Mathal
ISSN 2168-538X

Volume 5 | Issue 1 (2016)

Article 2
DOI: 10.17077/2168-538X.1077

The Moroccan Jurist al-Khamlīshī: Can a Woman Become a Legislator (Mujtahid)?

Nayel A. Badareen *University of Arizona*

Recommended Citation
Badareen, Nayel A. (2016) "The Moroccan Jurist al-Khamlīshī: Can a Woman Become a Legislator (Mujtahid)?," *Mathal*: Vol. 5 : Iss. 1 , Article 2.
DOI: 10.17077/2168-538X.1077
Available at: http://ir.uiowa.edu/mathal/vol5/iss1/2

Hosted by Iowa Research Online

The Moroccan Jurist al-Khamlīshī: Can a Woman Become a Legislator (Mujtahid)?

Abstract
The idea of deducing legal rulings in Islamic law, or *ijtihād*, as well as the qualifications of the person who practices *ijtihād*, known as the *mujtahid*, has been a complex issue among Muslim *ʿulamāʾ* for centuries. Many Muslim *ʿulamāʾ* and Western scholars have maintained that the gate of *ijtihād* was closed. The title of *mujtahid* was therefore impossible to attain. The Moroccan intellectual al-Khamlīshī maintains that the strenuous conditions put forth by some of the Sunni jurists to qualify an individual to become a *mujtahid* actually contributed to the demise of *ijtihād*. These qualifications, according to al-Khamlīshī, were proven to be unachievable and stood as myriad obstacles in creating new generations to reform the old Islamic *fiqh*. This essay shows that, despite the extremely strenuous set of qualifications, through the writings of al-Khamlīshī, Moroccan women penetrated men's domain in Islamic family law, breaking the long-standing monopoly men held therein.

Keywords
ijtihād, fiqh, madhhab, ʿulamāʾ, ijmāʿ, sharīʿa.

Cover Page Footnote
I am indebted to Scott Lucas at the University of Arizona for his help and valuable suggestions. I am also grateful to the anonymous reviewers of this article and for their constructive input.

The Moroccan Jurist al-Khamlīshī: Can a Woman Become a Legislator (Mujtahid)?

Abstract

The idea of deducing legal rulings in Islamic law, or *ijtihād*, as well as the qualifications of the person who practices *ijtihād*, known as the *mujtahid*, has been a complex issue among Muslim *ʿulamāʾ* for centuries. Many Muslim *ʿulamāʾ* and Western scholars have maintained that the gate of *ijtihād* was closed. The title of *mujtahid* was therefore impossible to attain. The Moroccan intellectual al-Khamlīshī maintains that the strenuous conditions put forth by some of the Sunni jurists to qualify an individual to become a *mujtahid* actually contributed to the demise of *ijtihād*. These qualifications, according to al-Khamlīshī, were proven to be unachievable and stood as myriad obstacles in creating new generations to reform the old Islamic *fiqh*. This essay shows that, despite the extremely strenuous set of qualifications, through the writings of al-Khamlīshī, Moroccan women penetrated men's domain in Islamic family law, breaking the long-standing monopoly men held therein.

Keywords: *ijtihād*, *fiqh*, *madhhab*, *ʿulamāʾ*, *ijmāʿ*, *sharīʿa*.

Introduction

The idea of deducing legal rulings in Islamic law, or *ijtihād*, as well as the qualifications of the person who practices *ijtihād*, known as the *mujtahid*, has been a complex issue among Muslim *ʿulamāʾ* for centuries. Many Muslim *ʿulamāʾ* and Western scholars have maintained that the gate of *ijtihād* was closed after the formation of the Islamic schools of law (*madhāhib*). The title of *mujtahid* was therefore impossible to attain.[1] Aḥmad al-Khamlīshī, a Moroccan intellectual, maintains that the strenuous conditions put forth by some of the Sunni jurists to qualify an individual to become a *mujtahid* actually contributed to the demise of *ijtihād*. These qualifications, according to al-Khamlīshī, were proven to be unachievable and stood as myriad obstacles in creating new generations to reform the old Islamic substantive law (*fiqh*). This essay shows that, despite the extremely strenuous set of qualifications set in place for an individual to become a legislator (*mujtahid*), through the writings of al-Khamlīshī, Moroccan women penetrated men's domain in Islamic family law, breaking the long-standing monopoly men held therein. Most importantly, for the first time Moroccan women were publicly practicing *ijtihād*—a legal process that was once not only considered the realm of men exclusively, but was also seen as impossible to attain by anyone after the establishment of the Sunni Islamic schools of law in the tenth century.

Aḥmad al-Khamlīshī is one of the most prominent Moroccan scholars who has written extensively on the Moroccan Personal Status Law (*Mudawwanat al-Usra*) and the rights of women in Islamic substantive law.[2] Al-Khamlīshī authored a dozen books on Islamic law and the Moroccan *Mudawwana*. He was born in a small village in the Bedouin region of al-Ḥusayma in Northern Morocco in 1935.[3] Al-Khamlīshī was influenced by his father, a religious man and a

[1] A *mujtahid* is an individual engaged in the process of deducing legal rulings (*ijtihād*). Wael Hallaq debunked the idea that the "Gate of *Ijtihad*" was closed in practice, at least until the Ottoman period. See Wael Hallaq, "Was the Gate of Ijtihad Closed?" *International Journal of Middle East Studies* 16:1 (1984):3-41.

[2] See Dār al-Ḥadīth Institution's website at http://www.edhh.org/cv-directeur.php.

[3] For more on the life of al-Khamlīshī see his interview on al-Raḥma TV channel at http://www.youtube.com/watch?v=Xk9pCXcnTx4.

member of the Sufi order al-Nāsrīya.[4] Raised in an Islamic traditional conservative household, al-Khamlīshī memorized the Qurʾān at the age of ten.[5] Later in his life, al-Khamlīshī worked as a judge in the Moroccan Court of Appeal from 1960-1970 and served as a law professor at the University of Muḥammad V, Souissi from 1971-2000. He was appointed to head the famous religious-conservative university, the Institution of Dār al-*Ḥadīth* al-Ḥassanīa from 2000 until the present.[6] Al-Khamlīshī was selected twice by the latest kings of Morocco to be a member of the committee commissioned to reform the Moroccan *Mudawwana* in 1993 and in 2004.[7]

In criticizing Islamic substantive law, Khamlīshī argues for reforming some of the outdated Islamic rulings using the method of *ijtihād*, where *ijtihād* takes into consideration social and economic factors of the time.[8] He is of the opinion that while some Islamic rulings are founded on certain written evidence—from the Qurʾān and the Sunna (conduct) of the Prophet—other rulings were based on the *ijtihād* of the jurists.[9] The latter type of ruling, according to al-Khamlīshī, could be reformed if it was discovered that the rulings failed to execute the objectives of Sharīʿa (*maqāṣid al-sharīʿa*) due to the change in time, custom, tradition, or the region's political and economic systems.[10] Al-Khamlīshī goes on to state that Sharīʿa was revealed to protect the rights of the individual and to maintain these rights without transgressing those of others, according to the Qurʾanic injunction, Q. 16: 90, "Allah commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion."[11] Therefore, if the Islamic ruling does not achieve the objectives of Sharīʿa, according to al-Khamlīshī, it should be ignored even if jurists reached consensus (*ijmāʿ*) in the matter.[12]

Al-Khamlīshī argues that *fiqh* students of today believe that *ijtihād* was limited to the four *madhāhib* and ended by the death of the eponyms of these *madhāhib*.[13] This belief was due to the opinion of the majority of the *ʿulamāʾ*, who decided that the gate of *ijtihād* is closed, and that the only *madhhab* that should be practiced in Morocco is the Mālikī, from which no one should deviate.[14] Further, al-Khamlīshī maintains that these *ʿulamāʾ* and their students believe that only the absolute *mujtahid* (*al-mujtahid al-muṭlaq*) may exercise *ijtihād*, however, they believe that these *mujtahids* do not exist at the present time.[15] Al-Khamlīshī concludes that Moroccan society is left with judges who are imitators of past jurists.[16] Some of these judges, according to al-Khamlīshī, cherish imitation (*taqlīd*) and consider it a sacred tradition. Al-Khamlīshī argues that because of imitation, judges' gauge of what constitutes right from wrong becomes closely tied to

[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] Muḥammad al-Kashbūr, *Qānūn al-Aḥwāl al-Shakhṣīya* (al-Dār al-Bayḍāʾ, Maṭbaʿat al-Najāḥ al-Jadīda, 1993), 22. See also http://www.edhh.org/cv-directeur.php.
[8] Ibid. *Ijtihād* is the process of legal reasoning and hermeneutics through which the jurist-*mujtahid* derives or rationalize law on the bases of the Qurʾān and the Sunna. For more on *ijtihād*, see Wael B. Hallaq, *Authority Continuity and change in Islamic Law* (Cambridge, UK; New York: Cambridge University Press, 2001), 24-56.
[9] Aḥmad al-Khamlīshī, *Wijhat naẓar*: *Point of view* (Al-Dār Al-Bayḍāʾ: Maṭbaʿat al-najāḥ al-jadīdah, 1988), 13.
[10] Ibid.
[11] Khamlīshī, *Wijhat naẓar*, 13. Throughout the article I use Yusuf Ali, *The Holy Qurʾān* ([Washington, D.C.]: Khalil Al-Rawaf, 1946]).
[12] Khamlīshī, *Wijhat naẓar*, 13.
[13] Ibid., 32.
[14] Ibid.
[15] For more on the qualifications of the *mujtahids* see Hallaq, "*Authority*", 2001, 24-56.
[16] Al-Khamlīshī, *Wijhat naẓar*, 32-33.

agreeing or disagreeing with past jurists.[17] Most significantly, al-Khamlīshī is critical of Islamic *fiqh* which suffers, according to him, from the same disease as that of the court system of Morocco—that of being outdated.[18]

Collective *Ijtihād* (*Al-Ijtihād al-Jamāʿī*)

The idea of collective *ijtihād* is not new. During the twentieth century Muslim scholars including Muḥammad ʿAbduh (d. 1905), Rashīd Riḍā (d. 1935), Muhamad Iqbal (d. 1938), al-Qaraḍāwī (b. 1935), and the Moroccan scholar Aḥmad al-Khamlīshī (b. 1935)[19] began to advocate for a type of *ijtihad* different from the more individual *ijtihad* of past centuries. Rashīd Riḍā criticized Islamic *fiqh* and called for a collective *ijtihād* to be practiced by "those occupying leading positions in commerce, manufacturing, and agriculture; politicians; and respected journalists."[20] Muhammad Iqbal also called for an assembly of legislators made out of other members of the Islamic society in addition to Islamic religious scholars, *ʿulamāʾ*, to undertake the responsibility of collective *ijtihād* instead of individual *ijtihad*.[21] Of these scholars, al-Khamlīshī was ~~one of~~ the first to argue for women's place in this new collective *ijtihad*, calling for an elected body of experts composed of both men and women.

In May 2013, I had the privilege of conducting an interview with al-Khamlīshī. I asked his opinion on the state of *fiqh*, *ijtihād* and the role of women in the Moroccan *Mudawwana*, and al-Khamlīshī explained his belief that the lack of women's participation in legislation, and lack of freedom in marriage, divorce, and other legal issues stemmed from the current state of Islamic *fiqh* and *ʿulamāʾ*. Al-Khamlīshī stated that today, *ijtihād* among Muslims is in a debilitated state.[22] He stresses that for centuries *ijtihād* has always been an individual endeavor. This individual endeavor according to al-Khamlīshī, cannot deduce general rulings to govern hundreds of millions of people throughout the world in general matters, nor in matters of Islamic law. This individual *ijtihād* produced many negative rulings which became obstacles in the lives of people in general and in the lives of women in particular. Al-Khamlīshī attributes these obstacles to many elements. He felt that a number of obstacles were placed deliberately by experts in Islamic legal theory (*usūl al-fiqh*) who put forth impossible terms under which an individual could qualify as a *mujtahid*.[23] Al-Khamlīshī maintains that these experts believe that the *mujtahid* is one who interprets the eternal divine law to the masses.[24] According to al-Khamlīshī, other experts maintain that the *mujtahid*

[17] Ibid., 33. For more on the term *taqlīd* see Hallaq, *Authority*, 86-120**.** Contrary to many scholars, The Egyptian born scholar Mohammad Fadel considers *taqlīd* another method of *ijtihād*. Mohammad Fadel, "The Social Logic of Taqlīd and the Rise of the Mukhataṣar," *Islamic Law and Society* 3: 2 (1996), 193-233.
[18] Ibid.
[19] Muhammad Qasim Zaman, *Modern Islamic Thought in a Radical Age* (Cambridge; New York: Cambridge University Press, 2012), 49-53; Muḥammad Rashīd Riḍāʾ, *Tafsīr al-Manār*, 22 vols. (Beirūt: Dār al-Maʿrifah, 1970), 5: 181. For the Opinion of al-Qaraḍāwī, see Yūsuf al- Qaraḍāwī, *al-Fiqh al-islāmī bayna al-aṣāla waʾl-tajdīd* (Cairo: Maktabat Wahba, 1999), 41.
[20] Zaman, *Modern Islamic Thought* ,49-53; Rashīd Riḍā, *Tafsīr al-manār*, 5:181.
[21] Zaman, *Modern Islamic Thought*, 53-54; Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (London: Oxford University Press, 1934), 164-65.
[22] From May 2013 interview. See also al-Khamlīshī, *Jumūd al-dirāsāt al-fiqhīya: The Stagnation of Fiqh Studies* (al-Rabāṭ: Dār Nashr al-Maʿrifah, 2010), 3-21.
[23] Ibid, 5-7.
[24] Al-Khamlīshī, *Al-Ijtihād: taṣawwuran wa-mumārasa: Ijtihād: Imagination and Practice* (al-Rabāṭ: Dār al-Nashr al-Maʿrifah, 2010), 11-16. To support his argument, al-Khamlīshī cites the Muslim scholar al-Shāṭibī who maintains

reports on God's will and intentions; therefore, he interprets what God intended.[25] This belief, according to al-Khamlīshī, has inflicted a great deal of harm on Islamic law. "It is almost impossible for any individual to claim the knowledge of every legal and social issue no matter how much knowledge this individual possesses from the Qurʾān, the Sunna or other fields," he says.[26]

Al-Khamlīshī was not the first jurist to criticize Islamic *fiqh* and call for a new type of *ijtihād.* Contemporary Egyptian scholar al-Qaraḍāwī also followed in Riḍā's footsteps by calling for a new collective type of *ijtihad* formed of Muslim *'ulamāʾ* while retaining the individual *ijtihad* as a parallel practice.[27]

Al-Khamlīshī states that social issues differ from one century to another and from one region to another, even between Muslim states. To say that one individual is able to even be aware of all of these customs, let alone understand them all with respect to divine law (*Sharīʿa*) is a dangerous conclusion. Secondly, as a result of the reason described above, al-Khamlīshī believes that by stating that the *mujtahid* interprets the divine law, the *mujtahid's* opinion thus becomes absolute and unable to be challenged.[28] This leaves opinions deduced in the early Islamic centuries (between the seventh and tenth centuries) to become primary sources for debates in the twenty-first century. Thirdly, due to the definition of a *mujtahid* as the only one who may interprets the divine law, the *mujtahid* is therefore able to deduce a ruling on any specific or general legal issue.[29] More importantly, al-Khamlīshī argues that a ruling deduced by a *mujtahid*, whether the ruling concerns permitting or forbidding an action, is considered divine ruling (*ḥukm ilāhī*), and not merely a singular interpretation of the divine message, for instance.[30] As a result, the followers of the *mujtahid* held on to these opinions, considering them part of the Divine law (*Sharīʿa*).[31] With time, and after the formation of the *madhāhib*, by the end of the tenth century, people started to consider these *madhāhib* to be part of the divine law, according to al-Khamlīshī.[32]

Al-Khamlīshī says that this blind belief in the *madhāhib* resulted in freezing the process of *ijtihād* and the gate of *ijtihād*.[33] He says that despite the change in customs and traditions over the past ten centuries, *fiqh* has not changed.[34] Instead people held on tightly to the old personal opinions of jurists and considered them among the eternal part of Sharīʿa.[35] "That is why we see many Muslims today claiming that Muslim states are not applying Sharīʿa and instead use new laws that are foreign to Islam and are imported from the West."[36] These laws are considered by many to be a threat to Islam and Sharīʿa.[37]

Al-Khamlīshī's response to these complicated issues is to move away from the old *ijtihād* and the stagnation of *fiqh*. He also suggests a new type of *ijtihād,* which he calls "collective *ijtihād*"

---

that *muftīs*/*mujtahid*s were the heir of prophets. See Ibrāhīm b. Mūsā al-Shāṭibī, *Muwāfaqāt*, ed. Mashhūr Ḥasan Maḥmūd Salmān, 6 vols. (Saudi Arabia, al-Khubar: Dār Ibn ʿAffān, 1997), 5: 253-57.

[25] Al-Khamlīshī, *Jumūd*, 6-7; idem, *al-Ijtihād*, 16; al-Shāṭibī, *Muwāfaqāt*, 5: 253-57.

[26] An interview conducted in May 2013.

[27] Al-Qaraḍāwī, *al-Fiqh al-Islāmī*, 41.

[28] Al-Khamlīshī, *Jumūd*, 62-64.

[29] An interview conducted in May 2013. See also al-Khamlīshī, *Jumūd*, 6-7.

[30] Al-Khamlīshī, *Jumūd*, 59.

[31] Ibid., 1-90.

[32] Ibid., 7.

[33] An interview conducted in May 2013.

[34] Ibid.

[35] See also al-Khamlīshī, *al-Ijtihād*, 12-18.

[36] An interview conducted in May 2013.

[37] Ibid.

(*al-ijtihād al-jamāʿī*).[38] Al-Khamlīshī maintains that "the local society has the exclusive right to decide on which of the past rulings may be considered law. This may be done through institutions appointed by the local society or elected committee members."[39] He strongly recommends that the old restrictions on the qualifications of the *mujtahid* be eliminated.[40] The *mujtahid,* according to al-Khamlīshī, must be an expert in certain fields or an intellectual from within the local Islamic civil society.[41] In this collective *ijtihād,* says al-Khamlīshī, men and women experts in Islamic legal theory (*uṣūl al-fiqh*), as well as experts in law, science and other fields such as medical and scientific fields are to be included.[42] Al-Khamlīshī's suggestion to include men and women experts on social and legal issues from outside the *ʿulamāʾ* in an effort to hear from all aspects of Muslims' society rather than keeping legal matters solely in the hands of the *ʿulamāʾ*. Thus al-Khamlīshī's ultimate aim was to break the monopoly of religious jurists over Islamic family law.

Al-Khamlīshī criticizes the *ʿulamāʾ* for holding on to the old *fiqh* while customs have changed dramatically from one place to another through more than ten centuries. He also blames the stringent and strict qualifications of the *mujtahid* on the eponym of the Shāfiʿī *madhhab*, Muḥammad b. Idrīs al-Shāfiʿī (d. 820).[43] According to al-Khamlīshī, al-Shāfiʿī stipulated that a *mujtahid* must possess the following qualifications,

> … [t]he knowledge of the Qurʾān and Sunna of the Prophet. The *mujtahid* must know which legal issues Muslims reached consensus (*ijmāʿ*) over and which issues they disagreed over (*ikhtilāf*). The *mujtahid* must be aware of the opinions of previous predecessors (*salaf*). He must be able to practice legal analogical deduction based on the reveled texts. He must also possess knowledge of the commands of the Qurʾān, its prescribed duties and ethical discipline, its abrogating and abrogated, its general and its particular rulings, and must be able to interpret the ambiguous verses. He must possess full knowledge of the Arabic language.[44]

Al-Khamlīshī emphasizes that, due to the strenuous conditions made by al-Shāfiʿī, it was almost impossible for anyone to become a *mujtahid* and, instead, these conditions were responsible for producing imitators (*muqallidūn*) instead of genuine *mujtahids*.[45]

Al-Khamlīshī asserts that, due to the changes that occurred in every society throughout the centuries, there must be renewal and reform to the old rulings. To him, this must be conducted according to the universal Qurʾanic law which states, "who (conducts) their affairs by mutual Consultation."[46] Al-Khamlīshī interprets this verse to mean that any *ijtihād* must be a collective type of *ijtihād*. In addition, according to al-Khamlīshī this type of *ijtihād* must be conducted continuously throughout the ages and in every region using the consensus of the Muslim

---

[38] Ibid.
[39] Ibid.
[40] Al-Khamlīshī specifies the qualifications mentioned by al-Shāfiʿī (d. 204/820) and al-Shāṭibī (d. 790/1388). See al-Khamlīshī, *al-Ijtihād*, 149-53; idem, *Jumūd*, 158-59. For the qualifications of the *mujtahid*, see al-Shāṭibī, *Muwāfaqāt*, 5: 41-58. For the qualifications mentioned by al-Shāfiʿī, see Muḥammad b. Idrīs, al-Shāfiʿī, *al-Risāla*, ed. Aḥmad Muḥammad Shākir (Cairo: Maktabat Dār al-Turāth, 1979), 508-10.
[41] Al-Fākhūrī, *Qānūn al-Aḥwāl al-Shakhṣīya*, 104-06.
[42] Ibid.
[43] al-Shāfiʿī, *al-Risāla*, 510.
[44] Ibid., 509-10.
[45] Interview in May 2013. Although al-Shāfiʿī might have placed strenuous conditions to become a mujtahid, al-Ghaẓālī (d. 505/1111), on the other hand, seemed to have watered down the requirement of a *mujtahid*. See Hallaq, "Was the Gate of Ijtihad Closed?", 6.
[46] Q. 42:38.

community as a *guide only* and not a source of law.[47] He is of the opinion that there must be consultation with men and women experts as well as common people so as to deduce new rulings that are both pragmatic and, at the same time, able to resolve the issues of the day.[48] He also maintains that, while rulings in rituals (*ʿibādāt*) may differ from one jurist to another and from one *madhhab* to another, transactions (*muʿāmalāt*) may not be based on different opinions.[49] To him, there must be one law within the state that everyone can respect and obey.[50] Contrary to the opinions of other Arab Muslim intellectuals like al-Qaraḍāwī, who calls on Muslims to practice *ijtihād* only on issues without clear evidence, and only if Muslim jurists did not reach consensus (*ijmāʿ*) on these issues, al-Khamlīshī is of the opinion that *ijtihād* may be practiced for all issues of transaction, regardless of rulings previously reached by a consensus of jurists.[51] Therefore, he calls for new type of *ijtihād* so as to eliminate the *ʿulamāʾs* monopoly over *fiqh* and many transactions which harm the individual Muslim. Commenting on the role of the *faqīh* al-Khamlīshī questions his role by asking the question,

> What qualifies the *faqīh* to make a ruling regarding the age of marriage? Marriage laws require certain experts: lawyers, sociologists, and medical experts who need to be involved in making such decisions. A *faqīh's* opinion is only his opinion and must not be considered a law. The *faqīh* is nothing but a spiritual advisor (*wāʿiẓ*) and not a lawmaker. His opinion is one among many individual opinions, but never a law.[52]

Therefore, al-Khamlīshī limits the role of jurists and considers their role to be that of a spiritual advisor rather than a peer of the legislators. He also restricts the legal rulings of the past jurists and considers these rulings to be mere opinions only and not part of the state's law. Al-Khamlīshī was not the first jurist to criticize Islamic *fiqh* and call for a new type of *ijtihād.* Contemporary Egyptian scholar al-Qaraḍāwī also followed in Riḍā's footsteps by calling for a new collective type of *ijtihad* formed of Muslim *'ulamāʾ* while retaining the individual *ijtihad* as a parallel practice.[53]

Al-Khamlīshī on the Issue of Consensus (*Ijmāʿ*)

Consensus between Muslim scholars, though, has been something of a thorny issue for centuries. While we do not know the exact date that the consensus was reached, it is safe to say that the term was readily used by the eighth century.[54] As a general rule, consensus is applied to legal rulings that are mentioned in either the Qurʾān or Sunna, but are ambiguous or are otherwise not mentioned in the religious texts at all. Consensus is defined as the agreement of Muslim jurists (*mujtahids*) after the death of Prophet Muḥammad at a certain generation over a legal religious ruling deduced by jurists, or *mujtahids*.[55]

---

[47] Interview with al-Khamlīshī in May 2013. See also al-Khamlīshī, *al-Ijtihād*, 13-36.
[48] An interview conducted in May 2013.
[49] Ibid.
[50] Ibid.
[51] The opinion of al-Qaraḍāwī can be found in al-Khamlīshī, *al-Ijtihād,* 178-79.
[52] From an interview with al-Khamlīshī conducted in May 2013. See also al-Khamlīshī, *Jumūd*, 160.
[53] Al-Qaraḍāwī, *al-Fiqh al-Islāmī*, 41.
[54] Jonathan Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World* (Oxford: Oneworld, 2009), 168; George F. Hourani, "The Basis of Authority of Consensus in Sunnite Islam) *Studia Islamica*, 21 (1964), 19-20.
[55] Tāj al-Dīn ʿAbd al-Wahhāb b.ʿAlī al-Subkī, *Rafʿ al-ḥājib ʿan Mukhtaṣar Ibn al-Ḥājib*, ed. ʿAlī Muḥammad Muʿawwaḍ, ʿĀdil Aḥmad ʿAbd al-Mawjūd, and ʿUthmān b. al-Ḥājib, 4 vols. (Beirūt: ʿĀlam al-Kutub, 1999), 2:135; Muḥammad Muṣṭafā Shalabī, *Uṣūl al-fiqh al-Islāmī* (Beirūt: Dār al-Nahḍah al-ʿArabīyah, 1974), 151-54; N. J. Coulson, *A History of Islamic Law* (Edinburgh, 1964), 77; Wael Hallaq, "On the Authoritativeness of Sunni Consensus," *International Journal of Middle Eastern Studies* 18:4 (1986), 452.

During the twentieth-century a number of Muslim scholars raised questions concerning the authority of jurist consensus. Rashīd Riḍā, Muhammad Iqbal, al-Qaraḍāwī, and Fazlur Rahman were among the first Muslim scholars to levee criticism against the ancient method of consensus, calling for reformation of this outdated legal source. While Qaraḍāwī called for the establishment of a body of jurists and learned men of Islamic law, Riḍā and Iqbal argued that this elected body should also include legislatures with expertise in professions from outside the ʿulamāʾ.[56] However, a number of scholars have raised arguments in defense of the traditional authority of jurist consensus. For example, Fazlur Rahman considers consensus to be a versatile and necessary obstacle in Islamic law, contending that "*ijmāʿ* was regarded as absolutely authoritative" in its ability to establish law in the past, present, and future,[57] while Fazlur Rahman describes consensus as "the most potent factor in expressing and shaping the complex of belief and practice of the Muslims."[58]

Al-Khamlīshī is also critical of the consensus (*ijmāʿ*) of jurists as a source of law. This consensus, according to al-Khamlīshī, while started in the eighth century C.E., could not be generalized as a source of law to all Muslims living throughout the world in different centuries.[59] Rulings which were the outcome of *ijmāʿ* may not be considered laws for Muslims living in Spain, Africa and the Middle East, says al-Khamlīshī. He goes on to say that even if some of the *ʿulamāʾ* have agreed on certain rulings, these rulings are considered their own opinions and are open for reforms and changes.[60] Al-Khamlīshī of the opinion that all legal transactions are open for *ijtihād* even if jurists have reached consensus over the issues. The *ijmāʿ*, to al-Khamlīshī, must also be restricted by place and time. Therefore, the consensus of people in Algeria, according to al-Khamlīshī, may be different from that of the Muslims in Morocco**.** More importantly, *ijmāʿ* according to al-Khamlīshī must include the opinions of men and women alike. To him women must participate in legislating and reforming Islamic laws just like men do. Al-Khamlīshī's views regarding consensus are not without a foundation. Most jurists' of the four Sunni schools of law agreed that, once consensus is reached, it may not be challenged by later jurists.[61] More importantly, jurists reached consensus that legal rulings in the Qurīān and Sunna of the Prophet may be abrogated while rulings based on jurists' consensus may not.[62] In so doing, Sunni jurists gave more authority to jurists' consensus than they allowed the Qurʾān or the Sunna in legal issues.

---

[56] Zaman, *Modern Islamic Thought*, 49-54. For the opinion of al-Qaraḍāwī, see al-Qaraḍāwī, *al-Fiqh al-islāmī,* 41; Iqbal, 164-65; Riḍā, *Tafsīr al-Manār*, 5:181.

[57] Fazlur Rahman, *Islam* (Chicago: University of Chicago Press, 1979), 74.

[58] Fazlur Rahman, *Islam*, 74-75.

[59] From the interview with al-Khamlīshī. See also al-Khamlīshī, *Jumūd*, 58-62.

[60] On the issue of *ijmāʿ* and how it contributed to persisting rulings which discriminate against women, see Scott C. Lucas, "Justifying Gender Inequality in the Shāfiʿī Law School: Two Case Studies of Muslim Legal Reasoning," *Journal of the American Oriental Society*, 129:2 (2009), 237-58.

[61] Hallaq, "On the Authoritativeness of Sunni Consensus," 427; Bernard G. Weiss, *The Spirit of Islamic Law* (Athens: University of Georgia Press, 1998), 122; al-Subkī, *Rafʿ al-ḥājib*, 2:99.

[62] Bernard G. Weiss, *The search for God's law Islamic jurisprudence in the writings of Sayf al-Dīn al-Āmidī* (Salt Lake City: University of Utah Press, 1992), 531. On the abrogation of legal rulings from the Qurʾān and Sunna of the Prophet, see idem, *The search for God's law*, 541; al-Shāṭibī, *Muwāfaqāt*, 3:335; Sayf al-Dīn al-Āmidī, *al-Iḥkām fī uṣūl al-aḥkām*, 3 vols.([Cairo]: Muḥammad ʿAlī Ṣabīḥ, 1968), 2:236-93.

Conclusion

The work of al-Khamlīshī was considered a radical diversion from many of the other traditionalist *ʿulamāʾ* in the Arab-Muslim world. Unfazed by the mounting opposition, al-Khamlīshī challenged the outdated *fiqh* along with the work of many past jurists when he said that he considered all legal transactions to be open for *ijtihād*. This was not only a challenge for Islamists and the traditionalist ʿulamāʾ in Morocco, but also to the work of almost all Muslim jurists throughout the Islamic world. Unlike many of the Muslim jurists who called for opening the gate of *ijtihād* on certain issues on which past jurists had not yet deduced rulings, al-Khamlīshī called for revisiting and challenging all of the old rulings, including those concerning issues about which jurists claimed that they had already reached a consensus. Further, al-Khamlīshī broke away from other *ʿulamāʾ* and intellectuals in calling for a new form of *ijtihād*—a collective *ijtihād* (*al-ijtihād al-jamāʿī*). This type of *ijtihād* includes men and women who are professionals and experts from fields related to the topic of any law that is to be reformed—scientists, lawyers, social servants—as well as religious scholars. Thus, al-Khamlīshī may be considered the first Muslim intellectual to allow women to participate in the process of legal *ijtihād* alongside men.

For the first time, women participated in *ijtihād* and their opinion was heard and taken seriously, and men's long-standing monopoly over Islamic *fiqh* was broken. Unlike other collective *ijtihād* called for by other Muslim jurists like Riḍā, Iqbal, and al-Qaraḍāwī, for example, al-Khamlīshī's *ijtihād* is regional and confined to the demands of local issues within each individual state. By allowing expert men and women to take part in the process of *ijtihād*, al-Khamlīshī undermined the entire establishment of *ʿulamāʾ*. Furthermore, and contrary to the opinions of many jurists (*fuqahāʾ*), al-Khamlīshī considered the *faqīh* a religious, spiritual advisor and not a law maker. This radical statement by al-Khamlīshī was instrumental in granting intellectual men and women from various fields permission to act as part of the process of lawmaking in Morocco.

DOI: 10.17077/2168-538X.1077