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

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Keywords

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Cover Page Footnote
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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*, madhāhib, ‘ulamāʾ, *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 Ahmad 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.

Ahmad al-Khamlīshī is one of the most prominent Moroccan scholars who has written extensively on the Moroccan Personal Status Law (*Mudawwana* 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

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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.
3 For more on the life of al-Khamlīshī see his interview on al-Rahma TV channel at [http://www.youtube.com/watch?v=Xk9pCXcnTx4](http://www.youtube.com/watch?v=Xk9pCXcnTx4).
member of the Sufi order al-Nāṣrīya. Raised in an Islamic traditional conservative household, al-Khamlīshī memorized the Qurʾān at the age of ten. 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-Hassanīa from 2000 until the present. 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.

In criticizing Islamic substantive law, Khamlīshī argues for reforming some of the outdated Islamic rulings using the method of ijtiḥād, where ijtiḥād takes into consideration social and economic factors of the time. 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 ijtiḥād of the jurists. 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. This belief was due to the change in time, custom, tradition, or the region’s political and economic systems. 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 Qur’anic 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.” 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.

Al-Khamlīshī argues that fiqh students of today believe that ijtiḥād was limited to the four madhāhib and ended by the death of the eponyms of these madhāhib. This belief was due to the opinion of the majority of the ‘ulamāʾ, who decided that the gate of ijtiḥād is closed, and that the only madhab that should be practiced in Morocco is the Mālikī, from which no one should deviate. Further, al-Khamlīshī maintains that these ‘ulamāʾ and their students believe that only the absolute mujtahid (al-mujtahid al-muṭlaq) may exercise ijtiḥād, however, they believe that these mujtahids do not exist at the present time. Al-Khamlīshī concludes that Moroccan society is left with judges who are imitators of past jurists. Some of these judges, according to al-Khamlīshī, cherish imitation (taqlid) 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

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4 Ibid.
5 Ibid.
6 Ibid.
8 Ibid. Ijtiḥād is the process of legal reasoning and hermeneutics through which the jurist-mujtahid derives or rationalizes law on the bases of the Qurʾān and the Sunna. For more on ijtiḥād, see Wael B. Hallaq, Authority Continuity and change in Islamic Law (Cambridge, UK; New York: Cambridge University Press, 2001), 24-56.
10 Ibid.
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.\textsuperscript{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.\textsuperscript{18}

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

The idea of collective ijtihād is not new. During the twentieth century Muslim scholars including Muhammad Ḥusayn ʿAbduh (d. 1905), Rashīd Riḍā (d. 1935), Muḥammad ʿIqbal (d. 1938), al-Qaraḍāwī (b. 1935), and the Moroccan scholar Ṭāhir al-Khamlīshī (b. 1935)\textsuperscript{19} began to advocate for a type of ijtihād 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.”\textsuperscript{20} Muḥammad ʿIqbal also called for an assembly of legislators made out of other members of the Islamic society in addition to Islamic religious scholars, ‘ulamāʾ, to undertake the responsibility of collective ijtihād instead of individual ijtihad.\textsuperscript{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 ‘ulamāʾ. Al-Khamlīshī stated that today, ijtihād among Muslims is in a debilitated state.\textsuperscript{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.\textsuperscript{23} Al-Khamlīshī maintains that these experts believe that the mujtahid is one who interprets the eternal divine law to the masses.\textsuperscript{24} According to al-Khamlīshī, other experts maintain that the mujtahid


\textsuperscript{18} Ibid.


\textsuperscript{22} From May 2013 interview. See also al-Khamlīshī, Jumūd al-dirāsāt al-fiqhīya: The Stagnation of Fiqh Studies (al-Rabāt: Dār Nashr al-Maʿrifah, 2010), 3-21.

\textsuperscript{23} Ibid, 5-7.

reports on God’s will and intentions; therefore, he interprets what God intended. 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.

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 ijtihād formed of Muslim ‘ulamā’ while retaining the individual ijtihād as a parallel practice.

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. 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. 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 ʿilāhī), and not merely a singular interpretation of the divine message, for instance. As a result, the followers of the mujtahid held on to these opinions, considering them part of the Divine law (Sharīʿa). 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.

Al-Khamlīshī says that this blind belief in the madhāhib resulted in freezing the process of ijtihād and the gate of ijtihād. He says that despite the change in customs and traditions over the past ten centuries, fiqh has not changed. Instead people held on tightly to the old personal opinions of jurists and considered them among the eternal part of Sharīʿa. “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.” These laws are considered by many to be a threat to Islam and Sharīʿa.

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”
(al-ijtiḥād al-jamāʿī). 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.” He strongly recommends that the old restrictions on the qualifications of the mujtahid be eliminated. The mujtahid, according to al-Khamlīshī, must be an expert in certain fields or an intellectual from within the local Islamic civil society. 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. Al-Khamlīshī’s suggestion to include men and women experts on social and legal issues from outside the ‘ulamāʾ in an effort to hear from all aspects of Muslims’ society rather than keeping legal matters solely in the hands of the ‘ulamā’. Thus al-Khamlīshī’s ultimate aim was to break the monopoly of religious jurists over Islamic family law.

Al-Khamlīshī criticizes the ‘ulamāʾ 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 Shāfīʾ madhhab, Muḥammad b. Idrīs al-Shāfīʾī (d. 820). According to al-Khamlīshī, al-Shāfīʾī 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 revealed 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.

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

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 Qurʾānic law which states, “who (conducts) their affairs by mutual Consultation.” Al-Khamlīshī interprets this verse to mean that any ijtiḥād must be a collective type of ijtiḥād. In addition, according to al-Khamlīshī this type of ijtiḥād 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-Shāfīʾī (d. 204/820) and al-Shāṭibī (d. 790/1388). See al-Khamlīshī, al-ijtiḥād, 149-53; idem, Jumād, 158-59. For the qualifications of the mujtahid, see al-Shāṭibī, Muwāfaqāt, 5: 41-58. For the qualifications mentioned by al-Shāfīʾī, see Muhammad b. Idrīs, al-Shāfīʾī, al-Risāla, ed. Ahmad Muḥammad Shākir (Cairo: Maktabat Dār al-Turāth, 1979), 508-10.
41 Al-Fākhūrī, Qānūn al-Ahwāl al-Shakhsiyya, 104-06.
42 Ibid.
43 al-Shāfīʾī, al-Risāla, 510.
44 Ibid., 509-10.
45 Interview in May 2013. Although al-Shāfīʾī might have placed strenuous conditions to become a mujtahid, al-Ghażālī (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.\textsuperscript{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.\textsuperscript{48} He also maintains that, while rulings in rituals (ībādāt) may differ from one jurist to another and from one madhhab to another, transactions (muʿāmalāt) may not be based on different opinions.\textsuperscript{49} To him, there must be one law within the state that everyone can respect and obey.\textsuperscript{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.\textsuperscript{51} Therefore, he calls for new type of ijtihād so as to eliminate the ‘ulamāʾ’s 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 (wāʾiz) and not a lawmaker. His opinion is one among many individual opinions, but never a law.\textsuperscript{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 Ridā’s footsteps by calling for a new collective type of ijtihad formed of Muslim ‘ulamāʾ while retaining the individual ijtihad as a parallel practice.\textsuperscript{53}

\textbf{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.\textsuperscript{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 Muhammad at a certain generation over a legal religious ruling deduced by jurists, or mujtahids.\textsuperscript{55}

\begin{footnotesize}
\begin{enumerate}
\item Interview with al-Khamlīshī in May 2013. See also al-Khamlīshī, \textit{al-Ijtihād}, 13-36.
\item An interview conducted in May 2013.
\item Ibid.
\item Ibid.
\item The opinion of al-Qaraḍāwī can be found in al-Khamlīshī, \textit{al-Ijtihād}, 178-79.
\item From an interview with al-Khamlīshī conducted in May 2013. See also al-Khamlīshī, \textit{Jumūd}, 160.
\item Al-Qaraḍāwī, \textit{Fiqh al-Islāmī}, 41.
\end{enumerate}
\end{footnotesize}
During the twentieth-century a number of Muslim scholars raised questions concerning the authority of jurist consensus. Rashid Riḍā, Muhammad Iqbal, al-Qaraḍāwī, and Fazlur Rahman were among the first Muslim scholars to leeven 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 ‘ulamā’. 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 “ijmā’ was regarded as absolutely authoritative” in its ability to establish law in the past, present, and future, while Fazlur Rahman describes consensus as “the most potet factor in expressing and shaping the complex of belief and practice of the Muslims.”

Al-Khamlīshī is also critical of the consensus (ijmā’) 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. Rulings which were the outcome of ijmā’ 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 ‘ulamā’ have agreed on certain rulings, these rulings are considered their own opinions and are open for reforms and changes. Al-Khamlīshī of the opinion that all legal transactions are open for ijtiḥād even if jurists have reached consensus over the issues. The ijmā’, 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, ijmā’ 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. More importantly, jurists reached consensus that legal rulings in the Qurān and Sunna of the Prophet may be abrogated while rulings based on jurists’ consensus may not. In so doing, Sunni jurists gave more authority to jurists’ consensus than they allowed the Qur’ān 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.
58 Fazlur Rahman, Islam, 74-75.
59 From the interview with al-Khamlīshī. See also al-Khamlīshī, Jumūd, 58-62.
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.