

A Forward-looking Ijtihad in the Modern Era

Ijtihad has traditionally been defined as free or independent thinking to arrive at a juristic ruling on issues over which the Quran and Hadith are silent. The efforts of the eighth and ninth century learned fathers of jurisprudence such as Imam Shaffi and Abu Hanifah came about as a result of such ijtihad, as these doctors of jurisprudence were exercising independent reasoning to interpret legal sources by responding to the changing conditions of society. Consequently, they came to formulate elaborate rules of conduct for Muslims that would govern both their private and public life.

Though the need was widely felt to undertake ijtihad in the form of juristic rulings, earlier tensions among emergent juristic schools suggest there were differences in methodology over how such rulings were to be derived. There were some who insisted all rulings would have to conform to the text of the Quran and Sunnah, thereby discarding the notion that Ijma (Consensus) or Qayas (analogy) could be considered legitimate sources of Shariah. However, what crystallized as the Usul-ul- Fiqh or the classical theory of jurisprudence, positioned the Quran and Hadith as the primary, and Ijma and Qiyas as secondary sources of Islamic law. The secondary sources would have to conform in principle to the two primary sources.

However, rulings deduced through such meticulous adherence to the Usul-ul-Fiqh, led at times to discrimination of women and other disadvantaged groups living in Muslim countries. Less commonly known is the fact that such an eventuality was forestalled by early exegetes of the Quran, particularly those who belonged to the group of scholars known as the “Ahl Ra’aay”, who considered rationality and the principle of *Istihsaan* (juristic preference to arrive at the most equitable solution) a paramount principle in deducing religious law. Their objective was to achieve a just society that would accommodate the rights of all, while paying special attention to the rights of the weak and underprivileged. Unfortunately over time, the principle of *Istihsaan* came to be sidelined and the doctrine of Taqlid or blind following of traditional schools of jurisprudence gained ascendancy among Muslims.

Any forward looking ijtihad must revive the concept of *Istihsaan* as a first step towards delivering justice and equality to all in Muslim society. It must also take into consideration the difference between the Quran’s time-specific societal injunctions, its broad normative principles and its overall objective of creating a just society that would treat members with equality and fairness.

Regrettably, the Quran’s overarching principles of justice and fairness or Adl and Ihsaan, have been ignored due to excessive adherence to the temporal legal injunctions of the Quran. Whether it is in the application of Shariah law in Pakistan, unequal inheritance rights for women, unjust dispensations of cases involving alimony, child custody, divorce, and polygamy due to an obsession with conforming to specific seventh century

expressions of Quranic principles, the result has been the repression and marginalization of Muslim women.

My approach to Quranic exegesis is holistic. One must look at the principles behind Quranic edicts which certainly exhibited fairness and compassion towards the weaker sex. It is these principles of fairness, compassion, justice and equity that need to be expressed as greater equality under the law for women in the contemporary context where notions of gender equality, peace, tolerance and harmony have been refined to a point where such rights are considered inalienable and inhering in every human being. The Quran, through planting the seeds for such reform within the context of its own revelation, showed the path for future reform and progress towards universally recognized human values.

According to this holistic approach to the Quran, I would once again conclude that any forward looking ijtihadd must of necessity conform to the Quran's overall principles and objectives of delivering a just society rather than being excessively preoccupied with their seventh century expressions and manifestations that resulted in disparities between the rights of men and women.

Here the issue of "gender equity" versus "gender equality" needs to be examined in greater detail. Gender equity is premised on the argument that the roles of men and women in society are complementary, therefore their rights must be distributed accordingly. In essence what this means is that indeed disparities exist between the rights of men and women, but they are there for a good reason. Men for example are the bread-winners, they are the "protectors and sustainers" of women therefore it is only fair they be allotted a greater share in inheritance. While this argument may hold some validity in theory, it has to be examined against the reality on the ground. The reality on the ground is vastly different from the ideal envisioned by Muslim jurists and calls for a reexamination of such anachronistic justifications for unequal shares in inheritance or unequal rights generally. The fact is that conditions justifying such inequalities no longer exist. Women nowadays are sometimes the sole breadwinners for their children and families, many of them live below poverty lines and a significant population of rural women in impoverished Muslim countries work like slaves in the fields, only to come and play slave to their husbands at home. Where is the justice in unequal shares? One cannot therefore use the contexts and scenarios of long ago to continue justifying unequal rights. The "complementarity" or "gender equity" argument, though it enjoys wide currency among Muslims, now needs to be looked at afresh, as it entails far too many justifications for the continued discrimination and marginalization of women. It is preventing young Muslim women from recognizing their own secondary social and legal status in Muslim societies. Because of the complementarity argument, Muslim women believe there is no discrimination against them within Shariah law, but they are sadly mistaken on these issues. They must realize that equality must be conceived as an absolute if progress is to be achieved in Muslim societies.

There are at present in my opinion, three distinct discourses within Islam on women's rights. The first is the one vigorously promoted by Dr. Farhat Hashmi which attempts to

render women invisible and anonymous by enshrouding them in Burkas, endorsing polygamous marriages and upholding the uncontested leadership of the husband over the wife. Ironically such a discourse claims to be progressive, once again based on the “complementarity” argument, this time applied to the letter. The second, a slightly more progressive discourse does not intend to subjugate women to the extent of compartmentalizing them in gender specific roles entirely, but nonetheless emphasizes the need for reclaiming the “rights Muslim women enjoyed under Islam many centuries ago”. This is dangerous in my opinion, because it will not lead towards progress, it will lead towards seventh-century norms and applications of those norms which are by no means desirable in this day and age, given our vastly transformed societies. This is by far the prevalent discourse among Muslim women who are self-proclaimed “feminists” out to reclaim their rights. In my opinion it is no longer enough to simply reclaim these rights. While such reclamation will certainly improve conditions for a segment of Muslim women in some societies, it will fall hopelessly short of modern standards of gender equality under the law.

In my opinion there is a way out of the dilemma for those who wish to keep their faith and yet acknowledge the need for reform. Ijtihad for them would have to be applied unfettered by the Usul Fiqh and conform to the Quran’s broad principles of justice and fairness or Adl (Justice) and Ihsaan (the doing of that which is beautiful), rather than to the specific manifestations of these principles that may have worked within a particular cultural framework.

In my opinion the future of Muslim feminism depends on this recognition.