

## ISLAM, WOMEN AND GENDER JUSTICE

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### 1. Introduction

It is generally thought that Islam treats women unfairly and gender justice is not possible within Islamic law known as the Shari'ah law. This assertion is partly true and partly untrue: true as far as the existing Shari'ah laws are concerned; untrue, as the existing laws were codified during 2<sup>nd</sup> and 3<sup>rd</sup> centuries of Islam when general perspective of women's rights was very different from today's perspective. The Qur'anic verses which are quite fundamental to the Islamic law, were interpreted so as to be in conformity with the views about gender rights prevailing then.

### 2. Primacy of Scripture

It is important to note that scriptural injunctions are always mediated through prevailing social ethos. Also, it is more fundamental to framing of laws based on scriptures, as they both reflect the given situation and transcend it. There cannot be any scripture – revealed or otherwise – which is one-dimensional, i.e., it reflects only given situation. Every scripture tries to go beyond what is given and it faces stiff opposition from those who loose out if the transcendental perspectives are spelled out and enforced. The scriptures condemn prevailing social malaise and provide a new vision. Those who benefit from the new vision embrace the new faith; those who loose oppose it tooth and nail. The vested interests and those who want to perpetuate the old order, however, have their own strategies. Soon they find ways and means to hijack new religion to their own benefit. This is done in a number of ways: i) They capture political power,

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transforming religion into part of a political establishment, thus, causing the loss of its initial revolutionary thrust as it is appropriated by the ruling classes. ii) They convert religion itself into an establishment and a power structure develops around it. Religion is, then, used more for distribution of favours than for spiritual enrichment. iii) Intellectual resources are used to restore status quo and this is done chiefly by interpreting the scriptures in a way which will rob it of its transcendental thrust. Thus, a theology is developed to support and enhance the status quo. One must distinguish between original scriptural pronouncements and the theology woven around them. Scriptural pronouncements are divinely inspired and, hence, transcendental; theological formulations are human and, hence, often contradict divine intentions. Scriptural pronouncements are an option for the weaker sections whereas theological formulations are weapons in the hands of powerful interests. It is, therefore, necessary that theological formulations be continuously challenged by scriptural pronouncements. One must strive to build up a creative tension between scriptural and theological. While scripture remains immutable with its transcendental spirit, theology must change by creatively facing new challenges and newly emerging situations.

Those who oppose any change in theological formulations and Shari'ah laws are those who lose their dominant position; the priesthood that monopolises theology and religion for its own benefit is instrumental in promoting self-interest rather than spiritual source of inner enrichment. The priesthood, monopolising theology, projects it as divine and immutable. In general, a faithful's understanding of religion is mediated through the priesthood and, hence, they are made to believe that theology as formulated by them or their predecessors is divine and immutable. Any change will, therefore, amount to changing the divine will.

In Islam, it is a common belief that the Shari'ah is divine and, hence, immutable. Whenever any measures for gender justice are proposed one meets with this stock argument. It is important to note that Shari'ah, though undoubtedly based on the Holy Qur'an, is a human endeavour to understand the divine will. It is an approach to, rather than divine will itself. The priesthood, i.e., the community of 'Ulama, projects it as a divine end in itself and, therefore, refuses to admit any change. "The Shari'ah is divine" has become a commonly accepted position. Thus, what was thought of women's rights during the early period of Islamic history has

come to be the final and immutable. Even to think of interfering with the divine, much less changing it is an unpardonable sin.

As pointed out above, there is a big gap between the scriptural, i.e., the Qur'anic pronouncements, and, Shari'ah formulations. While the Qur'anic pronouncements are purely transcendental in spirit, human situations as well as human thinking on all related issues have influenced the Shari'ah formulations. Women were in subordinate position in the patriarchal societies and this subordinate relationship came to be reflected in the Shari'ah laws relating to their rights. The transcendental divine spirit was conveniently ignored and the prevailing situation was rationalised through contextual Qur'anic pronouncements. As pointed out above, there is always a creative tension between what is and what ought to be in scriptures. However, this tension is often resolved in favour of the prevalent rather than the emergent; thus, the prevalent is eternalised by rationalising certain divine pronouncements.

### 3. On the Methodology of Creating Islamic Legal Structure

If we want to effect necessary changes in the Shari'ah laws, it is important to understand the methodology of creating of Islamic legal structure. The Islamic legal corpus is known as Shari'ah. As Shari'ah is, after all, a human approach to divine will as reflected through the scripture, i.e., the holy Qur'an, it is not uniform but has several variants. In the Sunni Islam itself there are four different schools of jurisprudence, i.e., Hanafi, Shafi'i, Hanbali and Maliki. Besides these schools, there is what is known as the Zahiri school. There are several schools in the Shi'ah Islam as well: the Ja'fari or the Ithna 'Ashari School, the Isma'ili school and the Zaidi school.

The Sunni Islam bases Shari'ah – besides the Qur'an – on *Sunna* (i.e., the sayings and doings of the Holy Prophet), *qiyas* (analogy) and, finally, *ijma'* (consensus). However, except the Qur'an, the remaining three sources, i.e., *Sunna*, *qiyas* and *ijma'* are controversial. Some *ahadith* (sayings of the Prophet) are acceptable by some followers, while they are rejected by others. Some *ahadith* are considered weak (*da'if*), some of doubtful origin and some are outright forgeries. Also, *qiyas*, analogical reasoning varies from jurist to jurist. There is controversy about *ijma'* as well. The crucial question is whose *ijma'*? Of the jurists and the 'Ulama,

or of the entire community? Also, has *ijma'* ever been possible? Have all 'Ulama, let alone the entire community, ever developed consensus on any issue? There are hardly any instances of this nature in the history of Islamic jurisprudence. Thus, it will be seen that except the Qur'an which is divine and there are no textual differences about it, the three other fundamental sources, i.e., *Sunna*, *qiyas* and *ijma'* are human and, hence, controversial. It is also important to point out that about the Prophet's pronouncements, i.e., *ahadith* there is controversy whether they are considered as divine or human. The *Ahl-e-Hadith* (i.e., the followers of Hadith) consider *hadith* as divine like the Qur'an while many others do not give it that status and consider it as human and, hence, not eternal.

The Shi'i jurisprudence (Shari'ah) is based on the Qur'an and the pronouncements of the Prophet as reported by Imams, i.e., the male descendants of the Prophet's daughter Hazrat Fatima and her husband 'Ali. The Qur'an as interpreted by these Imams is considered as the only right interpretation, every other interpretation is considered mere conjecture or opinion (*ra'i*). *Tafsir bi'r ra'i* (i.e., Qur'anic interpretation or exegesis through human opinion) is rejected outright in the Shi'ah Islam. There is, however, controversy in the Shi'ah Islam as to who is rightfully appointed Imam. The Ithna 'Asharis (twelvers), the Isma'ilis (also referred to as seveners), Zaidis, the Qaramitas and the Alavids, all mutually differ on this issue. All these sects have Imams of their own and consider others as not rightfully appointed and, hence, have no legitimacy. Also, the juridical pronouncements of these Imams differ from each other even on matters of principles, at times.

The Qur'an, being divine, does not differ and is immutable. It admits of no change. However, its interpretations differ from sect to sect and from one school to the other. Thus the Qur'an is divine and its interpretations are human and what is human admits of change. Thus, had it been immutable the Shari'ah would not have differed from one school to the other and from sect to sect. The Shari'ah, being based on human interpretations of the divine word, can, and does admit change. What was thought to be just in respect of women's rights in medieval ages, is no longer so. The idea of justice also changes with changing consciousness and what is just in one age may not necessarily be just in the other. It is, in fact, a very important aspect as far as the Qur'anic concept of law is concerned.

#### 4. Sources of Shari'ah Law

One of the important sources of the Shari'ah law is *hadith* or *Sunna*. As pointed out above, this, too, is not above controversy. There are two types of controversies about this seminal source of Islamic law: i) whether *hadith* is divine or human, and ii) whether it is authentic, weak or forged. The Qur'an is unanimously accepted as divine and there is no controversy about it; so also, its content is accepted with unanimity. No one maintains that this or that verse of the Qur'an is unauthentic, or added later, or of doubtful origin. It is, however, not so as far as *hadith* literature is concerned. There are several *ahadith* which are controversial. Either they are considered of doubtful origin, weak or outright forgery. It is said that Imam Abu Hanifa, the founder of the Hanafi School of law, accepted only 17 *ahadith* as true and authentic and yet he used many more while giving his juridical opinions.

There are Muslims who maintain that *ahadith* are divine like the Qur'an. They believe that the Qur'anic verse "Nor does he speak out of desire. It is naught but revelation that is revealed" (53:3-4) applies to the Prophet's all pronouncements including his *ahadith*. These Muslims believe that *ahadith* too, are divine and, hence, above any human controversy. Thus, this source of Shari'ah also becomes equally divine for them. However, there is no unanimity about it. Not only that *hadith* is not believed to be divine by large sections of Muslims, it is not above controversy as to its origin. Imam Bukhari, one of the greatest collectors of *ahadith*, is said to have collected more than six hundred thousand *ahadith* of which he accepted only four thousand and rejected others as of doubtful origin or outright forgeries. This, therefore, according to Imam Bukhari, clearly shows how some interested people were producing *hadith* literature to serve their ends. Unfortunately, many of these *ahadith* went into juridical formulations, in general, and about women, in particular. These formulations reflect the prejudices and dominant thinking of the time rather than the Qur'anic principles. These formulations, therefore, cannot be treated above change.

There is yet another problem about *hadith* literature. This problem remains, even if *hadith* literature is treated as divine and immutable. The Qur'an which is unanimously held to be divine by all Muslims contain many pronouncements which are directly related to the then prevailing Arab social structure. These pronouncements also reflect the social norms

or social problems, as they existed in those times. These pronouncements cannot be of universal application in other societies and cultures. We would like to cite examples. There was a practice called *Zihar* among Arabs. It is mentioned in 33:4 and 58:2-3. It was a practice among Arabs to declare their wives like their mothers and abandon them. Thus, in verse 33:4 the Qur'an says, "Allah has not made for any man two hearts within him; nor has He made your wives whom you desert by *Zihar*, your mothers..." Edward William Lane defines *Zihar* in his Arabic-English Lexicon as husband telling his wife thou art to me as the back of my mother. In verse 2 of Chapter 58 the Qur'an says: "Those of you who put away their wives by calling them their mothers – they are not their mothers. None are their mothers save those who give them birth, and they utter indeed a hateful word and a lie..." In verse 3 of the same chapter it is said: "And those who put away their wives by calling them their mothers, then go back on that which they said, must free a captive before they touch one another. To this you are exhorted..."

From the above two verses we come to know that Arabs used to desert their wives calling them like the back of their mothers and some used to go back on that vow and would like to touch their wives again. The Qur'an prescribed that they free a captive (i.e., a slave) before breaking their vow. Now this practice was unique to the Arab society of that time; we do not find such practices in other societies. Also, today there is no institution of slavery; it has already been abolished. If an Arab today pronounces *Zihar* on his wife and wants to take back his vow there are no slaves available to free. Thus, such verses in the Qur'an should be treated as contextual, i.e., revealed in the context of that society and are no more valid as social practices have changed. Similarly, the institution of slavery is no more. There are several pronouncements about slaves and slavery in the holy Qur'an but they are no longer applicable as the institution itself does not exist any more. In Shari'ah as formulated in the 2<sup>nd</sup> and 3<sup>rd</sup> century Hijrah (Islamic Calendar), however, these practices prevailed and, hence, elaborate laws were made by the jurists based on Qur'an or *hadith*. In the given historical context of the contemporary society, they are totally irrelevant today. Thus, the proposition that Shari'ah laws are immutable is not maintainable.

The Qur'anic verses, thus, should be divided into two categories: i) contextual, and ii) normative. The normative pronouncements of the

Qur'an are eternal and while re-thinking issues in Islamic Shari'ah, particularly pertaining to women's rights, the normative pronouncements will have precedence over the contextual. During the early centuries, however, contextual often had precedence over normative and such a practice was quite 'normal'; hence, these formulations became widely acceptable in that society. These laws were thought to be normative and, hence, struck deeper roots in society as well as in the hearts and minds of the people as well and acquired an immutable status with the passage of time.

Thus, even if *hadith* is accepted as divine, its contextuality will have to be kept in mind. It is also said, and rightly so, that the Prophet explained the Qur'anic verses through his words and deeds and none knew the meaning and import of the Qur'anic verses better than the Prophet himself. Quite true. However, the question of contextuality remains. The holy Prophet, while dealing with the given society, could not have gone beyond its context in explaining and practising the Qur'anic pronouncements. Again, it can best be illustrated with an example of women's status in that society. While explaining the cause of revelation of the Qur'anic verse 4:34, all classical commentators like Tabari, Fakhruddin Razi and others maintain that the Prophet allowed a woman (daughter of his companion) right to retaliate against her husband who had unjustly slapped her but, in view of the prevailing social ethos it laid to unrest among the men and Qur'an reversed the Prophet's decision. This, once again, shows that the question of contextuality is very important and highly relevant in all judicial pronouncements be they those of the Prophet or other Islamic jurists.

Another example in this respect is that of *milk-e-yamin*, i.e., legitimising sexual relations with a slave girl. There is near unanimity among the Islamic jurists that it is permissible to have sexual relations with slave girls and that the Prophet himself had such relations with a Coptic Christian slave girl. The modernists and some other commentators, of course, challenge this formulation and maintain that the Prophet had married her. Maulana Maududi, one of the contemporary Islamic thinkers and founder of the Jam'at-e-Islami, however, maintains in his commentary on the Qur'an (*Tafhim al Qur'an*) that the Prophet had relations with the slave girl without marrying her. Most of the eminent medieval jurists concur with this. If this view that sexual relations with a slave girl is

permissible were accepted, the contemporary society would not approve of it. Thus, the Prophet's *Sunna* cannot be seen out of its social context.

### 5. Differentiating the Essential and the Contextual

There were four great jurists in Sunni Islam who founded four different schools of jurisprudence. All four differ from each other on many issues. Much has been written on causes of these differences. The modern scholars, however, maintain that one important reason was their differing social situations. Imam Hanbal and Imam Malik lived in Medina and, thus, were quite close to the social ethos of that society in which the Prophet himself lived. They were closer in their juridical formulations to what the Prophet said and did in that society. Imam Shafi'i and Imam Abu Hanifa, on the other, lived in Egypt and Iraq, respectively, which were confluences of many cultures and, thus, were unorthodox in their methodology in arriving at juridical opinions. While Imam Malik and Hanbal mainly relied on *Hadith*, Imam Sahfi'i and Abu Hanifa used *qiyas* and *ijma'* more liberally, apart from *Hadith*. Thus, while the former two Imams' formulations were closer to Arab practices in Mecca and Medina, the latter two Imam's formulations had been largely influenced by other practices as well. This clearly shows that Shari'ah is influenced by human situations and can incorporate situational changes. The Arab '*adat* (the Arab customary law) also became an integral part of the Shari'ah law. Thus, the then prevailing opinions about women in the Arab society greatly influenced the Shari'ah laws pertaining to women. The Arab '*adat* cannot certainly be considered divine injunctions and, hence, immutable. In fact, the Arab '*adat* had great relevance as long as Islam was confined to the Arab society. However, once it spread out to far off areas, the need to incorporate other practices also became equally important. Thus, finally, the changed consciousness about women's rights can also not be ignored.

There is yet another problem about the *hadith* literature which is, as pointed out above, an important ingredient of Shari'ah. The *ahadith* were generally reported by the Prophet's companions. In this respect even the most authentically reported *ahadith* present different kinds of problems. Firstly, most of the *ahadith* reported by the companions were not the exact words of the Prophet but the overall meaning of what he had said. There are hardly few *ahadith* which can be said to be the exact words of the



Prophet. Secondly, the *hadith* literature also incorporates the reports about what the companions saw the Prophet doing. Thus, the Prophetic *Sunna* includes both what the Prophet said as well as reports about what he did in different situations.

Now among the Prophet's companions there were all kinds of people. There were companions who had sharp memory, good understanding and comprehension of the problems. There were companions who had very poor understanding of the complex issues as well as who had poor memory. There were companions who spent several years with the Prophet and there were companions who spent only a few hours with him, apart from even those who saw and heard him from a distance. All that these companions reported having heard from the Prophet became part of *hadith* corpus, which then was used for formulating Shari'ah laws.

There is yet another problem. The *ahadith* have been reported by people who heard it from the companions of the companions (*tab'i tabi'in*) and from companions of the companions of the companions of the Prophet. Thus, there is a whole chain of narrators known as *rijal* (the narrating men or women). The collectors of *ahadith* did try to develop the science of *rijal* (i.e., '*ilm al-rijal*') criteria to judge the honesty and integrity of the narrators. This criterion, however, judged only the honesty and integrity of the narrators rather than his or her understanding, comprehension or/and intelligence. Moreover, there were often missing links. Further, there are cases wherein much was not known about one or more of the narrators in the chain. Many narrators were of totally different cultural backgrounds – some narrators being Arabs and others non-Arabs not properly acquainted with the Arab affairs. Also, many narrators had their own biases for or against women (also about other matters) and these biases definitely affected their narrative or reports.

It was for this reason that the Prophet had strictly forbidden his followers from compiling his sayings. He knew very well that his sayings might not be reported faithfully to future generations for various reasons. Also, he was fully aware of the fact that the future generations will insist on strictly following what reaches them as the sayings of Allah's Messenger though they may be facing different circumstances. Even the first Caliph Hazrat Abu Bakr did not permit compilation of *ahadith* for similar reasons. Still people did compile these *ahadith* though much later.

By the time they were compiled, spurious ones had mixed up with authentic ones, identifying one from the other, however, being too difficult.

Thus, it will be seen that *hadith* literature, even if entirely authentic, presents several problems. First of all, it cannot be considered a highly reliable source of Islamic legislation. The Islamic *juris corpus*, however, is as much based on the problematic *hadith* literature as on the holy Qur'an. Still the 'Ulama project it as unquestionable divine and, hence, immutable. They refuse to admit any change even though sweeping changes are taking place in the social, cultural, economic and political circumstances. The doctrine of *taqlid* (mechanical imitation) is emphasised by the contemporary jurists in the world of Islam. They maintain that rethinking about the formulations of the great Imams is not permissible. In fact, these formulations are treated as divine. Also, most of the 'Ulama do not even permit taking more favourable provisions for women from other schools of law. They insist that any one school should be followed in its entirety. Some 'Ulama of course permit such an approach. But they are fewer in numbers. Now more and more 'Ulama are coming around to permitting this approach which has given some relief to women. The Ottoman rulers had adopted this approach in the nineteenth century itself, although it is not yet widely accepted. In fact, *Taqlid* is the generally established rule.

It is causing a great deal of hardships to Muslim women everywhere. The holy Prophet had anticipated the problems which will arise in future. He took care to leave some guidance in this respect. Firstly, he encouraged what is known as *ijtihad* (i.e., exerting oneself to solve newly arising problems if no precise guidance were available in the Qur'an and Prophet's Sunnah). The *hadith* regarding *Ma'adh bin Jabal* is well known about this. When the Prophet appointed Ma'adh as governor of the Yemen, he asked him how would he govern. According to the Qur'an, Ma'adh replied. If it were not found in the Qur'an? the Prophet asked him. According to the Prophet's Sunnah, replied Ma'adh. Then, if he did not find anything of the sort in the Sunnah also? the Prophet inquired. Then I would exert myself to solve the problem (*Ana ajtahedo*). The Prophet patted his back in approval. Also, the Prophet is reported to have said that even if one makes a mistake in doing *ijtihad* he or she would earn one merit and if one does not err would earn two merits. The Prophet did this

to encourage Muslims to solve problems which were likely to arise in the future.

From this above mentioned situation, many modernists argue that one must resort to *ijtihad* to solve new problems and issues including women's issues. However, the orthodox 'Ulama argue that the gates of *ijtihad* were closed long ago and also that now there are no qualified persons to do *ijtihad*. They feel the great Imams and some of their followers had the requisite qualification and none today has such impressive merits. Some 'Ulama do feel the need for *ijtihad* but they too stop short of resorting to it for fear of consequences. Some who did do otherwise, faced the wrath of the fellow jurists and even ostracised. The debate is raging in the Islamic world for and against *ijtihad*. When it comes to women's issues and rights, the resistance to change and rethink is much greater in the male-dominated Islamic world.

Muhammad Iqbal, a noted Urdu poet and thinker from India (d.1938) was greatly in favour of *ijtihad*. He wrote in his *Reconstruction of Religious Thought in Islam*:

The ultimate spiritual basis of all life, as conceived by Islam, is eternal and reveals itself in variety and change. A society based on such a conception of Reality must reconcile, in its life, the categories of permanence and change. But eternal principles when they are understood to exclude all possibilities of change which, according to the Qur'an, is one of the greatest 'signs' of God, tend to immobilise what is essentially mobile in its nature.<sup>1</sup>

Iqbal continues in the above book very boldly:

The only alternative open to us, then, is to tear off from Islam the hard crust which has immobilised an essentially dynamic outlook on life, and to rediscover the original verities of freedom, equality, and solidarity with a view to rebuild our moral, social and political ideas out of their original simplicity and universality.<sup>2</sup>

Iqbal, thus, maintains that *ijtihad* is necessary to rebuild the law of Shari'ah in the light of modern thought and experience.

<sup>1</sup>Muhammad Iqbal, *Reconstruction of Religious Thought in Islam*, New Delhi: Kitab Bhavan, 1984, 147-148.

<sup>2</sup>Iqbal, *Reconstruction of Religious Thought in Islam*, 156.

*Ijtihad*, I would like to emphasise here, is even more necessary today in respect of Shari'ah laws pertaining to women. It is highly regrettable that the Shari'ah law is almost inoperative in many other respects (like property and contract laws, criminal laws, financial transactions, etc.), though when it comes to women's issues, the Shari'ah laws are sought to be strictly applied. In several Muslim majority and minority countries modern secular laws are applied in respect of all other things except laws pertaining to marriage, divorce, maintenance, inheritance, etc., i.e., in the sphere of what is called personal laws. The greatest resistance, in the name of Shari'ah, is manifested by men when it comes to according better status to women. In this respect the Shari'ah becomes sacred and immutable and arouses great passions. The Islamic world, if it has to understand the dynamic spirit of Qur'an, and enact it in real life, will have to enact changes in the Shari'ah laws and accord women an equal status. In fact, time has come to put the Qur'anic vision of gender equality in practice.

As pointed out earlier there are verses in the Qur'an which have contextual significance. These verses formed the legal foundations of Islamic law in a previous era. These were, however, not the verses having impress of permanence and principles. There are certainly the verses that lay down eternal and universal norms and principles, and the Islamic legislation should necessarily be based on such verses. Before we examine these verses, we would like to set out certain values which are fundamental to the Islamic teachings. Any legislation which ignores these fundamental values could be anything but Islamic. It is necessary to understand that the classical jurists though did not ignore these fundamental values but the application of these values was constrained by the social ethos of the age. The Prophet's traditions also had to take these constraints into account.

## 6. Re-interpreting the Qur'anic Notion of Justice

The most fundamental values in Islam, as expounded by the Qur'an are justice, benevolence and compassion. The Qur'anic expression for these values is '*adl, ihsan and rahmah*'. The Qur'an talks of these values in imperative categories. The Qur'anic verse 16:90 testifies to this: And surely Allah enjoins justice and benevolence (to others). Thus, it will be seen that justice is very central to the Islamic value system – as central as

love to the Christian ethics. No legislation in Islam which ignores this value can be valid.

It is this concern for justice that makes the Qur'an show deep concern for the weaker sections of society. Thus, we find the verse 28:5 expressing this concern: "And We desire to bestow a favour upon those who were deemed weak in the land, and to make them the leaders, and to make them the heirs." The Qur'an desires to bestow the mantle of leadership of this earth upon the weak. The Islamic jurisprudence has to imbibe this spirit towards the weaker sections of society. Women certainly belong to this category as far as any patriarchal society is concerned.

It is important to note that the values like justice and compassion cannot be applied independent of the age. In the medieval period the understanding of the concept of justice was very different from what it is today. Our era is a democratic era and justice in our era cannot be deemed to have been done if equality of all humans irrespective of sex, race and creed, is not ensured. Discrimination between one and the other human being on any ground, including those based on gender differences, will be unjust. In medieval ages, however, these discriminations were thought to be quite natural and non-violative of the concept of justice. Even slavery was thought to be natural and in keeping with the principles of justice. In fact, if a slave ran away from the master it was thought to be an unjust act. Today, let alone slavery, even bonded labour or child labour is considered as grossly violative of justice. Thus, the concept of justice greatly varies in a democratic era from that of feudal ones. Yet justice remains an important value in both the ages. The expression of the concept of justice in a particular era is not fundamental but justice *per se* is. However, religious traditions, including those of Islam, give more importance to the expression of justice in a particular age than to the notion of justice itself. It is because of this that the expression of justice in the *hadith* literature is more important than the notion of justice as a fundamental value in the Qur'an. What was thought to be just during the classical period of Islam is thought to be just even today. Not only that the orthodox think the expression of justice today is violative of divine will; it is this attitude that impedes change in Islamic legislation so as to accord women equality with men.

However, one finds in the Qur'an full support for gender equality in several verses. The Qur'an was certainly mindful of what was just in that

era when it was revealed and what ought to be just in the transcendental sense. When the Prophet permitted a Muslim wife retaliation against her husband as a measure of justice, the Qur'an overruled him and permitted a measure of conditional male domination, though conditionality of justice was stipulated (see the verse 4:34). It would have been thought to be unjust if the Qur'an had permitted wife to retaliate against her husband and it would not have found acceptability in that society.

However, the Qur'an also did not intend to eternalise the then acceptable notion of justice. The dynamics of 'is' and 'ought', or interaction between history and eternity informs the whole spirit of Qur'an. Unfortunately, the orthodox miss this very spirit while reading the Qur'an from their own perspective. The verse 33:35 is much more fundamental in this respect as it clearly accords women equality with men in all respects. While 4:34 is informed by the spirit of that era, the verse 33:34 deals with the eternal dimension. The orthodox, however, do not wish to go beyond the divine injunction expressed in 4:34. They have frozen their minds in the classical age of Islam. What was temporal has become permanent for them and what is permanent is just brushed aside as of no consequence.

### **7. Qur'an Reinstates Justice to Women**

The Qur'an must be reread and reinterpreted in today's context as the classical jurists read and interpreted it in their own context. No reformation is possible without such rereading and reinterpreting the Qur'anic verses. The real intention of the Qur'an, especially that of sexual equality, becomes obvious through several verses. Those verses need to be re-emphasised. The verse 2:228 ("And women have rights similar to those against them in a just manner") is quite definitive in this respect. It hardly needs any comment. While commenting on the above verse, Maulana Muhammad Ali, a noted Pakistani commentator says:

The rights of women against their husbands are here stated to be similar to those which the husbands have against their wives. The statement must, no doubt, have caused a stir in a society which never recognised any rights for the woman. The change in this respect was really a revolutionising one, for the Arabs hitherto regarded women as mere chattels. Women were given a position equal in all respects

to that of men, for they were declared to have rights similar to those which were exercised against them. This declaration brought about a revolution not only in Arabia but also in the whole world, for any nation or any reformer never previously recognized the equality of rights of women with those of men. The woman could no longer be discarded at the will of her 'lord', but she could either claim equality as a wife or demand a divorce.<sup>3</sup>

However, much of this spirit of justice and equality was lost when the Islamic doctors legislated under the influence of their own social ethos. The Qur'anic categorical imperatives were ignored, as pointed out before, in favour of those verses which were of the nature of concession to the age. There are many instances of this, like polygamy. Firstly, it was a permissive measure in some circumstances (large number of war widows and orphans to be taken care of as many men perished fighting in the battle of Uhud) with great emphasis on justice to all the wives (their number not exceeding four). It was a great advance over the pre-Islamic practice of marrying unlimited number of women without any obligation towards them.

Secondly, the verse on polygamy (4:3) is preceded by the verse 4:1 which emphasises sexual equality in the words that "Lord Who created you from a single being (*min nafsini wahidatin*) and created its mate of the same [kind] and spread from these two many men and women....," and the verse 4:2 which talks of justice for orphans and widows. Then, polygamy is permitted provided one marries widows and orphans (and not any woman); moreover, justice with all wives is a must failing which one must marry only one. No one before had insisted on such conditionalities for plurality of wives.

Thirdly, the verse 4:129 states that even if you desire you cannot do justice between wives and ends by saying that do not leave the one with total disinclination and incline towards the other leaving the first in suspense. If the verses 4:3 and 4:129 are read together polygamy is as good as not permissible. The jurists, however, in order to avoid implications of reading the two verses together invented various explanations and took resort of *hadith* to keep the possibility of polygamy open. Much worse still, in practising it, conditionality for justice was

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<sup>3</sup>Maulana Muhammad Ali, 1973, 97.

hardly enforced. In today's conditions polygamy should be done away with in order to implement the Qur'anic conditionality. Abolition of polygamy will serve the end of justice far better than its practice today. The arguments such as men are more sexual, there are more women than men and it will be better to permit polygamous marriages to avoid immoral relations, etc., are all attempts at human rationalisation than divine intention. These arguments do not hold much water, as there may be excess of women over men in one country and excess of men over women in another. Further, prostitution and immoral sex thrived even when men could marry any number of wives and also keep slave girls without limit.

Also, normatively speaking, the Qur'an has conceded all rights to women which were available earlier only to men. She could exercise her right to divorce her husband as men could divorce her at will. The Prophet permitted a woman called Jamila to divorce her husband – against his will and without consulting him – just because she did not approve of his looks. While the verse 2:229 permits her to liberate herself from an unsatisfactory marriage by suitable compensation to her husband (i.e., returning the dower amount), the verse 4:35 gives her right to appoint an arbiter of her own to settle the marital dispute, or else agree to a divorce. Also, the Qur'an requires of men to keep their wives in good manner and to leave them, if necessary, in a benevolent manner. The verse 4:19 lays down that women could not be inherited or taken as wives against their will. Men are also exhorted in this verse not to take a portion of what they have given to their wives and to treat them kindly. It was also emphasised in 9:71 that believing men and believing women are each other's friends and they (both men and women) enjoin good and forbid evil. Thus, both enjoy equal obligations and from this verse jurists like Abu Hanifa have concluded that a woman can become *Qadi*, i.e., judge as it is her obligation to enjoin good and forbid evil.

It is argued from verse 4:11 that a daughter inherits half that of a son and, hence, man is superior. Some modernists also argue on the basis of this verse that it is injustice to a daughter as she has been given half that of a son and, hence, it perpetuates a bias against female sex. It is simply not true. From one perspective one can say it was a cautious reform in favour of daughters. In pre-Islamic society daughters did not inherit at all and now they were given right to inherit half that of a son. From another perspective it could be argued that it was not bias against daughter that



they were given half that of son but daughters were duly compensated by *mehr* (dower amount at the time of marriage) whereas sons had to loose out by paying dower to their wives. The wives did not have to spend anything by way of maintenance as the husbands were enjoined to maintain their wives. Also, a woman inherited as a wife and mother too. Moreover, she did not contribute to family wealth in those days by way of earning but now she does and her portion could be increased in view of the changed conditions. Thus, the Qur'an has done no injustice to her in matters of inheritance.

Another question is of *hijab* (veil). There is no injunction in the Qur'an that she veils her face. The verse 24:31 only lays down that women should not display their adornment and fineries publicly and that they should cover their breasts (tribal women in those days used to leave their breasts uncovered) and that they should not strike their feet with anklets in public so as to draw attention to their adornments. In another passage both men and women have been asked to lower their gaze (4:30-31) and to restrain their sexual passions. As for what constitutes adornment, what should be displayed and what should be not, there are sharp differences of opinion. These differences are human and every commentator has his views. But Tabari, the noted classical commentator, has summarised the views of many eminent jurists in his *Jami' al-Bayan*. According to him, adornment means, i) adornment of dress or the clothes that a woman wears; in other words, she is not required to cover the clothes she wears; ii) it means the adornment which the woman is not required to cover, such as collyrium, rings, bracelets and her face; and iii) the exception (*illa ma zahara minha*) relates to a woman's clothing and her face.

These were opinions of the theologians of those days. Today the sensibilities in this respect are very different and the scope of the exception can be made much wider subject to – and that is real intention behind it – restraining sexual passion and protecting one's chastity. To prevent extra-marital sex is the responsibility of both men and women and not of women alone, as per the Qur'an. Also, both should avoid wearing sexually stimulating dress.; they should wear dignified dress. Covering of face by women is not required in the Qur'an at all. It was a cultural practice of some post-Islamic societies. The Qur'an also does not require women to be confined to homes. On the contrary, they could earn and what they earned was their own as per verse 4:32. The cultural practices like confining

women to home were sought to be legitimised later by inventing suitable *ahadith* or by far fetched interpretations of the Qur'an.

### 8. Conclusion

In conclusion it should be said that if one goes by those verses of the Qur'an which belong to the normative category or which are of the nature of laying down principles and givers of value, men and women should enjoy equal rights in every respect. It would be necessary to re-read and re-interpret many verses which were used for centuries to subjugate women in Muslim societies. This subjugation was more cultural and patriarchal than Islamic or Qur'anic. The whole *corpus juris* of Islam relating to women needs to be seriously re-thought on the basis of Qur'an.