HOW TO EFFECT CHANGES IN ISLAMIC LAW

Sayeed Ahmed Akbarabadi

I. Introduction

IT IS an undeniable fact that Islamic law by its very nature and structure is amendable and changeable. The principles of Islamic jurisprudence, the numerous schools of thought in Islamic law and the practice of theologians throughout the history of Islam show that Islamic law has always been flexible and adaptable, in order to meet the legitimate and genuine requirements of the people at a given time and under specific conditions and circumstances. However, Islam being a particular way of living with certain objectives and principles guiding human activities and ambitions, it is not to say that change of every kind would be acceptable to Islam. For the purpose of reconsideration of any particular principle of Islamic law, one has to make sure that:

(*a*) the change in issue is not contrary to the basic teachings and objectives of Islam,
(*b*) the change is really in the interest of the society, leading to its welfare, happiness and prosperity, and
(*c*) the change will have no evil repercussions in the near or distant future.

Being fully satisfied with the above three points, one will have to proceed to find out how the required change can be effected in the light of the principles of Islamic jurisprudence. Following is a brief account of the methods which may be adopted for this purpose.

II. Ijtihād : the living source of Islamic legislation

Sources of Islamic law

According to the fundamentals of the science of Islamic jurisprudence, there are four sources from which the whole Islamic law is derived:

(*a*) *Qur'ān*,
(*b*) *Sunna* (Traditions),

(*c*) *Ijmā'* (consensus of opinion) and
(*d*) *Qiyās* (analogy).

The *Qur'ān*, which is direct revelation by God to his Prophet Muhammad, consists of 114 small and big chapters. As stated by the *Qur'an* itself, the verses are of two kinds: (*a*) verses which are fundamental and of established meaning and, as such, the foundation of the Book, and (*b*) the verses which bear allegorical meaning. This implies that interpretation of the verses of the second category may be different from man to man, but no interpretation should be contrary to what has been laid down in the fundamental verses.

The *Sunna* is indirect revelation. As such once the genuineness of a *Sunna* is established it becomes binding. The Prophet was, according to the *Qur'ān*, the "brightest example" (*uswat al-hasana*). Thus, every action and every word of his was to be understood, interpreted and followed. Although the main task of the *Sunna* is to explain and elucidate what has been said in the *Qur'ān*, no *Sunna* will be acceptable which, in content or spirit, stands opposed to a plain statement of the *Qur'ān*.

Ijmā' and *qiyās* together constitute the method of *ijtihād*—a living source of legislation in Islam. They differ from each other in that the former is a collective opinion while the latter is an individual one. They are sanctioned as sources of Islamic law in the *Qur'ān* as well as in the *Sunna*, and are to be made use of in cases where there is no explicit command of God or of the Prophet.

It may be noted for the purpose of our discussion that though the *Qur'ān, Sunna, ijmā'* and *qiyās*, are all accepted as main sources of Islamic jurisprudence, a point of difference between them is that the former two are recognized as absolute arguments while the latter are arguments obtained by exercise of reason and hence not absolute. This is indeed a very significant point because it suggests that the door is still open for reassessment and revaluation of arguments which fall in the second category, in a given changed condition of the society. Such a reassessment or revaluation amounts to *ijtihād*. The main tasks of a *mujtahid* are :

(*a*) to suggest any change or amendment, if possible, in the law prescribed by the old doctors of Islamic jurisprudence, in order to meet a new situation, and
(*b*) to find a solution to new problems arising out of the changed social and economic conditions of the world.

In the former case the *mujtahid* will have to go deep into the basis of particular principles. If the basis is found to be a verse of the *Qur'ān* or *Sunna*, a *mujtahid* will have to see if the injunction concerned is *'mansūs'*, *i.e.*, a clear verdict by God or by the Prophet without assignment of any reason.

If so, no change and no amendment would be possible.[1] If, on the other hand, the particular injunction mentioned in the *Qur'ān* or a *Sunna* is based on a reason specified therein or indicated by the Prophet or by one of his eminent companions (either through words or by action), then it would be the task of a *mujtahid* to see whether that particular case could be applicable to the new situation which he has to face. If a *mujtahid* finds that a principle of Islamic law is not based on the *Qur'ān* or a *Sunna* and derives authority from mere conjecture and reasoning of a jurist-interpreter, then he is entitled to express a different opinion, provided he is well-equipped and in a position to argue his view-point. This he can possibly do even when an old jurist has based his decision on an interpretation which he put to a verse of the *Qur'ān* or to a *Sunna* according to his own understanding and that interpretation could be refuted on more reasonable and logical grounds.

Indeed the sphere of *ijtihād* is very wide and broad. Tūfī (d. 716 A.H.) enumerated about forty five principles, all derived from the *Qur'ān* and *Sunna*, on the basis of which a *mujtahid* could proceed to exercise his judgment. A brief description of some of these principles and methods of *ijtihād* will be made below.

Custom and usage

Custom and usage of a community naturally play an important role in the formulation of laws. Shah Waliullah of Delhi and some other eminent theologians have discussed at length the importance of custom (*'urf*) in the development of the basic principles of Islamic law as promulgated in the *Qur'ān* and *Sunna*. *Qādī* Abū Yūsuf, the Chief Justice of the Abbaside Court and one of the main pillars of the *Hanafī* school of Islamic jurisprudence, declared :

> One who is not familiar with the custom of his time is not permitted to give a religious verdict.

Public interest

Things good for the human society (*masālih al-mursala*) constitute another factor determining the merit and value of an issue to be decided by the process of *ijtihād*. Though recognized by many jurists of various schools, it is very prominent in the system of Imām Mālik.

Other rules guiding the mujtahid

The other principles which provide guidance in the process of *ijtihād* are:

---

1. Even the Prophet had no authority to effect a change in what was clearly laid down in the *Qur'ān*. He was taken to task when under the force of some domestic circumstances he had taken an oath to refrain from certain things permitted by the *Qur'ān*. He was warned against this decision in the verse "Why do you make illegal a thing which God has made legal for you".

(*a*) permissibility is at the root of all things;
(*b*) he who is caught between two evils must prefer the lesser one;
(*c*) a safeguard must be provided against an anticipated nuisance;
(*d*) necessity makes forbidden things permissible;
(*e*) prevention is better than cure;
(*f*) religion is an easy thing to be practised;
(*g*) God does not impose upon any person a duty which is beyond his capacity.

Further, social harmlessness of a thing, as stated by the Prophet, also counts in Islamic legislation. In this connection benefit may be taken even of the practice and experiment made by non-Muslims.[2]

Last but not the least, the welfare and amenity of the society has been uppermost in the mind of our jurists and thinkers, some of whom emphatically said that the religious sanctions and orders were based on the welfare of man. A thought-provoking observation in this respect is found in the works of jurist Ibn Qayyim :

> God, who is exalted and gracious, did send His messengers and His books with only one objective in view, *i.e.*, the people could be able to establish justice; it is only justice and equity which maintain Heaven and earth. So wherever there are signs of justice, they should be obtained; here only lies the way and religion of God. God, who is so just and wise can never be expected to specifically mention some ways and means for attainment of justice and then negate some more successful ones when they come in existence.... The establishment of peace and justice is the main purpose of God. Therefore, whatever may be the way leading to this end would be nothing but a part of religion and never opposed to it.

II. Ijtihād in historical perspective

We have seen how legislation is made in Islam, what its main and subsidiary sources are, and how they can be utilised within the scope of *ijtihād*. Before proceeding to examine who can undertake legislation in accordance with these, we may briefly examine the historical background of the existing Islamic law as evolved by the earliest *mujtahids*, namely, the founders of the various schools of Islamic law.

During his lifetime the Prophet was the sole authority to whom Muslims turned to seek guidance concerning any problem. The words of the

2. The Prophet is reported to have once made up his mind to prohibit cohabitation during the period of fosterage. But he abandoned the idea when he came to know that the practice was in vogue amongst the people of Persia and Rome without any adverse effect either on the mother or the child.

Prophet, his deeds and his silence over any action taken by any of his followers in his presence (which implied his tacit approval) all constituted the law. The Prophet was still alive when there began to emerge an important source of legislation, *viz.*, deduction and elaboration of rules in cases where there was no express injunction. After the death of the Prophet, the Muslims managed their affairs by recourse to what they had learnt or heard from the Prophet, along with the aforesaid means of legislation already approved and sanctioned by him. Later, the expansion of Islam brought millions and millions of men and women, of different denominations, languages and cultures, to live together under one banner and one government. This socio-economic situation gave rise to a large number of new problems. The Arab society at that time was quite different from that outside Arabia; the former being isolated and closed while the latter was cosmopolitan and mixed. The jurists of Madina, *e.g.*, Imām Mālik did not have such difficult and complicated situations to meet as those of Iraq, *e.g.*, Imām Abū Hanīfa faced. So, Imām Mālik could have been satisfied with the customs and usages of the people of Madina, in respect of legal issues. But Imām Abū Hanīfa and his colleagues had no alternative but to resort to *qiyās* and other methods of *ijtihād* mentioned above. This difference in approach and method of exercising judgment resulted in widening the gulf between the two groups of the jurists who were called by two different names, *viz.*, the people of opinion (or rationalists) and the traditionists. However, Imām Mālik, though the most prominent among the traditionists, appreciated the situation in which the jurists of the other group lived. So he bluntly refused to give his consent to a suggestion put forward by an Abbaside Caliph who wanted to make a royal proclamation to the effect that Muslims throughout the empire should follow Imām Mālik exclusively in respect of legal matters. Preventing the Caliph from taking such a step, the Imām said that it would not be advisable to impose any one system of *fiqh* on all Muslims irrespective of the type and character of the society in which they lived.

The process of action and reaction which emerged in the wake of Arab conquests and their mixing up with so many nations and communities, reached its climax in the second and third centuries. It was in that period that the jurisprudences of Mālik ibn Anas, Abū Hanīfa, Shāfi'ī, Ibn Hanbal[3] and others flourished and were accepted by Muslims in different parts of the world. Imām Shāfi'ī, founder of the classical theory of Islamic jurisprudence, perfected the doctrine of *ijmā'* (juristic consensus). He acted as an intermediary between independent legal investigation and the traditionalism of his time. In his *Risāla*, he laid down the principles and methods of jurisprudence which, though they cannot be supposed to be the last word

3. These four were the founders of the four schools of law prevalent among the *Sunnī* Muslims—*Editor.*

on the subject, paved the way for *ijtihād* in every age. Those principles and methods have been explained, elucidated and elaborately discussed by so many scholars and authors of later generations, in their books a large number of which still remain unpublished.[4]

III. Ijtihād in practice

How the method of *ijtihād* can be applied to the solution of some problems of our times can be best explained by reference to some specific issues.

Polygamy

Perhaps the most burning question of our times is polygamy. The following points have to be taken into consideration in regard to the issue of polygamy.

The system of polygamy in its various forms was in vogue in many countries and particularly in Arabia when Islam emerged as a religion. Before the advent of Islam people generally lived in an age when fighting was the order of the day with the result that the number of men was much less than that of women. Such women were unfortunately left to live a destitute and miserable life. This state of affairs largely contributed to the continuance of the institution of polygamy. Such conditions continued to prevail during the early period of Islamic history. It is no secret that Muslims were in a state of perpetual war against an enemy bent upon their extirpation. Women had to lose their husbands and young children lost their fathers. Islam had to provide for these widows and orphans. It was in order to meet such emergencies that Islam permitted a man to have wives more than one. There may be other circumstances, too, necessitating polygamy—for instance, physical inability on the part of a married woman to fulfil the duties of marriage or her inability to bear an issue.[5]

However, according to the *Qur'ān*, monogamy is the general rule, and polygamy is only a provision for emergencies. This is quite evident from the very text of the verse in which this provision has been made. And even this provision is not unconditional. It is conditioned with justice and equity. The Verse of Polygamy runs as follows :

> If ye fear that ye shall not deal fairly with the (female) orphan wards under you, (do not marry any of them) but marry other women whom you like, two or three or four; and if ye shall fear that ye shall not act equitably, then marry one only (from free

4. Recently some of these books have been published in Egypt. These are more informative and illuminating on the subject of *ijtihād*.
5. This hapened to Josephine, the most beloved wife of Napolcon.

> women) or from the female captives under your charge. This will facilitate just dealings on your part.[6]

It may be noted that this verse was revealed after the battle of Uhad when the Muslim community was left with many orphans, widows and captives. As Abdullah Yusuf Ali in his translation of the *Qur'ān* points out:

> Their treatment was to be governed by principles of the greatest humanity and equity. The occasion is past, but the principles remain.

Polygamy comes under that category of legal principles (*ahkām*) which are called *mubāhāt* (permissibles) and as such, like other permissibles, polygamy has its uses and abuses. If there comes a time when a certain permissible thing begins to be abused and misused for nefarious ends shattering the moral structure of the society, then, an Islamic state or a Muslim society as the case may be, would have every right to interfere in the matter by stopping it temporarily or putting some restrictions on its operation.[7] In this connection, rapid growth in the population of mankind and other social and economic repercussions of the practice of polygamy may be lawfully given consideration. However, the interest of those who may be genuinely in need of having a second wife must not be jeopardized.

Divorce

Divorce, another *mubāh* (permissible thing), was described by the Prophet as *abghad al-mubāhāt*, the most despicable of the permissible things. The practice of the unscrupulous members of the Muslim community in this regard has been disastrous to a sound social order causing misery to innocent women without any fault on their part. It is, therefore, a demand in certain sections of the community to reconsider the Islamic law of divorce with a purpose to finding out whether any change could be introduced therein. There is ample scope for *ijtihād* in respect of this problem also. First, it should be kept in mind that according to the *Qur'ān*, in all disputes arising between husband and wife which may lead to a breach two judges are to be appointed from the respective people of the two parties.[8] These judges are required to try to reconcile the parties, failing which a divorce or *khul'*

---

6. The *Qur'ān*, IV : 3.
7. Support for this is found in the history relating to the legislative policies of 'Umar b. Khattāb, the second Caliph. For instance, a Muslim is permitted to marry a *kitābīyya* woman, but when 'Umar came to know that this practice was gaining popularity in the community he came forward to ban it and said :
   > I have no right to make an illegal thing legal or *vice versa*. But imagine ! what would happen to the maidens of Arabia if you got fascinated with the beauty of Roman girls.
8. The *Qur'ān*, IV : 35, 130.

would be the last resort. This implies that though it is the husband who has to pronounce a divorce, yet certain limitations are placed upon the exercise of his right and he is not left free to use it arbitrarily. 'Ali, the fourth Caliph, is reported to have told a husband who was under the impression that he had the sole right to repudiate his wife that he would have to abide by the judgment of the judges appointed under the verse referred to above. The Prophet also is reported to have interfered in the matter, sometimes by disallowing a divorce pronounced by a husband and so restoring the marital relations, and sometimes by treating three divorces as one. This shows that the authority constituted by law has the right to interfere in the matter of divorce. As such, Muslim jurists of any age will be entitled to make an amendment or effect a change in the existing law of divorce in order to meet an emergency of their time.

The consideration of a possible change in the law of divorce will be focussed on three points :

(*a*) whose pronouncement of divorce would be legally valid ?
(*b*) in what circumstances a divorce would be valid or invalid ? and
(*c*) what kind of the pronouncement of divorce would be deemed as valid ?

These points have been extensively discussed by our eminent jurists in their books. Their discussions certainly provide a wide scope for a *mujtahid* in our times to exercise his own judgment and discretion in regard to the modern problems of divorce.

Family planning

Birth control is another important question of our times. Though discussed with great disputation, the matter is not very intricate or complicated. Side-stepping the conflicting Traditions regarding the validity of *'azl*[9] reported to be in practice during the Prophet's days, the following points should be taken into consideration to arrive at a safe conclusion in respect of this matter.

The purpose of marriage, according to Islam, is not only the satisfaction of sexual impulse, but also multiplication of and contribution to the maintenance and growth of human population. Therefore, resort to birth control cannot be permitted arbitrarily. But, Islam can hardly be expected to shut its eyes to hard facts and realities of life which a man or a nation may have to face. So, birth control is not permissible without genuine reasons, but when there is a genuine reason calling for such a step, it may be regarded not merely permissible but even compulsory.

9. This terms denotes what is known in the terminology of family planning as *coitus interruptus*—Ed.

The reasons must, however, be real and not merely whimsical or wishful.[10]

IV. Conclusion

Ijtihād—the living method for effecting changes in Islamic law—is permissible and desirable in every age. Like the *mujtahids* of the past, those of our times can also adapt the legal principles of Islam to the contemporary social needs.

As to who can be a *mujtahid*, the obvious answer is that it is for the *'ulamā'* to look into the need for change and make suggestions. It is they who are meant by the words "in-charge of your affairs" in the Qur'anic verse saying "Obey God, the Prophet and those who are in charge of their affairs". This privilege of the *'ulamā'* is recognized everywhere in the Muslim world.

10. As for the genuine reasons; they may be physical as well as economic. Imam Ghazzali (in his *Ihyā al-'Ulūm*) and Shah 'Abd al-Azīz (in his *Tafsīr*) have gone so far as to include protection of beauty, or health of the wife as a purpose for which birth control may be allowed. Poverty of parents cannot ordinarily be a valid reason for birth control. This is indicated by the verses of *Qur'ān* directing men not to kill their children (which term includes foetus) only because they cannot feed them. See the *Qur'ān*, VI : 151; XVII : 31.