



Shari'ah in Today's World: Renewing Islamic Discourse

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Introduction

Renewal of religious discourse in Islam (*tajdeed*) has taken center stage due to the turmoil in Muslim lands nowadays. While the concept of *tajdeed* is legitimate, the implication (occasionally stated explicitly) that religious discourse is the root cause of the many problems from which Muslim-majority countries suffer is unfair. It deliberately overlooks a myriad of factors leading to these problems, which if examined, would show that these harms are partly self-inflicted and partly inflicted on Muslims by others. However, it would also be unreasonable to claim that the contemporary religious discourse is completely free of any guilt.

First, let me state here that it is only expected of any Muslim who believes that Prophet Muhammad ﷺ received a revelation from God to submit to that revelation and acknowledge its infallibility. After all, God is above any error. However, the religious discourse that is subject to this discussion is in part a human product that should not be conflated with the revelation itself nor treated as sacred. Infallibility is the characteristic only of the explicit text of the revelation (the Qur'an and the *Sunnah*) and of *bona fide* explicit scholarly consensus. Our understanding of the text may be far from what is intended. For example, our misunderstanding of some of our religious teachings may be contributing to the lack of righteous governance and the high level of corruption in the vast majority of Muslim countries. If, however, someone claimed that Islam itself is responsible for this situation, then the simple answer is that contemporary Muslim generations are not better Muslims than the Companions of the Messenger ﷺ who were successful in establishing righteous governance. In fact, the *Columbia History of the World* notes that 'Umar established a system of government superior to the bureaucracy of the Roman Empire, which had preceded Muslim rule.¹

Furthermore, *tajdeed* of religious discourse is not only a communal necessity, but it is a religious responsibility, as the Messenger ﷺ himself indicated:

إِنَّ اللَّهَ تَعَالَى يَبْعَثُ لِهَذِهِ الْأُمَّةِ عَلَى رَأْسِ كُلِّ مِائَةِ سَنَةٍ مَنْ يُجَدِّدُ لَهَا دِينَهَا

¹ Garraty, J. A., & Gay, P., *The Columbia History of the World*. New York: Harper & Row, 1985, p. 264.

Indeed, Allah sends for this *ummah*, at the onset of every century, those who renew the religion for it.²

Most people will agree that renewal is needed. Nonetheless, many disagree on what renewal consists of and exactly what part or parts need to be renewed. Some accept the concept of *tajdeed* as long as it is limited to the techniques of delivering *da'wah*. Once religious content is addressed, many 'conservative' Muslims feel instantly uncomfortable. For some this is due to fear of the unknown. This is partly because our *ummah* suffers from a great deal of weakness and disunity, which fosters an environment of defensiveness and mistrust. However, some of our fears of the call to *tajdeed* may be justified. After all, many of the callers to *tajdeed* of the *deen* are utterly unqualified for the job. They dismiss much of the established *Sunnah* and, with complete disregard for the cumulative tradition, defy the definitive implications of the text of revelation. They are quick to dismiss the great jurists of Islam, claiming that they were but a product of their culture and were blindfolded by their biases. It also seems to the 'conservative' Muslim that much of the proposed *tajdeed* is simply an act of unconditional surrender to the mainstream modern culture, making the Divine instruction subject to the influence of people's changing thoughts and social constructs. However, the problem with our timidity in contributing to this discourse about *tajdeed* is that others may hijack its banner. Those who are frustrated with the condition of the *ummah* and are yearning for a change may well be tempted to follow unqualified "renewers."

This paper discusses certain aspects about the renewal of the religion, mainly the following points:

1. The validity of the concept of *tajdeed* and its scope
Tajdeed is mainly about restoration and adaptation
2. Do we need to renew the methodology of deduction itself (or the science of *uṣool ul-fiqh*)?

² Collected by Abu Dâwood and al-Hâkim, who authenticated it on the authority of Abu Hurayrah. *Sunan Abi Dâwood*, verified by Muhammad Muhyid-Deen 'Abdil-Hameed. Beirut: Dâr al-Fikr, 4/109.

- a. *Uṣool*-related *ijtihād*³ that may have impeded the renewal of religious discourse
 - i. The problem of over-reporting consensus
 - ii. Departure from the agreement of the four *madhâhib*⁴ and when a position outside them can be validated
 - b. Existing flexibility in the discipline of *uṣool ul-fiqh*
 - i. The role of *maqâṣid* (objectives) in the renewal of the religion
 - ii. The role of human intellect
 - c. Suggestions for incremental renewal within juridical theory
3. Practical examples of intended and unintended *tajdeed*

The Validity of the Concept of Tajdeed (Renewal) and Its Scope

As mentioned earlier, the Prophet ﷺ explained that at the turn of every century Allah sends to the *ummah* “those who renew the religion for it.” Therefore, the one who calls for *tajdeed* should not be denounced, since the first one to utter this term in this context was the Messenger ﷺ himself. Rather, the discussion should revolve around the intended meaning of this *tajdeed*. Does it only mean ‘restoration’? If it does, why did the Prophet ﷺ use *tajdeed* (renewal) rather than other Arabic words that specifically mean ‘restoration’? Also, ‘restoration’ sounds more suited to a static structure, like a historic building that you want to bring back to its original beauty. Our *deen* is a living entity with one spirit, consistent objectives, and overarching maxims, but with a flexible legal framework that can appropriately engage with changing realities. ‘Renewal’ is thus the appropriate word. But if it is about renewal, how does one ‘renew’ the religion? Does this mean we have the liberty to change the Divine instruction?

³*Ijtihad*: to use one’s knowledge of the Qur’an, the *Sunnah*, and other Islamic sciences to derive rulings on matters not specifically or explicitly mentioned in either source of Islamic law.

⁴ *Madhhab* (pl. *madhâhib*): a school of juridical or legal thought. The four schools in Sunni Islam are the Ḥanafī, Shāfi‘ī, Māliki, and Ḥanbali.

The default status in the religion is that it remains unchanging, and most of what is meant by ‘renewal’ is actually restoration achieved simply through reviving that which is original, and cleansing it of that which is unoriginal, such as innovations and customs which conflict with the revelation. Aside from that, there is another type of renewal, and that is the *ijtihâd*-based renewal. This is what the scholars refer to by saying, “The change in rulings due to the change in times is not to be denounced.”⁵ One example of this was when ‘Umar (ra)⁶ prevented *al-mu'allafati quloobuhum*⁷ from receiving their share of *zakat* when he saw that Allah had empowered Islam and the Muslims during his blessed caliphate. He felt that he no longer needed to repel their evil or earn their loyalty by giving them money from the *zakat* funds. In another instance, ‘Uthmân (ra) commanded during his caliphate that the stray camel be taken, sold, and its price kept in escrow for its owner. This was contrary to the original ruling that taking stray camels was prohibited, but it was resorted to because of the moral deterioration that had occurred between the time of the Prophet ﷺ and the time of the caliphate of ‘Uthmân (ra). ‘Ali (ra) made craftsmen liable for the materials they received from clients, when he feared that they may become otherwise negligent or reckless in safeguarding people’s property. Similarly, it was undisputed among the early Ḥanafî scholars that taking a wage for teaching the Qur’an was unlawful; they later consented to allow Qur’an teachers to receive payment when volunteers became few in number—out of fear that knowledge of the Qur’an would be lost.

Did these greats change the legislated ruling? Never, for the legislation of Allah is not subject to change. Allah, the Most High, said:

اتَّخَذُوا أَحْبَارَهُمْ وَرُهْبَانَهُمْ أَرْبَابًا مِّن دُونِ اللَّهِ

They took their scholars and monks as lords besides Allah (at-Tawbah 9:31)

The Messenger of Allah ﷺ explained to ‘Adi ibn Ḥâtim (ra) that “taking scholars and monks as lords” meant following them in considering the unlawful as

⁵ *Majallat al-ahkâm al-‘adliyyah*, Article 39. This was also stipulated in different wordings by some of the most erudite scholars of *uṣool*, such as Ibn al-Qayyim, ash-Shâṭibî, ash-Shawkânî, and others.

⁶ *Raḍiya Allâhu ‘anhu*: may Allah be pleased with him.

⁷ *Al-mu'allafati quloobuhum* (at-Tawbah 9:60) are new or non-Muslims whose hearts the Muslims hope to win over.

permissible and the permissible as unlawful.⁸ Moreover, this is exactly what the Messenger of Allah ﷺ prohibited when he said:

مَنْ أَحْدَثَ فِي أَمْرِنَا هَذَا مَا لَيْسَ مِنْهُ فَهُوَ رَدٌّ

If anyone introduces into this matter of ours what is not from it, it will be rejected.⁹

Therefore, it is impossible that the preceding examples involved changing the *ḥukm* (as it refers to the Divine *khiṭāb* or instruction), even if some of the scholars used that term, for they only meant the *fatwa* (religious edict) and not the actual ruling in *Shariah*. A single act can have two different *fatwas* in different contexts.

To further clarify, let us take the example of receiving wages for teaching the Qur'an. Its prohibition was a matter of agreement among the early Ḥanafī scholars, but then the practice was later permitted by them. The question is: were the prohibition and permission with regard to the same thing? It may appear that way, but upon taking a closer look, it becomes clear that we cannot equate between accepting a wage for teaching the Qur'an during an era when many were enthusiastic about teaching it as an act of devotion to Allah, and were supported financially from the state treasury, and the same action during a period in which teachers were no longer sustained by the state treasury. In the latter situation, if they occupied themselves with teaching, their families would be lost, and if they occupied themselves with earning a livelihood, their students would be lost.

Thus, a particular scenario may call for different sets of rulings that suit it, and the *mujtahid* (the one who engages in expert reasoning) chooses from among these rulings what is most suitable to it. Sometimes, the matter may fall between two rulings or two principles, in which case the *mujtahid* attributes the matter to whichever of the two it seems closer to. This is obviously pertinent only to rulings

⁸ *Sunan al-Bayhaqi al-kubrâ*, 10/116, in the chapter 'The Manners of the Judge, and What the Judge Rules By,' Mecca: Dâr al-Bâz, 1414H.

⁹ *Ṣaḥeḥ al-Bukhârî*, 2/959, in the chapter 'Treaties: Agreeing upon Unfair Terms Nullifies the Treaty,' Beirut: Dâr Ibn Katheer wal-Yamâmah, 3rd ed., 1407 H; and *Ṣaḥeḥ Muslim*, 3/1343, in the chapter 'Verdicts: Nullifying False Rulings and Rejecting Innovations,' Beirut: Dâr Ihyâ' at-Turâth al-'Arabi.

that are affected by people's customs and interests. Regarding this, Imam ash-Shâṭibi (rh)¹⁰ said:

*Rulings that differ whenever customs differ is not a [reflection of] any difference in the Divine instruction itself, for the Shariah was revealed to be permanent and eternal. Hypothetically, were this world to remain without end, and the people remained liable [to uphold the Shariah] as well, the Shariah would not need any additions. In other words, whenever customs change, they would fall under another [different] principle of Shariah that would govern them...*¹¹

In the example of taking wages for teaching the Qur'an, the first of the two principles was that there was no intention other than (the pleasure of) Allah in acts of devotion—and this supported the view of impermissibility in the first era; and the second was to preserve the Qur'an by teaching it to youngsters—and this supported the view of permissibility in the second era. The *ijtihâd*-based renewal considers the change of time and place, not because they are in themselves consequential to the rulings, but because they are vehicles of different circumstances that may be consequential to those rulings.

Before we embark on discussing what may be changed, let us first underline what may not be changed. While *ijtihâd* is always necessary in all fields to correct our understanding, the following are matters that are not subject to change, whether due to changes in customs, world conditions, technological advancements, or any circumstantial variables:

- all matters of creed
- the pillars of Islam
- rulings in the sphere of worship that have incomprehensible causes, such as the times of the different prayers and their composition, and the rituals of *hajj* and fasting

¹⁰ *Raḥimahu Allah*: may Allah bestow mercy on him.

¹¹ *Al-muwâfaqât* by ash-Shâṭibi, verified by 'Abdullâh Drâz, Beirut: Dâr al-Ma'rifah, 2/217.

- quantified injunctions of the *Shariah* (*muqaddarât*) that were fixed by the text of revelation, such as expiations (*kaffârât*), duration of the waiting period (*'iddah*), and entitlements in inheritance
- matters about which there is an explicit text with definitive implication and certain transmission, and their effective cause is still operative
- matters about which there is a clear genuine consensus: the consensus must not be based on circumstantial variables such as in cases where the common interest (or weighing harm vs. benefit) is the deciding factor
- basic rulings of morality and those that define the Islamic value system, such as the prohibition of arrogance, prejudice, murder, fornication, usury, gossip, slander, etc.; the obligation of mutual agreement in contracts; and the protection of basic human rights, such as the sacredness of life, property, and reputation: regarding these issues, change may only be related to the means of ensuring the preservation of those values and rights

After excluding those spheres, it seems that the renewal of *ijtihad* is most needed in the spheres of governance, public policy, international relations, financial transactions, employment, corporate ethics, admissible proofs and judiciary proceedings, and to some extent interpersonal relations and relations with people of different theological orientations and religious affiliations.

Mainly restoration and adaptation

After affirming that we do not consider the content of our *fiqhi* legacy immune to critical examination and that many of the rulings issued by our esteemed imams and scholars are subject to change because of changes in the geopolitical, economic, and social conditions of the world, it is important to assert that most *tajdeed* has nothing to do with this content. It is about restoration of the values and principles of the religion that were upheld by the earlier generations in a completely different world environment; so, it is restoration with adaptation, or meaningful restoration. This could be accomplished by a few changes in our

contemporary *da'wah* narrative.¹² What our contemporary religious discourse needs the most, in this author's assessment, is a change of emphasis, along with combating zealotry, partisanship, and demagoguery, while promoting intellectual honesty and objectivity.

Change of emphasis

As the news media can change the awareness of their audience by spinning the truth, preachers could do the same. However, the impact of the preachers may be deeper and longer lasting, because it is about changing and reshaping people's religious convictions. If a single story is repeated one hundred times, and there are fifty stories that counter that one story, but each counter story is presented only once, you will have managed to skew people's perception of the reality, and to alter their convictions. Can we say the same thing about the prophetic traditions? Absolutely. What the *da'wah* narrative needs nowadays is some change of emphasis from technicality to spirituality and morality, from the minor details to the major foundations, and from focusing on the form and the exterior to concentrating on the substance and the interior. This is not in any way an attempt to show disregard for the *Shariah* or for the *Sunnah* of our beloved ﷺ, or to call for an unjustifiable esoteric interpretation of them, but simply to rearrange the priorities of the religion into the proper order.

Our theological legacy, particularly when we include all the teachings and statements of our esteemed scholars, is so vast that one who wants to manipulate it will have enough material to do so. Two preachers may give their audiences two contrasting portraits of one scholar—Imam Ahmad ibn Hanbal, for instance—and both could do so using only the imam's own statements. It is not only about contextualization, but also about checking the messages of any imam or even of a Companion against the infallible measuring stick: that of the revelation and the traditions of the Prophet ﷺ. It is also about its suitability for the current circumstances. We need scholars to calibrate the message that will reach the masses; and we need the masses, in turn, to be learned enough to know which

¹² Since this article is mainly about *ijtihad*-based *tajdeed*, my discussion of the intended restoration will be brief and only serves as a second introduction to the subject matter at hand.

message they should accept, but humble enough to avoid assuming the role of the qualified scholars. It is clearly vital that we rebuild trust in scholarship to achieve these goals.

Combating zealotry and partisanship

When a young man or woman chooses a certain affiliation around the age of twenty, you usually find them at age fifty still allied to the same group or organization, upholding its convictions and defending its stances, despite thirty years of growth. This is true across the different factions and groups that make up the bulk of our *ummah*. Naturally, strong social bonds develop among people of the same group, and this means that a change in an individual's convictions becomes socially and emotionally costly. Allah mentions this phenomenon:

وَقَالَ إِنَّمَا اتَّخَذْتُمْ مِّن دُونِ اللَّهِ أَوْثَانًا مَّوَدَّةَ بَيْنِكُمْ فِي الْحَيَاةِ الدُّنْيَا

And [Abraham] said, "You have taken, other than Allah, idols only as [a bond of] affection among you in worldly life." (Al-'Ankaboot 29:25)

In addition to the burden of changing loyalties, or even just having convictions counter to the defining ones of one's group, people also fall into the quandary of having a skewed worldview because of their narrow exposure to their group's dicta and their continuous pursuit of confirmation of their established views, even when they are exposed to other ways of thinking. All those factors and others hinder free intellectual exploration and a true development of thought. This is not only detrimental to individuals, but it is particularly detrimental to those groups who commit 'mutual blindfolding.' The phenomenon of *ta'aṣṣub* (zealotry) cannot be described as a new occurrence in our *ummah*. If we know that luminaries the likes of Imam Aḥmad, al-Bukhārī, aṭ-Ṭabarī, Ibn Ḥazm, Ibn Rushd, Ibn Taymiyyah, and many others experienced nothing short of persecution by intellectual opponents, we may be able to understand how far back in our history this problem has its roots. Almost every scholar had his own *miḥnah* (trial). It is unfortunate that the vast majority of Islamic groups—whether they are divided along ideological, theological, legalistic or other lines—demand conformity and allegiance and fail to

inculcate in their followers the essential qualities of critical analysis. Changing this atmosphere is vital for an intellectual renaissance.

Combating demagogy while promoting intellectual honesty and objectivity

Contemporary discourse has worked to establish a stereotypical image of the religiously committed individual: ignorant of worldly affairs, blindly chasing after mystical legends, rigid in their ideas and perceptions, demagogic in their discourse, and intolerant of opposing views. Although this cartoonish image is very unfair, we must not disregard it completely in our introspection. We imperfect humans are not immune to any of that. Sometimes our demagogy is the result of misplaced zeal because we know no better; sometimes it involves deliberate attempts to hurt our intellectual or political adversaries. A skewed presentation of history and reality has created a generation of youth that has a severely distorted awareness of the past and present, completely consumed by mega-conspiracy theories.

Reform of the content

The need for reform and renewal is recognized by the vast majority of Muslim scholars. Recognition and acknowledgment of the stagnation that has taken place over centuries and that has affected the development of our juridical theory and laws is essential to generating the resolve for the desired renewal. A seasoned Azhari scholar of the fourteenth century, Sh. Abdul-Wahhâb Khallâf, attributes the stagnation that took place in *ijtihâd* to four factors: 1) political division and infighting within the Muslim state that derailed scholars in all fields from developing their respective disciplines; 2) *madhhab*-based partisanship that made many scholars preoccupied with a keen interest in supporting their own *madhhab* (school of thought) and proving it correct, precluding an impartial inquiry into the body of evidences, particularly the Qur'an and the *Sunnah*; 3) the “*fatwa* chaos” that the scholars had failed during that time to control,¹³ so they preemptively closed the door of *ijtihâd* out of caution, which resulted in considerable stagnation;

¹³ The “*fatwa* chaos” resulted in many odd and esoteric *fatwas* and teachings; many scholars attempted to regain control of the situation by shutting down independent *ijtihâd* (*ijtihâd muṭlaq*) and decreeing that it was allowed only for the scholars of the past.

and 4) moral decay that affected many scholars, causing them to envy and disparage anyone who attempted independent *ijtihâd*.¹⁴

Is renewable content limited to law?

While this discussion is mainly about renewal as it relates to laws, it is important to answer this question. As we said before, the matters of *'aqeedah* and principal Islamic values are not subject to new *ijtihâd* in the sense of forming new positions compatible with new realities. However, we still need *ijtihâd* to correct our own understanding of some of these concepts and values. For example, the misunderstanding of *qadar* (predestination) and *zuhd* (asceticism, or renunciation of worldly matters) has been detrimental to the well-being of the *ummah* and can impede any prospects of progress. Imagine an entire nation that is fatalist in its outlook and disinterested in this world. Simply put, we need to reset our collective understanding of these concepts to the time of the Messenger ﷺ and his Companions. Sometimes, the resetting of our collective understanding needs to go back one or two centuries only, to remove a thin crust of recent deviation. At other times, the reset needs to go back all the way to the time of the Messenger ﷺ and his Companions, whose teachings and lives will always be the brightest beacons of light and an unfailing measuring stick. This does not mean that the *ummah* was entirely misguided at any time, but it is very possible (as predicted by the Messenger ﷺ himself) that certain trends inconsistent with the revelation may prevail in our collective conscience and practice.

While many people will continue to be opposed to (or at least suspicious of) *ijtihâd*-based *tajdeed*, it is promising that most of the notable Muslim scholars are showing acceptance of this concept. One issue of contention, however, is whether we need to reform the very principles of *uṣool al-fiqh*. This is what we attempt to discuss in the following section.

¹⁴ *Ilm uṣool al-fiqh* by Abdul Wahhâb Khallâf, p. 260. Retrieved from *Shamilah* [computer software].

Do We Need to Renew Juridical Theory and the Methodology of Deduction?

The vast majority of Muslim scholars agree that new *ijtihâd* is necessary to address newly emergent matters that have not been previously addressed by classical scholars. Most of them would also agree that new *ijtihâd* may also be needed to reexamine the established positions in the Islamic *fiqhi* legacy and choose from among those positions what is most suitable for the current realities. Those scholars are simply talking about using the same established juridical theory to reexamine individual rulings. However, a group of scholars are calling for a 'systems approach' to the juridical theory itself and an overhaul of the methodology of deduction. Not unexpectedly, they were met by fierce resistance. Those calling for *tajdeed al-uşool* are very diverse, and one should not be hasty to use a broad brush in describing their propositions, let alone their intentions. I will try here to examine whether there is a need for an overhaul of the juridical theory or of the science of *uşool al-fiqh*.

First, the scholars of Islam have always disagreed over issues pertaining to *uşool al-fiqh*. Imam Aḥmad (rh) famously said, "...whoever claimed a consensus had lied."¹⁵ Ibn Rushd (rh) wrote his book *Faṣl ul-maqâl wa taqreer ma bayn al-Sharee'ah wal-Ḥikmah min al-ittiṣâl* on the harmony between religion and philosophy. Ar-Râzi (rh) suggested that there is rational abrogation. Aṭ-Ṭoofi (rh) expanded (judiciously or not) the place of *maṣlaḥah* (benefit/interest) in legislation. Al-Qarâfi (rh) divided the traditions of the Prophet ﷺ into different categories based on the capacity in which he was acting. These are just a few examples of the ongoing *tajdeed* in the principles of jurisprudence.

It is obvious then that the science of *uşool al-fiqh* was not meant to be a closed system, since that makes it subject to stagnation and demise. Nevertheless, this author posits here that there is no need to overhaul the science of *uşool al-fiqh*; it is a solid structure with remarkable flexibility. It is our failure to utilize its flexibility

¹⁵ *Uşool al-fiqh* by Muhammad al-Khudari, pp. 313-314. Retrieved from *Shamilah* [computer software].

and discover its *tajdeed*-enabling principles that makes some of us hastily desire to overhaul it. What we really need is learned incremental renewal in this science. Having said that, one must admit that there have been positions, sometimes adopted by the majority, that caused some stagnation and rigidity in juridical theory and its practical use. These positions were mainly in the domain of *ijtihâd*. I will start here by addressing some of those positions and their impact on the development of the law; then I will talk about the existing flexibility within the science of *uṣool al-fiqh* that should be used to serve the purposes of adaptation and renewal of our religious discourse. Finally, I will suggest some areas where change may be desirable.

Positions impeding the ongoing renewal of discourse¹⁶

Over-reporting of consensus

Nothing could stifle *ijtihâd*-based renewal more than the over-reporting of consensus. Sometimes, scholars reported consensus on matters that were debated heatedly within the four *madhâhib* (pl. of *madhhab*), let alone outside of them. This was sometimes because of the usage of special terminology or simply the result of innocent mistakes. Even those scholars known for their rigorous practice of verification reported hundreds of cases of consensus after the era of the Companions that are extremely difficult—if not impossible—to establish. I will quote Shaykh Muhammad al-Khudari, whose views here are shared by many of the contemporary verifying scholars of *uṣool al-fiqh*. He states:

The question that remains is whether they [the Companions] truly reached consensus on a particular issue that was presented to them, while it is considered subject to ijtiḥâd. We may be able to answer this and say that there are many issues about which we do not know of any disagreement among the Companions regarding them. This is the most we could say. As far as claiming that they all reached a

¹⁶ I chose not to address the issue of *insidâd bâb al-ijtiḥâd* (closure of the gates of *ijtiḥâd*) declared near the end of the fifth century AH by many Muslim scholars who, after failing to properly regulate the practice of *ijtiḥâd*, intended to preserve the religion and protect it from the chaos of “*ijtiḥâd*” by unqualified individuals. It is hoped that most contemporary scholars are fully aware of the harmful effects of maintaining this position and how it could impede the development of Islamic law and its juridical theory.

positive consensus, that is a claim that lacks supporting proofs. As for the following generations, after the expansion of Muslim territories and the relocation of the jurists to different Muslim lands, and many of the jurists among the followers of the Companions (tâbi'een) and others reaching distinction, whose numbers grew beyond count, with their variant political ideologies and personal interests, the claim of the establishment of a consensus then is not easy for one to accept. This is even though many issues during these times were not known to be subjects of disagreement. On such basis, we may be able to understand the statement of Ahmad ibn Hanbal, "Whoever claimed a consensus has lied; maybe they disagreed; he should rather say, 'I don't know that they disagreed,' if he did not hear of a disagreement." Some Hanbali scholars posited that the imam means a consensus other than that of the Companions.¹⁷

While Ibn Hāzīm (rh) was an erudite scholar and was one of those known to verify reports, his book *Marātib al-Ijmā'*, in which he reported the consensuses of the scholars, had so many dubious reports of consensuses that Ibn Taymiyyah (rh) was prompted to write a treatise entitled *Naqd Marātib al-Ijmā'* to point out those erroneous reports. Interestingly, one consensus Ibn Taymiyyah criticized concerns the disbelief (*kufir*) of one who rejects a certain consensus after recognizing its validity.¹⁸

It is vital that we appreciate the beauty of the doctrine of *ijmā'*,¹⁹ which is not only a tool of preservation, but also an antidote to clerical autocracy. In a nation where no one after the Messenger ﷺ speaks on behalf of God, this doctrine provided an instrument not only for conservatism, but also for efficiency, tolerance, and adaptability. However, we need an objective examination of the reported consensuses and we need to apply stringent criteria before we accept them, since

¹⁷ *Uṣool al-fiqh* by al-Khudari, pp. 313-314; See also, *Ilm uṣool al-fiqh* by Khallāf, pp. 54-55.

¹⁸ That is, one who yielded to sound proofs on an established consensus and then rejected the subject of that consensus, so he agreed that they agreed on a position but he subsequently rejected that position. *Naqd marātib al-ijmā'* by Ibn Taymiyyah, Beirut: Dār Ibn Hāzīm, 1419 H/1998 CE, p. 299.

¹⁹ *Ijmā'*: consensus; a method of deriving rulings in jurisprudence.

mere acceptance would be conferring definitiveness on a certain position and putting an end to any scholarly debate. We apply rigorous criteria before we authenticate the prophetic traditions, even though they may not confer the same decisiveness as a consensus, because of their often-speculative implications. Additionally, we should treat the validated *ijmâ' sukooti* (tacit *ijmâ'*),²⁰ which constitutes the bulk of *ijmâ'*, as only corroborative evidence because of its presumptive nature.

Can there be truth outside the four *madhâhib*?

The four *madhâhib* in Sunni Islam are intellectual accomplishments that any Sunni Muslim should feel proud of. Thousands of scholars contributed through interdisciplinary and transgenerational efforts to the production of these intellectual wonders. Their authority and our need for them are as clear as the sun in the middle of a summer day, as the Arabic proverb goes. It is also the recommendation of the vast majority of Muslim scholars that the student of knowledge be first instructed in one of the four schools. One may also add that the truth does not diverge from the positions of the four *madhâhib* except very rarely. Imam Ibn Taymiyyah (rh) stated:

As for one who says, "I am not bound by anyone of the four imams," if he meant he is not bound by a particular one of them as opposed to the rest, then he has spoken well; in fact, this is the correct of the two [known] positions. However, if he meant that he is bound by none of them and that he disagrees with them all, then surely he will be wrong most of the time. This is because the truth does not diverge from their positions in the vast majority of the [laws of] Shariah. People only disagreed whether the truth could be different from their positions in a few cases.²¹

²⁰ Tacit *ijmâ'* (*al-ijmâ' al-sukooti*) is when some *mujtahidoon* express their opinion concerning a religious matter, while the rest remain silent. There are many opinions about this type of *ijmâ'* (see *Ilm uşool al-fiqh* by Abdul Wahhâb Khallâf, p. 51. Retrieved from *Shamilah* [computer software]).

²¹ *Mukhtaşar al-fatâwa al-mişriyyah* by Badrul-Deen al-Ba'li, Cairo: Maţba'at as-Sunnah al-Muhamadiyyah, 1/61.

Any attempt to belittle all, some, or any of the four *madhâhib* is an assault against the *ummah* and its heritage. However, having a balanced understanding regarding them is essential. The *ummah* cannot afford to swing with the pendulum of extremism. 'Anti-*madhhabism*' is wrong, but it is not the cause of all of the ailments of our *ummah*, as some ideologues on the opposite end of the spectrum like to believe. This simplistic reduction of complex phenomena is not new to human thinking. However, it seems extremely repugnant to the facts and the concept of causation itself. After all, who would have the audacity to claim that our *ummah* was doing well before this 'new phenomenon'? This is not only about defeat by external forces, but also backwardness, inner conflict, and *ta'aṣṣub*, whether interdenominational or inter-*madhhabi*. The verifying scholars complained during their times about the conditions of *fiqh* and the *fuqahâ'*. The stagnation within the *madhâhib* resulted in the divide between *fiqh* and the needs of the people, pushing the leaders, long before the colonial era, to make arbitrary legislations. Additionally, why is it that countries and communities that were not affected by this 'new phenomenon' are not faring better than those that were affected?

Having said that, this is not a discussion of the importance of the legacy of the four *madhâhib*, nor an attempt to referee between the contestants on the two ends of the spectrum concerning them. The discussion here is about the existence of truth beyond what they have agreed upon—an agreement that many Muslim scholars treat as a binding consensus. Some scholars have gone as far as claiming that there is a consensus that in the spheres of *fatwa* and judging at least, no scholar may take a position outside that of the four schools.²² According to Dâr al-Iftâ' al-Miṣriyyah (the Egyptian *fatwa* agency), this agreement is subject to change with time, people's customs, and the acceptance of and trust in other positions. It is also subject to enforcement by the state.²³ The most someone can say about this agreement—and this is extremely hard to establish—is that it was a procedural decision that may have had some merit at some point, but is not in any way a

²² *Tuhfat al-muhtâj fee sharḥ al-minhâj* by Ibn Ḥajar al-Haytami, Cairo: Al-Maktabah at-Tijâriyyah al-Kubrâ, 10/109. Retrieved from *Shamilah* [computer software].

²³ 'Following the Four Schools of Law and the Ruling of Being at Variance with Them' اتباع المذاهب الفقهية الأربعة وحكم مخالفتها. (n.d.). Retrieved August 14, 2017, from <http://www.dar-alifta.org/AR/ViewFatawaConcept.aspx?ID= 187>

binding consensus that the *ummah* must indefinitely abide by. It is interesting to note here that the disagreement between the earlier scholars was not about the obligation for a *mujtahid* to follow the opinion of another *mujtahid*, but about its permissibility. Imam Abu Ḥanifah (rh) allowed it, whereas Imam ash-Shâfi'i (rh) prohibited it: the latter argued that the level of certainty someone acquires through his or her own *ijtihâd* must exceed that which could be ever acquired through someone else's *ijtihâd*.²⁴

Whenever we seek a ruling on a particular issue, it is either a contemporary matter or one that has been previously addressed. If it is new, then the position of the four *madhâhib* is not even present, except through *takhreej* (a form of analogical deduction based on a position in a *madhhab*), which usually offers some flexibility and is not particularly binding. If it is a matter that has been previously addressed, then the question is whether a position outside of the agreement of the four *madhâhib* may have any merit.

While it is commendable for Muslims to be wary of positions that conflict with the agreement of the four imams, this wariness should not completely rule out such positions. Abu al-Khattâb (rh) (d. 510 AH) stated in his book *At-tamheed fî uṣool al-fiqh*,

*The proofs on the [authority of] consensus do not pertain to them (the agreement of the four imams), because they are among the believers of the ummah, and their status as imams does not change the rulings of ijma'.*²⁵

Ibn Taymiyyah (rh) held the same opinion and mentioned several instances where some followers of the four imams dissented from their agreement.²⁶ While Imam al-Qarâfi (rh) was one of the scholars who reported from Ibn aṣ-Ṣalâḥ (rh) the agreement on following one of the four *madhâhib*, he said in a different place (and

²⁴ See *Qawâ'id al-ahkâm fî maṣâlih al-anâm* by 'Izz ad-Deen ibn 'Abdil-'Azeed ibn 'Abdis-Salâm, Beirut: Dâr al-Kutub al-'Ilmiyyah, 2/160.

²⁵ *At-tamheed fî uṣool al-fiqh* by Abu al-Khattâb al-Kallodhani. Makkah: Markaz al-Baḥth al-'Ilmi wa Iḥyâ' al-Turâth al-Islâmi, 1406 H/ 1985 CE, 3/281.

²⁶ *Majmoo' al-fatâwâ* by Ibn Taymiyyah, Taqi ad-Deen Aḥmad, Cairo: Maktabat Ibn Taymiyyah, 20/10.

context) that a consensus was established during the time of the Companions that whoever converts to Islam may ask any of the scholars and is not bound to ask certain ones, and that one who asked Abu Bakr and 'Umar may still ask Mu'âdh and Abu Hurayrah and others, and he challenged anyone who claimed those consensus had been revoked to produce evidence for that.²⁷ Imam Ibn Hajar al-Haytami ash-Shâfi'i (rh) explained that it is permissible for a scholar to follow an *ijtihâd* outside the four *madhâhib* as long as it is well documented, and its conditions and all necessary details are known, and he attributed this opinion to Imam as-Subki (rh).²⁸ Imam an-Nafrâwi al-Maliki (rh) attributed this position to some of the verifying scholars—without limiting the permissibility of *taqlêd* to the scholars.²⁹

What should be clear is that there is no legitimate justification that the agreement of the four *madhâhib* establishes consensus, and if it does not, then there are no grounds for adding their agreement to the sources of legislation. Their agreement should rather serve as a warning sign for the *mujtahid* to proceed with caution and the non-*mujtahid* to stop. As mentioned above, even those who did not allow the public to follow other than one of the four *madhâhib* recognized that the truth may exist outside their agreement, and they allowed the *faqeeh* (pl. *fuqahâ'*: specialist in *fiqh*) to adopt a position outside that of the four schools.³⁰ As mentioned in our discussion of the existing flexibility within the juridical theory, they also allowed the use of unauthorized positions in the *madhâhib* for valid reasons.

In our times, what can be done to protect people from the chaos of unregulated *fatwas* is to stress the guidelines that must be followed in mainstreaming positions that are counter to the agreement of the four *madhâhib* (which will be addressed later) and to advance the cause of collective *ijtihâd*, which confers greater validity on new positions, as Shaykh Mustafa az-Zarqa remarked when he talked about reopening the gates of *ijtihâd*.³¹

²⁷ *Sharh tanqeeh al-fuṣool* by al-Qarâfi, Cairo: Sharikat at-Tibâ'ah al-Fanniyyah, 1973, p. 432.

²⁸ *Tuḥfat al-muḥtâj* by Ibn Hajar, Cairo: al-Maktabah at-Tijâriyyah, 1983, 1/47.

²⁹ *Al-fawâkih al-dawâni* by an-Nafrâwi, Beirut: Dâr al-Fikr, 1995, 2/356.

³⁰ See *Fayd al-Qadeer* by Abdul Ra'oof al-Munawi (d. 1031), Cairo: al-Maktabah al-Tijâriyyah al-Kubra, 1/210.

³¹ *Al-ijtihâd al-jamâ'i wa dawr al-fiqh fi ḥall al-mushkilât* by Mustafa az-Zarqa, Jam'iyyat al-Dirâsât wal-Buḥooth al-Islâmiyyah, p. 49.

An example of a new collective *ijtihâd* is the decision of the Fiqh Assembly of the OIC (Organisation of Islamic Cooperation) concerning the manufacturing contract (*'aqd al-istiṣnâ'*) whereby people may purchase unbuilt homes and pay their price in installments. This transaction is considered a type of *salam* (sale with payment in advance) by the Mâliki, Shâfi'i, and Ḥanbali schools, which means all of the conditions of *salam* will apply to it, including the immediate payment of the whole price. The reason for this particular condition is so that the transaction does not become forbidden because of the deferment of both the price and the commodity (*bay' al-kâli' bil-kâli'*). However, Imam Abu Ḥanifah (rh) considers it a separate contract since, unlike *salam*, it involves the manufacturing of the commodity. This position allows the buyer to pay the price in installments. Yet, according to Abu Ḥanifah, this contract will turn into *salam* if a deadline is set for submitting the commodity. His two disciples held a different position, and allowed setting a deadline. The Fiqh Assembly of the OIC indicated that a deadline should be set, and that this should not change the contract from *istiṣnâ'* to *salam*, allowing for deferred payments. Thus, the Assembly approved the sale of homes before their construction and paying the price in installments if there is an accurate description of the property.³² This is an important ruling that is vital for the thriving of a major industry. Its adoption by a major *fiqh* council removed the discomfort many people may have had because of its perceived contradiction with the authorized view of the four *madhâhib*. The same may be said about Ibn Taymiyyah's position on the composite threefold divorce. He counted it as one divorce. His position was counter to the authorized view of the four *madhâhib*. The adoption of this position by *fatwa* agencies in many Muslim countries, including Egypt, Syria, and Jordan, has conferred it with mainstream acceptance. In summary, one may say that the mainstreaming of positions outside the agreement of the four *madhâhib* should be contingent upon their validation by collective *ijtihâd* or acceptance by a large group of verifying scholars.

³² Resolution # 65 (7/3), Sixth Annual Conference of the OIC, 1412 AH/ 1992 CE.

Flexibility Within Juridical Theory (*Uṣool al-Fiqh*)

Objectives of *Shariah* and reform

The *maqâṣid* of *Shariah* and their role in *tajdeed* is a frequently and heatedly debated issue. The primary objectives of *Shariah*, as deduced by the scholars, are the preservation of religion, life, intellect, lineage, honor, and wealth of the people. The *Shariah* not only prioritizes among these objectives, but it also recognizes three levels within each of them: luxuries, needs, and dire necessities. A third aspect of brilliance is the flexibility of the *Shariah* wherein concessions are made for dire necessities, and to some extent, for needs as well.

Muslim thinkers who were searching for a way to reform the Islamic collective mind, like the prominent Moroccan critic and professor of philosophy Muhammad ‘Âbid al-Jâbiri (rh), had hopes, as he posited in his book *Wijhat naẓar*, that the use of *maqâṣid* would be the key to that reform. They felt that such use—coupled with a proper understanding of the reality to which the rulings were meant to be applied—would result in a major renaissance in Muslim communities. There is no doubt that this is true. However, a problem arises when some of them seek to use *maqâṣid* in isolation from the detailed rulings in the books of *fiqh* and even in the textual proofs. The *maqâṣid* are the highest level of abstraction in Islamic law, like the ultimate transcendental values of Plato (truth, beauty, and goodness) and the motto of the French Revolution (liberty, fraternity, and equality). Although humans have perpetually agreed on the merit of these values, they have forever disagreed on the roadmap to them. This is where the *Shariah* shines bright, for it is what grants guidance towards the realization of those great objectives and values, quenching humanity's thirst for direction. Linguistically, *Shariah* (*sharee'ah*) refers to a path which leads to a water supply. Water is essential for our physical sustenance, and invoking the Divine guidance of Allah is essential for our spiritual (and overall) sustenance.

The middle position between those who exaggerate the utility of *maqâṣid* and those who reject their role in guiding the *ijtihâd* of the *faqeeh*, in my belief, is that the

faqeeh must always be mindful of the *maqâṣid* (as addressed in the discussion of the rational proofs), but he or she should not circumvent the detailed rulings, the methodology of deduction, or the legal maxims to realize those objectives. They must provide valid justification if they decided to use *istiḥsân* or other legal devices to achieve those *maqâṣid*. It is those legal experts that are most suited to employ the *maqâṣid* without compromising the methodology of deduction laid out in *uṣool al-fiqh*. They will always be capable of finding a way to their proper realization through the proper understanding of the textual proofs and legal maxims (*al-qawâ'id al-fiqhiyyah*); the latter are a lower level of abstraction than the *maqâṣid*, and thus much more reckonable.

A mistake that many callers to *tajdeed* through the understanding of *maqâṣid* make is overestimating the capacity of the human intellect in realizing those *maqâṣid* independently. The error their diametrical opponents fall into is underestimating the human intellect, which results in a state of stagnation and deprives the *Shariah* of its flexibility in addressing ever-changing realities—a salient quality that guarantees its transcendental vitality.

The role of human intellect

The pressing question here is whether human intellect can suffice in realizing the *maqâṣid* mentioned above. The scholars have disagreed regarding the ability of humankind to discern between good and bad (*ḥasan* and *qabeeh*). The Mu'tazilah believed that human intellect is totally capable of this (and liable for it as well). Many Ash'aris and some Atharis said it is not (but they still employed rational thought in the matters of law). Many Maturidis and Atharis, including Ibn Taymiyyah,³³ maintained a middle position and said that human intellect is partially capable of that discernment; however, it is incomplete and clouded by ego, prejudice, ignorance, and so on. They also maintained, like the Ash'aris, that people are not liable based on this discernment until they receive a revelation from God. The last position has great merit, because all humans agree at some level on

³³ *Majmoo' al-fatâwâ* by Ibn Taymiyyah, 8/434.

an objective consistent system of basic moral values. The *Shariah* acknowledges that discernment mechanism which exists in every human being; it calls it *fitrah* (natural disposition). Based on this position, which Ibn Taymiyyah (rh) attributed to the majority of *Ahl us-Sunnah*,³⁴ the intellect has a great role in drawing that roadmap by ensuring a solid understanding of the *Shariah* and its *maqâṣid* and a clear understanding of the reality within which the *Shariah* operates.

Before we talk about the interplay between the intellect and *Shariah*, we must ask about their respective scopes of operation. What parts and how much of our lives are controlled by the *Shariah* and how much is left for human thought? As Muslims, we comply with the Divine. Life itself is a gift from Him. We live it by Him and for Him. However, how much did the Divine leave for us to decide for ourselves, while still being under His authority? Contention between the Divine and the secular in our modern discourse as Muslims is intense. Many times, the proponents of secularism assault the place of the Divine in the 'public sphere.' However, we need to ask ourselves if the opposite is also true. When you hear of clinics that claim to treat patients with prophetic medicine, you must find the idea offensive to the Prophet ﷺ himself and his teachings. He ﷺ was, after all, the one who said,

أَنْتُمْ أَعْلَمُ بِأَمْرِ دُنْيَاكُمْ.

You know best about the affairs of your world. (Reported by Muslim)

It is true that the Prophet ﷺ did prescribe some medications. However, only very few of these prescriptions have an indication that their source was Divine revelation. Otherwise, the Prophet ﷺ used the same medicines available to him at the time and in the place he lived. While some scholars, like Ibn al-Qayyim (rh), believed that all of his prescriptions are infallible, others, like al-Qâḍi 'Iyâd (rh) and Ibn Khaldoon (rh), believed they are not. Excluding the few prescriptions that have some indication of a Divine origin, the second position seems more consistent with the *hadith* above, and as Ibn Khaldoon pointed out, he ﷺ came to teach us

³⁴ Ibid.

about the religion, not about medicine and the like.³⁵ Whichever position you are more comfortable with, the fact that should not be missed is that there is no separate genre of medicine called 'prophetic medicine.'

The matter gets more contentious when the discussion pertains to politics, economics, or other aspects of public policy. It is to be expected that there would be Islamic instructions and guidelines regarding these matters. It seems though that we selectively abandoned some of the most obvious ones, like the concept of *shoorâ* (consultation), which, if we consider it binding, may be translated as 'majority rule.' Having said that, it seems that those areas were left very lightly regulated and without detailed instruction in order to allow for human creativity and leave ample room for human intellect to decide what is suitable in different times and places. If we had been commanded to abide by direct democracy, the command would have been inapplicable for more than twelve centuries because it was simply logistically impossible. It would have also barred people from choosing some form of representative oligarchy if they found it more suitable in certain circumstances. The endless debate over Islam being more capitalist or socialist or a completely separate system is an indication of the light regulation in this area that has allowed this discussion to take place between sincere scholars and thinkers.

Beyond setting boundaries between the Divine and the secular, the interplay between the intellect and *Shariah* is enormous. One of the roles of the intellect, which is guided by the text of revelation and the tradition, is to examine the tradition in light of the revelation, the *maqâsid*, and *al-qawâ'id al-fiqhiyyah*, and to determine which opinions are most justifiable and most suitable. Imam Ibn al-Qayyim (rh) wrote,

The Shariah is based on wisdom and the pursuit of the welfare of humanity in their fleeting life and in the life to come. It is entirely just, wise, beneficial, and merciful. Anything that veers from justice into injustice, from mercy to its opposite, from wisdom to foolishness, and

³⁵ *Târeekh Ibn Khaldoon* by Abdul-Rahmân Ibn Khaldoon, Beirut: Dâr al-Fikr, 1988, 1/651.

*from the welfare of humanity to its harm, is not part of the Shariah, even if it has been included therein by misinterpretation.*³⁶

These positions, which were included by misinterpretation in the *Shariah* (meaning here the *fiqhi* legacy), need to be identified. The critical examination of the great legacy of the scholars is not an assault on the *Shariah*, as long as it is done by qualified experts, for proper purposes, and with the respect due to our intellectual elders, those who spent their lives serving the religion and its branches of study.

The intellect has another role here that relates to changing realities. A *fatwa* is a specific ruling, or the application of *Shariah* in tailored details, so it is the customization of a ruling for a certain situation. There is even more of a human element here—and subsequently a greater margin of error—since a *fatwa* requires understanding the texts of the *Shariah* as well as an understanding of the situation being judged. When you add to this the enormous changes that have taken place in the world in the last two hundred years, you will be able to appreciate how much effort should be spent in examining the *fatwas* in classical *fiqh* books before we rush to apply them to current realities. If we go by the expression of Imam ar-Râzi (rh),³⁷ there will be a lot of rational abrogation, which is abrogation of a ruling because of the absence of its sphere of operation (*dhahâb al-maḥal*). However, the word ‘abrogation’ here may have been used loosely by ar-Râzi (rh). We can simply say that the rule is inapplicable due to the absence of the conditions of its application, as Imam al-Qarâfi (rh) remarked.³⁸ For example, the condition of the imam (head of the Muslim state) being from the tribe of Quraysh may have been simply, as Ibn Khaldoon maintained, to defuse conflict and chaos in the immediate succession to the Prophet ﷺ. Nowadays, millions of people trace their roots back to Quraysh, and there is no dependable way of verifying the veracity of their claims. The ruling is, therefore, considered by many to be inapplicable.

Those who master the different sciences and fields of human activity would be the best people to employ the Islamic value system in them. The scholars need to have

³⁶ *I'lâm al-muwaqqi'een* by Ibn al-Qayyim, Beirut: Dâr al-Kutub al-'Ilmiyyah, 1991, 3/11.

³⁷ *Al-maḥṣool* by ar-Râzi, Beirut: ar-Risâlah Foundation, 3/74-75.

³⁸ *Nafâ'is al-uṣool fi sharḥ al-maḥṣool* by al-Qarâfi, Makkah: Nizâr al-Bâz, 5/2073-2074.

some mastery of those fields to provide proper guidance in them. Then, we must resort to the division of *ijtihād*, where scholars may be most sought for *fatwas* in the areas of their specialization. If that is not always possible, then it may be required that *fatwas* in such matters be undertaken collectively with the *faqeeh* being the last signatory, after listening to various experts and learning sufficiently about the issue at hand.

Expansion of our use of rational proofs

In our existing juridical theory, there is an expected emphasis on the authority of textual proofs (the Qur'an, the *Sunnah*, and the *fatwas* of the Companions), but there is also an acknowledgment of a myriad of rational proofs, such as *qiyās* (analogical reasoning), *al-maṣlaḥah al-mursalah* (consideration of interest), *istiḥsān* (juristic preference), '*urf* (norms and customs), and *sadd/fath al-dharā'i*' (blocking and opening the means to evil and good, respectively). These rational proofs provide a great repository for renewal-enabling instruments when the *faqeeh* approaches them while being cognizant of the *maqāṣid* and the wisdoms of legislation.

For example, the different forms of *qiyās* provide great malleability and strength to the body of *fiqh*; this is particularly true of the less technical *qiyās*, which is more observant of the *maqāṣid* and the principle of equity. Also, using the *ḥikmah* (wisdom; which is the primary reason behind the legislation of a particular ruling) in addition to the '*illah*' (which is the immediate contingency of the ruling) will give great vitality to *qiyās*. Using the *ḥikmah*, when it is apparent (*zāhir*) and measurable (*mundabīṭ*) is the position of al-Āmidī, Ibn al-Hājjib, aṣ-Ṣafiy al-Hindiyy, and many Ḥanbalis.³⁹ This is also the way in which the Qur'an attaches rulings to the ultimate wisdom of their legislation. Even when some scholars stress that *qiyās* cannot be based on the *ḥikmah*, you find them considering it in their application of *qiyās*. A good example of this is the ruling on combining the prayers for the sick, which lacks any specific proof in the text of revelation: you find the Mālikis, the Ḥanbalis, and many Shāfi'is allowing it, using analogy to the rule on combining prayers for travel and for prolonged bleeding, on the basis of preventing

³⁹ *Al-muhadh-dhab fi 'ilm uṣool al-fiqh* by Abdul-Kareem an-Namlah, Riyadh: Maktabat ar-Rushd, 1999, 5/2121.

hardship. Hardship is not the *'illah* (immediate effective cause) in combining the prayers for traveling; it is rather the *hikmah* (wisdom behind the legislation). We find the Ḥanbalis using that rationale to further expand the list of valid excuses for combining prayers to include various reasons that may cause hardship or harm to a person concerning his or her health, dignity, or even livelihood.⁴⁰ Ibn Taymiyyah (rh) expounded upon this to include a baker who fears that his dough will get spoiled if he leaves it.⁴¹ It was also Ibn Taymiyyah's understanding of the wisdom of the prohibition of intoxication that led him to keep his disciples from preventing the Tatar soldiers from drinking. He reasoned that if the invaders became intoxicated, people might be safe for a while from their evil, because whenever they were sober, they pillaged the city and spread mischief.

The consideration of *hikmah* is not limited to using it in *qiyās*, but it affects the understanding of the *naṣṣ* (text of revelation) itself. For example, you find the Ḥanafis and Mālikis considering, in addition to other factors, the ultimate wisdom behind the legislation of *tayammum* (dry ablution) where they consider any surface of the earth suitable for it, unlike those who, based on the wording of one report, limited it to mean soil.

The consideration of *hikmah* is also behind the concept of *istiḥsân*, which is an antidote to the literalism and technicality that may frustrate rather than serve the ideals and objectives of *Shariah*. It is setting aside an established analogy in favor of an alternative one that serves the ideals of justice and public interest in a better way. This form of *istiḥsân* originally considered by Imam Abu Ḥanifah (rh) and his main disciples, as Ibn Taymiyyah noted, is not the form that was denounced by Imam ash-Shâfi'i and Imam Aḥmad when they encountered some of the later Ḥanafī scholars practicing it.⁴² Al-Âmidī (Shâfi'i jurist) stated that,

⁴⁰ *Kash-shâf al-qinâ'* by Maṣṣūr al-Buhooti, Beirut: Dâr al-Kutub al-'Ilmiyyah, 2/6.

⁴¹ *Al-inṣâf fi ma'rifat ar-râjih min al-khilâf 'alâ madhhab al-Imâm al-Mubajjal Aḥmad ibn Ḥanbal* by 'Ali ibn Sulaymân al-Mirdâwi, Cairo: Dâr Ḥajar, 1995, 5/91.

⁴² *Jâmi' al-masâ'il, qâ'idah fil-istiḥsân* by Ibn Taymiyyah, p. 195. Retrieved from *Shamilah* [computer software].

notwithstanding his explicit denunciation of *istiḥsân*, Imam al-Shâfi'i (rh) himself resorted to *istiḥsân* on several occasions.⁴³

For a practical example, traditionally our jurists agreed that someone who is in debt may subtract their debts from their assets when calculating their *zakat*. However, nowadays people incur debts to purchase durable assets, such as houses and investment tools. If we allow people to subtract their mortgages and the debts incurred to buy machines for their factories, many wealthy people will not pay *zakat* at all. The scholars, through juristic preference, excluded investment debts from those debts that may be subtracted from the 'zakatable' assets. This *istiḥsân* is observant of the spirit of the legislation of *zakat* and its objectives and wisdoms, including the prioritization of the rights of the poor.

The place of *maṣlaḥah* in the *Shariah* is established, whether, the jurists recognize *istiṣlâḥ* (acquisition of benefit) in theory as a source of legislation or not. The fact is that all of them in their actual deduction of rulings considered *maṣlaḥah*. The question is not about the consideration of *maṣlaḥah* but rather the strength of this in the face of the explicit or implicit meaning of the text of revelation. One finds that scholars differ regarding this: their opinions fall on a wide spectrum from Najm-ud-Deen at-Ṭoofi (rh) who gave *istiṣlâḥ* almost unchecked authority, to others who limited it to instances where there is no superior basis for legislation in the revelation; and even then, this particular *maṣlaḥah* has to be recognized by the *Shariah*.⁴⁴ If we tie this into the role of *maqâṣid* in *tajdeed*, we can simply expand the recognizable *maṣlaḥah* to include any benefit that is harmonious with the *maqâṣid* of the *Shariah*: that is, all the benefits that are recognized by sound intellect. Where there is a conflict between the perceived benefit and the text of revelation, a careful examination of both is warranted by qualified masters of *fiqh*.

⁴³ *Al-iḥkâm fî uṣool al-aḥkâm* by Al-Âmidî, Beirut: al-Maktab al-Islâmi, 4/157. Retrieved from *Shamilah* [computer software].

⁴⁴ See *Nazariyyat al-maṣlaḥah fil-fiqh al-Islâmi* by Ḥusayn Ḥamid Ḥassân, Dâr an-Nahdah al-'Arabiyyah, 1971, p. 10.

There is always an error, whether in the estimation of the benefit, or due to overlooking the overriding associated harms, or in our understanding of the *naṣṣ*.⁴⁵

“Customs are binding” is a legal maxim of *Shariah*. ‘*Urf* which does not oppose the *Shariah* is, hence, given authority and recognized as evidence. In other words, the Law-Giver considers customs a determining factor in the rulings on interpersonal dealings, not as a stand-alone source of law, usually, but a secondary one that will ensure the proper application of the *naṣṣ*.

Allah says,

خُذْ الْعَفْوَ وَأْمُرْ بِالْعُرْفِ وَأَعْرِضْ عَنِ الْجَاهِلِينَ

Take what is given freely, enjoin what is ‘*urf* (known to be good), and turn away from the ignorant. (al-A‘râf 7:199)

Allah also says,

وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ

And due to them [i.e., the wives] is similar to what is expected of them, according to what is *ma‘roof* (considered reasonable). (al-Baqarah 2:228)

That which is ‘known to be good’ and ‘considered reasonable’ is left to the judgment of the society or community, as long as there is no conflict with a clear text of revelation.

An example of the consideration of societal norms is what Abu Dâwood reported from Ḥarâm ibn Muhayyiṣah on the authority of his father:

*A she-camel belonging to al-Barâ’ ibn ‘Azib entered a man’s garden and ruined it. The Messenger of Allah ﷺ decreed that the property owners must safeguard their wealth by day, and the herd owners must keep their animals [from harming] by night.*⁴⁶

⁴⁵ *Dar’ ta‘ârud al-‘aql wal-naql* [Refutation of the contradiction of reason and Revelation] by Ibn Taymiyyah (d. 728/1328) is all about this.

⁴⁶ *Sunan Abi Dâwood*, authenticated by al-Albâni (sunnah.com/abudawud/24/154).

If people in a different time or place agreed that the owners of livestock must watch them all the time, their 'urf (custom) will be the basis of judgment between them. Imam al-Qarâfi stated:

*Whenever the customs change, take that into consideration, and whenever they end, drop them (out of the equation), and do not be stiffly bound your entire life by that which is written in books. Similarly, when someone from outside your region comes to seek your fatwa, do not apply to him the norms ('urf) of your town. Instead, ask him about the norms of his town and base your fatwa on them, not on the norms of your town or that which is established in your books. This is the plain truth; stiffness in applying the transmitted edicts is misguidance in the religion and ignorance of the objectives of the Muslim scholars and the pious predecessors.*⁴⁷

Imam Ibn al-Qayyim wrote:

*He who issues fatwas to people based only on what is transmitted in books, despite the differences in their norms, customs, times, and places, and their own conditions, has gone astray and led others astray. His crime against the religion is greater than that of one who treats all people, regardless of their countries, customs, times, and personal inclinations, by that which is in the books of medicine. These ignorant muftis and physicians are the most damaging to the people's religion and bodies. Allah alone is the one sought for assistance.*⁴⁸

Through this maxim, the *Shariah* recognizes people's varying norms, customs, and traditions, and preserves the cultural identities of diverse nations. This also applies to people of different times, accommodating the changes that humans of different generations are bound to experience. In summary, the expansion of the use of rational evidence that is guided by the *maqâṣid* and observant of the bounds set by the text of revelation and genuine consensus will provide a major source of flexibility and serve as an instrument of *tajdeed*.

⁴⁷ *Al-furooq* by Shihâb al-Din al-Qarâfi, 'Alam al-Kutub, 1/191.

⁴⁸ *I'lâm al-muwaqqi'een*, 3/66.

Flexibility in the existing theory of *ijtihad*

Quoting earlier scholars, Imam Ibn Taymiyyah stated,

إجماعهم حجة قاطعة واختلافهم رحمة واسعة

Their [the scholars'] consensus is a definitive proof, and their divergence of opinion is a vast mercy.⁴⁹

The vastness of our *fiqhi* legacy and the many disagreements among the different *madhâhib* and independent *mujtahideen* cause frustration to some students of *fiqh* and junior *fuqahâ'*. This is, however, a major source of flexibility that enables renewal. Many followers of the four most reputable schools allowed transfer (*tanaqqul*), even for the public,⁵⁰ from one *madhhab* to another, and *takhayyur* (expert selection) or patching positions (*talfeeq*) from the different *madhâhib*; something that is frequently done in contemporary *fiqh* assemblies by scholars who are otherwise wholly committed to their own *madhâhib*.

Concerning the concept of *tanaqqul* from one *madhhab* to another, Imam Ibn Nujaym al-Ḥanafî wrote:

It is permissible to follow any mujtahid one pleases, even after the codification of the madhâhib as is the case today. It is also permissible for him to transfer from his madhhab, but he should not seek out the concessions (rukhaṣ), and if he did, would he be a deviant (fâsiq)? [There are] two views. The commentator said, the most eminent view: [he is] not; and Allah knows best. In the beginning of At-tatârkhaniyah, [the author] wrote two chapters on religious decrees; the summary of the first is that Abu Yusuf said that issuing a fatwa is permissible only for a mujtahid, while Muhammad permitted it for anyone whose correct views are more numerous than his errors. It is reported from Al-iskâf that the most knowledgeable in a town has no excuse to avoid [issuing fatwas].⁵¹

⁴⁹ Majmoo' al-fatâwâ, 30/80. The *hadith* cited in this regard is not authentic.

⁵⁰ At-taqreer wal-taḥbeer 'ala taḥreer al-kamâl, 3/352.

⁵¹ Al-baḥr ar-râ'iq, 6/292. At-taqreer wal-taḥbeer, 3/352.

Imam Zakariyâ al-Anṣârî ash-Shâfi'i said:

It is permissible for the non-mujtahid "to follow any mujtahid he chooses, if the madhâhib are codified like they are today." Then, they may follow each of them in some issues, for the Companions used to ask someone one time and another one another time, without any denunciation [of this practice by any of them]. "He may also transfer from his madhhab" to another one, whether or not we said he is bound to seek the more knowledgeable or allowed him to choose any of them, as when he follows someone in their ijtihâd concerning the qibla sometimes and [follows] another one at other times. However, he may not seek out the concessions, for selecting them leads to the compromise of one's religious dutifulness. "If he still chose them from the different madhâhib, would he become a deviant (fâsiq)? Two views; the more esteemed one: no." This is different from one who selects them from the madhâhib that have not been documented, if he was in the early era, he would certainly not be a deviant (fâsiq), but if he is from the latter ages, it appears that he would become a deviant (fâsiq) for sure.⁵²

The Ḥanbalis agree with this concept, and Abu al-Khaṭṭâb al-Kallodhani (rh) even cites consensus on it.⁵³ Al-Qâḍî Abu Ya'lâ (rh) cites several reports from Aḥmad allowing his disciples and other people who asked him to find a concession in *fatwas* by other scholars, referring them at times to Abdul Wahhâb al-Warrâq, Ishâq, or Abu Thawr, and even to locations where scholars gathered to ask any of them.⁵⁴ It is obvious that, to Abu Ya'lâ (d. 458 AH), the concept was not limited to the four *madhâhib*.

⁵² *Asna al-Maṭâlib fî Sharḥ Rawd aṭ-Ṭâlib* by Zakariyâ al-Anṣârî, Cairo: Dâr al-Kitâb al-Islâmî, 4/286.

⁵³ *At-tamheed* by al-Kallodhani, 4/334.

⁵⁴ *Al-'uddah fî uṣool al-fiqh* by Abu Ya'lâ al-Farrâ', 5/1571. Retrieved from *Shamilah* [computer software].

The utility of weak or unauthorized positions

Even if we consider an opinion weak, it may sometimes be adopted to relieve some hardship, provided that it meets certain conditions, as found in the following verses by the Mâliki author of *Marâqi as-so 'ood*:

وَكَوْنِهِ يُلْجِي إِلَيْهِ الضَّرَرُ إِنْ كَانَ لَمْ يَشْتَدَّ فِيهِ الْخَوَرُ
وَتَبَتِ الْعَزُومَةُ وَقَدْ تَحَقَّقَا ضُرًّا مِّنَ الضَّرِّ بِهِ تَعَلُّقًا

*Finally, because the pressing need or necessity may compel people to act upon such [weak positions] if they are not too weak, and their attribution [to a mujtahid] was established, and the one under duress is certain of his/her necessity.*⁵⁵

One may add to those two more conditions that al-Qarâfi quoted from previous Mâliki scholars:

1. That one does not seek out concessions wherever they are.

This may be part of the condition mentioned above, which is the presence of need. Thus, one may not screen all the *madhâhib* of the previous scholars in order to take the easiest position among them concerning every matter. This is the position of the vast majority. A minority of scholars allowed this. They also attribute it to 'Umar ibn 'Abdul-'Azeez, who said,

مَا أُحِبُّ أَنْ أَصْحَابَ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لَمْ يَخْتَلَفُوا؛ لِأَنَّهُ لَوْ كَانُوا قَوْلًا وَاحِدًا
كَانَ النَّاسُ فِي ضَيْقٍ وَإِنَّهُمْ أَيْمَةٌ يُقْتَدَى بِهِمْ وَلَوْ أَخَذَ رَجُلٌ بِقَوْلِ أَحَدِهِمْ كَانَ فِي سَعَةٍ

*I would not like it if the Companions of the Messenger of Allah ﷺ had not differed, for if they had agreed on one opinion, people would be restricted. They (the Companions) are the leaders to be followed, and if a person were to adopt the opinion of one of them, he would not be blameworthy.*⁵⁶

⁵⁵ *Nashr al-bunood 'ala Marâqi as-So 'ood* by Abdullâh Ibn Ibrâheem al-'Alawi, 2/270-271. Retrieved from *Shamilah* [computer software].

⁵⁶ *Jâmi' bayân al-'ilm wa faḍlih* by Ibn 'Abdul-Barr, 2/901. Retrieved from *Shamilah* [computer software].

However, the vast majority of scholars qualify that statement to mean that one may take an easier position of a qualified *mujtahid* if it spares him or her some hardship, but may not simply select every easy position he or she encounters.

2. That one does not compose a position which is rejected by consensus. (This applies mostly to *talfeeq* (patching or mixing of different positions)).

Al-Qarâfi approvingly reported from az-Zanâti that the three conditions to make a transfer from one *madhhab* to another permissible are: 1) that one does not patch the opinions of the different *madhâhib* in a way that produces a position which has been rejected by consensus; 2) that the person engaging in this *talfeeq* believes in the virtue of the *mujtahid* being followed; and 3) that they do not choose the concessions from all the *madhâhib*. Al-Qarâfi commented that the concessions that are not to be adopted are those that are unfounded and that may be revoked even if issued by a judge.⁵⁷

Also, *talfeeq* that leads to the synthesis of a position rejected by all of the integrated *madhâhib* should only be forbidden in certain cases. If one engages in *taqleed* (following) of one imam in some clauses of a sale transaction and another in others, this contract should still be valid, unless the clauses are mutually exclusive or lead to inequity or deviation that is repugnant to the *maqâsid* of the *Shariah*. This is based on the stronger position, which is that the '*ammi* (the layperson) has no *madhhab*.'⁵⁸ An example of forbidden *talfeeq* is when someone marries without witnesses, citing Imam Mâlik, and without announcement, citing the majority. This marriage is a secretive relationship that is considered unlawful by all. Another example is when one applies different standards to oneself than one applies to others, such as invoking the right to preemption against one of his neighbors but refusing to honor it if another neighbor attempted to use it against him.

⁵⁷ *Sharḥ tanqeeḥ al-fuṣool*, p. 432.

⁵⁸ See *Al-baḥr al-muḥeṭṭ* by az-Zarkashi, 8/375, Dâr al-Kutbi, 1997. Retrieved from *Shamilah* [computer software]; *Hâshiyat Ibn 'Âbideen*, 2nd ed., by Ibn 'Âbideen, Beirut: Dâr al-Fikr, 1/48.

It should be obvious that these examples are different from the case of a layperson asking two *muftis* about two different matters pertaining to *wudu* (*wuḍoo'*: ablution) and getting an answer from a Shâfi'i *mufti* that wiping any part of the hair is sufficient and another answer from a Ḥanafī that (a man) touching a woman without lust is not a nullifier. If he makes *wudu* according to the Shâfi'i position and then touches a woman without lust, he will have retained his *wudu* according to any of the four. Despite that, it seems that his *wudu* should still be valid.⁵⁹ These issues are neither interdependent nor mutually exclusive. Although the majority of scholars after the tenth century prevented this, we do not find it mentioned before the seventh century.⁶⁰ Also, it is the consensus of the Companions that one who asked Abu Bakr and 'Umar about one issue may ask Mu'adh, Abu Hurayrah, or others, about another issue.⁶¹ They never restricted this to issues that do not pertain to the same act of worship. Without the permission of regulated *talfeeq* many modern contracts would not be permissible according to any single *madhhab*. Much hardship would ensue and the vastness of our *fiqhi* legacy would lose an important feature of its malleability and resilience.

One may add another condition here, which is that the follower of the weaker position must not have certain knowledge of its faultiness. Imam ash-Shâfi'i stated,

أجمع المسلمون على أن من استبان له سنة رسول الله ﷺ لم يكن له أن يدعها لقول أحد من الناس

*The Muslims have unanimously agreed that whomever the Sunnah of the Messenger of Allah ﷺ becomes apparent to, it becomes impermissible for him to leave it for the statement of anyone else, regardless of who they are.*⁶²

While he was talking about the scholars, the same may apply to all people who are certain of the erroneousness of some position.⁶³ Wâbisah bin Ma'bad (ra) said: I

⁵⁹ See *Al-fiqh al-Islâmi wa adillatuhu* by Wahbah az-Zuhayli, Damascus: Dâr al-Fikr, 1/106-107.

⁶⁰ Ibid.

⁶¹ *Sharḥ tanqeeḥ al-fuṣool*, p. 432.

⁶² *I'lâm al-muwaqqi'een*, 1/6.

⁶³ See *At-taqreer wat taḥbeer*, 3/352.

came to the Messenger of Allah ﷺ and he said, “You have come to ask about righteousness.” I replied, “Yes.” He ﷺ said,

اسْتَفْتِ قَلْبَكَ؛ الْبِرُّ مَا أَطْمَأْنَتَ إِلَيْهِ النَّفْسُ وَأَطْمَأَنَّ إِلَيْهِ الْقَلْبُ، وَالْإِثْمُ مَا حَاكَ فِي النَّفْسِ
وَتَرَدَّدَ فِي الصَّدْرِ وَإِنْ أَفْتَاكَ النَّاسُ وَأَفْتَوْكَ

*Consult your heart. Righteousness is that about which the soul feels at ease and the heart feels tranquil. And ithm (sin) is that which wavers in the soul and causes uneasiness in the breast, even though people have repeatedly given you their legal opinion.*⁶⁴

Suggestions for Incremental Renewal

Here are some areas of flexibility and suggestions to improve the existent utility of *uṣool* in the adaptation of the laws to changing realities:

- Removing topics that are of no benefit and adding others, such as the legal maxims that are considered a different discipline of knowledge, but must be recoupled with the science of *uṣool* due to their great utility in the deduction of rulings. Also, coupling the study of *uṣool* with that of *maqâṣid* is essential due to the role the *maqâṣid* play in guiding the whole theory. Finally, recoupling the study of *uṣool* with that of *takhreej al-furoo'* 'ala al-*uṣool*, which deals with tracing the various positions in *fiqh* to their roots in the *uṣool* (juridical theory). One must add here that it is essential to update the examples given in the science of *uṣool* and use modern and relevant examples in the application of the principles to detailed rulings, so that the junior *faqeeh* may be trained in addressing contemporary issues.
- Placing a greater emphasis on the sources of rational evidence discussed above.
- Including *dalâlât al-maqṣood* (signification of intended objective). In the chapters of *dalâlât* (significations), which deals with the rules of

⁶⁴ A reliable *hadith* reported by Imam Ahmad and by ad-Dârimi with a good chain (sunnah.com/nawawi40/27).

interpretation, we have two main *dalâlat*: *manṭooq* (stated) and *mafḥoom* (implied). While the scholars have always been aware of the importance of *maqâsid*, it may be helpful to add *dalâlat al-maqṣood* to the rubric. This addition may simply highlight the importance of including the intended objective in the understanding of the text to begin with. Sometimes, scholars who accept the divergent implication (*mafḥoom al-mukhâlafah*) and then reject it are thought by junior *fuqahâ'* to be contradicting themselves in their practice of deduction; whereas these scholars did so purely because their awareness of the intended objectives made them override their previous position on this type of implication. It would be helpful to explain this clearly, in order for the junior *fuqahâ'* to learn the inclusion of *dalâlat al-maqṣood* in their deductive methodology.

- In the chapters on *ijtihâd*, greater emphasis should be placed on collective *ijtihâd*, as discussed earlier, and experts from various fields need to be included in this process.
- There is also a need for placing greater emphasis on specialized *ijtihâd*, the so called *tajazzu' al-ijtihâd* (division of juristic reasoning). This allows jurists to specialize in certain areas of the law, so that they may become more competent in those areas. This is not a new concept; in fact, *tajazzu' al-ijtihâd* is sanctioned by the majority of the scholars as pointed out by Imam Ibn an-Najjâr al-Futooḥi al-Ḥanbali (rh), who wrote, “[*Ijtiḥâd* is divisible] according to our fellows and the majority, and it is the correct position.”⁶⁵
- Finally, there is a need for reexamination of *uṣooli* positions that may have hindered the development of the *fiqhi* legacy, such as the over-reporting of consensus and the requirement of following only one of the four *madhâhib* while avoiding any alternative *ijtihâd*, even from qualified scholars.

⁶⁵ *Sharḥ mukhtaṣar al-taḥreer* by Ibn an-Najjâr al-Futooḥi, 14/74. Retrieved from *Shamilah* [computer software].

Some Practical Examples of Tajdeed

Sometimes we need to reexamine not only the rulings but the very terms we use, since the similarity of the name does not necessarily mean similarity of the named. For example, the prohibition of making a *ṣoorah* (translated as 'picture') of any being that can be said to have a soul: is this prohibition applicable to a photograph by virtue of the two things (picture and photograph) having a name in common in Arabic? Not likely. This still does not mean that they cannot share the same ruling. However, the prohibition of photographs (if one is so inclined) must be reached through analogy, and only if it meets specific requirements.

Was war during the time of the Prophet ﷺ like war is today? Lexically speaking, yes. However, we must ask ourselves if the one-on-one confrontation of thousands of individual soldiers sparring in a battlefield is like the mass and indiscriminate devastation that ensues from modern warfare. If Imam Ibn Taymiyyah says that a catapult may not be used in other than the necessary *jihad* (to repel the enemy),⁶⁶ what would he have said concerning modern war? Should the difference be consequential? Should it make war an even remoter last resort? Did the early Muslims fight for humanity or against it? We are sure they fought and sacrificed their lives to achieve the cause of Divine justice and to liberate humanity from tyranny, to afford people the right to worship their Lord. If so, is the fact that most nations allow their subjects freedom of religion consequential?

When the Prophet ﷺ prohibited women from travelling alone, was travel then like travel now? Would a difference be consequential? It would, at least according to the scholars who rule as acceptable travelling with a safe company; they must have understood that there was some identifiable *'illah* for the prohibition. As mentioned before, sometimes, erudite scholars will even make the well-defined *ḥikmah* consequential to the rulings. Some may claim that, using the same rationale, we may also do away with *hijab* or the rules of proper conduct between the two sexes, since the human community has matured and it is safer for women

⁶⁶ *Majmoo' al-fatâwâ*, 24/69.

to go out in whichever attire they please. This would be in defiance of a clear text and of unchanging human nature as well. The Islamic rules of modesty were meant to protect women, men, and entire societies from an avalanche of evil that would result from failure to observe them. It must be also observed that the societies of the modern and 'civilized' humans of the twenty-first century, when compared to societies of earlier eras, are not experiencing lower rates of infidelity, family breakdown, rape, or psychological disorders related to sex. There is no level of education or cultural sophistication that has proved to be protective against any of these ills.

This religion has immense vitality, so there will never be a time where the *mujtahidoon* fail at finding solutions for newly emerging challenges. All over the world, changes in living standards and conditions in the last two centuries have been immense. Some of these changes have had an enormous impact on family dynamics. In today's world, if a woman decides to stay at home for the interest of the family, and after forty years of marriage her husband divorces her, should he walk away with all of the family's savings because it is 'his' money? Should she get half of it? What if this happened after only two years of marriage? Would that discourage many men from getting married? Is there a point of moderation between those two ends? The *Shariah* has in fact provided a solution, albeit controversial in this case, yet authentic and also supported by the apparent implication of the Qur'an, where Allah says,

وَالْمُطَلَّاتِ مَتَاعٌ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ

And for divorced women is a provision according to what is acceptable—a duty upon the righteous. (al-Baqarah 2:241)

This provision is called *mut'ah*, which may be translated as 'bereavement gift' or alimony. If we employ this provision and make it sizeable and commensurate with the duration of marriage and the socioeconomic status of the family, we can provide a legitimate solution for a new challenge.

Some people may argue that the same changes in our world should warrant a change to the laws of inheritance. This would not fall under *tajdeed* (renewal), but rather *tabdeed* (annihilation). This is a fixed law in the revelation. It is explicitly stated. It is not contingent upon the customs and interests of people. Women do not always take half of what men take. This is only true in certain cases. However, if you make the proportion of inheritance equal in all cases, you must also relieve men of their financial responsibilities towards the women of their households and kin. While certain people (not necessarily Muslims) may find this to be acceptable during different times or eras, it defies the distribution of roles that Allah has designated based on innate differences between the sexes that are not subject to change. Such a suggestion would have been absurd to Westerners in the nineteenth century, and still is to many people throughout the world.

An indispensable component of *tajdeed* must be fact-checking our literature to avoid the recirculation and perpetuation of errors. Advancements in various sciences proved wrong some judgments of some of our jurists—may Allah have mercy on them. They did all they could during their time to ascertain the presence of the effective causes of the various rulings in the individual cases that confronted them. May Allah reward them immensely on behalf of this *ummah*. However, while the Qur'an and the *Sunnah* are infallible, the judgments of the jurists are not. There is no shame in their having erred, consequent to the erring of the experts of their times. It is shameful, however, that the mistake be confirmed and recirculated. For example, modern medicine does not know of—nor can it even theorize about—any cases of human gestation longer than forty-five weeks. This is an example of the interface between Islamic law and other disciplines. As Ibn Abdul-Barr noted, this is a matter that has no basis in the revelation, and is founded completely on reasoning and occurrence.⁶⁷ It is also an example of a case where we cannot afford to limit the truth to the four *madhâhib*. According to them, the longest duration of a pregnancy ranges from two years to an unlimited time period.⁶⁸ It is among the favors of Allah on this *ummah* that some scholars disagreed with

⁶⁷ *Ahkâm al-Qur'ân* by al-Qurṭubî, Cairo: Dâr al-Sha'b, 1372 H, 9/287.

⁶⁸ See *Al-mabṣoot* by as-Sarakhsi, Beirut: Dâr al-Ma'rifah, 30/51; *Ahkâm al-Qur'ân* by al-Qurṭubî, 9/287; *Al-umm* by ash-Shâfi'i, Beirut: Dâr al-Ma'rifah, 1393 H, 5/234; *Kash-shâf al-qinâ'*, 4/356; and *Al-mughni* by 'Abdullâh ibn Aḥmad ibn Qudâmah al-Maqdisi, Beirut: Dâr al-Fikr, 1405 H, 6/260.

the position of the four schools, so that it will not be said that the entire *ummah* was misguided regarding this issue. Al-Ḥasan al-Baṣri hinted that it is ten months.⁶⁹ Ibn Ḥazm limited it to nine months.⁷⁰ The longest term of pregnancy does not surpass ten months, according to modern medicine. It is prudent, though, for the law to make the maximum duration one year, as indicated by Muhammad ibn Abdul-Ḥakam,⁷¹ and as chosen by the law in many Muslim countries. Based on this, the *fatwas* will need to change concerning many issues that are contingent upon this determination.

At times, we have conflicting scholarly positions. Some opinions may be indispensable in our times, even if they are counter to the majority position. When there is nothing definitive in the Qur'an and the *Sunnah* to prevent us from choosing to go with an opinion that provides a solution to a contemporary problem, we ought to. For example, in the past, the jurists differed regarding the methods by which a claim is established in the Islamic judiciary. Some limited it to whatever has been explicitly stated in, or extracted from, the revealed texts. Others widened the circle of evidence to include whatever reveals the truth and paves the way for justice. For this reason, basing rulings on *qarâ'in* (corroborative evidence) was a matter of debate among the jurists.

The difference today is that forensic science has evolved to such a degree that judicial systems throughout the world are extremely reliant on it. Law experts call this type of evidence 'tangible proof,' and despite it being considered a largely modern phenomenon, it still falls under corroborative evidences. The question is, where should the Islamic judiciary stand regarding forensic science? Should it benefit from it? Should this benefit be limited to guiding the criminal investigator and enlightening the judge with important details of the crime? Or should these evidences be used by the judge, whenever they qualify, even in the absence of the customary evidences known to Islamic jurisprudence, such as the testimony of witnesses, admissions, oaths, and *nukool* (refusal to take an oath)?

⁶⁹ *Tuḥfat al-mawdood* by Ibn al-Qayyim, Damascus: Dâr al-Bayân, 1/267.

⁷⁰ *Al-muhallâ* by Ibn Ḥazm adh-Dhâhiri, Beirut: Dâr al-Âfâq al-Jadeedah, 10/316.

⁷¹ *Al-muhallâ*, 10/316; *Ahkâm al-Qur'ân*, 9/287.

I believe that a reasoned incorporation of tangible evidences in what counts as admissible proofs is completely warranted. This was the position of luminaries like Ibn al-Qayyim,⁷² Ibn Taymiyyah,⁷³ and Ibn Farḥoon,⁷⁴ of the Mâlikis, in addition to Ibn al-Ghars⁷⁵ of the Ḥanafis, and some Ḥanbalis.⁷⁶ The use of *qarâ'in* is emphatically not like redefining the admissible proofs or equating the testimony of women in financial matters to that of men. These actions would be in defiance of a clear text, while using corroborative evidences is not. There is reason to believe that there are specific differences between men and women that made the testimony of two women equal to that of one man in financial matters, while a woman's testimony is of the same or higher value than a man's in other areas of knowledge, such as childbirth and breastfeeding.

Sometimes we create rigidity and fear of 'walking away' from what we created. Neither the Prophet ﷺ nor 'Umar⁷⁷ (ra) decreed that the *tarâweeh* prayer should be done in congregation, or that it should be eight or twenty *raka'ât* or that one *juz'* ought to be completed every night. In fact, Imam Mâlik and Imam ash-Shâfi'i consider it superior if *tarâweeh* prayers are done at home. Yet today we adhere to a particular number of *raka'ât* in *tarâweeh* and/or a specific length for its recitation, without this being binding on us. Now, with the time for '*ishâ*' starting very late in North America and other extremely northern or extremely southern lands during the summer, and the many differences between the era of the Companions and our own, should we adhere to a particular format for the *tarâweeh* when none has been designated by Allah, His Messenger ﷺ, or even any of the Companions? Should there be more time for reflection in the local language over the meanings of what is

⁷² See his books *I'lâm al-muwaqqi'een* and *Aṭ-ṭuruq al-ḥukmiyyah*.

⁷³ See the two previous books, in addition to *Al-inṣâf* by Al-Mirdâwi, Cairo: Dâr Ḥajar, 1995, 10/233; Ibn Muflih's *al-Furoo'*, (6/85); and Ibn Taymiyyah's *As-siyâsah ash-shar'îyyah*, p. 136. The last two sources were retrieved from *Shamilah* [computer software].

⁷⁴ See his book *Tabṣirat al-ḥukkâm fee uṣool al-'aqḍiyyah wa manâhij al-aḥkâm*: 2nd section, regarding the types of evidences.

⁷⁵ See *Hâshiyat Ibn 'Âbideen*, 5/354.

⁷⁶ These are mentioned in order of the strength of their support for the use of *qarâ'in* and the scope of its use in their *ijtihâd*.

⁷⁷ 'Umar (ra) found the Companions praying in the *masjid* in small groups, so he simply brought them together and had Ubayy lead them in prayer. Many of the Companions continued to pray at home. Some of them, including Ibn 'Umar, considered it inferior if done at the *masjid* in congregation.

being recited? Should there be more time left for socialization and creating a bond between the 'Ramadan only' congregants and their local *masjid*? I believe all of this is warranted. On the other hand, if someone said that we should do away with the *tarâweeh* prayers in congregation, then he would be calling for the cessation of an agreed-upon practice that has been ongoing since the time of 'Umar (ra). Once again, that is not in any way a form of *tajdeed*.⁷⁸

Some people want, via *tajdeed*, to diminish the role of the *Shariah* in guiding humanity. We believe that beyond the domain of worship and family law, the *Shariah* already leaves enough room for human thought and creativity, and it only provides guidelines and milestones to prevent people from being victims of their own and others' prejudices, biases, and excesses. We do believe, however, that this general guidance is much needed by humanity. We believe that the *Shariah* must contribute to the discourse on contemporary issues such as corporate ethics, bioethics, environmentalism, and so on. This is an important aspect of the *tajdeed* we seek.

In the attempts by Muslim countries to re-normalize Islam's position in the public sphere, they will have to answer many questions. In fact, we have to develop a new *fiqh* that is conscious of the new world we live in: again, without departing from the objectives of the law or the constants of the revelation. The relationship between the ruler and the ruled must be re-evaluated. The consensus reported about the prohibition of rebellion against the oppressive ruler must be re-examined—at least with regard to its modern implications.⁷⁹ If we were to accept it, we must ask whether it applies to a sectarian effort to topple a ruler or a popular uprising by the nation. Would it apply to populist revolutions, even if they were unarmed? What if

⁷⁸ An even more absurd suggestion we have heard is to make the *tarâweeh* start before '*ishâ*'.

⁷⁹ The first one to report it was Ibn Mujâhid al-Baṣri (d. 370 AH). It was contested by many scholars. Ibn Mujâhid (rh) was a resident of Basra, a city deeply traumatized two centuries earlier by the defeat of Ibn al-Ash'ath, which cost the lives of many of its eminent scholars in their fight against the Umayyads. One may ask if there is a basis in the Revelation that made them agree on this edict in the fourth century AH. If there is, how could it have been missed by all of the previous generations of the righteous predecessors and suddenly become so clear to them? If this agreement was based on reasoning related to public interest, which is most likely, then as Shaykh Shaltoot points out, such is the only consensus that may be abrogated by another upon a change in circumstances.

it were supported by *ahl ul-ḥall wal-'aqd*?⁸⁰ Is there an effective alternative to end the tyrannical regimes that have become a signature characteristic of Muslim-majority countries?

What about the caliphate we reminisce about? Does it consist of a central, federal, or confederal government? What is the plausibility of that? Could the OIC (Organisation of Islamic Cooperation) serve that purpose, if it took gradual steps towards becoming more like the European Union, allowing Muslim and non-Muslim states to join if they wished to? Denying Muslim-majority countries the right to seek some form of unity and denouncing the very concept of the caliphate is simply succumbing to outside pressure. This is not a genuine *tajdeed* in the interest of Islam and the Muslims. On the other hand, expecting the return of an Abbasid-style caliphate is a form of rigidity that is bound to impede any progress towards a more plausible form of unity.

The presence of large Muslim minorities in non-Muslim lands is not a recent phenomenon. However, nation-states and secular governments are relatively new. There is a pressing need to normalize and harmonize the relationship between those minorities and their respective countries. This effort is a major part of the needed *ijtihâd*-based *tajdeed*. We need an authentic and realistic formula to reconcile between religious allegiance and national belonging. Muslims in non-Muslim countries must not be seen as a Trojan horse or potential traitors by their compatriots, and they should not act as such.

Finally, this *ijtihâd*-based renewal can only be exercised by the most distinguished *mujtahid* scholars of each era. If the matter is left to those who have not reached this degree of *ijtihâd*, the religion will fall into peril and be subject to distortion, and the enormity committed by non-scholars who engage in this is beyond needing to be mentioned. This involves the greatest calamity: forging lies about Allah—the

⁸⁰ Literally: 'the people of authority.' They are the elites, somewhat equivalent to today's 'representatives of the people,' or the 'senate.' Traditionally, they were the princes, scholars, tribal chiefs, leaders of the army and various professions.

Mighty and Majestic—and speaking about Him without knowledge. Allah (st) says:

وَلَا تَقْفُ مَا لَيْسَ لَكَ بِهِ عِلْمٌ إِنَّ السَّمْعَ وَالْبَصَرَ وَالْفُؤَادَ كُلُّ أُولَٰئِكَ كَانَ عَنْهُ مَسْئُولًا

And do not pursue that of which you have no knowledge. Indeed, the hearing, the sight and the heart—about all those [a person] will be questioned. (al-Isrâ' 17:36)

Therefore, what is required is the reunion between theory and practice, in light of the *ijtihâd* that preserves the constants but accommodates changing variables. This is what existed during the days of the rightly-guided caliphate, and it is what enabled the *ummah* to accommodate the Persian, Roman, Nabataean, Kurdish, Coptic, Berber, and other cultures which led to a civilizational, technological, and cultural development that has never been matched in the history of this world. All of that occurred without the religion itself being tainted by any distortion. But when this vigilant *ijtihâd* vanished, and that was specifically around the middle of the Abbasid era, the gap between theory and practice began widening until Muslim society became divided into groups: people of extravagance who had no care for religion; Sufis who mostly fled the trials of life by escaping into spirituality and monasticism (and some to mysticism) in search of what would satisfy their souls' longing for truth; withdrawn scholars who were fixated upon serving the texts and literature; and the masses who became lost when their leaders lost their compass. Correspondingly, there remained a scarcity of God-fearing scholars, committed to the spirit and letter of the *deen*, to purifying the interior (actions of the heart) and upholding the law, true beacons of light that—by Allah's bounty—no era in the life of this *ummah* may be void of. They are those who remained fighting to revive the true teachings of Islam that have been subverted by heedlessness and corrupted customs, and make these teachings guide the life of the *ummah* once again.

I hope that some of the examples mentioned above clarify, to some extent, what I mean by *tajdeed*. Some readers may justifiably ask what my role is in this effort. It is understandable that *ijtihâd*-based *tajdeed* is the lot of the *mujtahideen*. However, the public can always engage in restorative *tajdeed*. It is also the public that will

establish foundations and institutions to foster *ijtihâd*-based *tajdeed*. If we are still struggling to build mosques, when might we have endowments that could support independent and authentic research institutes?

Let the revival begin by individual repentance, purification of the hearts and intentions, learning the religion from its pristine sources, commitment to righteousness and correctness, and finally, a discerning *ijtihâd* that allows the *Shariah* to continue its role in showing humanity a balanced and holistic path to success in this world and the one to come.