He emphasizes that a jurist must have an overall vision of the law (*al-ru'ya al-kulliyya lil-shari'a*). He mentions again that the *Shari'a* is a complete, integrated structure thus it must be connected to its various domains and that each system connects to another; thus family life, economics, purity, impurity etc are the various domains under which the *Shari'a* operates. They are all akin to interconnected bodies. The *mu'amalat* and *ibadat* do not differ in this regard. He goes on to cite more examples of areas in which jurists must develop further understanding and provide contextual *fatawa*, these include: price fixing, monopolization or capitalism (*al-ihtikar*).²¹

Like Shams al-Din, Ayatullah Fadlallah complains that Shi'i *fiqh* has focused on personal rather than social issues. He states that "our works of jurisprudence from the beginning century of compilation, have followed an imitative style in so far as they emphasize individual and particular issues that impact people. They do not follow the method of emphasizing general principles which the law has ruled regarding society except for a few instances."²² This, in part, due to the fact that it is largely reliant on the genre of traditions narrated from the Imams. These traditions consist primarily of companions asking the Imams questions pertaining to personal issues. This tendency to focus on the *juz'iyya* (particulars) is because these are areas that impact people most in their lives; i.e., the particulars of *fiqh* and its application to specific circumstances of their lives.²³ The second question posed to Fadlallah deals more directly with the *Shari'a* and its overall objectives in deriving the law (*maqasid al-kulliyya fi istinbat*). The questioner states that the study of the texts is myopic, at the expense of the broader objectives. Fadlallah is asked how can a jurist balance a *ḥadith* which

¹⁵ Ayatullah Muhaghegh-Damad. The Role of Time and Social Welfare. In L. Clarke (Ed.), *Shi'ite Heritage: Essays on Classical and Modern Tradition* (p.215).

¹⁶ Ibid.

¹⁷ Takim, L. (2014). Maqasid al-Shari'a in Contemporary Shi'i Jurisprudence" in *Maqasid al-Shari'a in Contemporary Reformist Thought: An Examination* (pp.115-116). In A. D. Taurus (Ed.).

¹⁸ Muhammad al-Husayni (Ed.). *al-Ijtihad wa al-Hayat*, p.24.

¹⁹ Ibid. pp.23-4.

²⁰ Ibid. p.25.

²¹ Ibid. p.27

²² Ibid. p.47.

²³ Ibid. p.46.

discourages marriage with certain groups of people like Negroes and Kurds keeping in mind the spirit of the *Shari'a*?

He responds that scholars must distinguish between the *harfi* (literal-linguistic approach) and the *'urfi* (customary) understanding of the law. Jurists have not emphasized the latter. He discusses the principle of comparing traditions to the Qur'an and specifically how scholars may interpret traditions indicating *kiraha* (detesting) in marrying Kurds and Negroes while the Qur'an clearly states "And We have honoured the children of Adam (17:70)" If a jurist approaches this position from a literalist perspective he would say that the tradition restricts (*takhṣiṣ*) the verse and thus the verse is not applicable to everyone.²⁴ However, in Fadlallah's view, by approaching it from the *'urfi* perspective one is able to determine that this verse can be used a principle, thus, any *fatwa* or *ḥadith* indicating that a certain group of people are inherently deficient would be tantamount to it being against the spirit of the law (*mukhalafan li-ruḥ al-Shari'a*). Fadlallah takes 17:70 to be indicative of the spirit of the *Shari'a* and hence he uses it as an important litmus test in matters of racial-ethnic bias.²⁵

Fadlallah's concern to apply the principles of *maqasid* and *maṣlaḥa* is evident in another question. He is asked his view regarding the current status of Islamic marital laws and their apparent inequities. For example, if a husband is absent for more than four months due to work and during that time he marries another wife abroad and continues to send financial support to his first wife, it would seem that his first wife has no choice but to stay married to him despite her displeasure. How do the *fatawa* which allow such behavior accord with the Qur'anic demand that a husband either live with his wife in accordance with customary norms (*ma'ruf*) or leave her based on *ma'ruf*? He states that there is no doubt that these rulings need to be revised and require further investigation. For instance, a woman's desire (*shahwa*) is greater than that of a man. However, every situation must be examined separately, and patience is needed on both sides. Nevertheless, cases such as these can be solved by recourse to *qa'ida nafi al-haraj* (the principle that averts harm). He then cites 2:185, "Live with them in a kind manner (*bi l-ma'ruf*)" *Ma'ruf* must be understood in its *'urfi* form and thus it must act as a guiding principle over these rulings.²⁶ In other words, Fadlallah appeals to the common sense and the spirit of the law which states that a marriage must be based upon a common understanding of decency and kindness. Thus, the problem lies in a vast array of jurists who examine texts in an atomistic rather than an *'urfi* manner. This is because their method is imitative (*taqlidi*) and follows previous interpretations of the texts (*nusus*).

In many instances, it is the *'urf* that can best determine the normative standards and what is in the best interest of society.²⁷

6. FEMALE JUDGES

The question of reformation is also interwoven to how a *Shari'a* ruling can be re-examined and revised with time. I intend to discuss this within the context of the jurists' ruling that women cannot be judges. Here, I will examine how Ayatullah Bujnardi challenges and revises this ruling.

Bujnardi questions the commonly held view that women cannot be judges. He reviews the Qur'anic position and the major traditions on the issue. At the outset, he contends that there is no authenticated proof to prohibit women from becoming judges.²⁸ He further maintains that among the early scholars within Shi'i traditions, two conditions had to be met to be a judge. A judge must be upright and base his rulings on justice and that he be knowledgeable of God's law. Other stipulations were introduced later.

Bujnardi notes that al-Tabari permitted women to be judges unconditionally and Abu Hanifa gave a conditional (*mashrut*) permission. However, other scholars stipulated the condition of being male (*shart-i rajuliyat*) and essentially prohibited women from becoming judges.²⁹ Bujnardi acknowledges that most Shi'i scholars have not allowed to women to become judges. Shaykh al-Tūsī was the first scholar to stipulate that only a man can be a judge.³⁰ Before his time, there is no evidence to indicate that any Shi'i scholar had stipulated this condition. Tusi argues in his *Khilaf* that to be a judge, an explicit permission is required by the Imam. As there are no traditions that allow women to hold this position, Tusi rules that women are prohibited from becoming judges. Tusi bases his ruling on the 'principle of absence of permission' (*asalat 'adam al-jawaz*) although there are no traditions in Shi'i sources that disallow women from becoming judges.³¹ Bujnardi refutes this argument using another principle, that of generality (*asalat al-'umum*). He argues that although one needs permission from the law-maker (*shari'*) to be a judge, the Qur'an does not specify the judge's gender, hence the ruling applies it to all just believers. This is obvious in verses like 4:58, 4:158 and 5:44. These verses stipulate that one who judges must be a Muslim and be able to judge with justice. However, they do not mention the gender of the judge.

²⁷ Ibid. p.60.

²⁸ Bujnardi, *Majmu'a Maqalat Fiqhi*, 2/375.

²⁹ Ibid. 2/378.

³⁰ Ibid. 2/381.

³¹ Ibid. 2/382.

²⁴ Liyakat Takim, "Maqasid", p.119.

²⁵ Muhammad al-Husayni ed. *al-Ijtihād wa al-Ḥayāt*, pp.49-50.

²⁶ Ibid. pp.59-60.

7. CONSENSUS AGAINST ALLOWING FEMALE JUDGES

The argument against allowing female judges is based on scholarly consensus. Many contemporary scholars have resorted to this argument, as did earlier scholars like Shahid al-Thani in his *Masalik al-Itham*. Bujnurdi refutes this argument stating that although there are no explicit references allowing female judges in the works of earlier scholars, nevertheless their absence is not proof that the scholars believed it was impermissible. In fact, although Tusi deemed it impermissible for women to be judges, he did not claim that there was an *ijma'* prohibiting women from holding such a position.³² Some scholars, like Muqaddas al-Ardabili (d. 1585) doubted that being male should be a condition for being a judge whereas Shaykh Bahai maintained that there was no *ijma'* on the issue.³³

Although most of these traditions are weak, their numbers suggest that the gist of the message cannot be ignored. As such, since men are not supposed to obey or seek advice from women, they should not be judges either as it would require men to listen to them and seek their counsel. Bujnurdi, however, replies to the use of these traditions at multiple levels:

The traditions pertain to husbands obeying their wives, as such they are restricted to household matters.³⁴ The question of obedience to women revolves around areas that are outside the realm of Islamic law. This would not be applicable to judges. As for seeking advice from women, jurists have understood this as an admonition and not a prohibition. Furthermore, Bujnurdi argues, being a judge is not to be construed as seeking advice, it pertains issuance of rulings based on Islamic law.³⁵ In addition, the traditions say nothing regarding women seeking advice from each other, and therefore leaves open the question of women judging other women. The traditions which speak of women's relatively weak intellect and faith in comparison to men cannot be used against female judges since there is no condition which stipulates that a judge must have the best faith and intellect. If we are to assume that women are intellectually deficient, Bujnurdi argues, then women cannot be duty-bound (*mukallaf*) in performing legal duties. Since women, according to the law, can reach intellectual maturity, they do meet the condition of being a judge.³⁶

Amongst the Sunnis, it is noteworthy that the Hanafis have allowed women to be judges under all circumstances except for matters pertaining to capital punishments (*hudud*) and blood-money (*diyya*).³⁷ This is done through using the analogy of testimony where the Hanafis do not

allow women to be witnesses in cases relating to capital punishments and retaliation. Tabari and the Khawarij, on the other hand are more liberal in that they allow women to judge on every issue.³⁸

Bujnurdi writes that Muqaddas al-Ardabili believed that it was permissible for women to become witnesses or judges among women.³⁹ This is an important observation since it contradicts the claim there is a consensus among Shi'i scholars on prohibiting female judges.⁴⁰ Bujnurdi concludes that there are no explicit prohibitions against women becoming judges. On the contrary, whenever the Imams set conditions for judges, they stipulated conditions such as knowledge and justice but did not refer to the gender of a judge. As such, these traditions should be taken as absolute (in the sense that they are gender neutral) just like commands to pray or pay the *zakat* (religious tax).⁴¹

CONCLUSION

A major feature of reformist thinkers like Ayatullah Sanei, Muhammad Ibrahim Jannati and Fadlullah is the positioning of the Qur'an as the primary and the foundational textual source in formulating new legal opinions, empowering reason to uncover the rationale and the wisdom ('*illa*) behind a divine injunction and taking into account the context of time (*zaman*) and space (*makan*) associated with particular decrees that were legislated. This is evident in the existing legal corpus dealing with issues such as apostasy, status of non-Muslims, and gender justice, many of which contradict the Qur'anic ethos but are given legal currency primarily on the basis of prophetic traditions (*hadith*), consensus (*ijma'*) and the science of jurisprudence (*usul al-fiqh*). According to Ayatullah Sanei, this has stultified the onward progression of Islamic legal theory and Islamic law that ought to be harmonious and compatible with the new context and circumstances (Sanei, 2005, pp.9-12).

As Muslims search for ways to chart out peaceful coexistence with others, they also need to reevaluate their normative texts. This exercise is contingent on recognizing that Muslims are not bound to erstwhile juridical or exegetical hermeneutics. Communities often construct a paradigmatic interpretation on the text and assert it on the readers. Once it is defined, the authoritative legacy of the text is transmitted to the next group of scholars and becomes entrenched as the normative and "authentic" position. Gradually, the texts construct an increasingly

³² Ibid. 2/385.

³³ Ibid. 2/285

³⁴ Ibid. 2/408.

³⁵ Ibid. 2/409.

³⁶ Ibid. 2/410.

³⁷ Bujnurdi, *Majmu'a Maqalat Fiqhi*, 2/417.

³⁸ The Khawarij were a group of Muslims who initially broke off from Ali b. Abi Talib's rank after the battle of Siffin. They claimed that Ali had become an infidel by accepting an arbitration to end the battle. Subsequently, they became politically active and established their own school of law.

³⁹ Bujnurdi, *Majmu'a Maqalat Fiqhi*, 2/417.

⁴⁰ Ibid. 2/419.

⁴¹ Ibid. 2/420

restrictive and specific well-defined position on an issue. The contents of the sacred texts are frequently less important than the social and historical settings in which they are interpreted.⁴²

The reading of a text is interwoven with the closing of the interpretive process, restricting, thereby, the text of a specific determination. This determination is then submitted as the final and only possible interpretation of the text (Fadl, 2001, p.92). In this sense, juridical hermeneutics are no different from the interpretive activities evident in other fields. The interpretive strategy can shape both future readings and the texts themselves, thus constructing the texts rather than arising from them. Hence, there is a need for Muslims 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. Contemporary Muslims are confronted with hegemonic values of the past and the emerging political reality that often challenges the applicability of those values.⁴³ The tension between the peaceful and militant strains of Islam can be resolved only through the reexamination of the specific contexts of the rulings and the ways in which they were conditioned by the times. This re-interpretive task demands that Muslims undertake the task of re-evaluating the classical and medieval juridical corpus.

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⁴² Stanley Kurtz. Text and Context. In J. Cohen & I. Lague (Ed.), *The Place of Tolerance* (p.51).

⁴³ Liyakat Takim, "Peace and Conflict Resolution, p.210.