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Islamic Law and the *Neoijtihadist* Phenomenon

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Abstract: Many contemporary scholars claim that erstwhile juristic determinations were intertwined with the socio-political realities in the eighth and ninth centuries, the classical period of Islamic law. They also maintain that although the Qur'an is a divinely revealed and immutable text, the applicability of its verses is contingent on the needs and conditions of the times. This paper argues that there is a need to move beyond the current form of *ijtihad* to an era of *neoijtihadism* 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. The paper will focus on the *neoijtihadist* phenomenon and will argue that the traditional text-centered *ijtihad* has to be replaced with a new form of *ijtihad* which utilizes different forms of exegetical and epistemological principles to formulate rulings that will serve the Muslim community better. *Neoijtihadism*, as I call it, will entail a re-evaluation of classical juristic formulations and, based on the application of new exegetical and interpretive principles, can engender a divergent form of jurisprudence that is based on different epistemological parameters and universal moral values. *Neoijtihadism* will also entail revamping traditional Islamic legal theory (*usul al-fiqh*), which has hampered rather than enhanced the formulations of newer laws.

Keywords: *neoijtihadism*; reform; *usul al-fiqh*; Sane'i; '*urf*; Sistani

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1. Introduction

The term Islamism, according to Asef Bayat, refers to movements that attempt to establish a state that is based on Islamic law (the *shari'a*) and a moral-ethical code (Bayat 2013, p. 4). 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 and their vision of what constitutes an Islamic state. In fact, it conceals its distinctive markers and the fact that often there are more differences than similarities between these movements. To be sure, movements like the Muslim Brotherhood, al-Qaida, the Taliban, Boko Haram, ISIS, the Tablighis and Hizb al-Tahrir exhibit major ideological differences. Some of these movements are apolitical, others are distinctly violent and militant, and others have a political agenda but do not subscribe to violence. By labeling such movements as "Islamist" such differences are either obliterated or concealed.

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." (Bayat 2013, p. x). In contrast to Islamism, Bayat posits post-Islamism which is the after-effect of the failure of political Islamism. Incorporated in Bayat's notion of post-Islamism are principles like democracy, change, and individual choice. For Bayat, post-Islamism also accentuates other principles connected to democratic states like "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 2013, p. 10). Bayat demonstrates different trajectories and narratives of post-Islamism in different countries. It signifies, he argues, a complete disjuncture from quintessential Islamic movements.

This chapter will explore the religious rather than the political dimension of post-Islamist discourse. More specifically, it will focus on the reasons for the failure of traditional *ijtihad* in contemporary times. It will also discuss and expound on the arguments set forth by various Shi'i scholars for the need to transition to a new form of *ijtihad*, or what I have termed *neoijtihadism*. The term *ijtihad* refers to a process of inferring religious injunctions from textual and non-textual sources. It also reflects a jurist's search for the divine will or ruling on a particular legal point based on hermeneutical and other interpretive tools from the authoritative sources of Islamic law.[1]

2. The Formulation of Islamic Law

In the classical period of Islam, Muslim jurists (*fuqaha'*) extrapolated and formulated various laws based on the socio-historical exigencies and vicissitudes of their times. *Fuqaha'* like Abu Hanifa (d. 767), Malik b. Anas (d. 795), Abu Yusuf al-Shaybani (d. 805), and Muhammad b. Idris al-Shafi'i (d. 820) combined their understanding of the Islamic sacred sources, Qur'an and the *sunna*, with the interpretations and opinions of the previous generation of scholars. When they could not find an answer in the normative revelatory texts, they deployed a wide range of interpretive devices and hermeneutical strategies to arrive at solutions to the questions they encountered. These jurists invoked variegated principles like *maslaha* (public welfare), *qiyas* (analogy), *ra'y* (personal opinion) and *istihsan* (juristic preference) in their formulations.

Premising their arguments on textual sources and other legal principles they developed, the scholars often arrived at contrasting legal opinions on the diverse topics that confronted them. These ranged from the times and forms of prayers, genres of business transactions, a woman's share of inheritance, whether a non-Muslim can testify in a Muslim case, to whether a girl can travel or marry without the consent of her guardian. Such opinions and interpretive strategies, formulated in the formative period of Islamic juridical thought, form the basis of contemporary Islamic law. As I shall demonstrate in this chapter, Shi'i reformers have argued that the edicts of erstwhile jurists are neither binding nor necessarily applicable in the present age. They have also argued that there is a need to revise the traditional methodologies and basis for deducing juristic rulings.

The argument that juristic laws are malleable and subject to change depending on circumstances and time is not new. Throughout their history, Shi'i jurists have revised juridical rulings when conditions (*mawdu'*) changed. For example, the Shi'i jurist Muhammad b. Ja'far Tusi (d. 1067) ruled that since water is plentiful in winter, it is prohibited to sell it. His ruling for the summer was the opposite. Due to the scarcity of water in summer, Tusi opined that it is permitted to sell it (Fadhli 2007). Medieval Shi'i jurists also issued a wide range of conflicting *fatawa* (juridical edicts) on a multitude of questions. Fayd Kashani (d. 1680–1681), for example, allowed singing, and maintained that no *khums* (religious tax according to the Shi'is) is payable on savings accumulated from earnings and on agriculture during the occultation of the Imam (Fayz 1997, p. 381). He also stated that the time for evening prayers starts when the sun sets (Fayz 1997, pp. 426–27). Most Shi'i jurists maintain that the correct prayer time is when darkness appears at the horizon. Muqaddas Ardabili (d. 1585) and other Akhbari scholars claimed that wine was not *najas* (impure), although it was prohibited to consume. Ardabili also maintained that the ritual ablution (*wudu'*) could be performed with rose water (Jannati 2009, p. 279; Mahrizi n.d., pp. 32–34).

In his study on the malleability of Islamic juristic rulings, Ayatollah Bujnurdi (b. 1942) states that Islamic jurisprudence (*fiqh*) does not necessarily reflect the divine law. *Fiqh*, as it is called, comprises the hermeneutical endeavours and constructs of erstwhile Shi'i jurists. Their legal edicts were issued under certain socio-historical circumstances and are subject to revision if these conditions change. Bujnurdi cites the example of a number of jurists who ruled that a wife is entitled to inherit the house but not land from her husband's

[1] On the history and development of *ijtihad* in Twelver Shi'ism see (Takim 2013b, p. 81).

estate. He states, "their interpretations of the sources can be different from what they have declared".[2]

Along the same lines, Bujnurdi also challenges some of the positions held by previous and present-day jurists and argues against the view that puberty is determined by a person's age. Through a meticulous examination and analysis of Qur'anic verses and traditions from the Imams, he argues that to establish puberty, factors such as the growth of pubic hair, ejaculation, and menstrual cycles must be taken into consideration.[3] Based on this understanding, a girl will not be considered to have attained puberty at the age of nine.

In contrast to commonly held views, Bujnurdi also allows female judges to function in the judiciary. To vindicate his stance, he argues "there are no explicit prohibitions against women becoming judges" (Bujnurdi 2002, 2/420). Traditions that stipulate the conditions for being a judge do not restrict the function to men. In contrast to this ruling, the most prominent Shi'i jurist of the last century, Ayatullah al-Khu'i (d. 1992), had prohibited women from working as judges since this was considered to be against the spirit (*madhaq*) of the *shari'a*.[4] He did not cite any other proof to vindicate his ruling. Such instances of legal pluralism in juristic views and practices demonstrate the degree of flexibility and suppleness in the interpretation of Islamic texts.

3. The Deficiencies of Contemporary *Ijtihad*

My basic contention is that there is a need to move beyond the current form of *ijtihad* as it revises certain rulings based on expediency or on an ad hoc basis. I also argue that there is a concomitant requirement for a transition in the epistemological and methodological parameters in Shi'i legal theory. Historically, the concept and epistemology of *ijtihad* evolved as the need arose. Although the Shi'is initially prohibited the use of any form of reasoning, *ijtihad* was redefined and its principles developed starting with the times of Muhaqqiq al-Hilli (d. 1277) and 'Allama Hilli (d. 1324). The principles and methodology of *ijtihad* subsequently evolved, notably through the efforts of eminent scholars such as Wahid al-Bihbahani (d. 1792) and Murtada al-Ansari (d. 1864). It is al-Ansari's typology of epistemic states that has been used in the Shi'i seminaries until today.

Although Shi'is argue that the doors of *ijtihad* have remained opened within their school, the reality is that the exposition and interpretation of Islamic law is primarily text-centered. In the discourse on *istinbat* (derivation of rulings), there is little or no discussion on inferring rulings based on ethical and moral imperatives that prescribe justice (*'adl*) and virtue (*ihsan*). Furthermore, there is little discourse on whether legal rulings should accord with reason, whether they are congruent with the objectives (*maqasid*) of the Lawgiver or if they are conducive or harmful to the welfare of the community. For many *neoijtihadists*, the current form of *ijtihad* is also problematic because traditionally, Shi'i *mujtahids* have downplayed the role of hermeneutical stratagems like *maslaha* (welfare), *maqasid* (objectives), *'aql*, and *'urf* (custom), and *sira al-'uqala'* (the views of the people of sound mind) in legal decision-making. This is because such devices do not provide conclusive evidence of the divine will on an issue.

This chapter will investigate some scholarly works in favor of a *neo-ijtihad*. The call for a new form of *ijtihad* has come not only from reformers like Mojtahed Shabistari, 'Abd al-Karim Soroush, and Mohsin Kadivar but also from those trained in the traditional seminaries like Ayatollahs Sane'i, Bujnurdi, Fadlallah, Mahdi Shams al-Din, Ibrahim Jannati, and Kamal Haidary. The view that traditional *ijtihad* has failed to meet the challenges facing contemporary Muslims can be discerned from their complaints that many current juridical treatises do not discuss topics that are germane to contemporary social needs. Issues like

[2] 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.

[3] See (Bujnurdi 2002, 1/58). See also (Takim 2013a, pp. 17–34).

[4] Abu'l Qasim al-Musawi al-Khu'i, *al-Tanqih fi Sharh al-'Urwa al-Wuthqa*, 1/18.

equal human rights, enhancing the status of women in Islamic law, the ecology, cloning and transgender surgery, social welfare, forms of governance, and economics and finance are ignored in juridical treatises. Instead, as Mustafa Ashrafi Shahrudi, a contemporary Iranian jurist, acknowledges, more attention is paid to minute personal details like the distance that a traveler has to cover in order to offer the *qasr* (shortened) prayers.[5] Others discuss how to position a chair when seated at a table where alcohol is served or the need to keep a small distance between the table where alcohol is served and other adjacent tables.[6]

One of the reasons for the failure of contemporary *ijtihad* is that within the seminaries, judicial decisions are made with reference to textual sources, while the social and ethical ramifications of the legislations are often ignored. The overreliance on traditions and a refusal to historicize or contextualize them based on the social realities of the time when the traditions were uttered or interpreted have been salient features in traditional *ijtihad*. More significantly, the juristic scope and vision has to expand. Jurists in the seminaries today need to engage in topics like textual hermeneutics, the social sciences, literary criticism, and the principles of hermeneutical cycles so as to ascertain their possible signification in today's world. Jurists also need to study and examine the social and moral consequences of their edicts.

The need to re-evaluate and revise the juristic methodology in the Shi'i legal system is also because in the juridical treatises, non-Muslims have not been treated with respect and dignity. For example, the discussion on whether non-Muslims are pure or not is often conjoined to a discussion on the impurities of blood, urine, and excrements. In addition, as I shall discuss, there are many instances of discriminatory laws against women. The failure of traditional *ijtihad* to keep pace with contemporary issues and challenges can be further discerned from the fact that during my visit to Qum in April 2017, I was amazed to find that, even in contemporary times, some jurists consider slavery, female genital mutilation (FGM) and child marriages to be permissible.[7]

4. The *Neoijtihadist* Phenomenon

I use the term *neoijtihadism* to describe the current thinking among many scholars who are critical of the traditional form of *ijtihad* and its myopic text-centered outlook. To be sure, *neoijtihadism* 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 who advocate a new form of *ijtihad*. Their methods and parameters of change vary considerably. Within Shi'i circles, many scholars have called for a re-examination and revision of contemporary juristic rulings. Such calls have come from reformers like 'Abdolkarim Soroush, Abdulaziz Sachedina, Mojtahid Shabistari, Mohsen Kadivar, and Abulqasem Fanaei. Significantly, their views are broadly shared by the '*ulama*' from within the religious seminaries. Scholars like Ayatullahs Sane'i, Ibrahim Jannati, Muhaqqiq Damad, Muhammad Husayn Fadlallah, Mahdi Shams al-Din, Mohsen Sa'idzadeh, and Ahmed Qabil have also voiced similar concerns.

There are, however, differences in their strategies. The seminarians advocate changes to legal injunctions based on principles like *zaman wa makan* (time and place) or those grounded on changed circumstances (*mawdu'*) or secondary rulings like *maslaha* (welfare). They do not discuss issues like postulating different epistemological propositions and new hermeneutical principles. More frequently, the reformist seminarians resort to the utilization of different interpretive devises so as to ensure more equitable and practical rulings. Stated differently, their rulings have often been casuistic and linked to revising existing legal injunctions on specific topics.

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[5] See (Shahrudi 1995, 1/119)

[6] http://shiaonlinelibrary.com/%D8%A7%D9%84%D9%83%D8%AA%D8%A8/192_%D9%85%D8%AC%D9%85%D8%B9-%D8%A7%D9%84%D9%81%D8%A7%D8%A6%D8%AF%D8%A9-%D8%A7%D9%84%D9%85%D8%AD%D9%82%D9%82-%D8%A7%D9%84%D8%A3%D8%B1%D8%AF%D8%A8%D9%8A%D9%84%D9%8A-%D8%AC-%D9%A1%D9%A1/%D8%A7%D9%84%D8%B5%D9%81%D8%AD%D8%A9_328#top. Accessed February 6, 2020.

[7] It should be noted that jurists like Ayatullah Mohaghegh-Damad have prohibited slavery. See his article in (Damad 2001, p. 218).

On the other hand, rather than calling for changes in particular rulings, the revisionist discourse of scholars like Shabistari, Soroush, Fanaei, and Kadivar is predicated on modifications in the foundations and methodology of *usul al-fiqh*. In their attempts to rethink traditional *ijtihad*, these scholars have sought to forge new methodologies and hermeneutical devices that will lead to pragmatic and more ethical responses facing the contemporary Muslim community. They argue that there is a need to challenge and modify not only the opinions of the *fuqaha'* (jurists) on particular rulings but also the legal framework upon which traditional *ijtihad* is founded, i.e., the discipline of Islamic legal theory.[8]

More specifically, *neoijtihadists* seek to ameliorate the weaknesses in traditional jurisprudence by going beyond the *ahadith* (traditions) in the normative texts and the application of procedural principles enunciated in *usul al-fiqh*. They outline different exegetical tools that the new jurisprudence should deploy to cater for the specific needs of contemporary times. Reformers like Mojtahed Shabistari have advocated for a more critical examination of the sacred texts to derive fresh meanings from these texts. He claims that there is no final reading or understanding of a text and that "new meanings or understanding can be deciphered from a re-reading of the texts with the passage of time" (Shabistari 1996, p. 135; Kamrava 2008, p. 168). Shabistari also argues in favor of engaging the hermeneutical cycle (*dor e hermenutik*) so that there should be a continuous and renewed understanding of texts (Shabistari 1996).

5. *Neoijtihadism* and the Qur'an

In their understanding and exegesis of the Qur'an, Muslim scholars have also employed various interpretive techniques enunciated in *usul al-fiqh*. These include reconciling apparent contradictory verses by resorting to the principle of abrogation or claiming that a verse was conditional or general, whereas an opposing one was unconditional or specific to a particular occasion. Exegetes also subjected Qur'anic verses to numerous hermeneutical processes, ranging from *takhsis* (specification of a verse) to other forms of modification based on *hadith*, consensus, abrogation, etc. There is little, if any, explanation in the exegetical literature on linking the verses with the ethical and juridical precepts in the Qur'an. To be sure, the scripture enunciates moral and ethical principles that can be invoked to evaluate the value of an act. This observation is derived from the fact that it continuously mentions ethical principles like justice, moral uprightness, keeping promises, fulfilling contracts, and enjoining social good and prohibiting evil.

In their efforts at reforming the legal system, *neoijtihadists* need to grapple with the notion that much of the Qur'anic exegetical literature was composed in response to specific historical socio-political and economic conditions and that these can change with time. This observation can be discerned from the exegetical discourse on warfare. Classical Muslim jurists attempted to vindicate the military expansion of the Muslim world by claiming that the sword verses in the Qur'an (2:191, 9:5, 9:29) provided the justification for their rulings regarding engagement with non-Muslims. To vindicate their contention that *jihad* can be used as a tool to absorb land occupied by non-Muslims into *dar al-Islam* (abode of Islam), jurists claimed that one hundred and twenty four tolerant verses (*ayat al-tasamuh*) in the Qur'an were nullified by verse 9:5, a sword verse, and other verses like it (Hashmi 2002, p. 168; El Fadl 2002, p. 99). They appealed to the sword verses and other statements that permitted militant activities to vindicate legislations that would initiate and then perpetuate hostile relations with non-Muslims.[9] In reality, jurists cited Qur'anic verses on warfare (*qital*) to justify the political realities of the time, i.e., the expansion of the Muslim empire. Paradoxically, they used the very scripture that prohibited religious coercion and territorial expansion to validate the political hegemony of the Muslim community.

[8] See for example, (Sadri 2008, 4/422-4; Shabistari 2001, p. 249).

[9] See (Firestone 1999) for a discussion on the sword verses and *jihad* in the Qur'an. See also (Takim 2007, pp. 295–307).

6. Usul al-Fiqh and Neoijtihadists

Besides the Qur'an, *neoijtihadists* also engage Shi'i legal theory and its methods and principles, since it is this discipline that jurists rely on in the inference of laws. A study of *usul al-fiqh* manuals demonstrates that there is little or no discussion that would provide a rationale for established practices or a historical contextualization of the edicts enunciated by classical and medieval jurists. More significantly, there is no chapter that discusses the moral basis for inferring juristic rulings or that the rulings must conform to specific ethical principles, which Shi'is believe can be discerned by reason independently of the scripture.

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" (Dahlen 2003, pp. 237–39). For him, to reform the law requires a rectification of its epistemological basis. Although he does not elaborate on this, Soroush is essentially calling for a restructuring of the basic principles that undergird *usul al-fiqh*. He further argues that there is a need to draw a distinction between a religion that is divinely revealed and human understanding of that religion. This is the basis of his theory on the expansion and contraction of religious knowledge. While religion is seen as immutable and eternal, its knowledge can change based on a reader's horizon of understanding and personal experiences (Soroush 1996). The latter goes through contraction and expansion and is subject to alteration based on the epistemic horizons and interpretations of a scholar.

Soroush also claims that religious understanding is contingent on comprehending other disciplines and fields of learning. If human understanding of non-religious fields experiences contraction or expansion, it will inevitably generate concomitant revisions and changes in the understanding of the religious sciences. This is because these fields are deeply intertwined (Soroush 1998, p. 280). He therefore urges jurists to extend their expertise and acumen to other fields of learning.

Other *neoijtihadists* like Kadivar argue that only a new epistemological foundation of *ijtihad* and a modification of Islamic legal thought (which he calls structural *ijtihad*) can effectively respond to modern challenges that are raised in the fields of medicine and bioethics. They can also help revise the laws governing apostasy, human rights, and disproportion gender rights (Mavani 2013, p. 226). In advocating for a restructuring of *usul al-fiqh*, he contends that the *shari'a* should be based on ethical and rationalist considerations rather than mere juristic prescriptions. The structural *ijtihad*, as he calls it, entails definitive epistemological, cosmological, ontological, anthropological, sociological, psychological, and theological changes so that juristic reasoning and *ijtihad* become more ethical, rational, and practical in their outlook. For Kadivar, a renewed commitment to *ijtihad* means that classical or medieval interpretations of the sacred sources are not significant. Instead, in their deliberations, jurists must factor the social, economic, political, and cultural circumstances of the present community.[10] Based on this line of thinking, even the inheritance laws stated in the Qur'an can be revised since, in many instances, contemporary women share equal financial responsibilities in a home. In some cases, a woman is the sole breadwinner in the family.

Neoijtihadists argue that jurists must measure their edicts against Qur'anic values and ingrained universal ethical values rather than the legal opinions proffered by previous scholars. Juristic injunctions cannot and should not contravene the dictates of divine morality which are accessible to human beings through reason. Stated differently, a just and benevolent deity cannot oppose moral values that He has instilled in the human conscience. By highlighting the incongruence between laws and moral sensibilities, *neoijtihadists* can rethink and revise many juristic opinions, especially those which are an affront to human dignity.

[10] Cited in (Dahlen 2003, pp. 237–39). see also see (Kadivar 2015, p. 3).

The need to re-align Islamic law with Islamic ethics and justice can be illustrated in many cases. For example, when discussing a woman's desire to divorce her spouse, Ayatullah Sistani 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]" (al-Hakim 1999, p. 212). According to this line of thinking, whereas a husband can divorce his wife or marry another woman at will, a wife is required to patiently accept the situation and suffer if the husband does not consent to her plea for divorce.

Sistani's stance on the issue can be compared and contrasted to that offered by the reformist jurist Ayatullah Sane'i (d. 2020). He maintains that if a woman detests her husband and returns his *mahr* (dowry) 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 (al-Sane'i n.d., p. 88). Sane'i further adds that if a woman finds it very difficult to live with a husband, she can ask for a divorce or even recite it on her own. Sane'i cites the views of scholars like 'Allama al-Hilli (d. 1325) and Ayatullah Khumayni (d. 1989) who, based on principle of *la haraj* (no difficulties), had also issued a similar ruling.[11]

In explaining the rationale for his ruling on this case, Sane'i argues that legal injunctions must be predicated on the principle of '*adl* (justice). He complains that although '*adl* is discussed extensively in *kalam* (theology), philosophy, ethics, and history it is often ignored in the *fiqh* manuals. In the juridical works, '*adl* is discussed in the context of the personal traits of a prayer leader, a witness in judicial proceedings, or the qualifications of a *mujtahid* (Qabil 2011, p. 54). Although the personal moral probity of a person is discussed, the application of principles like social justice and egalitarianism are ignored. Sane'i cites examples of *fiqh* rulings that contravene the principle of '*adl*. He states that the *diyya* (blood money) of a woman is stipulated to be half of that of a man (Qabil 2011, p. 185). This, he believes, discriminates against women. Sane'i's pronouncements are in stark contrast to those of the traditional '*ulama*' who reject the view that ethically and rationally derived values can override the scripturally pronounced role of women and minorities which, for them, reflects the divine will on the topic.

For *neoijtihadists*, a reading of Islamic texts that is anchored on justice and ethics should mold the shape of Islamic *fiqh*. There should be no conflict between the basic moral values of the Qur'an and legal reasoning. In this way, legal rulings can validate and reflect precepts attributed to a God who is just in His actions and in regulative instructions.

7. *Neoijtihadism* and Reason

Neoijtihadism also emphasizes a congruity between reason and what God ordains. Like their Mu'tazili counterparts, Shi'i scholars posit good and evil as ontological categories that can be intuitively comprehended by divinely endowed reason. They also insist that a just God cannot perform evil acts. Shi'is also assert that reason and the Divine are in harmony otherwise it would imply that "God has created a device in human beings that is in conflict with His purpose" (Damad 2011, 5/14; 5/22). The divine cannot ask human beings to ignore or violate a faculty that He has endowed and asked them to utilize. In fact, according to Shi'i legal theory, God is the *ra'is al-'uqala'* (the epitome or head of the people of reason). Hence, from a purely rational point of view, God cannot command what is irrational or opposite to what reason dictates.

This line of thinking offers the possibility for reason to override textual proof when the two conflict. Especially when texts are silent on an issue, reason can be invoked in the deduction of laws or difficult juridical decisions like donating organs to non-Muslims, the equal treatment of all human beings, praying at places which do not experience days and nights, etc. *Neoijtihadists* like Ahmad Qabil argue that there is a need for a

[11] (Qabil 2011, pp. 212–13; 252–53). See also (Takim 2019, p. 95).

reinterpretation of the *shari'a* based on reason (Ulrich 2015, pp. 214–15). For Qabil, although we cannot be sure that reason accurately reflects the will of the Lawgiver, they can override *hadith* reports when the two are in conflict. This is because the *ahadith* themselves do not necessarily accord with the divine will since they too are based on *zann* (probability) rather than *qat'* (certitude).

Stated differently, the hermeneutical tools 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 (*qat'*). His deduction can only approximate rather than demonstrate the exact will of the Lawgiver. This suggests that statements in the revelatory sources which prohibit commonly acknowledged and accepted principles like freedom of conscience, a woman's right to choose her spouse regardless of the wishes of her guardian, or the dignity and inalienable rights of all human beings should not be accepted in the inference of *shari'a* rulings. This is because such statements conflict with basic moral values that all human beings share. Interestingly, when discussing the moral worth of traditions, Sane'i states that he discards any tradition which contravenes Qur'anic principles (Qabil 2011, p. 187).

There is a need to reinstate reason as a partner of rather than a subsidiary to revelation. Reason can empower jurists to venture beyond transmitting the rulings of previous scholars, the *hadith* narrated from the Prophet and Imams and verses randomly selected from the Qur'an. So far, the role of *'aql* in Islamic legal theory has been strictly circumscribed. This observation is confirmed by scholars like 'Ali Rida Fayz and Muhammad Baqir al-Sadr (d. 1980), who claim that although there is much juristic discourse about the role of reasoning, it is barely utilized as an independent source for inferring legal injunctions (Fayz 1997, pp. 80–81).

Epistemologically, it is important to understand that jurists claim that judgements regarding the moral value of a legal injunction cannot be based on reason. This is because in itself, *'aql* does not afford certainty (*qat'*) that the will of the Lawgiver has been correctly discerned. However, most of the traditions that jurists depend on when deciphering a ruling are also based on conjecture. This is because traditions too cannot provide conclusive evidence that the divine will has been corrected discerned. In response, jurists claim that the *zann* of the texts has been approbated and approved by the Lawgiver. This is because He has allowed dependence on *al-khabar al-wahid* (singular report) and the apparent meaning of words.[12] In essence, there is a clash between the two types of conjectures, one from the texts and the other based on reason. As Abu'l-Qasim Fanaei, a contemporary Iranian scholar, has argued, when faced with tension between an immoral *hadith* and the moral judgement of the intellect, people of sound mind (*al-'uqala'*) will depend on the latter rather than the former. Most rational people will reject an immoral *hadith*, however strong it may be, and accept instead the ruling of a moral judgement based on reason. This is because reason rules that God cannot condone or accept an immoral act.[13]

8. *Neoijtihadism* and *'Urf*

In their attempts at revising aspects of Islamic law, *neoijtihadists* need to be cognizant of the fact that many social rulings are *imza'i*, i.e., borrowed and endorsed from pre-Islamic social customs. They were neither revealed in nor legislated by the Qur'an. There is nothing sacred about laws which state that a forty-year-old virgin requires the permission of a guardian to get married or that she must travel with a male who is related to her. Neither is it sacred to rule that a slave girl cannot cover her hair in public or that a wife cannot inherit land from her husband. Islam endorsed many such regulations since they reflected and were acceptable by the customary praxis of the time of revelation and did not infringe or violate any Qur'anic ethical principle. Legal pronouncements on slavery, child marriage and custody, the testimony and guardianship of women, their capacity to

[12] See for example, (Tusi 1995, pp. 337, 340).

[13] See (Fanaei 2013, pp. 463–66).

travel without a male guardian, and forms of Islamic punishment were appropriated from customary laws prevalent at the advent of Islam (Takim 2018, pp. 14–15).

Just as many legal rulings in the past were premised on local customs, contemporary '*urf* can form the basis of new legal rulings. Especially, in the western diaspora, scholars must take into consideration diasporic customary norms because law and custom are indissolubly bound.[14] New interpretation and articulation of the law can be grounded in locally accepted social norms. *Neoijtihadists* 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. Instead of basing contemporary *fatawa* on the Qur'anic principles of justice and equality, juridical rulings are often based on texts which were influenced and shaped by eighth-century '*urf*.

In the diaspora, based on the principle of appropriating local '*urf* together with the principle of social reasoning, *neoijtihadists* can invoke diasporic customary law provided they do not violate the basic ethical tenor of the Qur'an. Based on the principles I have outlined, *neoijtihadists* can address topics such as copyright laws, the rulings on sitting at tables where alcoholic drinks are served, inter-gender handshaking and gatherings, serving in Western judiciaries and armies, and participating in musical concerts.

9. Conclusions

I have argued in this chapter that reason and ethics rather than previous edicts must undergird legal rulings in their social and cultural contexts. *Neoijtihadists*' decisions and rulings should not just be legal but, more importantly, they should be moral. To date, the ethical outlook of Shi'i theology, with its emphasis on the ability of reason to differentiate good from evil, is not reflected in Shi'i jurisprudence, where the law is frequently divorced from both reason and ethics.

In the seminaries, there is a concurrent need to comprehend the underlying ethical principles and historical considerations that guided classical jurists in their judicial deliberations. The challenge that *neoijtihadism* faces is that contemporary hermeneutical enterprises should be predicated on current exigencies. Instead, they are often circumvented by the legislation of erstwhile rulings. *Neoijtihadists* also need to accentuate and restate the moral and egalitarian tones of the Qur'an rather than regurgitate the interpretations which were articulated by previous scholars. Stated differently, they need to interlace the ethical elan of the Qur'an with legal pronouncements. *Neoijtihadist* scholars' revisionist efforts must be centered on the Qur'an itself rather than the juristic discourse and consensus that have accumulated since the classical period.

Although scholars like Kadivar state that the new *ijtihad* model reconstructs theology and ethics, there are many gaps in this theory that remain to be filled. The model of a new *ijtihad* proposed by many reformers is conceptually ambiguous and nebulous, 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. Precisely how *neoijtihadists* will legislate and how *neoijtihadism* will resolve the challenges of the modern world without compromising the basic principles of *usul al-fiqh* is being deliberated. Clearly, *neoijtihadism* is a work in progress.

Given the transformation of Islamism in the Muslim world and the discourse of post-Islamism, the concept of *neoijtihadism* and the epistemological parameters that it offers would extend post-Islamism principles like democracy, change, individual choice, and religious and political pluralism to the religious field. This nexus is another aspect that needs to be further explored.

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[14] See a fuller discussion on this in (Takim 2018, pp. 1–19).

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