

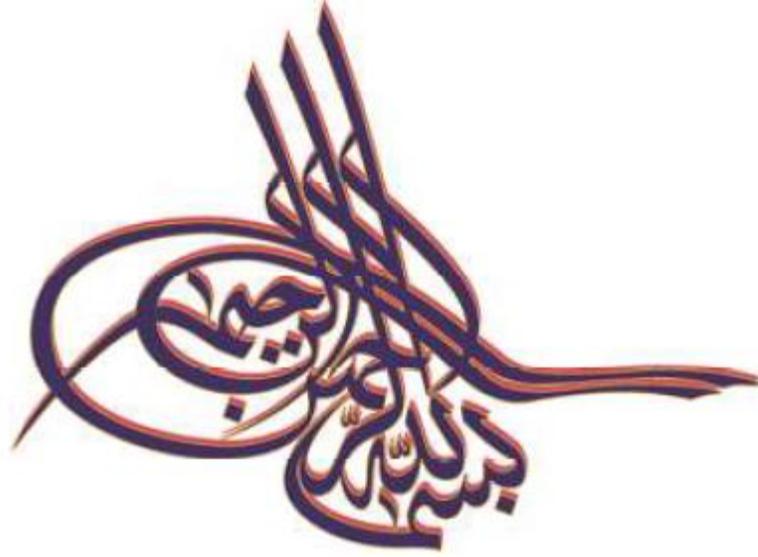


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Principles of "Fatwaa-Making": Easiest Opinions, Madhhab-Combining and Anomalies

Dr. Jamaal Zarabozo

prolific writer, researcher and speaker



"الأراء الفقهية في هذا البحث تعبر عن رأي الباحث و ليس بالضرورة عن رأي أمجا"
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In the name of Allah, the Most Merciful, the Grantor of Mercy

Introduction

For various reasons, in contemporary times, fatwaas play an increasingly important role for Muslims. Many Muslims today do not have access to an Islamic court system nor are the laws in many Muslim countries directly derived from Islamic Law. Muslims, however, need guidance on numerous contemporary issues and one of the only outlets available to them is turning to individuals (or organizations) to provide them with "Islamic rulings" or fatwaas.¹

In the process of issuing a fatwaa, there are many methodological options that various *muftis* have traditionally implemented. These sometimes invoked "options" include a number of contested approaches: invoking *rukhas* ("legal exemptions"), *talfeeq* (combining of *madhhabs*), and reviving *shaadh* (anomalous) views.

Above all, these approaches bring up the question as to what exactly is the goal and purpose of a *fatwaa*. Actually, this question goes well beyond the question of issuing *fatwaas* and is actually related to the entire purpose of Islamic Law itself. Indeed, this even brings up the question as to what constitutes a part of "Islamic law." The events in recent years in the Arab world, in particular Egypt, have highlighted dilemmas that have existed within the Muslim Ummah for centuries now, back to the time of the Fatimids, Mamluks and Ottomans, if not earlier. Thus, although the scope of this paper is restricted to the issuing of fatwaas, the principles are relevant to questions of court judgments, legislation and the codification of Islamic Law.²

1- This explains the explosion of internet fatwaas. Online fatwaas are especially important for Muslim minorities living in the diaspora as they may not have direct access to scholars and Islamic institutions. It is very important to understand how this source of Islamic knowledge affects and biases Muslims' understanding and practice of Islam. This is a topic that probably deserves much more attention than it has received, especially from Muslim authors. One of the earliest studies on this topic is Gary Bunt, *Islam in the Digital Age: E-Jihad, Online Fatwas and Cyber Islamic Environments* (London, England: Pluto Press, 2003). Another interesting work is Derek John Illar, "Cyber Fatwas and Classical Islamic Jurisprudence," *Journal of Information & Computer Law* (Vol. 27, No. 4, Summer 2010).

2- Note that the focus of this paper will be on the mufti (the one giving the fatwaa), as it is prepared for AMJA Conference on "The Principles of Issuing Religious Rulings (Fatwa) – Practical Examples from the Muslim American Community." Issues related to the ones seeking fatwaas and the layperson's approach to fatwaas are beyond the scope of this paper.

Definition of Fatwaa

*Fatwaa*³ lexically means, "to make something clear, to clarify something." As a technical term, *fatwaa* has been defined in various ways by scholars. Al-Ashqar defines *fatwaa* as, "The informing of the ruling of Allah based on Shareeah evidences for the one who has asked about it concerning an issue that has arisen."⁴ Al-Ashqar's definition does not state that the *fatwaa* need be based on *ijtihaad*, as a *fatwaa* is a response to a query and sometimes it does not require *ijtihaad* but simply a passing on of a text, for example. Al-Ashqar also includes in his definition that a *fatwaa* is related to an issue that has arisen, as opposed to an unprecedented issue—as not every question put to a *mufti* is related to an unprecedented issue. One point that al-Ashqar did not include in his definition which others did include (although al-Ashqar did explain it later) is that a *fatwaa* is non-binding, as opposed to a court ruling.⁵ Al-Kindi further notes that a difference between fiqh and *fatwaa* is that fiqh is static and not concerned with particular circumstances while in the case of *fatwaa* the *mufti* has to analyze the particular circumstances, determine what driving legal cause is present and make a ruling based upon that reality.⁶

Above and beyond the definition given, Al-Shaatibi and ibn al-Qayyim emphasize an aspect related to *fatwaas* that should never be forgotten: The *mufti* is essentially acting on behalf of Allah. Al-Shaatibi stated, "The position of the *mufti* in the Ummah is like the position of the Prophet (peace and blessings of Allah be upon him)."⁷ He explains further that the *mufti*'s role is to convey the truth from Allah like the Prophet (peace and blessings of Allah be upon him) had done so. Ibn al-Qayyim's famous work *Ilaam al-Muwaqieen an Rabb al-Aalameen* is essentially entire a reminder to the *mufti* that when he "signs" his *fatwaa* he is actually signing on "behalf of Allah." No doubt, this is a heavy burden on the *mufti*'s shoulders and the only one he can escape sin is if he approaches his role with the proper intention and by attempting to follow the proper methodology to reach his conclusion.

3- The word *futyaa* is considered more proper Arabic (*afsah*). However, *fatwaa* is also sound and has become predominant in the English literature. Cf., Muhammad al-Ashqar, *al-Futyaa wa Manaahij al-Iftaa* (Kuwait: Maktabah al-Manaar al-Islaamiyyah, 1976), p. 7.

4- Al-Ashqar, p. 9.

5- Adding "non-binding" nature to the definition was done by al-Qaraafi and others. Cf., Qutub al-Raisooni, *Sinaah al-Fatwaa fi al-Qadhaayaa al-Muaasirah* (Beirut, Lebanon: Daar ibn Hazm, 2014), p. 26; Muhammad Ibraaheem, *Al-Fatwaa: Ahamiyyatuhaa, Dhawaabituhaa, Aathaaruhaa* (2008), p. 30.

6- See Abdul Razzaaq al-Kindi, *al-Taiseer fi al-Fatwaa: Asbaabuhu wa Dhawaabituh* (Beirut, Lebanon: Resalah Publishers, 2008), p. 105.

7- Ibraaheem ibn Moosaa al-Shaatibi, *al-Muwaafaqaat* (Al-Khobr, Saudi Arabia: Daar ibn Affaan, 1997), vol. 5, p. 253.

Methodological Challenges Facing the *Mufti*

The various definitions of *fatwaa* demonstrate that *fatwaas* are often or mostly given in relation to actual, not theoretical, events and issues. In particular, unprecedented issues or events often require *fatwaas*. Actual events often differ greatly from hypotheticals, with the realities on the ground possibly presenting a very different picture than one would have assumed. Unprecedented events, obviously, require fresh *ijtihaad*.

Muftis face numerous dilemmas and ethical issues. For example, what should a *mufti* do when he feels that the individual he is dealing with does not have the means to handle the most correct answer to his question? Suppose that "most correct answer" is a matter of *ijtihaad* itself and not a point that is definitive in the Quran or Sunnah. Additionally, what if the mufti opines that the theoretically correct view is inconsistent with *maslahah* (public good) or the goals of the Shareeah (*maqasid*).⁸ Could the *mufti* invoke an Islamic version of "the theory of the second best" and reply with a response that is not as sound but will be more appropriate for the individual in question? For that second best response, is the *mufti* free to choose from any of the myriad opinions held by Islamic scholars, even if they be weak or anomalous opinions? The historical practice related to these issues may be different than the theoretical—or sound—practice. The emphasis in this paper will be on what the author considers the sound approach, not what has historically become the practiced in parts of the Muslim world.

8- It is a well-established principle that an *ijtihaad* or *fatwaa* is to change given changes in time and place. The parameters related to that principle are discussed in other papers at this AMJA conference. Hence, they will not be discussed here.

The *Mufti* and *al-Rukhsah al-Shariyyah*

Lexically speaking, the term *rukhsah* can be defined as, "license, facilitation, permission, concession, leave."⁹ As a technical term, it has been used in a couple of different ways. The meaning of first concern here is related to the concept of *rukhsah vis-à-vis azeemah*.

Al-Rukhsah vis-à-vis al-Azeemah

A very basic definition of *azeemah* is given by Kamali: "A law, or *hukm*, is an '*azimah* when it is in its primary and unabated rigor without reference to any attenuating circumstances which may soften its original force or suspend it. It is, in other words, a law as the Lawgiver intended it in the first place."¹⁰ In other words, the revelatory law that has come from Allah includes default actions that a Muslim is required to perform given that there are no exceptional circumstances that would allow or require the Muslim to deviate from that default. Thus, for example, it is expected that a Muslim pray fives time a day, complete with all of its forms of ritual washing, standing, sitting and so forth. In general, in the absence of extenuating circumstances, a Muslim is required to fulfill acts in their complete and normal manner.

However, under certain circumstances, out of the Mercy and Grace of Allah, the Lawgiver has lessened the burden upon the believer. This is what is referred to as a Shareeah *rukhsah* (concessionary law, exemption). Al-Subki stated, "If a Shareeah command is changed to one of ease due to an excuse, even though the conditions for the original command are present, it is considered a *rukhsah* (exemption). This would include devouring carrion, shortening the prayers, forward purchases, and the traveler breaking his fast even if there is no hardship. [A *rukhsah*] could be obligatory, recommended, permitted or simply the contrary of what is preferable."¹¹

Although there may be some fiqh details that scholars differ concerning Shareeh *rukhsahs*, since these *rukhsahs* form part of the revelatory law, there is not

9- Cf., Hans Wehr, A Dictionary of Modern Written Arabic (Ithaca, New York: Spoken Language Services, 1976), p. 384; Edward William Lane, An Arabic-English Lexicon (Beirut, Lebanon: Librarie du Liban, 1968), vol. 3, p.1059.

10- Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Cambridge, England: Islamic Texts Society, 2003), pp. 436-437.

11- Taajuddeen al-Subki, Jaami al-Jawaami fi Usool al-Fiqh (Beirut, Lebanon: Daar al-Kutub al-Ilmiyyah, 2003), p. 15. Much more detail about the nature of *azeemah* and *rukhsah* can be found in Ahmad Hasan, The Principles of Islamic Jurisprudence: The Command of the Shariah and Juridical Norm Volume 1 (Islamabad, Pakistan: Islamic Research Institute, 1993), pp. 154-175. In particular, he goes into detail concerning the varied approaches of the Hanafis and the Shafiees in their treatment of *rukhsah*. A similar discussion can be found in Wahbah al-Zuhaili, "Al-Akhdu bi-l-Rukhas al-Shariyyah wa Hukmuh," Majallah Majma al-Fiqh al-Islामी (Fiqh Academy of the OIC, 1994), No. 8, vol. 1, pp. 51-56.

much dispute as to the acceptance of these *rukhsah*. In fact, the Prophet (peace and blessings of Allah be upon him) has even said,

إِنَّ اللَّهَ يُحِبُّ أَنْ تُؤْتَى رُخْصَةٌ، كَمَا يَكْرَهُ أَنْ تُؤْتَى مَعْصِيَةٌ

"Allah loves that you perform His *rukhsahs* in the same way that He dislikes that you perform His prohibited acts."¹² These being part of the revelatory law is why they are often referred to as *Shareeah rukhsahs* as opposed to the *fiqhi rukhsahs* that are discussed later.¹³ However, there is one important topic that a *mufti* must grapple with: extending the *rukhsah* to new cases via analogy (*qiyaas*).

The *Mufti* and Making *Qiyaas* based on a *Shareeah Rukhsah*

Every legal system faces the same issues when it comes to applying the law to a new case that is not explicitly covered in the text. In the words of the famous German legal theorist Paul Oertmann,

Legal science has at all times provided two opposite tendencies for establishing new rules: analogy and the argument a contrario [*mafهوم al-mukhaalafah*]... it is always possible to reason both ways, that is to say, either since a and b are expressly regulated by law, but c is not, the law does not wish c to be treated in the same manner as a and b; or to say, since the law has regulated a and b in a definite manner, one may conclude that it intended the similar case c to be handled in the same manner.¹⁴

However, the difficulties of applying the law to new cases are exacerbated when there are established exceptions (*rukhsah*) to the law stated in the text. This leads to yet another possibility to the two mentioned above: extend the establish exemption from the law to the new case.

The question of the permissibility of extending *rukhsahs* to new cases via analogy is disputed among the legal theorists. For example, it is an established exception to combine prayers during rain. This raises the question: Can the exception to combine prayers when it is raining be extended to combining prayers when it is snowing?¹⁵ The majority of the scholars say it is permissible to make such

12- Recorded by Ahmad. According to Shuaib al-Arnaaoot, et al., it is sahih. Shuaib al-Arnaaoot, et al., footnotes to Ahmad ibn Hanbal, Musand al-Imaam Ahmad ibn Hanbal (Beirut, Lebanon: Muasassah al-Risaalah, 2001), vol. 10, p. 107.

13- Of course, since both of them form part of the fiqh as well, either of them could be referred to as fiqhi *rukhsahs* although that is not the norm. For example, the following book is about what is termed herein *Shareeah rukhsahs* while the title describes them as *fiqhi rukhsahs*: Ahmad Azzu Anaayah, *Al-Rukhas al-Fiqhiyyah fi Dhau al-Kitaab wa al-Sunnah* (Beirut, Lebanon: Daar al-Kutub al-Ilmiyyah, 2003).

14- Quoted in Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Atlanta, GA: Lockwood Press, 2013), p. 103.

15- Both rain and snow are forms of precipitation. Hence, one could argue that they fall under the same category and it is not an issue of analogy. However, according to most jurists, rain is different from snow and the texts only touch upon rain and not precipitation as a whole. So the question of extending the *rukhsah* could stand.

an analogy. This is the view of the majority of the Shafiees¹⁶, Malikis and Hanafis while the Hanafis state that it is not acceptable to make such an analogy.¹⁷ In this author's view, as long as the *illah* (effective legal cause) can be determined, there does not seem to be any reason to disallow analogies based on *rukhsah* (and Allah alone knows best). At the same time, though, the burden of proof would be great to go from the default ruling to applying an exception in a new case.

A skilled *mufti* would have to determine, in his or her view, the correct stance towards making analogies based on *rukhsahs*. However, if the *mufti* decides that it is acceptable to make such analogies, that theoretical issue is simply the beginning. Putting the theory into practice is the challenge. Determining what new, unprecedented parallel cases are proper for analogies with established Shareeah *rukhsahs* is a most difficult step. Classical practical examples include making an analogy between rain and snow for combining the prayers and making an analogy between the person who is riding on an animal and fears drowning if he were to get off the animal and the one fighting in war to perform the prayer in the manner of the prayer of one in a state of fighting. In contemporary times, one may pose the question as to whether one who is working a 24-hour shift in an emergency room should be considered similar to a traveler in the sense of being able to combine the prayers and break the fast. The Shareeah has also allowed for an exception of a limited use of music¹⁸/singing on very specific occasions. Could one make an analogy with these cases and allow such music/singing on other occasions as well?

Summary

In sum, the default ruling (*azeemah*) is the ruling that is to be applied under all normal circumstances. *Rukhsahs* are exceptions to the general rule. As such, *rukhsahs* are in need of clear evidence to override the default or norm. Making analogies based on those Shareeah *rukhsahs* seems to be acceptable but one has to apply much caution when doing so, since one is already starting with a situation that is an exception to the norm.

16- There is some difference of opinion as to where Imam al-Shaafiee himself stood on this issue, as contradicting narrations have been attributed. Al-Namlah concludes that al-Shaafiee was of the opinion that it is permissible to make such an analogy. See Abdul-Kareem al-Namlah, *Al-Rukhas al-Shariyyah wa Ithbaatuhaa bi-l-Qiyaas* (Riyadh, Saudi Arabia: Maktabah al-Rushd, 1990), pp.187-188.

17- The arguments for or against such a position are beyond the scope of this paper. The interested reader may consult Al-Namlah, pp. 178-187; Saalihah Aseeri, *Ithbaat al-Hudood wa al-Kaffaaraat wa al-Rukhas bi-l-Qiyaas* (Master's Thesis, King Khaalid University, 1430-1421 A.H.), pp. 276-282.

18- In the hadith, there is only mention of playing the daff (a bottomless hand drum) and not any other instruments.

The *Mufti* and "Following *Fiqhi Rukhsahs*" (تتبع الرخص)

When considering *fatwaas* and *rukhsahs*, a common concern is the question of resorting to the myriad of fiqh opinions available and choosing the one which is the "easiest." This is sometimes referred to as "following/seeking *rukhsahs*" or "fiqhi *rukhsahs*."¹⁹ These are *rukhsahs* derived from the opinions of jurists rather than built into the Shareeah itself (hence they are referred to commonly as *fiqhi rukhsahs* and not the earlier discussed Shareeah *rukhsahs*). Al-Zarkashi has defined "following *rukhsahs*" as, "The choosing by an individual from each *madhhab* what is easiest upon him."²⁰ In the resolution of the Fiqh Academy of the OIC, they defined *fiqhi rukhsahs* as, "*Ijtihads* in *madhhabs* that permit an action as opposed to other *ijtihaads* that prohibit that action."²¹

Basically, as the definitions above imply, it is the process of seeking "easy/easier/easiest fiqh positions." Anyone familiar with the vast literature of fiqh and the amount of *ijtihaad* that such literature contains might, at first glance, find this concept somewhat puzzling: just pick and choose among the various opinions that exist in the realm of fiqh? This concept has a number of theoretical underpinnings that need to be understood properly in order to make a sound conclusion concerning the question of "following *rukhsahs*" in one's *fatwaas*. Among these theoretical aspects is the concept that "every mujtahid is *museeb* (correct)" and the principle of making things easy (*taiseer*) and removing hardship (*raf' al-haraj*).

The Nature of the Differences of Opinion among the Fuqahaa

Differences in interpreting law is not something unique to Islam but the history of fiqh is definitely filled with differing opinions. It is, at least partially, the existence of such differences that led to the concept of following *fiqhi rukhsahs* in the first place—in the sense that if there were no difference of opinions, there would be no "options" to choose from. Concerning differences of opinion among the jurists, two extreme positions can easily be identified. One extreme is to accept as equally

19- The same word *rukhsah* is used here as for Shareeah *rukhsahs* as it based on the lexical meaning of the word, which implies "ease."

20- Badr al-Deen al-Zarkashi, *al-Bahr al-Muheet fi Usool al-Fiqh* (Beirut, Lebanon: Daar al-Kutub al-Ilmiyyah, 2000), vol. 4, p. 602. It should be noted that he discusses this practice in the context of whether following *rukhsahs* would make one an immoral person or not. Without calling it following *rukhsahs*, al-Shaukaani presents virtually the same discussion of when the muqallid, as al-Shaukaani expressly calls him, takes the easiest opinions. See Muhammad ibn Ali al-Shaukaani, *Irshaad al-Fuhoool ilaa Tahqeeq al-Haqq min Ilm al-Usool* (Daar al-Kutub al-Arabi, 1999), vol. 2, p. 253.

21- Fiqh Academy of the OIC, *Majallah Majma al-Fiqh al-Islaami* (1994), no. 8, vol. 1, p. 639.

valid (and equally true) all opinions. Those who believe in "multiple truths" will be of this extreme or, at least, approach this extreme (as there may be some opinions that they would not accept). (The question of "multiple truths" is discussed in the next section.) The other extreme is to adamantly insist that one's conclusion is correct and that all others are, with no question, incorrect (those who hold those views are "opposing the Sunnah" or are "off the path," two expressions that one hears often these days). These two extremes, like most extremes, are very simplistic attitudes and they fail to grasp the entire of the reality what leads to fiqh differences.

A holistic view of the causes of differences of opinions among the jurists should lead to an appreciation of the challenge of making *fatwaas*—leading as well to a less than dogmatic view concerning one's own conclusions. Most works on the causes for differences of opinion have a tendency to discuss only one category of causes. Differences in opinion can actually be divided into three major categories, as displayed in Figure 1.

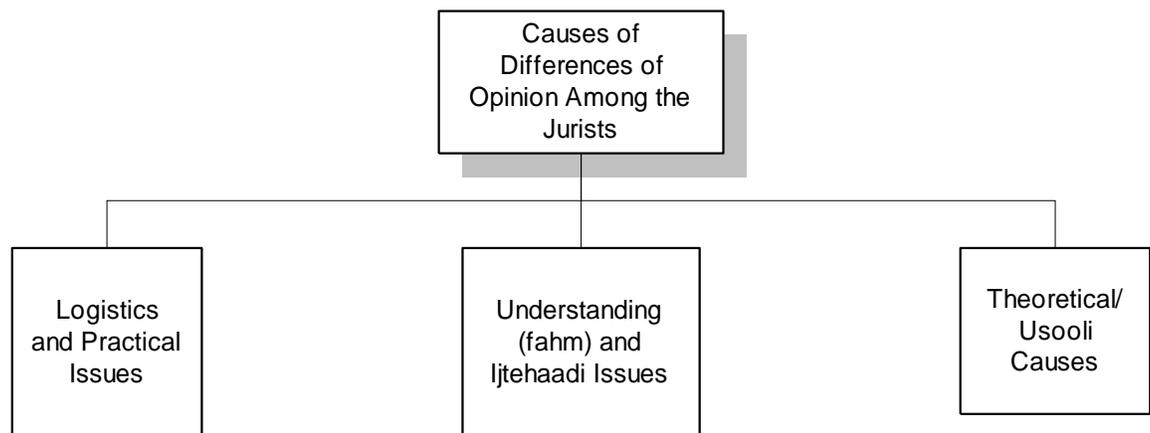


Figure 1. View of the Different Main Categories of Causes for Differences of Opinion among Jurists

The logistics and practical issues would include cases like one scholar knowing a particular hadith that another scholar was unaware of. Sometimes a hadith would reach one scholar through trustworthy means and reach another through unacceptable means. When a scholar knows a hadith, he would make a ruling on the basis of that hadith while the one unaware of that hadith would have to make *ijtihaad* and his *ijtihaad* may or may not be consistent with the authentic hadith. The objective observer could analyze cases of this nature and determine which is the

correct ruling and could frankly declare that the opposing view is incorrect, as there is a text on this issue. At the same time, though, there could still remain a difference concerning the grading or acceptability of a hadith, either at a theoretical or a practical level.²² Hence, the resolution to these types of differences need not be "black and white."

A *fatwaa* requires a methodology to determine one's conclusion. This methodology is defined by the science of *Usool al-Fiqh* (Islamic Legal Theory). The Theoretical or *Usooli* causes for differences of opinion entail a greater degree of lack of clarity, as a number of logical arguments usually surround such issues. These issues would include questions such as: Is *mafhoom al-mukhaalafah* (argumentum a contrario) a sound legal argument? Is a general text definitive or conjectural? Is it permissible to make an analogy based on a Shareeah *rukhsah*? Is *qiyaas* (analogy) a *hujjah* (proof in Islamic Law) or not? Each of these questions, and many more like them, have numerous fiqh ramifications to them. Most likely, not everyone who makes a *fatwaa* has studied Islamic Legal Theory in such detail as to make strong conclusions on these types of issues. Instead, the position of a specific *madhhab* or scholar is probably accepted or followed. Interestingly, this implies a tier of *taqleed* in the process of *fatwaa* making. This should, by definition, preclude dogmatism. However, even in this realm, there are some positions that can be demonstrated to contradict the clear texts of the Quran and Sunnah and hence are completely untenable views. Examples of that nature would include those who reject the process of analogy (*qiyaas*) as a legal tool or those who reject the authority of the Sunnah in Islamic Law.

A third category of causes of differences of opinion has to do with the reality on the ground and how to weigh various points of consideration related to a particular case. For most cases, there are many proofs and points pulling the *mufti* into different directions. It is definitely a skill to see through all of the contradictory arguments and have a clear vision of what the correct conclusion should be. For example, when considering organ transplants one has to balance questions of preservation of life versus the prohibition of breaking the bones of the deceased as well as consideration of the risks of such a procedure and so forth. In this era of advanced technology and all sorts of possibilities today, such issues will probably

22- At a theoretical level would include, for example, the acceptance or rejection of mursal hadith (hadith in which only the name of the Companion is missing from the chain). At a practical level this would include, for example, the acceptance or rejection of a particular narrator or of a particular narrator under a particular circumstance.

grow in number and becoming more difficult to rule on. It does seem that in some cases, the "stronger" view is just barely the stronger view.²³

The above causes lead to various differences of opinion. However, the source or cause of a difference of opinion can be analyzed. Based on this analysis as to what has led to the difference of opinion, scholars have divided differences of opinion into blameworthy/impermissible and permissible differences of opinion.²⁴ Al-Shaafiee has defined blameworthy difference of opinion as, "It is unlawful, for those who know of it, to disagree about any text that God used to furnish binding authority in a clear and textually explicit manner, whether in His Book or through the words of His Prophet."²⁵ In other words, there are issues which are considered "clear cut," meaning no opposing view would be given any weight. This is expressed in the famous statement:

وَلَيْسَ كُلُّ خِلَافٍ جَاءَ مُعْتَبَرًا ... إِلَّا خِلَافٌ لَهُ حَظٌّ مِنَ النَّظَرِ

("Not every difference is to be given consideration except that difference which has a portion of 'evidence' to it").²⁶ Bakr Abu Zaid points out that the evidently errant positions are to be refuted, opposed and removed from among the Muslims. Opposing and correcting such views, he states, is one of the greatest forms of jihad with one's tongue and pen.²⁷ However, this author would like to emphasize that the broader one's understanding of Islamic Legal Theory is, the greater one would be able to appreciate how seemingly baseless views do sometimes have a defensible basis (while at other times remain indefensible).

Thus, not every difference of opinion provides an opinion that a scholar can resort to later. However, that still leaves a great deal of difference of opinions within the permissible scope. A permissible difference of opinion implies that two *mujtahids* are coming to opposing views and yet neither of them has done anything improper or sinful. In fact, it is rightfully argued that one should not hold a grudge against

23- One of the questions that faces a mufti is what should he or she do when faced when an issue concerning which he or she cannot come to a conclusion concerning the correct view. At that time is the mufti free, for example, to simply choose (resort to al-takhyeer) among the various views that may be out there? That type of question is beyond the scope of this paper.

24- This is also sometimes referred to as weak and strong differences of opinion, respectively.

25- Joseph E. Lowry, trans. The Epistle on Legal Theory: A Translation of Al-Shafi'i's Risalah (New York, NY: New York University Press, 2015), p. 239.

26- These are the words of Abu al-Hasan ibn al-Hasaarifi. Quoted in Jalaal al-Deen al-Suyooti, al-Itqaan fi Uloom al-Quran (Madinah, Saudi Arabia: Majma Malik Fahd), vol. 1, p. 59.

27- Bakr Abu Zaid, al-Rudood (Riyadh, Saudi Arabia: Daar al-Aasimah, 1414 A.H.), p. 40. See also Taqiyy al-Deen Ahmad ibn Taimiyyah, Kitaab Bayaan al-Daleel ala Butlaan al-Tahleel (al-Maktab al-Islaami, n.d.), pp. 145-146.

another *mujtahid* who has an opposing view.²⁸ How should one treat those differences that are within the permissible realm—should, for example, all the views expressed by the sinless *mujtahids* be considered acceptable and proper?

Is Every *Mujtahid Museeb* (Correct)²⁹?

When the *mujtahid* properly exerts himself or herself to determine the truth and he or she does so for the sake of Allah, the *mujtahid* is definitely doing an act that is pleasing to Allah and deserves Allah's pleasure and reward. There should not be any dispute concerning this fact. At the same time, though, *ijtihad* should not take place if there is a definitive, relevant text or definitive proof on an issue. When there is a definitive, relevant text or proof, the truth or correct position is known and there is, theoretically, no room for difference of opinion. Thus, according to al-Anazi, there are some agreed upon principles related to the issue of giving a *fatwaa*: First, if there is an explicit text (or consensus³⁰) that applies to a particular situation, it is obligatory to rule according to the indication of that text. Second, if there is an explicit text that applies to a particular situation and the *mujtahid* is familiar with that text and understands that it applies to his situation and yet he gives a contrary ruling, then he is wrong and sinful. Third, if there is a specific relevant text that would have been available to the *mujtahid* but he did not discover it simply due to his failure to research the issue properly, then he is wrong and sinful. The cases concerning which there is a difference of opinion is where the *mujtahid* makes a ruling and (a) there is no definitive, explicit text available, (b) there is a text but after due diligence the scholar did not come across it, or (c) there is a text yet after due diligence the scholar did not see how the text is related to his particular case. In these cases, when the *mujtahid* makes a conclusion, is his conclusion to be considered always "correct" or is it that he may be correct or incorrect.³¹

28- Yoonus al-Sadafi reported that after he debated with Imam al-Shaafiee on an issue, the two later met up and al-Shafiee took him by his hand and said to him, "Isn't it proper that we still be brothers even though we differ on an issue." Recorded by Shams al-Deen al-Dhahabi, *Siyar Alaam al-Nubalaa* (Beirut, Lebanon: Muassasah al-Risaalah, 1985), vol. 16, p. 10. Ibn Taimiyyah once referred to the absurdity of opposing others over every type of fiqh difference when he wrote, "If whenever two Muslims differed from one another they would boycott each other, there would be left between the Muslims no sanctity nor brotherhood." Ahmad ibn Taimiyyah, *Majmoo Fataawaa Shaikh al-Islam ibn Taimiyyah* (Madinah, Saudi Arabia: Majma Malik Fahd, 1995), vol. 24, p. 173.

29- If the term *museeb* (correct) is understood here to mean that the *mujtahid* will be rewarded due to following the proper path of exerting himself to discover the truth, then all scholars would agree with that interpretation and there would be no controversy. The controversy arises when the word *museeb* is understood to mean that the *mujtahid's* conclusion will always be considered sound and correct, even when other scholars differ from him. See Muhammad al-Jaizaani, *Maalim Usool al-Fiqh ind Ahl al-Sunnah wa al-Jamaah* (al-Damaam, Saudi Arabia: Daar ibn al-Jauzi, 1427 A.H.), pp. 480f.

30- Faisal al-Anazi does not mention consensus on any of these agreed upon points but in this author's view, it needs to be mentioned as well, as consensus on an issue would also deny the permissibility of *ijtihad*.

31- Faisal al-Anazi, *Al-Taufeeq wa al-Sadaad fi Masalah al-Tasweed wa al-Takhtiah fi al-Ijtihad* (Kuwait: Wizaarah al-Auqaaf, 2011), pp. 32-33.

In other words, in the absence of or ignorance of definitive proof, *mujtahids* resort to *ijtihaad*—an *ijtihaad* that involves probability and not, most likely, certainty. There has been a great deal of dispute concerning the status of the conclusion that the *mujtahid* made—should it be considered correct as a result of the praiseworthy process that the *mujtahid* followed or can the *mujtahid*'s result be considered mistaken? This issue was taken up by the scholars under various titles: Is the truth (*haqq*) one or multiple? Does Allah have a specific ruling for each case or is His ruling what the *mujtahid* concludes? Is every *mujtahid* correct?³² Historically speaking, on this issue there are two broad schools, *al-musawwibah* (المصوبة) and *al-mukhattiah* (المخطية), those who believe that the *mujtahid* is always correct ("multiple truths") and those who argue that a *mujtahid* can be mistaken ("only one truth"), respectively.³³

According to al-Khateeb al-Baghdaadi, one of the earliest to address this issue, the view that every *mujtahid* is correct and that the truth is whatever the *mujtahid* sees as correct has been attributed to Abu Haneefah. He said that it is also the apparent view of Imam Malik. Two opinions have been narrated from al-Shafiee, that the truth is multiple and that the truth is only one. Some Shafiees state that it is not true that al-Shafiee held the view that the truth is multiple.³⁴ According to Abdul-Qadir, the view that the *mujtahid* is always correct is the view of the majority of the *mutakallimeen* (non-Hanafi legal theorists) and the later Hanafis. It is also, he says, the view attributed to al-Ashari.³⁵ On the other hand, according to al-Anazi, the view that there is only truth is the view of the majority of the scholars, including a narration from Abu Haneefah and the decision of most of his companions, the view of Imam Malik and most of his followers, an opinion from al-Shaafiee and the view of the majority of Shafiees, the opinion of Imam Ahmad and his followers, the view of some Mutazilah, a narration from al-Ashari and the view of some of his followers.³⁶

32- Since this paper is related to the issue of fatwaas, this question as it relates to matters of aqeedah, at least in the manner that it is typically breached, will not be dealt with here.

33- Zysow refers to these views as the school of infallibism (al-muwawwibah) and fallibism (al-mukhattiah). Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Ph.D. Thesis, Harvard University, 1984), pp. 463ff. For simplicity, in this paper, they shall be referred to as the view of one truth vis-à-vis the view of multiple truths as one of the manners in which the question was posed was whether al-haqq (the truth), on a specific fiqh issue of course, was only one or possibly multiple.

34- Abu Bakr Ahmad al-Khateeb al-Baghdaadi, *al-Faqeh wa al-Mutafaqih* (al-Damam, Saudi Arabia: Daar ibn al-Jauzi, 1996), vol. 2, p. 114.

35- Muhammad Abdul-Qadir, *al-Masaail al-Mushtarakah bain Usool al-Fiqh wa Usool al-Deen* (n.c.: Maktabah al-Rushd, n.d.), p. 295.

36- Faisal al-Anazi, p. 33.

Al-Anazi also says that the view that there are multiple truths is narrated from Abu Haneefah and Maalik; it is also attributed to al-Shaafiee, while most of his followers reject that notion; some of the Mutazilah and most of the Asharis, including al-Ghazaali³⁷ and ibn Burhaan, were of this view.³⁸ Zysow discusses al-Baaqillaani as one of the leading proponents of the multiple truths view. He argues that it was due to the ever growing influence of the Asharis within the Shafiee school that this view began to be a major view within the Shafiee school.³⁹ He also states that within the Hanafi school, the opposing views on this issue were between the Iraqi Mutazilah (who held the multiple truth view) and the Central Asian orthodoxy branch of the school (who held the view of only one truth).⁴⁰ Zysow also demonstrates that there is a slight difference between the Mutazilah and the Ashari views of the multiple truth positions.⁴¹

In any case, determining what opinion should be attributed to whom is not the most important concern here—but the issue itself is of great concern.⁴² The difference of opinion on this issue is definitely not one of semantics only, as it has far-reaching ramifications. The question touches upon matters of aqeedah,⁴³ fiqh and legal proceedings.⁴⁴ Hence, a discussion of the proofs for the various sides is demanded.

Arguments in Favor of the Multiple Truths View

Al-Ghazaali is one of the most vocal of the proponents for multiple truths.⁴⁵ He starts his discussion by saying that sin and error are mutually binding—everyone who is "wrong" is a sinner and every sinner is "wrong".⁴⁶ He comes to this conclusion by distinguish between definitive and conjectural issues. There is no *ijtihaad* and no excuse for error when it comes to definitive issues. However, since conjectural issues

37- Al-Ghazaali was a student of Imam al-Haramain al-Juwaini, who was of the one truth view. Zysow notes that in al-Mankhool, al-Ghazaali reproduces al-Juwaini's view but in his later work al-Mustasfaa he clearly comes on the side of the multiple truths view. See Zysow, thesis, p. 474-475.

38- Faisal al-Anazi, pp. 40-41.

39- Zysow, thesis, P. 465.

40- Zysow, thesis, p. 466.

41- Zysow, thesis, p. 473.

42- After presenting a couple of exams, Zysow (thesis, p. 459) writes, "What is common to these very different positions on the question of infallibility of ijtihaad is the fervor with which they are espoused. With the doctrine of ijtihaad, we touch a very sensitive nerve of Islamic culture. For upon this doctrine hinges in large measure the role of law among the religious disciplines."

43- For example, Ibrahim writes, "The musawwiba essentially believed that on issues in which there is no scriptural evidence or consensus (ijmaa), there is no divine ruling at all." Ahmed Fekry Ibrahim, Pragmatism in Islamic Law: A Social and Intellectual History (Syracuse, New York: Syracuse University Press, 2015), p. 66.

44- According to some, legal theory (usool al-fiqh) was considered an area in which mistakes were not considered acceptable. Given all of the differences of opinion within usool al-fiqh, this view seems untenable and al-Ghazaali explicitly does not agree with it. See Abu Haamid Muhammad al-Ghazaali, al-Mustasfaa fi Ilm al-Usool (Beirut, Lebanon: Muassasah al-Risaalah, 1997), vol. 2, p. 399.

45- See al-Ghazaali, vol. 4, pp. 30-111

46- Al-Ghazaali, vol. 4, p. 30.

are probabilistic and have no specific ruling for them (لَا فِيهَا حُكْمٌ مُّعَيَّنٌ),⁴⁷ if the *mujtahid* is qualified and does due diligence, he cannot be considered sinful if he were mistaken. At the same time, since the issue is conjectural and having no specific ruling for it, he cannot be considered wrong either. Therefore, as long as he was not sinful, he was not wrong either. As al-Ghazaali himself noted, the scholars in general agree that if the *mujtahid* puts forth the proper effort, he will not be sinful. The weakness in al-Ghazaali's argument here is two-fold. First, error and sin are not mutually binding when it comes to matters of *ijtihaad*—as the evidence for the opposing view will clearly demonstrate, Allah willing. Second, he fails to prove that there are issues in which "there is no divine ruling at all."⁴⁸ If it is accepted that the Shareeah has been revealed by Allah out of His Wisdom and His Mercy for human beings to guide them to the path which is best for them in both this life and the Hereafter⁴⁹, it is virtually impossible to accept the view that there are rulings that have no divine ruling to them at all—especially given the large number of fiqh issues which are conjectural and not definitive.

In a similar fashion, al-Baaqillaani has stated, with respect to the question of *qiyaas* (analogy) and determining legal causes, "What appears probable to me, I act upon and treat as a mark and a sign. But if something else appears probable to someone else and he acts upon it, he is correct and does not err. Every *mujtahid* is correct."⁵⁰ Once again, there is a logical flaw here. If two people counted the number of people in a room and one was standing in a better position to see everyone, the fact that they come up with a different total count does not mean that they are both "correct." Neither one is to be faulted if they did their best but that is different from saying that they are both correct.

Al-Ghazaali also argues that the Companions—as a consensus—did not object to each others' opinions and *ijtihaad*—while they did object to the mistakes of the Kharijites and those who refused to pay zakaat. Indeed, the Companions greatly respected each other, even given those differing views.⁵¹ However, in response, a person admitting that there is a possibility that he is incorrect and a possibility that his opponent is correct—and thereby respecting his opponent's opinion—is not the

47- Al-Ghazaali, vol. 4, p. 43.

48- As Ibrahim (Pragmatism), p. 66, expressed it.

49- Discussing the details of the question of Shareeah laws having a purpose and goal to them is well beyond the scope of this paper.

50- Quoted in Zysow, thesis, p. 462. Zysow attributes the quote to Shaikh al-Mufeed's Fusool. Unfortunately, this author was not able to find it in the copies of Shaikh al-Mufeed's work available to him.

51- Al-Ghazaali, vol. 4, p. 44f.

same thing as stating that there are multiple truths and that every view is correct. There is no necessary correlation between these two views. (Similarly, Al-Ghazaali's argument can be taken even further by saying that if one argues that there is only one truth, then one could declare some of the Companions to be immoral for their violation of the truth.⁵² However, this would conflate the issue of committing a sin and committing a mistake, two acts that must be kept separate.)

Another argument in support of this view quotes the verses,

وَدَاوُدَ وَسُلَيْمَانَ إِذْ يَحْكُمَانِ فِي الْحَرْثِ إِذْ نَفَسَتْ فِيهِ غَنَمُ الْقَوْمِ وَكُنَّا لِحُكْمِهِمْ شَاهِدِينَ^{٧٨}
فَفَهَّمْنَاهَا سُلَيْمَانَ وَكُلًّا ءَاتَيْنَا حُكْمًا وَعِلْمًا وَسَخَّرْنَا مَعَ دَاوُدَ الْجِبَالَ يُسَبِّحْنَ وَالطَّيْرَ وَكُنَّا فَاعِلِينَ^{٧٩}

"And [mention] David and Solomon, when they judged concerning the field - when the sheep of a people overran it [at night], and We were witness to their judgment. And We gave understanding of the case to Solomon, and to each [of them] We gave judgment and knowledge. And We subjected the mountains to exalt [Us], along with David and [also] the birds. And We were doing [that]" [Al-Anbiyaa 78-79]. The argument here is that Allah affirms judgment and knowledge to both of them. The response to this argument is that the verse clearly shows that the Solomon was given the proper understanding of the case and thus his response was the correct response.⁵³

The proponents of the multiple truths view also cite the following verses:

وَمَنْ لَّمْ يَحْكَمْ بِمَا أَنزَلَ اللَّهُ فَأُولَٰئِكَ هُمُ الْكَافِرُونَ

« And whoever does not judge by what Allah has revealed - then it is those who are the disbelievers» [Al-Maidah: 44].

وَمَنْ لَّمْ يَحْكَمْ بِمَا أَنزَلَ اللَّهُ فَأُولَٰئِكَ هُمُ الظَّالِمُونَ

« And whoever does not judge by what Allah has revealed - then it is those who are the wrongdoers» [Al-Maidah: 45]

وَمَنْ لَّمْ يَحْكَمْ بِمَا أَنزَلَ اللَّهُ فَأُولَٰئِكَ هُمُ الْفَاسِقُونَ

«And whoever does not judge by what Allah has revealed - then it is those who are the defiantly disobedient» [Al-Maidah: 47]

The implication of these verses is that if the correct position is only one, the *mujtahid* who is taking an opposing view is committing disbelief, injustice and immorality.⁵⁴ This argument is once again conflating sin with error while there is

52- Faisal al-Anazi, p. 44 presents and responds to this argument.

53- See Faisal al-Anazi, p. 34. Al-Ghazaali (vol. 4, pp. 73-75) has a stern response to the argument that David was mistaken in his *ijtihad* in this case. Space does not allow a lengthy response to al-Ghazaali's arguments, however, his argument rests on premises that themselves require proof or that are disputed, such as whether prophets are allowed to make *ijtihad* and if it is possible for them to err in their *ijtihad*s.

54- Faisal al-Anazi, p. 42.

clear evidence that if one mistakenly counters Allah's commands, he will not be sinful and therefore cannot possibly be a disbeliever or immoral person. As is well known, Allah has responded positively to the supplication from the end of *Soorah al-Baqarah*,

رَبَّنَا لَا تُؤَاخِذْنَا إِنْ نَسِينَا أَوْ أَخْطَأْنَا

"Our Lord, do not impose blame upon us if we have forgotten or erred" [*Al-Baqara*: 286].

In addition, the Prophet (peace and blessings of Allah be upon him) has stated,

إِنَّ اللَّهَ قَدْ تَجَاوَزَ عَنْ أُمَّتِي الْخَطَأَ وَالنَّسْيَانَ وَمَا اسْتَكْرَهُوا عَلَيْهِ

"Allah has overlooked for my Nation [what is done out of] mistake or forgetfulness or what they are coerced to do."⁵⁵

Another argument for the multiple truths position is the incident recorded by al-Bukhari and Muslim (this being al-Bukhari's wording):

عَنِ ابْنِ عُمَرَ، قَالَ: قَالَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لَنَا لَمَّا رَجَعَ مِنَ الْأَحْزَابِ: «لَا يُصَلِّيَنَّ أَحَدُ الْعَصْرِ إِلَّا فِي بَنِي قُرَيْظَةَ» فَأَدْرَكَ بَعْضُهُمُ الْعَصْرَ فِي الطَّرِيقِ، فَقَالَ بَعْضُهُمْ: لَا نُصَلِّي حَتَّى نَأْتِيَهَا، وَقَالَ بَعْضُهُمْ: بَلْ نُصَلِّي، لَمْ يَرِدْ مِنَّا ذَلِكَ، فَذَكَرَ لِلنَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَلَمْ يُعَنْفَ وَاحِدًا مِنْهُمْ

Narrated Ibn `Umar: When the Prophet (peace and blessings of Allah be upon him) returned from the battle of Al-Ahzaab (The confederates), he said to us, "None should offer the *Asr* prayer but at Bani Quraidha." The *Asr* prayer became due for some of them on the way. Some of them decided not to offer the prayer but at Bani Quraiza while others decided to offer the prayer on the spot and said that the intention of the Prophet (peace and blessings of Allah be upon him) was not what the former party had understood. And when that was told to the Prophet (peace and blessings of Allah be upon him) he did not blame anyone of them.

This could be considered the strongest argument for the multiple truths view. Both al-Nawawi and ibn Hajar argue that it is not explicit that the Prophet (peace and blessings of Allah be upon him) indicated that both the groups were "correct." It simply indicates that one should not be blamed for properly exerting oneself via *ijtihad* even when coming to a wrong conclusion.⁵⁶ In other words, not blaming or censuring someone for an act that they thought they did properly in the past—and it

55- Recorded by ibn Maajah It is a hasan hadith. For the details of its hadith status, see Jamaal al-Din Zarabozo, Commentary on the Forty Hadith of al-Nawawi (Denver, CO: Al-Basheer Publications, 1998), vol. 2, pp. 1184-1203.

56- Yahya al-Nawawi, Al-Minhaaj Sharh Sahih Muslim ibn al-Hajjaaj (Beirut, Lebanon: Daar Ihyaa al-Turaath al-Arabi, 1392 A.H.), vol. 12, p. 98; Ahmad ibn Ali ibn Hajar al-Asqalaani, Fath al-Baari bi-Sharh Saheeh al-Bukhaari (Beirut, Lebanon: Daar al-Marifah, 1379 A.H.), vol. 7, p. 410.

does not involve the rights of others, as in the case—does not imply or even hint at accepting the action that they did as being correct.

Another argument offered in favor of the multiple truths view is that viewing the truth as only one and thereby not allowing choices to people would lead to hardships and difficulties, which counters Islamic principles. This principle of "ease" (*taiseer*) will be discussed separately below, in-shaa-Allaah.

Finally, it is an accepted principle that, in general, one *ijtihaad* cannot negate another's *ijtihaad*. This indicates that truth is multiple, otherwise the one truth should negate the other falsehoods. In response, once again, one point may not necessarily lead to the other point. It is accepted that probability is involved in *ijtihaad* and therefore, as in the example of the Companions referred to above, different *ijtihaads* are to be respected, given some conditions, and are not overruled by other *ijtihaad*. Furthermore, there are some practical considerations of importance here as well: *Ijtihaads*, especially by judges, continually being overruled will lead to instability. Thus, this principle is accepted but it does not necessarily imply that there are multiple truths.

Arguments in Favor of Only One Truth

Perhaps one of the strongest arguments for the "one truth" view is the explicit statement of the Prophet (peace and blessings of Allah be upon him),

إِذَا حَكَمَ الْحَاكِمُ فَاجْتَهَدَ ثُمَّ أَصَابَ فَلَهُ أَجْرَانِ، وَإِذَا حَكَمَ فَاجْتَهَدَ ثُمَّ أَخْطَأَ فَلَهُ أَجْرٌ

"When a judge gives a decision, having tried his best to decide correctly and is right, there are two rewards for him; and if he gave a judgment after having tried his best (to arrive at a correct decision) but erred, there is one reward for him." (Recorded by al-Bukhari and Muslim.) This hadith gives a clear indication that when striving to make a decision, a person's judgment could be right or wrong. It certainly does not indicate that any decision made would be considered correct.⁵⁷ This hadith is also an indication that the *mujtahid* should make all possible efforts to conclude that which is correct—as the reward is greater for being correct.

Another argument for this view is found in the verse,

يَا أَيُّهَا الَّذِينَ ءَامَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ فَإِن تَنَزَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ إِن كُنتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا

57- Those who believe in "multiple truths" have offered various responses to this seemingly very clear hadith. In this author's view, none of their arguments were worthy of presentation here. The interested reader may consult Taqi al-Deen al-Subki and Taaj al-Deen al-Subki, *al-Ibhaaj fi Sharh al-Minhaaj* (Beirut, Lebanon: Daar al-Kutub al-Ilmiyyah, 1995), vol. 3, p. 261; Ali ibn Hazm, *al-Ihkaam fi Usool al-Ahkaam* (Beirut, Lebanon: Daar al-Afaaq al-Jadeedah), vol. 5, p. 77.

«O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result» [An-Nisaa: 59]

This verse demonstrates that absolute obedience belongs to Allah and His Messenger. If the people of *ijtihad* differ, there is an objective standard by which that they are supposed to judge their differences. The purpose of referring the dispute back to Allah and His Messenger is to determine the truth and the way of life that is pleasing to Allah. Furthermore, this seeking of a correct resolution is a must upon those who truly believe in Allah and His Messenger.

The Prophet (peace and blessings of Allah be upon him) said,

إِنَّ الْحَلَالَ بَيِّنٌ، وَإِنَّ الْحَرَامَ بَيِّنٌ، وَبَيْنَهُمَا مُشْتَبِهَاتٌ لَا يَعْلَمُهُنَّ كَثِيرٌ مِنَ النَّاسِ

"The permissible is plain (and clear) while the impermissible is plain (and clear). Between them there are doubtful matters concerning which many people are not knowledgeable." (Recorded by al-Bukhari and Muslim.) Here the Prophet (peace and blessings of Allah be upon him) demonstrates that even the doubtful or confusing matters have a correct ruling to them, yet it is difficult for most people to determine it.

When discussing the evidence for the multiple truths view, the below verse was quoted but it seems much more appropriate to cite it as evidence against the multiple truths view:

وَدَاوُدَ وَسُلَيْمَانَ إِذْ يَحْكُمَانِ فِي الْحَرْثِ إِذْ نَفَسَتْ فِيهِ غَنَمُ الْقَوْمِ وَكُنَّا لِحُكْمِهِمْ شَاهِدِينَ ۝
فَفَهَّمْنَاهَا سُلَيْمَانَ ۚ وَكُلًّا ءَاتَيْنَا حُكْمًا وَعِلْمًا وَسَخَّرْنَا مَعَ دَاوُدَ الْجِبَالَ يُسَبِّحْنَ وَالطَّيْرَ ۗ وَكُنَّا فَاعِلِينَ ۝

"And [mention] David and Solomon, when they judged concerning the field - when the sheep of a people overran it [at night], and We were witness to their judgment. And We gave understanding of the case to Solomon, and to each [of them] We gave judgment and knowledge. And We subjected the mountains to exalt [Us], along with David and [also] the birds. And We were doing [that]" [Al-Anbiyaa 78-79]. Again, this verse clearly shows that the Solomon was given the proper understanding of the case and thus his response was the correct response.⁵⁸

The proponents of this view can also cite events during the time of the Prophet (peace and blessings of Allah be upon him) in which Companions essentially

58- See Faisal al-Anazi, p. 34.

made *ijtihaad* and the Prophet (peace and blessings of Allah be upon him) corrected what they had said or done. For example, al-Bukhari records:

قَالَ أَخْبَرَنِي أَبُو سَلَمَةَ بْنُ عَبْدِ الرَّحْمَنِ، أَنَّ زَيْنَبَ ابْنَةَ أَبِي سَلَمَةَ، أَخْبَرَتْهُ عَنْ أُمِّهَا أُمِّ سَلَمَةَ، زَوْجِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ أَنَّ امْرَأَةً مِنْ أَسْلَمٍ يُقَالُ لَهَا سُبَيْعَةُ كَانَتْ تَحْتَ زَوْجِهَا، تُؤَفِّي عَنْهَا وَهِيَ حُبْلَى، فَخَطَبَهَا أَبُو السَّنَابِلِ بْنُ بَعَكَكٍ، فَأَبَتْ أَنْ تَنْكِحَهُ، فَقَالَ وَاللَّهِ مَا يَصْلُحُ أَنْ تَنْكِحِيهِ حَتَّى تَعْتَدِي آخِرَ الْأَجَلَيْنِ. فَمَكَثَتْ قَرِيبًا مِنْ عَشْرِ لَيَالٍ ثُمَّ جَاءَتِ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَقَالَ " اُنْكِحِي ".

Narrated Um Salama: A lady from Bani Aslam, called Subai'a, become a widow while she was pregnant. Abu As-Sanaabil bin Ba'kak demanded her hand in marriage, but she refused to marry him and said, "By Allah, I cannot marry him unless I have completed the latter of two prescribed periods." About ten days later (after having delivered her child), she went to the Prophet (peace and blessings of Allah be upon him) and he said (to her), "You can marry now."⁵⁹ Various other examples of the Prophet (peace and blessings of Allah be upon him) correcting the *ijtihaad* of his Companions can be given.⁶⁰ Had there been multiple truths and had it been that the *mujtahid* is always correct, there would have been no need for the Prophet (peace and blessings of Allah be upon him) to correct these Companions.

Numerous narrations from the Companions also demonstrate that they believed that there were correct and incorrect views and that simply them being *mujtahids* did not guarantee that what they concluded was correct. About the inheritance issue known as *al-kalaalah*, Abu Bakr reached a conclusion and said, "I am stating what is my opinion. If it is correct, it is from Allah and if it is incorrect, it is from me and from Satan."⁶¹ In this narration, Abu Bakr is both accepting the possibility of mistake as well as stating that Allah has nothing to do with the mistaken view. Umar ibn al-Khattaab expressed something similar when he stated after expressing his opinion, "This is Umar's view. If it is correct, it is from Allah. If it

59- Unfortunately, this hadith has been mistranslated in the English translation of Sahih al-Bukhari by Muhammad Muhsin Khan, thus losing the effect of this example. The Arabic wording in the English translation is correct, "حَتَّى تَعْتَدِي آخِرَ الْأَجَلَيْنِ" but it has been translated as, "I cannot marry him unless I have completed one of the two prescribed periods," rather than "the later of the two prescribed periods." See Muhammad Muhsin Khan, The Translation of the Meanings of Sahih al-Bukhari (Riyadh, Saudi Arabia: Darussalam, 1997), vol. 7, p. 158.

60- The interested reader may consult Faisal al-Anazi, pp. 35-36.

61- Recorded by al-Daarimi. It is narrated by Aamir al-Shabi from Abu Bakr. Al-Albaani states that the chain back to al-Shabi is sound though. [Muhammad Naasir al-Deen al-Albaani, Silsilat al-Ahaadeeth al-Dhaeefah wa al-Mauhdoohah (Riyadh, Saudi Arabia: Daar al-Maarif, 1992), vol. 10, p. 183.] Al-Shabi is known to have narrated directly from numerous Companions as well as for his strictness in narration. However, he did not narrate directly from Abu Bakr. Thus, the chain is broken at that link.

is mistaken, it is from Umar."⁶² Similarly, ibn Masood once made *ijtihaad* and stated, "I am going to state concerning it that which I reached through my reasoning. If it is correct, it is from Allah, if it wrong then it is from me and Allah and His Messenger are innocent of it."⁶³ In addition, there is no record—as far as this author is aware—of any of the Companions expressing explicitly or implicitly the opposing view that there are multiple truths. This lack of an opposing view could allow one to conclude that there was a tacit consensus on this issue among the Companions, as both al-Namlah and al-Salmi have claimed.⁶⁴ In addition to stating that they themselves may be mistaken, they would sometimes point out the mistakes of their fellow Companions' *ijtihaad*.⁶⁵

Logically speaking, it does not seem tenable that Islamic Law would, for example, say that an action is both sound and invalid at one and the same time—stating that they are both correct views. There is a difference between scholars expressing contradictory views with each of them claiming that their view is correct and the Law actually stating that both views are true and correct. Such contradiction should be negated of the Shareeah—Allah's Law—especially given that Allah has said about His revelation,

أَفَلَا يَتَذَكَّرُونَ الْقُرْآنَ وَلَوْ كَانَ مِنْ عِنْدِ غَيْرِ اللَّهِ لَوَجَدُوا فِيهِ اخْتِلَافًا كَثِيرًا

«Then do they not reflect upon the Qur'an? If it had been from [any] other than Allah, they would have found within it much contradiction» [An-Nisaa: 82]

Other proofs could be provided⁶⁶ but the above should be more than sufficient to establish that the Quran and Sunnah indicate that the view of multiple truths is untenable. The conclusion here is the same as that made by Imam al-Shaafiee when he wrote, "If a person would ask, 'What do you think about the *mujtahid* making *ijtihaad*, what is the truth with respect to Allah?' In our opinion, and Allah alone knows best, it is not permissible for the truth with Allah to be anything other than

62- Recorded by al-Baihaqi. According to ibn Hajar, its chain is sahih. Ahmad ibn Ali ibn Hajar al-Asqalaani, *Al-Talkhees al-Habeer fi Takhreej Ahaadeeth al-Raafiee al-Kabeer* (Beirut, Lebanon: Daar al-Kutub al-Ilmiyyah, 1989), vol. 4, p. 472.

63- Recorded by ibn Hibbaan. According to al-Arnaaoot, its chain is sahih. See Shuaib al-Arnaaot, footnotes to *Alaa al-Deen al-Faarisi, al-Ihsaan fi Taqreeb Saheeh ibn Hibbaan* (Beirut, Lebanon: Muassasah al-Risaalah, 1988), vol. 9, p. 411.

64- Abdul Kareem al-Namlah, *al-Jaami li-Masaail Usool al-Fiqh wa Tatbeeqaatuhaa ala al-Madhhab al-Raajih* (Riyadh, Saudi Arabia: Maktabah al-Rushd, 2000), p. 405; Iyyaadh al-Salmi, *Usool al-Fiqh al-ladhee Laa Yasa' al-Faqeeh Jahluh* (Riyadh, Saudi Arabia: Daar al-Tadmuriyyah, 2005), p. 464.

65- Cf., Abdul Kareem al-Namlah, *al-Muhadhab fi Ilm Usool al-Fiqh al-Muqaarin* (Riyadh, Saudi Arabia: Maktabah al-Rushd, 1999), vol. 5, p. 2349. For examples of early scholars refuting each other, see Fauzi ibn Abdilaah al-Athari, *Adhwa al-Athariyyah fi Bayaan Inkaar al-Salaf Badhuhum ala Badh fi al-Masaail al-Khilaafiyyah al-Fiqhiyyah* (Ajman, UAE: Maktabah al-Furqaan), passim.

66- See, for example, Faisal al-Anazi, pp. 33-40. Some of the other "proofs" are not very convincing.

one only as the knowledge and laws of Allah are one, as what is hidden and apparent are all equal to Him."⁶⁷

Of course, this does not answer all the questions that need to be addressed but it does remove one of the key points related to the issue of following *rukhsahs*. The Concept of *al-Taiseer* ("Ease") and *Raf al-Haraj* (Removal of Hardship)

The concepts of *al-taiseer* (creating ease) and *raf al-haraj* (removing hardship) for individuals is a salient feature of Islamic Law; some even refer to them as distinguishing features of the Law.⁶⁸ In particular, the concept of ease and removal of hardship is invoked to support the act of following fiqhi *rukhsahs*.⁶⁹ For example, the Shafiee scholar al-Izz ibn Abdil Salaam (d. 660 A.H.) has been attributed to have said, "The layperson may follow the *rukhsahs* of the fiqh schools. To object to that is ignorance on the part of the one objecting to it as following *rukhsahs* is beloved and Allah's religion is that of ease, 'He has not place upon you in the religion any difficult' (*al-Hajj* 78)."⁷⁰ In fact, in the resolution of the OIC Fiqh

67- Muhammad ibn Idrees al-Shaafiee, *Kitaab al-Umm* (Beirut, Lebanon: Daar al-Marifah, 1990), vol. 7, p. 317.

68 Cf., for example, Abdul Rahmaan al-Abdullateef, *al-Qawaaid wa al-Dhawaabit al-Fiqhiyyah al-Mutadhaminah li-l-Taiseer* (Madinah, Saudi Arabia: Al-Jaamia al-Islaamiyyah, 2003), vol. 2, pp. 779-780.

69- The opposite is true as well: Those who have a tendency to overemphasize the role of *al-taiseer* (ease) and removing hardship use following of fiqhi *rukhsahs* as one of the basis for their views. According to Taweel, the invoking of *taiseer* is based on the following practices: Taking into consideration the goals of the Shareeah rather than its texts; an exaggerated view of the concept of *taiseer* in Islam; following fiqhi *rukhsahs*; avoiding the unequivocal texts and following the ambiguous ones; over use of the concept of relief due to unavoidable general consequences (*umoom al-balwaa*); applying the principle of *talfeeq* (*madhhab-mixing*); and considering differing fiqh opinions as evidence and proofs in themselves. See Abdullah al-Taweel, *Manhaj al-Taiseer al-Muaasir: Diraasah Tahleeliyyah* (al-Mansurah, Egypt: Daar al-Hadi al-Nabawwi, 2005), pp. 105ff.

70- This quote has been attributed to al-Izz ibn Abdil Salaam by two Maliki scholars al-Wanshareesi and Ulyash, neither of whom were students or close in time to ibn Abdil Salaam's era and neither of whom presented an *isnad* for the quote: Abu al-Abbaas Ahmad al-Wanshareesi, al-Miyaar al-Murib wa al-Jaami al-Maghrib an Fataawee Ahl Ifreeqiyyah wa al-Andalus wa al-Maghrib (Rabat, Morocco: Wizaarah al-Auqaaf, 1981), vol. 12, p. 31; Muhammad ibn Ahmad Ulaish, *Fath al-Aliyy al-Maalik fi al-Fatwaa ala Madhhab al-Imaam Maalik* (Beirut, Lebanon: Daar al-Marifah, n.d.), vol. 1, p. 78. Al-Wanshareesi actually offers this quote as a refutation of ibn Hazm's and Ibn Abdul Barr's claim that there is a consensus that it is not allowed to seek and follow fiqhi *rukhsahs*. This quote from ibn Abdil Salaam was also quoted verbatim by Wahbah al-Zuhaili, Khaleel al-Mais and Abu Bakr Dookoori in their papers for the OIC Fiqh Academy Conference. Each of them provided only Ulyash as their source for the quote. [Wahbah al-Zuhaili, "Al-Akhdu bi-l-Rukhas al-Shariyyah wa Hukmuh," *Majallah Majma al-Fiqh al-Islaami* (Fiqh Academy of the OIC, 1994), No. 8, vol. 1, p. 63; Khaleel Muhyi al-Deen al-Mais, "Al-Akhdu bi-l-Rukhas wa Hukmuh," *Majallah Majma al-Fiqh al-Islaami* (Fiqh Academy of the OIC, 1994), No. 8, vol. 1, p. 148; Abu Bakr Dookoori, "Al-Akhdu bi-l-Rukhas wa Hukmuh," *Majallah Majma al-Fiqh al-Islaami* (Fiqh Academy of the OIC, 1994), No. 8, vol. 1, p. 579.] This author has doubt concerning this statement attributed to al-Izz ibn Abdil-Salaam, as it seems too strong and not consistent with some of his other statements. This author has yet to find it in any of ibn Abdil-Salaam's published works, such as in *al-Fataawaa*. Ibn Abdil-Salaam does however have a *fatwaa* (p. 153) in which he argues that a lesser authority can give *fatwaas* in the presence of a greater one and people are free to follow his views. He said that it does not matter if the person follows the *azeemah* or *rukhsah* because those who say that the truth is one do not identify that truth and those who say that the truth is multiple would not blame either view. In addition, though, this author did find in al-Izz ibn Abdil Salaam's *Fataawaa* statements that present a very different view. In one question (p 122), he was asked whether Imam al-Shaafiee could blindly follow Abu Haneefah or could a lay Hanafi blindly follow a view from al-Shaafiee. He replied that it is permissible to follow any of the four Imams and for them to follow each other. A person is not obliged to follow a specific person on a specific issue. Then he stated, "It is not permissible to follow/seek *rukhsahs*." In another *fatwaa* (pp. 155-156), he was asked about an issue in which Shaafiee scholars and Maalik differed and he replied that on that issue that it would not be

Academy, they concluded that it is permissible to resort to *fiqhi rukhsahs* (given all of the other conditions that they mention) if there is a need to do so in order to repel hardship, regardless of whether that hardship be of a general societal nature or with respect to individuals.⁷¹

Plenty of evidence can be provided to demonstrate that the Shareeah upholds the concept of *taiseer* and *raf al-haraj*. For example, Allah has said,

يُرِيدُ اللَّهُ بِكُمْ الْيُسْرَ وَلَا يُرِيدُ بِكُمْ الْعُسْرَ

"Allah intends for you ease and does not intend for you hardship" [Al-Baqarah: 185].

Commenting on this verse, al-Saadi states,

Allah says, Allah intends for you ease and does not intend for you hardship, that is, He desires to make the following of His ordained path as easy as possible for you. That is why all matters or actions, which have been made compulsory by Allah upon His servants, are very easy to obey and follow. When a person suffers from a disability or has some difficulty in obeying any decree, Allah has eased it for him by declaring an alleviation for it. Hence, either these compulsions are totally excused or have been modified and alleviated.⁷²

Allah also says,

وَمَا جَعَلَ عَلَيْكُمْ فِي الدِّينِ مِنْ حَرَجٍ

"He has not placed upon you in the religion any difficulty" [Al-Hajj: 78].

Al-Suyooti states, "This verse is the basis for a great maxim upon which numerous laws are derived: Hardship calls for ease."⁷³

Al-Bukhari and Muslim both record from Aishah that whenever the Prophet (peace and blessings of Allah be upon him) had a choice between two matters, he would always choose the easiest one.

proper for the Shafiee layperson to follow Maalik on that issue but if they did so, there would be no harm. On this question, he did not say that following the rukhsah is "beloved" and the Shafiee layperson should follow Malik in this case, although, he said, it could be a case that would be greatly disliked. [Al-Izz ibn Abdil Salaam, Kitaab al-Fataawaa (Beirut, Lebanon: Daar al-Marifah, 1986), pp. 122, 153 and 155-156.] Especially from the vantage of the mufti, Muhammad al-Zuhaili has shown that al-Izz ibn Abdil Salaam, both in his practice and in his teachings, emphasized that one must follow the evidence and not make taqleed. [Cf., Muhammad al-Zuhaili, Al-Izz ibn Abdil Salaam (Damascus, Syria: Daar al-Qalam, 1992), pp. 274-282.] If one has to follow the evidence, it means that one cannot simply choose an opinion simply because it exists in the available fiqh literature, which was the essence of following rukhsahs. It is possible that either ibn Abdil-Salaam was inconsistent in his view, changed his view at some point in time or the claimed quote simply is not authentic. Allah alone knows best. This is of some significance because, as Ibrahim points out, ibn Abdil-Salaam was used as a reference for later schools who argued for permissibility of following rukhsahs, such as Ibn Arafah (d. 803) and al-Munaawi (d. 1029). See Ibrahim, Pragmatism, p. 75.

71- Majallah Majma al-Fiqh al-Islami (Fiqh Academy of the OIC, 1994), No. 8, vol. 1, p. 640.

72- Shaykh Abd ar-Rahman as-Sa'di, Tafsir as-Sa'di, translated by S. Abd al-Hamid (Floral Park, NY: The Islamic Literary Foundation, 2012), vol. 1, p. 127.

73- Jalaal al-Deen al-Suyooti, al-Ikleeel fi Istinbaat al-Tanzeel (Beirut, Lebanon: Daar al-Kutub al-Ilmiyyah, 1981), p. 41.

Numerous other texts can be quoted to demonstrate that *taiseer* (bringing about ease) is an established Shareeah principle.⁷⁴

However, the proper understanding of *taiseer* and *raf al-harj* must be understood in a holistic sense within the Shareeah. First and foremost, it is the default laws of the Shareeah that both bring about utility (*maslahah*) as well as removal of hardship. Thus, Allah describes the Prophet Muhammad (peace and blessings of Allah be upon him),

الَّذِينَ يَتَّبِعُونَ الرَّسُولَ النَّبِيَّ الْأُمِّيَّ الَّذِي يَجِدُونَهُ مَكْتُوبًا عِنْدَهُمْ فِي التَّوْرَةِ وَالْإِنْجِيلِ يَأْمُرُهُمْ
بِالْمَعْرُوفِ وَيَنْهَاهُمْ عَنِ الْمُنْكَرِ وَيُحِلُّ لَهُمُ الطَّيِّبَاتِ وَيُحَرِّمُ عَلَيْهِمُ الْخَبَائِثَ وَيَضَعُ عَنْهُمْ إِصْرَهُمْ
وَالْأَغْلَالَ الَّتِي كَانَتْ عَلَيْهِمْ

"Those who follow the Messenger, the unlettered prophet, whom they find written in what they have of the Torah and the Gospel, who enjoins upon them what is right and forbids them what is wrong and makes lawful for them the good things and prohibits for them the evil and relieves them of their burden and the shackles which were upon them" [Al-A'aaf 157].

It is part of the mercy of Allah that the Shareeah that the final prophet was sent with captures the concept of *taiseer*. The final Ummah has been relieved of some of the stricter laws and regulations that were required, for various reasons, of the previous Ummahs.

Similarly, above the verse was quoted,

وَمَا جَعَلَ عَلَيْكُمْ فِي الدِّينِ مِنْ حَرَجٍ

"He has not placed upon you in the religion any difficulty" [Al-Hajj: 78].

This is a commonly quoted verse in the context of *taiseer*. When only this portion of the verse is quoted, the entirety of the message of the verse is lost. The complete verse states,

وَجَاهِدُوا فِي اللَّهِ حَقَّ جِهَادِهِ هُوَ اجْتَبَاكُمْ وَمَا جَعَلَ عَلَيْكُمْ فِي الدِّينِ مِنْ حَرَجٍ مِلَّةَ أَبِيكُمْ إِبْرَاهِيمَ هُوَ سَمَّاكُمُ الْمُسْلِمِينَ مِنْ قَبْلُ وَفِي هَذَا لِيَكُونَ الرَّسُولُ شَهِيدًا عَلَيْكُمْ وَتَكُونُوا شُهَدَاءَ عَلَى النَّاسِ فَأَقِيمُوا الصَّلَاةَ وَآتُوا الزَّكَاةَ وَأَعْتَصِمُوا بِاللَّهِ هُوَ مَوْلَاكُمْ فَنِعْمَ الْمَوْلَى وَنِعْمَ النَّصِيرُ

«And strive for Allah with the striving due to Him. He has chosen you and has not placed upon you in the religion any difficulty. [It is] the religion of your father, Abraham. Allah named you "Muslims" before [in former scriptures] and in this [revelation] that the Messenger may be a witness over you and you may be witnesses over the people. So establish prayer and give zakah and hold fast to Allah.

74- The interested reader may consult al-Kindi, pp. 72-82.

He is your protector; and excellent is the protector, and excellent is the helper» [Al-Hajj: 78]

It is in the same verse that Allah commands the believers to strive for the sake of Allah as is His right that Allah states that He has placed to difficulty in the religion. It is also Allah who has told the believers,

كُتِبَ عَلَيْكُمُ الْقِتَالُ وَهُوَ كُرْهُ لَكُمْ وَعَسَىٰ أَن تَكْرَهُوا شَيْئًا وَهُوَ خَيْرٌ لَّكُمْ وَعَسَىٰ أَن تُحِبُّوا شَيْئًا وَهُوَ شَرٌّ لَّكُمْ وَاللَّهُ يَعْلَمُ وَأَنْتُمْ لَا تَعْلَمُونَ

«Fighting has been enjoined upon you while it is hateful to you. But perhaps you hate a thing and it is good for you; and perhaps you love a thing and it is bad for you. And Allah Knows, while you know not» [Al-Baqara: 216]

Taiseer must be seen in this light. What the Shareeah demands of the Muslims in already in accord with *taiseer* (ease) and removing hardship.

Earlier a hadith from al-Bukhari and Muslim was quoted but only a portion of it was quoted. The entire statement from Aishah (may Allah be pleased with her) was:

مَا خَيْرٌ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ بَيْنَ أَمْرَيْنِ أَحَدُهُمَا أَيْسَرُ مِنَ الْآخَرِ إِلَّا اخْتَارَ أَيْسَرَهُمَا مَا لَمْ يَكُنْ إِثْمًا فَإِنْ كَانَ إِثْمًا كَانَ أَبْعَدَ النَّاسِ مِنْهُ

"Never did Allah's Messenger (peace and blessings of Allah be upon him) make a choice between two things but adopting the easier one as compared to the difficult one, but his choice for the easier one was only in case it did not involve any sin, but if it involved sin he was the one who was the farthest from it amongst the people." Thus, this hadith also has to be viewed in its entirety.⁷⁵ Before one can choose the easiest choice, one has to make sure first that all the possible choices are permissible according to the Shareeah. Only after determining that the easiest choice is acceptable does one then follow the easiest path. Otherwise, if an act is sinful, one must remain away from it even it were to be the easiest path.

Taiseer is, thus, not a goal in and of itself of the Shareeah but it is only a means to bring about a Shareeah goal. If *taiseer* in itself were the goal, many of the essential deeds, such as prayer and fasting, should be dropped as they contain a great deal of effort and work. Instead, *taiseer* is within the scope of the overall goal

75- There are times in which only the first portion is quoted. Obviously, no distortion was intended but it does fail to give the complete picture of what the hadith is stating. For example, in the following references only the first portion of the hadith was quoted: Muhammad Shams al-Aimmah al-Sarakhsi, al-Mabsoot (Beirut, Lebanon: Daar al-Marifah, n.d.), vol. 24, p. 67; Maufuq al-Deen ibn Qudaamah, al-Mughni (Maktabah al-Qaahirah, n.d.), vol. 1, p. 206; Muhammad al-Zuhaili, al-Wajeez fi Usool al-Fiqh al-Islaami (Damascus, Syria: Daar al-Khair, 2006), vol. 1, p. 444; Abdullah al-Bassaam, Taudheeh al-Ahkaam min Bulooq al-Muraam (Makkah, Saudi Arabia: Maktabah al-Asadi, 2003), vol. 1, p. 197.

of developing the individual to be a true and devoted servant of Allah and developing a just and Islamic society. That is why the Prophet (peace and blessings of Allah be upon him) would remain the furthest away from that which is sinful even if it were easier. What is "easy" can be damaging to one's spiritual health and one's relationship to Allah. Furthermore, what is "easy" may also conflict with what is needed for society. Al-Kindi states that the jurists have noted that from the Shareeah perspective it is not a hardship to be obliged to fulfill a deed due to some overall greater importance to the act, such as fulfilling the rights of Allah or the general well-being, as in the case of jihad.⁷⁶ Indeed, as Al-Utaibi stated, "If the *mufti* makes a ruling of ease in such a way that he is going against what the evidence would indicate, this cannot be considered *taiseer*. Instead, this is being lax and negligent in way that contradicts the balance that is found in the perfect Shareeah."⁷⁷

From the *mufti's* perspective, *taiseer* will also be an important concept when previous *ijtihaad* need to be reevaluated in the light of changed circumstances. If an earlier fiqh position was taken as a result of a specific environment, in a different environment that ruling may be difficult to uphold and would require a changing of the *fatwaa*. However, upon deeper inspection, one will note that this has nothing to do with *taiseer* per se. It has to do with the reality that *fatwaas* are supposed to take into consideration the circumstances on the ground and if those circumstances change, the ruling should be changed, regardless if the ruling is changed to an "easier" position or a more stringent position. For example, some early Muslims felt that women should no longer be allowed to go to the mosque due to changes in the people's behavior from the time of the Prophet (peace and blessings of Allah be upon him). This was a change in the ruling due to a change in the environment but it was not *taiseer*, as they became more stringent in their application. A similar analysis can be made for the other circumstances in which *taiseer* is usually invoked.⁷⁸ As al-Kindi noted, *taiseer* is not about the *mufti* seeking the easiest opinions (in other words,

76- Al-Kindi, p. 85. At the same time, there is no meaning for the Law to order people to do that which is beyond their actual capabilities or for the Law to order them to do actions that would be so draining upon them that they would even drive a sincere person away from the faith. This captures the two interpretations of *taiseer* from a Quranic perspective. See al-Abdul-Lateef, pp. 44-45.

77- Ghaazi al-Utaibi, "Al-Talfeeq bain al-Madhaahib al-Fiqhiyyah wa Alaaqatuhu bi-Taiseer al-Fatwaa," https://www.themwl.org/web/sites/default/files/world_conference_for_fatwa_and_controls_7.pdf. Last accessed Nov. 26, 2017, p. 36.

78- In al-Kindi's work on *taiseer* (pp. 111-232), he devotes separate chapters to changes in time, changes in place, changes in individuals involved, development, changes in customs, *maslahah* (utility/welfare), considering the expected results of a *fatwaa* and *umoom al-balwaa* (something inescapable afflicting a people as a whole). All of these could be causes of *taiseer*, as al-Kindi demonstrates, but they are also all independent of *taiseer*, in the sense that they could require stricter and not more lenient rulings.

seeking *fiqhi rukhsahs*) as the *mufti* still has to seek what is correct and proper⁷⁹— which sometimes may demand that things be made easier. Thus, *taiseer* can never be an absolute principle or policy of *fatwaas*.⁸⁰

Additional Evidence for Following *Rukhsahs*

There are some narrations quoted in support of following *rukhsahs*. One prominent one is,

اٰخْتِلاَفُ اُمَّتِي رَحْمَةٌ

"The differences [in opinion] among my Nation is a mercy."⁸¹ This is a "famous" hadith among the masses. However, from a hadith perspective, it is baseless, not having a chain of any merit. As such, a number of scholars included it in their collections of fabricated hadith.⁸² This hadith, therefore, cannot be used as evidence.

Another oft-quoted hadith is,

اَصْحَابِي كَالنُّجُومِ فَاَيُّهَا اَقْتَدَوْا اِهْتَدَوْا

"My Companions are like the stars. Whichever of them you follow, you will be guided." This is another well-discussed hadith among the hadith specialists. Al-Albaani has declared it a fabrication while others simply call it very weak.⁸³ In either case, it cannot be invoked as evidence for the issue at hand.⁸⁴

Scholars' Warnings Concerning Following *Fiqhi Rukhsahs*

There has been a long history of scholars warning against seeking *fiqhi rukhsahs*. In fact, as shall be discussed shortly, a number of scholars claim that

79- Al-Kindi, p. 85.

80- The balance between being too strict or too lenient when it comes to *taiseer* requires a truly knowledgeable individual. It is sometimes easy to ignore the bigger picture and concentrate on making things easy for individuals. However, if that step leads to greater harm than good in the long-run, it is not a proper implementation of *taiseer*. For Muslims in the West, for example, a lax approach to *fiqh* and an overemphasis on *taiseer* could lead to future Muslims losing their Muslim identity, as had happened to many of the earlier groups of immigrant Muslims to the United States. Being too lax with respect to interrelationships between the sexes could lead to unwanted pregnancies that would harm the individuals involved and can also greatly harm the community as well. Being too stringent, though, brings about its own negative issues, including burn-out and turning people away from the faith.

81- This hadith was quoted in Abdul Azeez al-Khayaat, "Al-Akhdhu bi-l-Rukhsah wa Hukmuhu," *Majallah Majma al-Fiqh al-Islaami* (Fiqh Academy of the OIC, 1994), No. 8, vol. 1, p. 365.

82- See Muhammad Naasir al-Deen al-Albaani, *Silsilat al-Ahaadeeth al-Dhaeefah wa al-Maudhooah* (Riyadh, Saudi Arabia: Daar al-Maarif, 1992), vol. 1, pp. 141ff.

83- See al-Albaani, *Silsilat al-Ahaadeeth al-Dhaeefah wa al-Maudhooah*, vol. 1, pp. 144f.

84- The most that this hadith could establish is that one is free to choose among the statements of the Companions, not of the later scholars. The authority of the statements of the Companions is a disputed issue among the legal theorists. [The interested reader can consult Salaah al-Deen al-Ala'ee, *Ijmaal al-Isaabah fi Aqwaal al-Sahaabah* (Kuwait: Jamiyyah Ihya al-Turaath al-Islaami, 1987), *passim*.] If one accepts their statements as an authority, then the variety in their views can be considered a type of *Shareeah rukhsah*. Perhaps, and Allah alone knows best, this is the meaning of the statement of Umar ibn Abdul Azeez, "I would not be happy if the Companions did not differ among themselves because if they did not differ, there would be no *rukhsahs*." Recorded by al-Khateeb al-Baghdadi in *al-Faqeeh*. According to al-Uzaazi, its chain is *hasan*. See Adil al-Uzaazi, *Sahih al-Faqeeh wa al-Mutafaqih li-l-Khateeb al-Baghdadi* (Riyadh, Saudi Arabia: Daar al-Watn, 1997), vol. 2, p. 116.

there is a consensus that it is prohibited to seek and follow *fiqhi rukhsahs*. In this author's view, the concern about *fiqhi rukhsahs* should be obvious. As demonstrated earlier, scholars are liable to committing mistakes—or "slips" as commonly referred to—when they make *ijtihad*. It is often recognized by the other scholars that these are simply slips. The qualified individuals who made such slips should be dealt with mercifully but that does not mean that their mistakes should be raised to the level of acceptable law. Once something seems to be clearly a mistake—as in all other branches of human experience—the mistake should be discarded and everyone should move on. The concept of seeking *fiqhi rukhsahs* leaves the door open for people to follow those mistakes and make them part of the Islamic fiqh and Islamic rulings. This is what makes them so objectionable.⁸⁵

The *fiqhi rukhsahs* are often rooted in the anomalous and errant views of scholars. Numerous scholars have warned about the mistakes of scholars.⁸⁶ Umar ibn al-Khattaab once said to Ziyaad ibn Hudair, "Do you know what will bring about the destruction of Islam?" He replied, "No." He told him, "Islam will be destroyed by the slip of the scholar, the hypocrite making eloquent arguments via the Quran and the governance of misguided rulers."⁸⁷ At first glance, this statement from Umar ibn al-Khattaab may sound very strong. However, when one considers the number of mistakes made by scholars over the centuries and then imagine a movement that implements those mistakes, one can easily envision a situation in which Islam would be very difficult to recognize, if it were to exist at all.

85- What makes the slips of the scholars particularly dangerous is that when people—either muftis or laymen—invoke these obvious slips, they defend themselves by saying that it is not their opinion, they are simply following the view of so-and-so respected scholar. The implication or sometimes the clear challenge to the interlocutor is often, "How can you challenge what that great scholar said?"

86- There are a number of hadith that refer to scholars' slips. However, none of them are considered authentic by the leading hadith scholars. These hadith include:

إِنِّي أَخَافُ عَلَيْكُمْ فَلَا تُؤْمَرُوا بِالْفِرَاقِ وَالْمُنَافِقِ بِالْقُرْآنِ • وَوَدُّنَا تَفْتِيحَ عَلَيْكُمْ

"I fear for you three things: slip of a scholar, a hypocrite arguing eloquently with the Quran and this world being opened up to you" (this hadith has been recorded with various wordings, some mentioned "desires that are followed" instead of the last portion stated above);

انتقروا رَلَّةَ الْعَالِمِ وَانْتَظِرُوا فَيَتَبَّهُ

"Beware of the slip of the scholar and wait for his recanting his view";

أَحْذَرُوا رَلَّةَ الْعَالِمِ فَإِنَّ رَلَّتْهُ نُكِبَتْ فِي النَّارِ

"Beware of the slip of the scholar for it shall cast him head first into the Fire";

تَجَاوَزُوا عَنْ ذَنْبِ السَّيِّئِ وَرَلَّةَ الْعَالِمِ وَسَطْوَةَ السُّلْطَانِ الْعَادِلِ فَإِنَّ اللَّهَ تَعَالَى آخِذٌ بِبَيْدِهِمْ كُلَّمَا عَزَّرَ عَائِزٌ مِنْهُمْ

"Overlook the sin of those beloved to Allah, the slip of the scholar and the punishment of the just ruler as Allah will rescue them from those shortcomings."

For a discussion of these hadith see, for example, Noor al-Deen al-Haithami, *Majma al-Zawaaid wa Manbi al-Fawaaid* (Cairo, Egypt: Maktabah al-Qudsi, 1994), vol. 1, pp. 186f; Muhammad Naasir al-Deen al-Albaani, *Silsilat al-Ahaadeeth al-Dhaeefah*, vol. 4, p. 193ff.

87 Recorded by al-Daarimi. Al-Albaani has declared its chain sahih. See Muhammad Naasir al-Deen al-Albaani, footnotes to Muhammad al-Khateeb al-Tabreezi, *Mishkaat al-Masaabeeh* (Beirut, Lebanon: al-Maktab al-Islami, 1985), vol. 1, p. 89.

Similarly, the Companion Muaadh ibn Jabal said to his students, "How will you deal with three things: the slip of the scholar, the hypocrite arguing eloquently by the Quran and the worldly pursuits cutting your necks? As for the slip of the scholar, if you are guided to the truth, do not blindly follow him in your religion. If you are put to trial by what he said, do not cut off your patience and mercy for him..."⁸⁸ Similarly, Yazeed ibn Umairah, who was one of the companions of Muaadh ibn Jabal said:

He [Muaadh] never sat in a gathering of remembrance without saying: "Allah is a just Judge, may those who doubt perish." Muaadh bin Jabal said one day: "Ahead of you there are trials in which there will be a great deal of wealth, and the Qur'an will be so easy that believers and hypocrites, men and women, young and old, slave and free will all learn it. Then soon a man will say: 'Why don't the people follow me when I have read the Qur'an. They will not follow me until I innovate something else for them.' So beware of that which is innovated, for that which is innovated is misguidance. And beware of the deviation of a man of wisdom, for the Satan may utter words of misguidance on the lips of a man of wisdom, and a hypocrite may speak a word of truth." He [Yazeed] said: "I said to Muaadh: 'How could I tell, may Allah have mercy on you, when the man of wisdom speaks a word of misguidance, and the hypocrite speaks a word of truth?' He said: 'Rather, avoid the wise man's words that become well known and it is said about them: "What is this?" and that should not avert you from him, because he may retract it. And you should accept the truth when you hear it, for the truth has light.'"⁸⁹

Ibn Abbaas said, "Woe to the followers of the slip of the scholar." He was asked, "Why is that?" He explained, "A scholar says something according to his opinion and then he meets one who is more knowledge of the Messenger of Allah (peace and blessings of Allah be upon him) than him and he informs him [of his error] and he retracts his statement but his followers continue to follow his [earlier] ruling."⁹⁰

Later scholars built upon what these Companions advised and also saw in front of them how people would follow the slips of the scholars and invoke them in

88 Recorded by Wakee in al-Zuhd and by Abu Dawood in al-Zuhd. According to Yaasir ibn Muhammad and Ghunaim ibn Ghunaim, its chain is hasan. See Yaasir ibn Muhammad and Ghunaim ibn Ghunaim, footnotes to Abu Dawood al-Sijistaani, Kitaab al-Zuhd (Cairo, Egypt: Daar al-Mishkaat, 1993), p. 177. Ibn Abdul-Barr also records this narration, with a slightly different wording, from both Muaadh ibn Jabal and Salmaan al-Faarisi. The chain from Muaadh is, according to the Abu al-Ishbaal al-Zuhairi, hasan while that from Salmaan is weak. See Abu al-Ishbaal al-Zuhairi, footnotes to Yoosuf ibn Abdul-Barr, Jaami Bayaan al-Ilm wa Fadhlil (al-Damam, Saudi Arabia: Daar ibn al-Jauzi, 1994), vol. 2, pp. 982-983.

89- Translation taken from Nasiruddin al-Khattab, trans., English Translation of Sunan Abu Dawud (Riyadh, Saudi Arabia: Darussalam, 2008), vol. 5, pp. 164-165. In that work, it states that Zubair Ali Zai has declared its chain sahih.

90- Recorded by al-Khateeb al-Baghdaadi in al-Faqeeh and ibn Abdul-Baar in Jaami Bayaan al-Ilm. According to Aadir al-Uzaazi, its chain is sahih. See al-Uzaazi, p. 245.

the name of *fiqhi rukhsahs*.⁹¹ Some clearly errant views developed in different parts of the Muslim world and the scholars were concerned how this would affect the religiosity, piety and practice of the Muslims. Thus, numerous and strong words of warning were given concerning this issue.

Sulaimaan al-Taimi, who died in 143 A.H.⁹², stated, "If you were to follow the *rukhsah* of each scholar, you would combine together in your deeds all evil."⁹³ Mamar ibn Raashid (d. 154 A.H.), "If a person were to follow the people of Madinah's views on singing and anal intercourse with wives, the people of Makkah's views on temporary marriage and money exchange and the people of Kufah's views on intoxicants, he would be the vilest of the slaves of Allah."⁹⁴ Eventually, Imam Ahmad (d. 241 A.H.) said, "If a person abides by the view of the people of Kufah concerning *nabeedh* (an intoxicating fruit nectar), and the view of the people of Madinah concerning singing and the view of the people of Makkah concerning temporary marriage, he would be an evildoer (*faasiq*)."⁹⁵ This is a strong statement from Imam Ahmad. In essence, he is saying that the person is not a true and complete believer. Al-Qaadhi Ismaaeel ibn Ishaq (d. 282 A.H.) narrated that he went to the Abbasid Caliph al-Mutadhid and the Caliph handed him a book. The book contained the *rukhsahs* found in the errors of the scholars that someone had compiled for the Caliph. The Qaadhi told the Caliph, "This has been compiled by a *zindeeq* (a person who is publicly a Muslim but is trying to destroy Islam from within)." "Why is that?" the Caliph asked. He replied, "The ones who permitted temporary marriage did not permit singing. And the ones who permitted singing did not permit using accompanying music instruments. Whoever compiles the slips of the scholars and then follows them will have his faith go away." The Caliph then ordered for the book to be burnt.⁹⁶

Numerous statements of this nature were made by scholars throughout the years. Eventually, there appeared the claim that a consensus (*ijmaa*) had taken place that it is forbidden for individuals to intentionally seek and follow *fiqhi rukhsahs*. This consensus was claimed by ibn Hazm (d. 456), ibn Abdul-Barr⁹⁷ (d.

91- Jaasim al-Dausiri has done an excellent job of compiling the views and quotes from numerous scholars on this issue. See Jaasim al-Dausiri, *Zajr al-Sufahaa an Tatabbu Rukhas al-Fuqahaa* (Beirut, Lebanon: Daar al-Bashaair al-Islaamiyyah, 1992), pp. 50-77.

92- Thus demonstrating how early this recognition began to be developed.

93- Quoted in al-Dausiri, p. 50, from ibn Abdul-Barr, *Jaami Bayaan*.

94- Quoted in al-Dausiri, pp. 50-51, from al-Saafireeni's *Lawaami al-Anwaar*.

95- Quoted in al-Dausiri, p. 52.

96- Ismaaeel ibn Katheer, *al-Bidaayah wa al-Nihaayah* (Daar Ihya al-Turaath al-Arabi, 1988), vol. 11, p. 100. Also quoted in al-Dausiri, pp. 52-53.

97- After presenting the earlier quote from Sulaimaan al-Taimi, ibn Abdul-Barr stated, "Concerning that there is a consensus. I do not know any dissenting view." See Yoosuf ibn Abdul-Barr, *Jaami Bayaan al-Ilm wa Fadhlil* (al-Damam, Saudi Arabia: Daar ibn al-Jauzi, 1994), vol. 2, p. 927. It is well-known and

463), Abu al-Waleed al-Baaji (d. 474), ibn al-Salaah (d. 643), ibn al-Najjaar (d. 972) and others.⁹⁸ Consensus is difficult to establish but, in this case, it seems clear that there was a tacit consensus (*ijmaa sukooti*) in that numerous scholars expressed the above views while there never seemed to be dissenting voices.

The discussion by the scholars were, in general, in reference to individuals seeking to follow the *rukhsahs* just to make life easier for themselves. It was probably inconceivable for these scholars to think that it was the *mufti* who was doing this—that is, his version of Islam is to just find the opinions that would make things easier on people. Furthermore, from the above statements, it seems clear that there was a consensus and consensus is an authority in Islamic Law. What then happened is an interesting historical phenomenon.

The Historical Development of the Attitude toward Following *Fiqhi Rukhsahs* and the Important Role that *Rukhsahs* Did Play

Consensus is an authority in Islamic law. It does not make sense to say that a consensus has been established but it is still permissible for later scholars to hold opposing views, thus bringing an end to the consensus. If consensus can be violated in that fashion, it means that it is not an authority in Islamic Law. In particular, on this issue, al-Dausiri wrote, after referencing those scholars who declared a consensus on this issue, "After such conclusions, no weight can be given to those anomalous Hanafis who permit the following of *rukhsahs* nor to those attempts that try to cast doubt on the establishment of the consensus."⁹⁹

However, with respect to following *rukhsahs*, according to Ibrahim, attitudes did seem to change. When describing his work, he writes,

I demonstrate that pragmatic eclecticism¹⁰⁰, which was forbidden in juristic discourse in the formative period, became increasingly subject to debate in the Mamluk and Ottoman periods. The result of these debates was that its status changed from being forbidden by consensus to its gradual permissibility within the more fluid *ikhtilaaf* paradigm.¹⁰¹

Based on this, after scholars such as ibn Hazm and ibn Abdil-Barr have declared a consensus on this issue, later scholars began opening the door to the permissibility

accepted that this is ibn Abdil-Barr's work. Somewhat inexplicably, Wahbah al-Zuhaili (may Allah have mercy on him), trying to refute the claim of consensus wrote, "As for what has been attributed to ibn Abdil Barr that it is not allowed for the layperson to follow the *rukhsahs* by consensus, we do not accept the validity of this attribution. Even if we were to accept it, we do not admit to the occurrence of a consensus." Wahbah al-Zuhaili, vol. 1, p. 63.

98- For the relevant references, see Abdul-Lateef al-Tuwaijiri, *Tatabbu al-Rukhas bain al-Shari wa al-Waaqi* (Riyadh, Saudi Arabia: Majallah al-Bayaan, 2009), p. 31.

99- Al-Dausiri, p. 76.

100- This is the term that Ibrahim uses for both following *rukhsahs* and combining madhhabs (al-talfeeq).

101- Ibrahim (Pragmatism), pp. 9-10.

of following *rukhsahs*. Ibrahim states, "I was able to locate the earliest justification of pragmatic eclecticism in juristic discourse in the early years of the thirteenth century [of the Christian era], in ibn Arabi's magnum opus *al-Futoohaat al-Makiyyah*, which he started while living in Mecca in 599/1201 and finished in 629/1231 in Damascus under the Ayyubids."¹⁰² It does not seem that the extreme Sufi ibn Arabi had too much of an influence on this issue (at least, not until al-Sharaani's appearance later¹⁰³). Ibn Abdil-Salaam (d. 660) is the next notable scholar who is invoked as supporting following *rukhsahs*. As noted earlier, it is difficult to determine his exact position on this issue as he explicitly stated that it is not permissible to follow *rukhsahs*. Among mainstream scholars, the Maliki ibn Arafah (d. 803) and the Hanafi ibn al-Humaam (d. 861) were among the first to explicitly call for the permissibility of following *rukhsahs*.¹⁰⁴ This trend continued, as Ibrahim writes,

The voices supporting the practice that one finds in the fifteenth century are multiplied manyfold over the sixteenth through the eighteenth centuries. Although opposition to *tatabbu' al-rukhas* never ceased to exist throughout the Ayyubid, Mamluk, and Ottoman periods, there was a noticeable discursive shift, with an increasing number of jurists recognizing the existence of a vibrant debate.¹⁰⁵

This historical occurrence begs the following question: How could there be a consensus on an issue and then later that consensus is overturned? The above

102- Ibrahim (Pragmatism), p. 25. For more on ibn Arabi, see Ibrahim (Pragmatism) pp. 73-74.

103- The Sufi Shafiee Abdul Wahhaab al-Sharaani (d. 973) is an important historical figure in the promotion of the following of *rukhsahs*. Al-Sharaani wrote his famous *al-Meezaan al-Kubraa* based on ibn Arabi's thought. [According to Pagani (p. 183), "It has been suggested that Shar'ani's writings facilitated the widespread dissemination of ibn Arabi's teachings amongst the *uruq* (Sufi orders)."] His theory is heavily Sufi influenced, distinguishing between the *awwaam* (masses), the *khaassah* (elite) and *khawwaas al-khaasah* (the super elite). He argues that the differences of opinion among the scholars is a mercy for the Ummah—wherein the masses can followed the less strict rules, the elite the stricter rules and the *khawwaas al-khaasah* the less strict rules again, since they have purified themselves. Ibrahim (Pragmatism, p. 94) gives an example of al-Sharaani's reasoning:

According to al-Sha'rānī, the Shāfi'ī view that touching one's genitals invalidates the ritual ablution is based on a Prophetic tradition to that effect, and so is the opposing Hanafī opinion that it does not invalidate the ablution. These seemingly contradictory traditions, he contended, were designed for two different types of people. The more strict tradition is meant for the superior believers (akaabir al-mumineen), whereas the more lenient one is aimed at the general laity. Similarly, the Prophetic traditions "Drink, but do not get drunk," and "What is inebriating in large quantities is forbidden in small quantities" are both part of the Sharī'a. They lie along the two ends of the strictness/leniency spectrum, and both are applicable, but for different people.

In a separate paper, Ibrahim ("al-Sharaani") argues that al-Sharaani was introducing something new into the realm of *fiqh* and "his project sought to provide lay people with access to the views of the different schools as a matter of habit and without subjecting them to feelings of guilt and doubt" (p. 139). For more about al-Sharaani, see Ibrahim, Pragmatism, pp. 93-97; Samuela Pagani, "The Meaning of *Ikhtilaaf al-Mahdaahib* in 'Abd al-Wahhaab al-Sha'raani's *al-Mizan al-Kubraa*," *Islamic Law and Society* (Vol. 11, No. 2, 2004), passim; Ahmed Fekry Ibrahim, "Al-Sha'rani's Response to Legal Plurism: A Theory of Legal Pluralism," *Islamic Law and Society* (Vol. 20, No. 1, 2013), passim.

104 See Ibrahim (Pragmatism), pp. 75-6. Ibrahim (Pragmatism, pp. 99-102) also discusses another later development during Ottoman times: the appearance of *ikhtilaaf* manuals, or books devoted to a simple presentation of the various *fiqh* opinions without delving into the details of how those conclusions were reached. This allowed the jurists to know the "easy opinions" but once again divorced them from the question of how baseless some of those opinions may have been.

105- Ibrahim (Pragmatism), p. 76.

mentioned scholars are Sunni scholars who believe in the place and role of consensus. Overruling of consensus should not be possible. However, there are a couple of possible ways to explain this. One is mentioned by Ibrahim: doubting the existence of the consensus in the first place.¹⁰⁶ In this author's view, this argument is not very convincing, since no explicit narrations from earlier scholars supporting following *rukhsahs* are ever presented.

A second explanation is more plausible: A ruling can change if the circumstances related to an issue have changed. There were two drastic changes that occurred in the Muslim world: an insistence on adhering to a *madhhab* view and the closing of the door to *ijtihaad*.¹⁰⁷ Before these changes, the *mufti* was free to make his own *ijtihaad* on a particular issue. Afterwards, he was no longer free to decide on an "easy opinion," even if he felt that were the correct position. Theoretically, everyone was now bound by the existing body of available fiqh statements and *madhhab* positions. This, by practical necessity, led to the position of the acceptance of following *rukhsahs*, as otherwise there would have been too much rigidity for the system to be practical.¹⁰⁸

At the same time, though, unfortunately this author has not been able to find any scholar who justified the change in view and contradiction of the consensus on this basis, although the events of the time described throughout Ibrahim's work lend credence to this occurrence.

Thus, these later scholars can be excused for "violating consensus" as they were compelled to take a different view given the changed circumstances they faced. At the same time, though, in the absence of such strict following of madhhabs and with the door to *ijtihaad* wide open, there is no need to continue to argue for the permissibility of following *rukhsahs*. Thus, the consensus view of its prohibition becomes reinforced. In other words, it was a practice that was needed due to the realities of that time but nowadays it cannot no longer be justified.

The OIC Fiqh Academy Resolution

Contemporary scholars have continued the discussion on the acceptability of following *rukhsahs*. In the Eighth Conference of the Fiqh Academy of the OIC, held in

106- Ibrahim gives an example of this nature, writing, "Even opponents of the practice no longer claimed a clear consensus on the subject. Thus, for instance, the Shāfi'ī jurist al-Samhūdī (d. 911/1505) who opposed the practice, nevertheless presented the other view, explicitly stating that there was no consensus on this issue and dismissing the consensus claimed by Ibn Hazm." Ibrahim (Pragmatism), pp. 76-77.

107- To what extent was the door to *ijtihaad* truly closed is a valid question. In any case, though, this concept was a powerful concept for some time.

108- Ibrahim (Pragmatism), p. 15, states a similar conclusion.

1994, they dealt with the issue of following *rukhsahs* (which they call "fiqh exemptions" in their translation). In their resolution, they concluded the following:

Fiqh exemptions are to mean the various religious Schools interpretations authorizing a certain matter as opposed to other interpretations prohibiting it. Availing of the scholars' exemptions, in applying the less restrictive of their opinions, is legitimate from a *Shari'a* perspective, under the following terms (as listed in Article 4)...

[Article] 4. Exemption allowed by the various *Fiqh* schools is not permissible to be availed solely on one's desire, for that would lead to ordained duties being shed.

Rather, exemptions are to be taken up under the following terms:

a) That the scholars' articulated views evoked for exemption are *Shari'a*-acknowledged and have not been qualified as departing from the norm [*shaadh*].

b) That there arises a need for the exemption so as to stave off hardship, whether for the common private or individual need.

c) That the exempted is capable of decision making or that he relies in the matter on a party known for its aptitude.

d) That availing of the exemption may not result in any of the unauthorized fakery interpretations [*talfeeq*] as listed under article 6.

e) That availing of the exemption is not taken as a pretext to achieve unlawful goals.

f) That the exempted feels at ease with the exemption and readily accepts it.¹⁰⁹

As the reader can readily see, the scholars of the OIC did not declare the following of *rukhsahs* prohibited. Instead, they sought simply to put some conditions to the following of *rukhsahs*.

There is, in this author's view, a strange logical flaw in the ruling.¹¹⁰ The overriding condition is (c), that there is a true need to resort to the *rukhsah* in order to remove a hardship. This is essentially the Shariah tool of *taiseer*, where, given restricting conditions, an application of a ruling may be easier than under the default conditions of no such restricting conditions. When one is faced with a case of hardship, the *mufti* simply needs to make an *ijtihaad* that would be relevant to the case and resolve the case in a manner that removes the hardship. Under such circumstances, there is absolutely no need for the *mufti* to look for an already established, easier position among the *madhhabs*, which is how they define *fiqhi rukhsahs*. The *mufti* needs to make an *ijtihaad* that will solve the problem regardless of whether that solution existed in one of the *fiqh madhhabs* or not. In other words, once they put condition (c) in their conditions, the matter becomes the proper way to

109- Islamic Fiqh Academy, Resolutions and Recommendations of the Council of the Islamic Fiqh Academy 1985-2000 (Jeddah, Saudi Arabia: The Islamic Fiqh Academy, 2000), p. 151.

110- They are not the first to exhibit this logical flaw. Numerous early scholars when speaking about resorting to *fiqhi rukhsahs* stated that there must be necessity or need to do so.

make *ijtihaad* under the principle of *taiseer* or necessity and not a search for an easier fiqh opinion found among the *madhhabs*. Thinking of *fiqhi rukhsahs* in this manner seems to be a throwback to an earlier time in which the *madhhab* rulings had some authority in and of themselves. Most scholars today would not accept that proposition. The *madhhab* views are views of scholars who may or may not be correct. Jurists are not bound by them nor it is necessary for jurists to find justification in their current views in what is found among the *madhhabs* of old.

Conclusions: The *Mufti* and Following *Fiqhi Rukhsahs*

Much of the scholarly literature on following *fiqhi rukhsahs* is more concerned with the layperson and not with the *mufti*.¹¹¹ However, it would be conceivable that if it is allowed for the layperson to follow the easiest fiqh opinions, it should be allowed for the *mufti* to give the same as a *fatwaa* for the layperson.

The above discussion has, though, demonstrated that there was a tacit consensus on the prohibition of following *fiqhi rukhsahs*. The implication of what those scholars were saying was that if someone were taking the easiest opinion simply because it is the easiest and on no other basis, regardless of whether it seemed to be an acceptable view or not, the person has not acted properly from an Islamic perspective.

Interestingly, although some scholars did allow some leeway with respect to the layperson, many times that same leeway was not offered to the *mufti*. For the *mufti*, he must analyze the issue and rule according to what is the strongest conclusion in his view. Thus, for example, ibn al-Qayyim stated, "It is not permissible for the *mufti* to apply any of the statements he wills without studying to see which is strongest and following it."¹¹² A similar statement was made by al-Nawawi. Both al-Nawawi and ibn al-Qayyim state there is no difference of opinion on this question.¹¹³

On this particular issue, Al-Samaani (d. 489) stated,

The *mufti* is the one who complete fulfills three qualities: [1] the ability to make *ijtihaad*, [2] righteousness and [3] refraining from seeking exemptions and ease. [An attitude of] ease [by the *mufti*] is of two types: One is being lackadaisical when it comes to seeking the evidence, methodology and rulings wherein one is instead content with a basic research and one's first thoughts. This person has failed with respect to the right of *ijtihaad* and it is not allowed

111- There are many reasons why one would distinguish a layperson from a mufti on this issue. A layperson by definition would not be able to ascertain the varying strengths of the differing positions. Hence, to the layperson, they are all equally valid if they come from scholars. One could then argue that there is nothing wrong with choosing the easiest of available authentic views.

112- Shams al-Deen ibn al-Qayyim, *Ilaam al-Muwaqieen an Rabb al-Aalameen* (Beirut, Lebanon: Daar al-Kutub al-Ilmiyyah, 1996), vol. 4, p. 162.

113- Ibn al-Qayyim, *Ibid.*; Yahya al-Nawawi, *Raudhah al-Taalibeen wa Umdah al-Mufteen* (Beirut, Lebanon: al-Maktab al-Islami, 1991), vol. 11, p. 111.

for him to give *fatwaas* and it is not allowed to seek a *fatwaa* from him. The second type is being too easy in seeking *rukhsahs* and reinterpreting the Sunnah [to accommodate easy opinions]. This person has overstepped the bounds with respect to his religion and he is more of a sinner than the first case.¹¹⁴

As shall be discussed later, the *mufti* has a special role and burden upon his shoulder and it is unacceptable for him to simply give *fatwaas* solely based on what is easiest or, in other words, *fiqhi rukhsahs*. At the same time, note that the strongest conclusion given particular circumstances may be an "easier approach." As long as the proper use of the evidence and circumstances point to that conclusion, there is nothing wrong with that. That is part of the quality of *taiseer* of the Shareeah. However, for a *mufti* to accept the easiest approach simply because it is the easiest, regardless of whether the evidence indicates that is what he should decide, is an abuse of the concept of *taiseer*.

114- Quoted in Shams al-Deen ibn Ameer Haaj, *Al-Taqreer wa al-Tahbeer* (Beirut, Lebanon: Daar al-Kutub al-Ilmiyyah, 1983), vol. 3 p. 341.

The *Mufti* and *Talfeeq* (التلفيق)

Talfeeq is a concept that is often discussed in conjunction with following fiqh *rukhsahs*. It, like following *fiqhi rukhsahs*, is definitely another practice that could be abused.¹¹⁵

Talfeeq lexically means, "to patch up, piece together, to concoct."¹¹⁶ As a technical term, it has been defined in numerous ways. Al-Utaibi, on the other hand, simply defines it as, "A compound *taqleed*¹¹⁷ from two or more madhabs concerning one act or worship or one legal matter."¹¹⁸ Al-Utaibi's definition is not concerned with whether the "compound" act is unprecedented or not. Others include this quality as part of the definition. In the OIC Fiqh Academy resolution, they stated, "The nature of *talfeeq* in strict adherence to *madhhabs* (*taqleed*) is for the follower to approach one issue that has two or more components to it in a manner that has never been proposed by any *mujtahid* that he is taking from on that issue."¹¹⁹ Given the variety of definitions, Krawietz, who refers to it as, "cut and paste," noted,

Nevertheless, no standard definition emerges from their texts because the Muslim authors have-at least partially-different things in mind when they talk about *talfiq*. According to a widespread definition, *talfiq* is "to bring forward a fashion [of a rule of law] that no qualified legal interpreter teaches (*al-ityan bikayfiyya la yaqul bih mujtahid*)". It could be that a "number of opinions of different schools are considered together and then pieces from each of these are lumped to form a new opinion not held by any of the schools individually". This might happen when "concerning one and the same problem (*qadiya wahida*) two or more doctrines are combined in such a way that a compound reality (*haqiqa murakkaba*) is created thereby which no one [ever] upheld". In fact, such a piecing together is not only carried out with the doctrines of the four orthodox schools but also with minor or marginal doctrines within or outside the realm of these four.¹²⁰

115- This was another practice that was virtually unanimously opposed by the scholars but, over time, began to develop some acceptance for various reasons. Ibrahim (Pragmatism, p. 107) writes, "Based on the evidence presented below [in his book], I argue that the virtually unanimous opposition to *talfiq* characteristic of the Mamluk period was challenged in the sixteenth through eighteenth centuries, despite the persistence of strong opposition to the practice throughout the latter period. The growing acceptance of *talfiq* is reflected in juristic discussions in which even some opponents of this legal strategy refused to overrule *talfiq*-based judicial decisions. As I point out in chapter 5, nineteenth-century reformers invoked the juristic arguments advanced by proponents of *talfiq* from the sixteenth through eighteenth centuries to support its use in the modern codification of Islamic law."

116- Cf., Wehr, p. 873.

117- *Taqleed* refers to the accepting of an opinion not due to an evaluation of what that opinion is actually based on.

118- Al-Utaibi, p. 10.

119- OIC Fiqh Academy, vol. 1, p. 640.

120- Birgit Krawietz, "Cut and Paste in Legal Rules: Designing Islamic Norms with *Talfiq*," *Die Welt des Islams* (Vol. 42, No. 1, 2002), p. 7.

Ignoring the differences in the definition, the gist of the concept is understandable: One combines and blindly accepts already existing opinions in such a way that one takes a stand that is unique and unprecedented.

There is no mention of this term in the first few centuries of Islam.¹²¹ Al-Qaasimi states that it was never discussed by the early scholars and the concept did not exist until the concept of *taqleed* (strict and absolute obedience to a school of fiqh) became dominant. He stated that the early scholars all agreed that the layperson actually has no *madhhab*; he simply follows the *madhhab* of the one who gives him a *fatwaa*.¹²² According to al-Duwaish, it was not the development of strict *madhhab* allegiance that led to the development of *taqleed* but it was the attempt to break down the restrictions of *taqleed* and bring the schools together that brought about *talfeeq*. In other words, it was not in an environment of friction between the schools but one of an appeasement that it appeared.¹²³

In essence, both al-Qaasimi and al-Duwaish are correct. Without the entrenchment of the schools of fiqh first, the legitimacy of *talfeeq* probably would have never come into question. This can be noted from the history of fiqh. In the earliest generations, individuals would turn for rulings and guidance to those scholars they trusted. On one occasion, a Muslim may turn to one scholar and on another occasion, perhaps due to logistic, he or she may turn to another scholar. However, both of those questions could have been related to one and the same act, such as *wudhoo* or prayer. It was only later, when the schools became rigid and people were expected to have an absolute allegiance to a particular school, that doing something like that became an issue.

The reader can probably already conceive of how *talfeeq* can overlap with the following of *fiqhi rukhsahs*. When a person is choosing from the opinions of the various fiqh schools, it is possible that he may simply choose the easiest of all the opinions on each case. This would be a case of both following *fiqhi rukhsahs* and *talfeeq*. However, *talfeeq* definitely does not have to be of this nature. In fact, it can sometimes be virtually the opposite of that. If one wanted to be very cautious in his actions, he may add together a number of restrictions on a particular act and end up with a set of requirements beyond what any one particular school would require of

121- Al-Duwaish notes early references to this phenomenon in the 5th Century Hijri. However, it definitely did not become a major issue of discussion until centuries after that. See Muhammad ibn Abdul Razzaaq al-Duwaish, *Al-Talfeeq wa Mauqif al-Usooliyyeen minhu* (Kuwait: Wazaarah al-Auqaaf wa al-Shuoon al-Islaamiyyah, 2013), pp. 27ff.

122- Jamaal al-Deen al-Qaasimi, *al-Fatwaa fi al-Islaam* (Beirut, Lebanon: Daar al-Kutub al-Ilmiyyah, 1986), p. 169.

123- Al-Duwaish, pp. 28f.

him. In fact, some scholars do like the idea of taking into consideration differences of opinion to ensure that none of the opinions are violated in an act.

As alluded to above, the layperson almost by default will "practice *talfeeq*." The layperson will not be an expert on any particular *madhhab* to know how to follow it in detail. Hence, he or she will follow whatever information is received via a trustworthy source. For example, he or she may make ablution partially according to one source which could be Shafiee and the rest from another source that could be Hanafi. Since this is essentially what the earliest generations did, no one should fault the layperson for such actions. At the same time, though, a layperson (with some insight) might try to abuse this concept for his or her own advantage. An egregious example of such abuse would be a man "marrying" a woman without the permission of the *wali* (in accord with the Hanafi school), without witnesses (in accord with the Maliki school) and with no dower (in accord with the Shafiee school). No *madhhab* would accept this marriage in this combination as a sound marriage. (This is a classic example of *talfeeq* that explains why scholars were concerned about this issue.) This example could actually be extended as the man later could, if he wanted to simply walk away from the woman, argue according to the Hanbali school (and all others actually) that the marriage was never a valid marriage in the first place.¹²⁴

Some Theoretical Underpinnings Related to *Talfeeq*

The concept of *talfeeq* is related to a number of philosophical or theoretical issues that could influence one's view of *talfeeq*. Before discussing *talfeeq* further, they need to be touched upon.¹²⁵

One issue is that of whether every *mujtahid* is correct or, as described before, the question of "multiple truths." The relationship between that question and *talfeeq* is somewhat tricky. If a person believes in multiple truths, then he should be open to an individual following any of the "correct views" that are out there which should, presumably, also include combining them together. However, if a person is following a mode that has never been held before, then it is not one of the "truths" that is available to the individual. It was concluded earlier that there are not multiple truths

124- Another classic example of *talfeeq* is slightly different. The above was concerning one action at one time while *talfeeq* could be done with respect to two deeds of the same nature done over time. For example, an individual insists on his right of preemption to a sale because he is a neighbor. The neighbor has this right according to the Hanafis. However, later when he tries to sell the same property he refuses to recognize the right of his neighbor to preemption. Here he would be applying the Shafiee school view that the neighbor does not have this right.

125- Space limitations do not allow an in-depth study of these issues.

but only one truth. The view of only one truth actually lends itself to *talfeeq* on the part of the *mujtahid*, as shall be described later in-shaa-Allaah.

Earlier there was also a discussion of *taiseer*. If one improperly raises *taiseer* to the level of being an ultimate goal of the Shareeah, then *talfeeq* would obviously be an important tool, as one could combine all of the easiest views in one action. As stated earlier though, *taiseer* is not a goal in and of itself but when given permissible options, it would be desirable. Thus, one would have to prove *talfeeq* permissible first and then invoke *taiseer*.

Another related question is whether or not it is permissible for a *mujtahid* who is following a specific madhhab to take an opinion from a differing *madhhab* on a particular point. This question arises as a result of a very strict adherence to *madhhabs*.¹²⁶ As shall be discussed later, there should not be any objection for a qualified *mujtahid* to accept a position that differs from the *madhhab* he traditionally follows, as long as he has reasoned in the proper manner.

A final issue that needs to be dealt with relates to the concept of *ijmaa* (consensus). Sometimes no consensus is established on a particular issue but, at the same time, all the scholars fall into one of only two opinions on that issue. Are those two established opinions now binding, in the sense that a consensus has been established that the truth must be one of those two opinions?¹²⁷ If one does consider that a type of consensus, then a new, third opinion would essentially be violating consensus and not be considered permissible. According to this view, *talfeeq* would be forbidden, as al-Duwaish pointed out.¹²⁸

A most important evidence concerning consensus is the hadith,

إِنَّ أُمَّتِي لَا تَجْتَمِعُ عَلَى ضَلَالَةٍ

"Verily, my Nation does not unite upon misguidance."¹²⁹ In the case under discussion, there is actually no agreement. The scholars are holding opposing views and they are not necessarily claiming that the truth must be in either their view or

126- It seems that those who still believe in an absolute obedience to madhhabs are in the minority today. Therefore, this author will not dwell on this issue at length.

127- There are four opinions on this issue: (1) It is not allowed to introduce a new opinion after opinions have been reduced to two (or X); (2) It is allowed to introduce a new opinion, as there is an absence of a consensus; (3) If the Companions' opinions were only two, one cannot go beyond them; for any other generation, it is permissible to introduce a new opinion; (4) It is permissible to hold a new opinion as long as that opinion does not invalidate any of the previously existing opinions. For details, see al-Duwaish, pp. 40-51. See also al-Utaibi, pp. 14f.

128- Al-Duwaish, p. 50.

129- Recorded by al-Tirmidhi, ibn Abi Aasim in al-Sunnah and ibn Maajah. According to al-Arnaaoot and Abdul Ghafoor, it is sahih based on supporting evidence. Al-Albaani has called it hasan. See Shuaib al-Arnaaoot and Haitham Abdul Ghafoor, footnotes to Abu Isa Muhammad al-Tirmidhi, al-Jaami al-Kabeer (Sunan al-Tirmidhi) (Damascus, Syria: Daar al-Risaalah al-Alamiyyah, 2009), vol. 4, pp. 239-241; Muhammad Naasir al-Deen al-Albaani, Silsilat al-Ahaadeeth al-Saheehah (Riyadh, Saudi Arabia: Maktabah al-Maarif, 1995), vol. 3, pp. 319-320.

the opposing view. Another hadith of relevance is the statement of the Prophet (peace and blessings of Allah be upon him),

لَا تَزَالُ طَائِفَةٌ مِنْ أُمَّتِي ظَاهِرِينَ عَلَى الْحَقِّ لَا يَضُرُّهُمْ مَنْ خَذَهُمْ حَتَّى يَأْتِيَ أَمْرُ اللَّهِ وَهُمْ كَذَلِكَ

"A group of people from my *Ummah* will always remain triumphant on the right path and continue to be triumphant (against their opponents). He who deserts them shall not be able to do them any harm. They will remain in this position until Allah's Command [that is, the Day of Resurrection] is executed." (Recorded by Muslim.) Does this hadith refer more to the general methodology and path of the people or does it imply specifically all rulings as well? Ibn al-Qayyim has quoted this hadith to argue that the truth must be established at all times and hence there must be at least some of the believers on the truth. Thus, he argues that the truth must be contained among what the Companions were upon.¹³⁰ If that is the case, then when making *talfeeq*, one needs to take into consideration whether the new view is consistent with previous views. However, it could be, as Ibn Hazm noted, that once the difference of opinion occurs, it is difficult then to capture all of the different views.¹³¹ In other words, maybe a couple of views then become dominant while there were actually others out there. In the same way that it is difficult to declare a consensus on an issue, it would be difficult to declare that all held opinions were only two, three or X number.

The "Promise and Hope" of *Talfeeq*

In contemporary times, the concept of *talfeeq* has risen to some prominence, with the attempt to modernize and codify Islamic Law. Ibrahim states,

The common wisdom is that *talfeeq* came to be considered a lawful practice only in the nineteenth century, when legislators used it for the development of legal codes to accommodate modernity. Hallaq and Layish argue that the practice of *talfeeq* was outright forbidden prior to the nineteenth century. This view led Layish to describe the practice as a form of "legal opportunism" (as if such eclecticism and transplantation were peculiarities of Islamic law of the modern period) aimed at enabling legislators in Muslim majority societies to create legal codes compatible with the dictates of European modernity. He thus concludes that the modern codification of Shari'a was a development that occurred outside the classical tradition.¹³²

Hallaq and Layish's dating of the first occurrence of *talfeeq* is unquestionably in error¹³³, they were certainly correct in describing how *talfeeq* was used to

130- Ibn al-Qayyim, *Ilaam*, vol. 4, p. 114.

131- See al-Duwaish, p. 44.

132- Ibrahim (Pragmatism), p. 106.

133- For counter evidence, see al-Duwaish, pp. 28ff.

"modernize" and "modify" Islamic Law in recent times. Al-Utaibi notes that there are contemporary scholars who, in the face of the numerous new issue, consider *talfeeq* as the most appropriate solution for the fiqh problems facing today's Muslims. They make the following arguments:

(1) One fiqh *madhhab* alone will not be sufficient to meet the needs of the Muslims. It will be in need of the other *madhhabs*. As a whole only will they be sufficient.

(2) *Talfeeq* helps one to choose the opinion that is most merciful and easiest upon the people. This will encourage them to follow the religion and make the religion more beloved to them, especially given the relatively low level of religiosity among people today.

(3) Bringing the *madhhabs* together and in cooperation with each other is the best way to remove *madhhab* partisanship and extremism, or at least reduce it.¹³⁴

This infatuation with *talfeeq* highlights the importance of having the proper perspective on this question.

The *Mufti*, *Ijtihad* and *Talfeeq*¹³⁵

It is important to keep in mind that the opinions of the *madhhabs* and scholars are not a "divine" body of literature from which a *mufti* can choose whatever he wills. (That would be the "multiple truths" view that was rejected earlier.) Instead, they are the appreciated efforts of devoted humans who sometimes err. Therefore, the concept of *talfeeq* that is rooted in the "multiple truths" view, and which seems to be proposed by a number of contemporary authorities, is simply untenable.

On the other hand, the role of the *mufti*—as is clear in the definition of the word *fatwaa*—is to clarify Allah's ruling on an issue. Hence, it is his responsibility to seek Allah's ruling and not the ruling of his liking or of the masses' liking. He does this by making *ijtihad* to determine the strongest view on an issue.

If the *mufti* has the ability to make *ijtihad*, he cannot resort to *talfeeq*—simply picking and choosing from the existing database of fiqh opinions—as *talfeeq* is a form of *taqleed* (blind following) that is not allowed when one is able to make *ijtihad*.

134- Al-Utaibi, p. 5. He gives references to those who propose these views.

135- Much of the scholarly discussion concerning *talfeeq* is related to the layperson and *talfeeq*. This paper is concerned with the mufti making fatwaas and *talfeeq*.

If the *mufti* is an "absolute *mujtahid*," in the process of a *mufti* making *ijtihad*, it is very likely that he will come to conclusions that are consistent with one particular *madhhab* at some times and another at other times. This would be most common if the original differences of opinion were rooted in logistic or *ijtihaadi* causes (as defined earlier). As al-Duwaish notes, this action is not to be described as *talfeeq* at all because he is not combining *madhhabs* but he is independently, in essence, deriving his own *madhhab*. For that category of scholar, there is no difference of opinion that he is allowed to come to his own conclusion and *talfeeq* is not an issue.¹³⁶

Many times a *mufti* is not an "absolute *mujtahid*," coming up with his own views, but he does have the ability to understand and analyze the views of the *madhhabs* and to determine which of their views seems to be the strongest. It will be incumbent upon him, as shall be described later, to rule according to the strongest view. In the process, though, he may end up following some views from one *madhhab* and other views from a different *madhhab*, even concerning one and the same act, such as prayer or marriage.¹³⁷ Lexically speaking, this act can be called *talfeeq* (combining things together). Some scholars, such as al-Dahlawi, would even include this act under the technical definition of *talfeeq* as well.¹³⁸

Regardless of whether one wishes to call this act *talfeeq* or not, the more important question is its permissibility. Of course, at one period of time, it was expected or demanded that *muftis* would rule according to *madhhab* lines. Even in that atmosphere, it was recognized by many that a *mufti* could cross *madhhab* lines is that is what the proofs clearly demanded of him.¹³⁹ In fact, this, as ibn Taimiyyah stated, is obligatory upon him once it is clear to him what Allah's or the Messenger's ruling on an issue is as one is obliged only to obey Allah and His Messenger.¹⁴⁰

Objectivity is demanded of the *mufti*. This is why the following of *fiqhi rukhsahs* and certain *talfeeq* are prohibited as they render *fiqh* a source of following subjective goals rather than objective truths. A sign of a *mufti's* objectivity is his

136- Cf., al-Duwaish, p. 189.

137- For example, a scholar could wipe only a portion of his head while making ablution. This would be correct according to the Shafiee view and it may be the conclusion that the scholar reaches upon studying the evidence. It would not be sufficient from a Hanafi perspective. In addition, that scholar could then possibly touch a non-related woman and not consider that a negation of his ablution. The Shafiees would say that his ablution is nullified while the Hanafis do not consider it a violation. Now if that scholar prays, his ablution is not valid according to both the Shafiees and the Hanafis. However, due to his own personal study of the evidence, he has found no problem with either act and he considers his ablution still valid.

138- See al-Duwaish, pp. 190-191.

139- This is the opinion of the majority of the scholars. Al-Utaibi mentions that al-Ghazaali and al-Maaziri consider it impermissible. See al-Utaibi, p. 26.

140- See al-Duwaish, p. 194; al-Utaibi, p. 26.

consistency in his legal reasoning. This author believes that this is relevant to the question of *talfeeq* as well, although it is not touched upon in the literature. Often differences in fiqh opinion revolve around a difference in methodological approach (an *usooli* difference). For example, sometimes a fiqh conclusion hinges on the question of whether the jurist accepts or rejects, for example, *mursal* hadith or, in other cases, accepts or rejects argumentum a contrario (*mafhoom al-mukhaalafah*). Unless a jurist has changed his view on such an issue over time, it would be inconsistent of him to at one time accept the argument of argumentum a contrario and then to reject it as a proof on another occasion. In both cases he would be following a view of previous scholars, like *talfeeq*, but this inconsistency would either be an indication of a lack of objectivity or a lack of sound scholarship on his part.

If the *mufti* is not able to independently study an issue and make *ijtihaad*, either due to lack of time or not being specialized in an area, the *mufti* must then refer the issue to one who is qualified to respond to it or the *mufti* simply transmits others' opinions on the issue. In essence, he now becomes like a layperson who has to follow the opinions of the scholars. This means that the rules of *talfeeq* for the layperson will now apply to this *mufti*.

Motivations for Resorting to Talfeeq

After a detailed discussion, al-Utaibi states that there are three motivations driving contemporary scholars to *talfeeq*: (1) necessity and need; (2) the low level of piety and religiosity among those seeking *fatwaas*; (3) validating the acts of worship and mundane deeds of those seeking *fatwaas*. Al-Utaibi demonstrates that none of these are sound motivations for resorting to *talfeeq*. Each of these three deserve some attention.

With respect to necessity and need¹⁴¹, he writes, "It is not allowed for a *mufti* to resort to *talfeeq* due to necessity. Instead, it is obligatory upon him to look into the evidences. It will not be the case that there is no relevant evidence to remove the hardship from a person if it were truly a case of necessity and within its realms."¹⁴² This author is in agreement with al-Utaibi, as necessity has its own principles that should lead the *mufti* to his conclusion, completely independent of the concept of *talfeeq*. As al-Utaibi further says, "This does not mean that the previous *ijtihaads* are to be ignored. Indeed, they are the lamp that will help the jurist understand the evidences and reach guidance. If he then reaches a conclusion that is

141- Al-Utaibi does not cite a proponent of this view but Ibrahim (Pragmatism, p. 121) states that Taqiy al-Deen al-Subki and al-Zarkashi ascribed to this view.

142- Al-Utaibi, p. 41. He then goes on to quote ibn al-Qayyim who stated virtually the same.

a kind of *talfeeq* between two views, there is no blame upon him as he reached that conclusion as a consequence of his study of the evidences and not as his intent [to simply make *talfeeq*]."¹⁴³ Al-Utaibi further notes that if *talfeeq* is prohibited for the case of necessity, it must even more so be prohibited for the case of need, which is less than a necessity.¹⁴⁴

With respect to the low level of piety and religiosity of those seeking fatwaas, al-Utaibi states that it is from the etiquettes of the *mufti* to take into consideration the state of the one who is seeking a *fatwaa*. Thus, for example, one is physically incapable of performing an act properly may be given a different *fatwaa* from who is completely physically capable, depending on their capabilities. As mentioned earlier, this is part of the *taiseer* that forms an integral part of the Shareeah. But, again, *taiseer* is not the ultimate goal of the Law. Actually, the Law attempts to bring humans out of following their own whims, wants and conclusions to submitting to the Commands and Laws of Allah. Al-Shaatibi has made a very famous statement on this point, "The primary legal objective of the promulgation of the Shareeah is to free the subject from the exigencies of his own whims so that he may be the servant of Allah by choice, just as he is the servant of Allah by compulsion."¹⁴⁵ The point is that if the one who is already weak in his faith is constantly being given easy *fatwaas*, this will actually simply make him weaker, as he is being steered away from those acts that may strengthen his faith and resolve. He certainly cannot be given fatwaas that essentially offer him a way out of the fundamental practices of the faith. As al-Shaatibi noted, individuals need to be guided to the straight path, which is neither extremely harsh nor extremely lenient.¹⁴⁶

Incidentally, this author has often heard reference to how the Prophet (peace and blessings of Allah be upon him) dealt with people according to their ability and understanding. There is an entire dissertation dedicated to this topic.¹⁴⁷ Many times the difference in the Prophet's attitude was related to advice and guidance. They were not related to fiqh issues. In general, the Law for everyone is one and the same. There are perhaps only one or two explicit exceptions of this nature to be found.¹⁴⁸ One exception, in particular, does not lend itself necessarily to the concept

143- Al-Utaibi, p. 42.

144- Al-Utaibi, p. 43.

145- Ibrahim ibn Musa al-Shatibi, *The Reconciliation of the Fundamentals of Islamic Law*, Imran Nyazee, trans. (Reading, United Kingdom: Garnett Publishing, 2014), vol. 2, p. 135.

146- Al-Shaatibi, vol. 5, p. 276. See also al-Utaibi, pp. 44-46.

147- Abdul Lateef al-Astal, *Muraa'ah Ahwaal al-Naas fi Dhau al-Sunnah al-Nabawiyah* (Master's Thesis: The Islamic University, Gaza, 2008).

148- Other than the exemptions that the Prophet (peace and blessings of Allah be upon him) made for those who wished to embrace Islam on a condition that they would not perform certain acts. This could probably be considered a special case, as this author is unaware of it ever being extended except to

of *taiseer*, which is often why *talfeeq* is invoked. The reference is to the following hadith:

عَنْ أَبِي هُرَيْرَةَ، أَنَّ رَجُلًا سَأَلَ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَنِ الْمُبَاشَرَةِ لِلصَّائِمِ، «فَرَخَّصَ لَهُ»، وَأَنَّهُ
آخَرُ، فَسَأَلَهُ، «فَنَهَاهُ»، فَإِذَا الَّذِي رَخَّصَ لَهُ شَيْخٌ، وَالَّذِي نَهَاهُ شَابٌّ

Narrated Abu Hurairah, "A man asked the Prophet (peace and blessings of Allah be upon him) whether one who was fasting could embrace (his wife) and he gave him permission¹⁴⁹; but when another man came to him, and asked him, he forbade him. The one to whom he gave permission was an old man and the one whom he forbade was a youth."¹⁵⁰ Judging from the scholarly opinion on this issue, such as that presented by al-Tirmidhi, the default is the permissibility of kissing and it is only for those who fear that they may go too far that kissing becomes disliked or prohibited.¹⁵¹ Thus it is a case where the Prophet (peace and blessings of Allah be upon him) actually gave a different ruling for two different people but the exceptional ruling was not that of ease (*taiseer*) but of a restriction. It was an example of blocking the means to something permissible as it may lead to something more harmful (*sadd al-dharaai*).¹⁵²

people considering embracing Islam. The scholars differ as to how to deal with such conditions. AMJA's stance as proclaimed in 2017 is: "An exception is made for accepting a person's Islam with an invalid condition attached to the conversion. In other words, one could accept the Islam of a woman who says that she will stay married to her non-Muslim husband or who says that she will not wear the hijab, for example. However, any such stipulation cannot contravene the foundations of the testimony of faith or violate any others' rights. At the same time, one must also explain that such conditions are void; this explanation must not be in such a way that it will lead to a greater harm. Additionally, efforts should be made to teach that individual; they should be assisted to grow spiritually and pointed to ways that could solve their issues. It is hoped that their Islam will eventually lead them to correcting their own shortcomings." AMJA, <http://www.amjaonline.org/en/component/content/article/19-imams-conference/127-recommendations-of-the-conference-on-contemporary-issues-related-to-new-muslims>

149- The Arabic of the text actually says, فرخص له but this is simply the basic lexical usage of the word, which means "to permit" and does not imply that it was a rukhsah in the technical sense.

150- Recorded by Abu Dawood and others. This is Abu Dawood's wording. It is graded sahih by al-Albaani and by al-Arnaaoot. Muhammad Naasir al-Deen al-Albaani, footnotes to Abu Dawood al-Sijistaani, Sunan Abu Dawood: Al-Umm (Kuwait: Muasassah Gharaas, 2002), vol. 7, p. 148; Shuaib al-Arnaaoot and Muhammad Kaamil Balali, footnotes to Abu Dawood al-Sijistaani, Sunan Abu Dawood (Damascus, Syria: Daar al-Risaalah al-Aalimiyyah, 2009), vol. 4, p. 62.

151- Abu Isa Muhammad al-Tirmidhi, al-Jaami al-Kabeer (Sunan al-Tirmidhi) (Damascus, Syria: Daar al-Risaalah al-Alamiyyah, 2009), vol. 2, pp. 258-259.

152- Another possible case where the ruling is different for different people is what is known as the araaaya sale (بيع العرايا). This was an exceptional type of sale that was intended to benefit the poor and needy.

However, the restrictions in the text are concerned with the amount of dates sold and not with the nature of the individual (poor or otherwise). For details on this transaction, see Maufiq al-Deen ibn Qudaamah, al-Mughni (Cairo, Egypt: Maktabah al-Qaahirah, 1968), vol. 4, pp. 45f.

Physical, not spiritual, weakness is recognized in Islam. Hence, those who cannot pray standing are allowed to pray sitting. There is an example in the sunnah of the Prophet (peace and blessings of Allah be upon him) where the Prophet "finds a way out" for an individual while still making sure that the letter of the law was fulfilled. Some might point to this as another example of *taiseer*. However, since death was feared, this example would fit under the category of necessity rather than *taiseer*. Furthermore, the letter of the law was still upheld. The hadith is from Musnad Ahmad and Sunan ibn Maajah:

عَنْ سَعِيدِ بْنِ سَعْدِ بْنِ عَبَّادَةَ، قَالَ: كَانَ بَيْنَ أَبِينَا إِنْسَانٍ مُجَدِّحٍ ضَعِيفٍ، لَمْ يُرْغِ أَهْلَ الدَّارِ إِلَّا وَهُوَ عَلَى أَمَةٍ مِنْ إِمَاءِ الدَّارِ يَجْتَبِئُ بِهَا، وَكَانَ مُسْلِمًا، فَرَفَعَ شَأْنَهُ سَعْدًا إِلَى رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَقَالَ: "اضْرِبُوهُ حَذًى" قَالُوا: يَا رَسُولَ اللَّهِ، إِنَّهُ أضعفُ مِنْ ذَلِكَ، إِنْ ضَرَبْتَهُ مِائَةَ قَلْبَانَا قَالَ: "فَحَدُّوْا لَهُ عِنْدَآلَا فِيهِ مِائَةُ شِمْرَاحٍ، فَاضْرِبُوهُ بِهِ ضَرْبَةً وَاحِدَةً، وَخَلُّوا سَبِيلَهُ"

It was narrated that Sa'eed bin Sa'd bin 'Ubadah said: "There was a man living among our dwellings who had a physical defect, and to our astonishment he was seen with one of the slave women of the

With respect to validating the acts of worship and mundane deeds of those seeking *fatwaas*,¹⁵³ al-Utaibi states that the Shareeah has laid down specific requirements that render an action valid or void. If the *mufti* attempts to simply validate the wrong acts of individuals by *talfeeq*, legal stratagem or invoking rejected views, he will be voiding other intents of the Lawgiver and hence not bringing about any true good. In the laws of what is defined as valid or void are found the goals and intent of the Shareeah. As a result, the *mufti* cannot resort to *talfeeq* with this goal in mind. At the same time, though, al-Utaibi says that the *mufti* should not void any deed that any person has performed unless he has direct evidence that it is void, as the default concerning the actions of the Muslims is that they are sound.¹⁵⁴

There is no harm in a *mufti* attempting to help a sincere Muslim who has found himself or herself in a difficult predicament. The *mufti*, being more knowledgeable of the Shareeah, may be aware of steps that the individual can take of which the individual was unaware. However, this cannot involve validating acts, such as a marriage contract, that the Shareeah has definitively rendered invalid. Similarly, it cannot be by voiding acts that are clearly sound and legal from the Shareeah perspective.¹⁵⁵

In addition, sometimes people fail to perform acts properly out of ignorance. Ignorance has its own set of rules. There could be cases where an individual is excused due to his ignorance. The *mufti* has to be aware of this aspect of the Shareeah as well, especially in contemporary times where Islamic knowledge may not be as widespread as it once was. In these scenarios as well, then, the *mufti* again need not resort to *talfeeq*.¹⁵⁶

Conclusions: The *Mufti* and *Talfeeq*

Talfeeq is closely related to the practice of *taqleed*. The *mufti* who is making *ijtihad*, therefore, does not resort to *talfeeq*. The *mujtahid* independently comes to

dwelling, committing illegal sex with her while he was a Muslim. Sa'd bin 'Ubadah referred his case to the Messenger of Allah (peace and blessings of Allah be upon him), who said: 'Give him the hadd punishment [one hundred lashes]. They said: 'O Prophet (peace and blessings of Allah be upon him) of Allah, he is too weak to bear that. If we give him one hundred lashes he will die.' He said: 'Then take a branch with a hundred twigs and hit him once.'" This hadith is graded sahih by al-Albaani and by al-Arnaaoot, et al. See al-Albaani, *Silsilat al-Ahaadeeth al-Saheehah*, vol. 6, p. 1215; Shuaib al-Arnaaoot, et al., footnotes to Ahmad ibn Hanbal, *Musand*, vol. 36, pp. 263-264.

153- Al-Utaibi does not quote any proponent of this view but Ibrahim (Pragmatism, p. 115) describes the view of al-Karmi who "explicitly stated that it would be unrealistic to try to change people's practice and, on this basis, talfiq ought to be legitimized, 'wherever this takes place, especially as performed by the laity, who are unable to do otherwise.'"

154- Al-Utaibi, pp. 46-47.

155- Cf., Saad al-Anazi, "Al-Talfeeq fi al-Fatwaa," <http://feqhweb.com/dan3/uploads/1381598544215.pdf>, pp. 302-304.

156- For examples of ignorance is treated with respect to various aspects of the law, see Rafee Allaah Mahmood, "Al-Jahl bi-Tashree wa Atharuhu an al-Masooliyyah," (Ph.D. Dissertation: International Islamic University, Islamabad, Pakistan, 2005-2006), pp. 210-329.

his conclusion concerning an issue. The opinions of early scholars are beneficial to learn from but the goal is not to simply combine previous opinions together. The end result of the *ijtihaad* may look like *talfeeq*, in that there is an agreement with various *madhhabs* on different issues, but that should never be the goal.

When making *ijtihaad*, it is necessary to ensure that one is not contradicting any established consensus. The *mufti* should be careful about deriving rules that could be contradicting consensus or creating a new mode that does not seem to be consistent with the authentic and affirmed practices of the faith.

The Mufti and the Anomalous Opinion (Shaadh الشاذّ)

Shaadh opinions is another important issue for today's *mufti*. In particular, *shaadh* opinions are related to the previous two topics in the sense that in the name of seeking *fiqhi rukhsahs* or *talfeeq*, *shaadh* opinions are being invoked and followed, sometimes with great ramifications.

Definition of the term *Shaadh*

Lexically, the term *shaadh*¹⁵⁷ can be defined as, "isolated, separated, detached alone; abnormal, anomalous; irregular; extraordinary, exceptional, singular, curious, queer, odd, peculiar, strange, eccentric."¹⁵⁸

As a technical term, it has been defined in a number of ways. A problem is that the definitions lack consistency. In the various definitions *shaadh* is juxtaposed with the consensus, the majority opinion, the strongest opinion and the correct opinion.¹⁵⁹

Concerning *shaadh*, ibn Hazm wrote, "The definition of *shaadh* is anything which contradicts the truth. Everyone who contradicts what is correct on an issue is following what is *shaadh*, even if it is practically everyone on earth or some of them. The 'group' [on the truth] (*al-jamaah*) are the people of the truth, even if it is just one person on earth, he is the 'group'... The correct view is that *shaadh* is that which is *baatil* (false)."¹⁶⁰ Ibn al-Qayyim said something similar, "*Shaadh* is whatever contradicts the truth, even if everyone is following that [falsehood] except one of them, they are the ones adhering to what is *shaadh*. During the time of Ahmad ibn Hanbal, all of the people were on *shaadh* except for a small number, who were the [true] group (*al-jamaah*)."¹⁶¹ Ibn Taimiyyah stated, "The opinion that is indicated by the Book and the Sunnah can never be *shaadh*, even if those who adhere to it are fewer than those who [follow an opposing view]. No consideration is to be given to majority alone, all agree to that."¹⁶² They make an important point: Not every minority opinion is by default incorrect. The example of Abu Bakr can be cited in which he differed with the other Companions concerning fighting those who refused to pay Zakaat. (Granted, he was able to convince them that he was correct and they

157- There is a shaddah over the dhaal. So, technically it should be written shaadhhdh.

158- Wehr, p. 461.

159- Incidentally, some scholars use the term *shaadh* in a relative sense in relation to their particular *fiqh* madhhab. This means that it is "unique or strange" within that madhhab but it could be a prominent view outside of that madhhab.

160- ibn Hazm, *al-Ihkaam*, vol. 5, p. 87.

161- Ibn al-Qayyim, *Ilaam*, vol. 3, p. 308.

162- Taqiyy al-Deen ibn Taimiyyah, *al-Nubuwwaat* (Riyadh, Saudi Arabia: Adhwa al-Salafi, 2000), vol. 1, p. 594.

were incorrect.) At the same time, though, these definitions are deficient in that they do not distinguish *shaadh* from *baatil* (false). *Shaadh* is a subset of *baatil* but there must be something in the definition to distinguish the two. In addition, they do not relate the term *shaadh* to being solitary or anomalous, as its lexical meaning would imply.

On the other end of the spectrum, one definition of *shaadh* is, as al-Zarkashi expressed it, "It is the opinion of one while abandoning the opinion of the majority."¹⁶³ A similar definition has been quoted by ibn Hazm, "It is one scholar departing from the views of the rest of the scholars."¹⁶⁴ This definition is problematic in that it is not sufficient. As alluded to earlier, an opinion being a minority opinion does not necessarily mean that it is inconsistent with the Quran and Sunnah. Note that these definitions restrict *shaadh* to be an act of only one scholar. While one scholar departing from the others could be considered *shaadh*, there does not seem to be any justification to restrict it to only one scholar, as opposed to two or three scholars or more, for example.

A number of contemporary scholars have attempted new definitions in the light of the linguistic meaning of the word and the spirit of the word's meaning that previous scholars attempted to capture. Here is a sample:

"A view held by a small group of *mujtahideen* with no basis in acceptable evidence."¹⁶⁵

"To be unique in one's view, contradicting the vast majority of the *mujtahideens* with no basis in revelation, analogy or acceptable proof."¹⁶⁶

Jamaal Ali defines it as, "For a group [of scholars] to differ on a non-fundamental issue concerning which it is definitely clear that their view contradicts the well-established opinion, the preponderant opinion, the sound opinion, the weak opinion or the non-preponderant opinion."¹⁶⁷ What Ali is stating is that it is a view whose wrong nature is clear. Hence, it is not even comparable to a weak opinion among the jurists because a weak opinion could have a possibility of being correct—not so a *shaadh* opinion. Hence, he defines a *shaadh fatwaa* as, "Every *fatwaa* in

163- Badr al-Deen Muhammad al-Zarkashi, al-Bahr al-Muheet fi Usool al-Fiqh (Kuwait: Wizaarah al-Auqaaf wa al-Shuoon al-Islaamiyyah, 1988), vol. 4, p. 518.

164- Ibn Hazm, vol. 5, p. 86.

165- Abdul Azeez al-Namlah, Al-Araa al-Shaadha fi Usool al-Fiqh (Riyadh, Saudi Arabia: Daar al-Tadmuriyyah, 2009), vol. 1, p. 89.

166- Ahmad al-Mubaaraki, Al-Qaul al-Shaadha wa Atharuhu fi al-Futyya (Riyadh, Saudi Arabia: Daar al-Izzah, 2010), p. 75.

167- Jamaal Shabaan Husain Ali, "Al-Fataawa al-Shaadha wa Atharaha ala al-Mujtama: Diraasah Fiqhiyyah Tatbeeqiyyah" (Paper presented to conference on al-Fataawaa wa al-Istishraaq wa al-Mustaqbal), <http://www.csi.qu.edu.sa/Collegeevents/m-fatwa/Documents/%D9%83%D8%AA%D9%8A%D8%A8%20%D8%AA%D8%B9%D8%B1%D9%8A%D9%81%D9%8A.pdf> p. 923.

which its giver departs from the congregation and which contradicts a definitive correct position."¹⁶⁸

The emphasis, in these modern researches, is that generally scholars would not call an opinion *shaadh* unless it was clearly incorrect and therefore outside of the scope of what is termed "permissible differences of opinion."¹⁶⁹ Al-Mubaaraki writes that in a general sense *shaadh* is from the category of impermissible differences of opinion, "a view that is extremely weak and which is referred to as, 'the slips of the scholars.'"¹⁷⁰ Thus, Al-Ghalibzoori also defined a *shaadh fatwaa* as, "It is a ruling in opposition to the text of the Quran or Sunnah, or their wordings or indication do not support the interpretation of the *mufti*; or it is a ruling that is in opposition to that known of the faith by necessity; or is in opposition to the goals of the Law, its principles or fundamentals. That is so because a ruling would not be considered false and rejected except in these cases. A *fatwaa* of this nature is a *shaadh fatwaa*, as it has deviated (*shadhdah*) from the proper methodology."¹⁷¹

Thus, in general, *shaadh* refers to unique views which have been determined to be unsound.¹⁷² There is a direct relationship between *shaadh* views and following *fiqhi rukhsahs*. It is many times these strange and anomalous views that are seized upon to open the door for desired results. As such, a compound methodological mistake occurs. The improper seeking of exemptions is made worse by quoting a view that has been determined to be false, even though it was possibly held by a scholar. All scholars make mistakes and it is very possible that many scholars hold some views that may be *shaadh*.¹⁷³ Thus, al-Auzaaee (d. 158 A.H.) stated, "Whoever follows the scholars' rare opinions (*nawaadir*) leaves from Islam."¹⁷⁴

168- Ibid., p. 925.

169- In this way, it is analogous to the scholars of hadith usage of the term *shaadh*. For them, in general, it refers to a report narrated by a trustworthy narrator but which contradicts stronger sources and proofs. Hence, it is considered mistaken or, in other words, wrong.

170- Al-Mubaaraki, p. 67.

171- Tafeeq al-Ghalibzoori, "Al-Fatwaa al-Muaasirah bain al-Indhibaat wa al-Idhtiraab: Al-Fataawaa al-Shaadhaah Namoodhijaa," https://www.researchgate.net/publication/279165707_alftwy_almasrt_byn_alandbat_w_aladtrab_alftwy_alshadht_nmwdhja p. 325.

172- Sometimes there is some fluidity in the usage of technical terms. For the most part, though, it will be reserved for statements whose falsehood can be demonstrated. The context would demonstrate if it is meant in a more particular fashion. In al-Shamraani's study of ibn Rushd's usage of the term *shaadh* in his classic work *Bidaayah al-Mujtahid*, he found that ibn Rushd used the term in reference to the following cases: that which contradicts consensus; that which contradicts the Companions' consensus; that which is in opposition to the clear texts of the Quran or Sunnah; that which is void of any evidence; that which differs from the opinion of the *jamhoor* (majority); that which is not found among the views of the scholars; that which differs from an agreed upon view; and that which differs from the scholar's own *madhhab*. Saalih ibn Ali al-Shamraani, *Al-Aqwaal al-Shaadhaah fi Bidaayah al-Mujtahid li-ibn Rushd: Jamaa wa Diraasah* (Riyadh, Saudi Arabia: Maktabah Daar al-Minhaaj, 1428 A.H.), pp. 49-50.

173- It is important to keep in mind that declaring an opinion to be *shaadh* does not necessarily constitute an attack on the character of the person who held that view. Humans err, and scholars are no exception. An otherwise righteous and intelligent scholar is not to be abandoned simply because he has some slips. Cf., al-Mubaaraki, pp. 25-26.

174- Quoted by al-Dhahabi, *Siyar*, vol. 6, p. 552.

The *Mufti* and *Shaadh* Opinions

As described above, the essence of describing a view as *shaadh* is that there is a clear indication that that view is incorrect. Once a *mufti* accepts that a view is *shaadh*, there should be no excuse for him to rule based upon that view. In other words, a *mufti* is not permitted to rule based on something that he knows is false.

In some cases, the falsehood of a view should be so clear to the *mufti* that it would be inexcusable for him to follow that view if he researched and reflected on the matter properly. Recently, for example, there have been a number of personalities who have claimed that it is permissible for a Muslim woman to marry a non-Muslim man. For fourteen centuries, it was either explicitly or implicitly agreed upon that it is forbidden for a Muslim woman to marry a non-Muslim man.¹⁷⁵ There was not one who ever objected to that view. The achieving of a consensus on this point can hardly be questioned, especially since it is based on relatively clear texts. A brief look at some of the arguments or statements of the proponents of the new idea that such a marriage is permissible is sufficient to demonstrate that it is a *shaadh* and *baatil* (false) view. For example, Khaled Abou El Fadl, one of the proponents of this view, clearly admits that this view contradicts consensus, but that does not seem to disturb him. He wrote,

I am not comfortable telling a Muslim woman marrying a *kitabī* that she is committing a grave sin and that she must terminate her marriage immediately. I do tell such a woman that she should know that by being married to a *kitabī* that *she is acting against the weight of the consensus*; I tell her what the evidence is; and then I tell her my own *ijtihaad* on the matter (that it is *makruh* for both men and women in non-Muslim countries).¹⁷⁶

If it is recognized that it is violating consensus, it is not permissible for a *mufti* to rule according to such a view.

In other cases, though, the *mufti* may recognize a view to be a minority view but he may not be completely convinced that it is *shaadh*, in the sense of being wrong—although he must recognize that possibility. In his view, it is simply a

175- Hasan al-Turabi was one of the first to ever propose this permissibility. He has been followed by a small number of others, many of whom live in the West. For a discussion of this new view, see Alex Leeman, "Interfaith Marriage in Islam: An Examination of the Legal Theory Behind the Traditional and Reformist Positions," *Indiana Law Journal* (Vol. 84, No. 2, Spring 2009), *passim*. This issue can also pit contemporary secular national law versus Islamic teachings. A landmark case occurred in Indonesia in the 1980s. See Ratno Lukito, "The Enigma of Legal Pluralism in Indonesian Islam: The Case of Interfaith Marriage," *Journal of Islamic Law and Culture* (Vol. 10, No. 2, 2008), *passim*. For a refutation of al-Turabi and this notion in general, see "Al-Qaul al-Museeb fi Zawaaj al-Muslimah min Aabid al-Saleeb," <http://www.feqhweb.com/vb/t7173.html>.

176 - <https://www.searchforbeauty.org/2016/05/01/on-christian-men-marrying-muslim-women-updated/> Last accessed Nov. 29, 2017. Emphasis added. There is a difference between denying that a consensus has occurred and rejecting the consensus. Here, he is accepting that a consensus has occurred.

minority opinion that has some possibility of being correct. This author would recommend that the *mufti*, unless that minority view has some clear and direct evidence to support it, probably exercise some caution in how he applies and extends that possibly *shaadh* view. It is a strange phenomenon that possibly or probably *shaadh* opinions are taken and then built upon to the point that the meaning of relevant texts or established principles are lost or become the "exceptional cases."¹⁷⁷

177- Unfortunately, space limitations do not allow an extensive discussion of examples but one example, at least, is called for. One is the question of women traveling without a mahram. There is no need to reproduce here the clear texts of the Prophet (peace and blessings of Allah be upon him) in which he prohibited women from traveling without a mahram. Earlier scholars declared a consensus on this point with the exception of some cases which can be described as true necessities or strong need. Cases of necessity including making hijrah (fleeing from a non-Muslim land to a Muslim land), escaping from the enemy and traveling back to Muslim lands, losing a traveling party and needing to travel to safety. Those are obvious cases of necessity wherein the law of necessity kicks in. Others made a further exception for the obligatory Hajj or Umrah. Now it has gotten to the point that some have said that as long as there is "a legitimate reason," the woman is relatively safe and in the midst of a trustworthy group, it is permissible for her to travel. Without any mention of necessity or need, this view should probably be considered *shaadh*, as it is a blatant contradiction of the text: "No woman should travel except with a mahram." (Recorded by al-Bukhari.) However, it has come to this author's attention that a well-known Shaikh has stated that a woman traveling today without a mahram but with a group from the United States to Jerusalem simply for the blessings of visiting that locale would not be in violation of the Prophet's statement, as it would meet those three conditions described above. If this type of travel—in this day and age, when more and more women are reporting being sexually harassed by those in authority, including police and prison officials, and in a part of the world where disturbances and violence have occurred sporadically and the woman will be completely under the authority of the Israeli or Palestinian officials—is permissible for a woman without a mahram, what possible cases was the Prophet (peace and blessings of Allah be upon him) referring to in the above hadith?

As an example of the extent of sexual harassment, on the day this author completed this paper, there appeared this report: "Randi Zuckerberg calls out airline after passenger allegedly harasses her," <http://money.cnn.com/2017/11/30/technology/randi-zuckerberg-alaska-airlines/index.html>.) Last year, The New York Times ran this article, <https://www.nytimes.com/2016/10/20/travel/recent-incidents-put-a-new-focus-on-sexual-assault-on-airplanes.html>. For the scope of the problem internationally, see <http://www.cnn.com/2017/11/25/health/sexual-harassment-violence-abuse-global-levels/index.html>. For flights in particular, see <https://www.bustle.com/p/experts-explain-why-sexual-assaults-occur-on-airplanes-what-airlines-can-do-to-stop-it-70903> and <https://www.cntraveler.com/story/the-unfriendly-skies-why-sexual-assault-still-plagues-air-travel>.

These *Fatwaa* Issues and the Muslim Communities of the West

Muhammad Habeebullaah al-Shinqeeti narrates in his book *Fath al-Munim*, as quoted by al-Dausiri, his concern for Muslims living in the Far East as many of them shaved their beards out of fear of being laughed at in those lands in which it is the custom to shave the beard. He stated, "I researched my utmost for the basis of any way out for them to shave their beards such that even the righteous among them would not have to fall into an agreed upon forbidden act." He seems to be starting his discussion by admitting that there is a consensus on the obligation of growing a beard as otherwise he would not have had to make such an effort. He then resorted to a principle of Islamic legal theory concerning the imperative. He stated that the imperative implies obligation according to most of the scholars. But, he noted, some scholars stated that it is for recommendation or for either obligation or recommendation. He said that some distinguish between what is found in the Quran and what is found in the Sunnah, wherein what comes from Allah is obligatory and what comes from the Prophet (peace and blessings of Allah be upon him) is recommended.¹⁷⁸ Hence, the different hadith requesting Muslims to let their beard grow is to be interpreted as recommended only.¹⁷⁹

Unfortunately, this story is not atypical of how some people approach the question of fiqh for the Muslim minorities living in the West or elsewhere. There is a widespread attitude that such Muslim minorities deserve a "new fiqh,"¹⁸⁰ something special and distinct. In fact, many have even given it a name, "the fiqh of Muslim minorities,"¹⁸¹ a term which is well-known by now.

It is an accepted principle that a *fatwaa* that is based on custom or culture is to change when that custom or culture changes. However, there is a big difference between applying that principle properly and developing a new set of principles or methodology to deal with Muslims of a different environment. The principles behind

178- This author is not aware of this view in the classic works on Islamic legal theory (usool al-fiqh). In fact, there seems to be a consensus that the imperative in the speech of the Prophet (peace and blessings of Allah be upon him) has the same ruling as the imperative in the speech of Allah. [See, for example, Muhammad al-Shathri, *Al-Amr: Seeghatuhu wa Dalaalatuhu ind al-Usooliyyeen* (Daar al-Habeeb), pp. 40-49.] Hence, he is invoking a view which, if it even exists, is shaadh. As such, the above argument is problematic in a compound fashion: violating the consensus, creating a new shaadh opinion, introducing a new conclusion.

179- Quoted in al-Dausiri, 19-20.

180- Note the book whose title means, "Towards a new fiqh for the Muslim minorities": Jamaal al-Deen Atiyyah Muhammad, *Nahwu Fiqh Jadeed li-l-Aqalliyyaat* (Cairo, Egypt: Dar al-Salaam, 2003).

181- Two of the earliest and most prominent proponents of this approach are Taha Jabir Alalwani and Yusuf al-Qaradhawi.

the rulings should be the same but the conclusions will differ due to the circumstances. However, this trend is, in fact, calling for a new methodology.¹⁸²

The basic pillars of this new methodology are: (1) *ijtihaad*; (2) *maslahah* (public interest) and necessity; (3) *taiseer*, and (4) *'urf* (custom) and how fatwaas can change according to time and place.¹⁸³ One should probably add to this list a somewhat cautious approach to some of the hadith of the Prophet (peace and blessings of Allah be upon him).¹⁸⁴ Each one of these principles may have some validity on their own. However, once they are given undue emphasis and raised to be the main approaches of fiqh, rather than simply tools to be used within the superstructure of fiqh, the Shareeah evidences get distorted and the results can be devastating. Within this proposed approach, following *fiqhi rukhsahs*, *talfeeq* and even invoking *shaadh* views become commonplace tools of *ijtihaad* and *taiseer*.

Beyond the proponents of the fiqh of Muslim minorities which, one could argue, attempt to stay somewhat close to the broad framework of traditional fiqh ideas, there are a plethora of personalities who are more than willing to create and propagate their own *shaadh* views—willing to even violate consensus as was found in an earlier example. Many of these individuals, with their liberal and progressive views, are at universities and other institutions in the United States, giving them some prestige that could obviously influence young, impressionable Muslim minds. This group is a grave source of *shaadh* views but since they independently development their own *shaadh* views, they do not have to resort to *fiqhi rukhsahs* or *talfeeq*.¹⁸⁵

It is not clear to this author whether these individuals realize how great of a double-edged sword it is that they have stumbled upon. Once one opens the door for these approaches and cherry-picking, one opens the door for the extremists as well. If choosing any fiqh opinion is acceptable or if creating new *shaadh* views is

182- Taha Jabir Alalwani, *Towards a Fiqh for Minorities: Some Basic Reflections* (London, England: The International Institute of Islamic Thought, 2010), pp. 8-9.

183- Shammai Fishman, "Fiqh al-Aqaliyyat: A Legal Theory for Muslim Minorities," (Washington, DC: Hudson Institute, October 2006), pp. 7-12.

184- See, for example, the presentation of Yusuf al-Qaradawi, *Fi Fiqh al-Aqaliyyaat al-Muslimah* (Cairo, Egypt: Daar al-Shurooq, 2001), pp. 37-39; Yusuf al-Qaradawi, *Fiqh of Muslim Minorities: Contentious Issues & Recommended Solutions* (Cairo, Egypt: Al-Falah Foundation, 2003), pp. 9-11. An important response to such modern views to the Sunnah and hadith can be found in Khaalid al-Muzayyini, *al-Futyyaa al-Muaasirah: Diraasah Taseeliyyah Tatbeeqiyyah fi Dhau al-Siyaasah al-Shariyyah* (Damam, Saudi Arabia: Daar ibn al-Jauzi, 1430 A.H.), pp. 81-95.

185- There is a forthcoming work (*Sharia Compliant: A User's Guide to Hacking Islamic Law*) that claims that it will help the individual Muslim "hack" the Shareeah to meet their own desired results when it comes to matters of gender, sexuality, human rights and other issues. It promises to provide "step-by-step instructions for readers to hack laws for themselves, so that through their engagement and creativity, they can help Islamic law regain its intrinsic vitality and resume its role as a forward-looking source for good in the world." https://www.amazon.com/Sharia-Compliant-Hacking-Encountering-Traditions/dp/1503605701/ref=sr_1_1?s=books&ie=UTF8&qid=1512092335&sr=1-1&keywords=sharia+compliant

acceptable, that door cannot be opened only for the liberals and progressives but it will inevitably be opened for the hardline extremists as well. Thus, in the name of both following *fiqhi rukhsahs* and even *taiseer*, extremists may follow the view that is attributed to Ataa that it is permissible to lend out a female slave for the purpose of sexual intercourse.¹⁸⁶ The extremists may even argue that this is a case of necessity and *maslahah* as well. Many of the liberals and progressives will have no right to object because those extremists would be following the same principles that they have promoted.

The only objective standard to determine which approach is correct is that which is based on both the Quran and the Prophetic way. As shall be discussed later, this proper methodology is what is demanded for the *mufti* for any *fatwaa*. This is the only way to avoid the extremes just alluded to.

One can also question the wisdom of being too "soft" on Muslim minorities. Al-Qaradawi does state that one of the goals behind the fiqh of Muslim minorities is, "To help them maintain the essence of their Islamic identity known for its principles, obligations, values, morals, manners and common concepts, so much that all aspects of its life should be devoted to the Almighty and foster these precepts in forthcoming generations."¹⁸⁷ When faced with the onslaught of environmental and cultural challenges, including sometimes for the demands of assimilation, one would expect minorities to be stricter in their application of the culture as a means of self-preservation and identity protection. Thus, in many cases, *taiseer* may not be the best approach or may even be quite harmful. In fact, if one wanted to implement a guiding principle, *sadd al-dharaai* (blocking those permissible means that may end up with negative or sinful consequences) may be more appropriate. It is definitely something well-established in the Shareeah, as ibn al-Qayyim has demonstrated.¹⁸⁸

186- This is a well-known shaadh view. Some doubt its attribution to Ataa. See Abdul Waahid al-Rooyaani, *Bahr al-Madhab (fi Furoo al-Madhab al-Shaafiee)* (Beirut, Lebanon: Daar al-Kutub al-Ilmiyyah, 2009), vol. 5, p. 227; Umar ibn Raslaan al-Bulqaini, *al-Fawaaid al-Jisaam ala Qawaaid ibn Abd al-Salaam* (Qatar: Wizaarah al-Auqaaf wa al-Shuoon al-Islaamiyyah, 2013), p. 229, fn. 3.

187- Al-Qaradawi, *Fiqh of Muslim Minorities: Contentious Issues & Recommended Solutions*, p. 6.

188- Cf., Muhammad Hishaam al-Burhaani, *Sadd al-Dharaai fi al-Shareeah al-Islaamiyyah* (Damascus, Syria: Daar al-Fikr, 1995), pp. 329-602.

Turning the Law on Its Head: The "Secularization" of the Shareeah

Throughout the Quran, one can find Allah referring to the truth or following the guidance that has come from Him in juxtaposition with following *hawaa* ("desires, wants"). For example, Allah states,

وَلَوْ أَتَّبَعَ الْحَقُّ أَهْوَاءَهُمْ لَفَسَدَتِ السَّمَوَاتُ وَالْأَرْضُ وَمَنْ فِيهِنَّ بَلْ أَتَيْنَهُمْ بِذِكْرِهِمْ فَهُمْ عَنِ
ذِكْرِهِمْ مُّعْرِضُونَ

"But if the Truth had followed their inclinations, the heavens and the earth and whoever is in them would have been ruined. Rather, We have brought them their message, but they, from their message, are turning away" [Al-Muminun: 71]

يٰدَاوُدُ اِنَّا جَعَلْنَاكَ خَلِيفَةً فِي الْاَرْضِ فَاحْكُم بَيْنَ النَّاسِ بِالْحَقِّ وَلَا تَتَّبِعِ الْهَوٰى فَيُضِلَّكَ عَنْ
سَبِيْلِ اللّٰهِ

"[We said], 'O David, indeed We have made you a successor upon the earth, so judge between the people in truth and do not follow [your own] desire, as it will lead you astray from the way of Allah.'" [Sad: 26]

اَفَمَنْ كَانَ عَلَىٰ بَيِّنَةٍ مِّن رَّبِّهٖ كَمَنْ زُوِّنَ لَهُ سُوٓءُ عَمَلِهٖۗ وَاَتَّبَعُواْ اَهْوَاءَهُمْ

"So is he who is on clear evidence from his Lord like him to whom the evil of his work has been made attractive and they follow their [own] desires?" [Muhammad: 14]

ثُمَّ جَعَلْنَاكَ عَلَىٰ شَرِيْعَةٍ مِّنَ الْاَمْرِ فَاَتَّبِعْهَا وَلَا تَتَّبِعْ اَهْوَاءَ الَّذِيْنَ لَا يَعْلَمُوْنَ

"Then We put you, [O Muhammad], on an ordained way concerning the matter [of religion]; so follow it and do not follow the inclinations of those who do not know" [Al-Jaathiya: 18]

The point is that there is the guidance from the Lord and there are the matters that people conclude are in their best interest or simply desire. Due to how shortsighted humans can be and given that they do not have Allah's knowledge, often times what the people see as *maslahah* (beneficial) is different from what is truly *maslahah*. That which is truly *maslahah* is that which is indicated in the guidance of Allah. Thus, fulfilling the true *maslahah* is part of the purpose of the revelation of the Law by Allah.¹⁸⁹ Unfortunately, sometimes this purpose is neglected

189- It is well beyond the scope of this paper to discuss the concept of maqaasid al-Shareeah ("the goals of the Shareeah"). A couple of quotes will have to suffice. Ibn al-Qayyim (Ilaam, vol. 3, p. 11) wrote, "The base and foundation of the Shareeah is that of wisdom and well-being for humans in both this life and the Hereafter. It is all justice, all mercy, all welfare, all wisdom. Any issue that deviates from justice to injustice, from mercy to its opposite, from welfare to harm, from wisdom to frivolity is not from the Shareeah, even if it has been entered into via taweel (some form of interpretation). For the Shareeah is Allah's justice between His servants, His mercy among His creation, His shade upon his earth, and His wisdom to points to and affirms the veracity of His Messenger in the best and strongest manner. It is

or lost. The Law that Allah has revealed, therefore, has the dual purpose of bringing humans to the path that is pleasing to Allah and that establishes a way of life in this world that satisfies humans' true needs.

Often when Muslims, though, approach the law, this reality gets turned on its head in the sense that the priority becomes the *maslahah* (well-being) of this world, supposed as that sometimes is. *Fatwaas* are made not based first and foremost on what Allah is requiring of His servants but based on what apparently is meeting the needs of the humans. Therefore, the fiqh is scanned not to know what Allah wants from humans but to find the opinions that is most accommodating to themselves. Instead of being God-centered, the law becomes human-centered or "secularized" in a sense. This is what leads to following *fiqhi rukhsahs*, *talfeeq* and even reviving *shaadh* opinions. What is overlooked is the fact that achieving the worldly *maslahah* may not produce the pleasure of Allah and the benefits in the Hereafter. On the other hand, seeking the path that is pleasing to Allah, due to the nature of the Shareeah, produces the true benefits of both this life and the Hereafter.

This change in the focus of the law from being God-centered to human-centered is not simply a problem for the Muslim communities in the West and the *fatwaas* produced therein. This is a malady afflicting much of the Muslim *Ummah* and has so for some time. Ibrahim, whose study concentrates mostly on Egypt from Mamluk times to the present, speaks about how there was a shift among Muslim scholars from "process to content" in Islamic Law. "Process" refers to the methodology of finding the correct view in fiqh while "content" refers to accepting the fiqh opinions as an acceptable database to choose from. He wrote,

While it is true that there was a shift from process to content in Islamic law, I would argue that this shift came about much earlier than the modern period. Recall that there was a juristic disagreement (*ikhtilaf*) literature, particularly during the sixteenth through eighteenth centuries, in which only the substantive legal opinions of the different schools were given without any elaboration of the reasoning behind them. This genre, as we saw in chapter 2 [of his book], was used precisely because there was a shift from process to substantive law, from legal methodology and the epistemological coherence of the *madhhab* to a focus on the content of the law. The premodern practice of pragmatic eclecticism, whether in the form of *tatabbu' al-rukhas* or *talfiq*, confirms this observation. This shift of focus to content or legal result, rather than the process of reasoning, might partly explain the absence of strong

his light by which those who see, see. And His guidance by which the guided are guided. It is His complete cure by which every ailment is cured. And it is His straight path concerning which if one is upon it, he is rightly guided." Al-Shaatibi (vol. 1, p. 318) stated, "It is known from the Shareeah that it was legislated for the benefit of the servants [that is, humans]. All of the legal responsibilities are meant to repel an evil, produce some good or do both of them together."

opposition on the part of the *ulama* to the content-based "piecemeal" codification of Islamic law.

This shift from process to content saw juristic views being selected, not for their methodological consistency with legal methodology or based on the parameters of the single school's methodological, hermeneutic orientation, but according to their utility to society. The shift in emphasis from the methodological to the substantive is itself one of the most important developments that took place in Islamic legal discourse and practice in the premodern period...

Despite negative scholarly views of the modern codification of Islamic law, which is often described as inauthentic, the majority of Muslim reformers today focus on the content of Islamic law. There is very little discourse on legal methodology, which, by contrast, tends to come mostly from the liberalist camp...¹⁹⁰

These developments truly bring up the question of the entire purpose behind the law and the purpose behind the Muslim implementing Islamic Law. In implementing the law, the Muslim should have the intent to please and worship Allah alone. Allah says,

وَمَا أُمِرُوا إِلَّا لِيَعْبُدُوا اللَّهَ مُخْلِصِينَ لَهُ الدِّينَ حُنَفَاءَ وَيُقِيمُوا الصَّلَاةَ وَيُؤْتُوا الزَّكَاةَ وَذَلِكَ دِينُ الْقَيِّمَةِ

"And they were not commanded except to worship Allah, [being] sincere to Him in religion, inclining to truth, and to establish prayer and to give zakah. And that is the correct religion" [*Al-Baiyina*: 5]

This means that a conscious decision must take place before a Muslim accepts something as law and acts upon it. He must first attempt, given his capabilities, to determine if that act or law is truly pleasing to Allah and in accord with worshipping Him properly. When that consciousness is there, the temptation for following *fiqhi rukhsahs*, *talfeeq* or following *shaadh* opinions should disappear, regardless of whether that is in *fatwaa* making or codification of a national law. Again, this does not mean that human interest will be ignored. Instead, the true human interest will be fulfilled as it falls within the scope of worshipping Allah properly.

190- Ibrahim (Pragmatism), pp. 221-2. Layish argues that the modernist reform movement of Muhammad Abduh and Muhammad Rasheed Ridhaa have further contributed to the secularization of Islamic Law. This was the result of their views on issues like jurists' choice (*talfiq* and *takhayyur*), widening the scope of governmental license (*siyaasah shariyyah*) and reopening the gates of *ijtihad*, with an emphasis on *maslahah*. See Aharon Layish, "The Contribution of the Modernists to the Secularization of Islamic Law," *Middle Eastern Studies* (Vol. 14, No. 3, October 1978), *passim*.

Conclusions: The Responsibility of the *Mufti*

A *fatwaa* is about conveying Allah's ruling concerning an issue. Hence, it is Allah's ruling and not the *mufti's* ruling nor the layperson's ruling that is sought. The *mufti* himself has no "vested interest" in the outcome.¹⁹¹ He is only seeking what is correct and true. When he makes his *fatwaa*, he is "signing" on behalf of Allah. This is truly a heavy responsibility.

If there is a difference of opinion on an issue, the objective criteria for the *mufti* and the believer is very clear:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ فَإِن تَنَزَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ
إِلَى اللَّهِ وَالرَّسُولِ إِن كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا

«O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result» [*An-Nisaa*: 59]

While commenting on this verse, al-Shaatibi stated, "It is not proper to refer to the desires of the souls. One must refer only to the Shareeah. The Shareeah will clarify which of the two views is stronger. It is then obligatory to follow that [stronger view] and not what is in accord with one's intended goals."¹⁹² Al-Shaatibi also quotes al-Khattaabi who made this very important point, "The existence of a difference of opinion is not an authority (*hujjah*) while the clarification from the Sunnah is an authority for the first and last of peoples."¹⁹³

This is what is binding on the *mufti*: to attempt to find Allah's ruling on a matter. This is done by giving a *fatwaa* in accordance with what the preponderance of the evidence indicates. Al-Baaji argued, "It is not allowed, permissible or acceptable for anyone to give a *fatwaa* related to the religion of Allah except in accord with the truth as he believes it to be true--pleased with it whoever is pleased with it and angered with it whoever is angered with it. The *mufti* is informing on behalf of Allah concerning His ruling. How could he state something on behalf of Allah unless he believes that Allah has decreed and obligated it while Allah has stated to His Prophet (peace and blessings of Allah be upon him),

وَأَن أَحْكُم بَيْنَهُمْ بِمَا أَنزَلَ اللَّهُ وَلَا تَتَّبِعْ أَهْوَاءَهُمْ

191- This does not mean that he is blind to his surroundings or the reality on the ground. However, he does not start with a desired "good" outcome and then work backward to find some support for it, even if it be simply a fiqh opinion of the past.

192- Al-Shaatibi, vol. 5, p. 99.

193- Al-Shaatibi, vol. 5, pp. 93-94.

'And judge, [O Muhammad], between them by what Allah has revealed and do not follow their' [Al-Maidah: 49]."¹⁹⁴

Conveying on behalf of Allah in a *fatwaa* explains why scholars have repeatedly stated that it is obligatory upon the *mufti* to rule in accordance with what he perceives to be the strongest view—and no other subjective bases.¹⁹⁵ Ibn Abdul Barr, al-Nawawi and ibn al-Qayyim are among those who have demonstrated that it is obligatory to follow the strongest view as indicated by the evidence.¹⁹⁶ In fact, many scholars have stated that there is a consensus that the *mufti* and *mujtahid* must follow what is strongest and he or she is not allowed to resort to weaker opinions. Al-Qaraafi, for example, stated, "To make a ruling or fatwaa according to what is least weighty (*marjooh*) go against the consensus."¹⁹⁷ Al-Raazi,¹⁹⁸ al-Qurtubi,¹⁹⁹ Abdul Azeez al-Bukhaari,²⁰⁰ ibn Nujaim²⁰¹ and ibn Aabideen²⁰² have all claimed that there is a consensus that it is forbidden for a *mufti* to bypass the stronger view and rule in accordance with a weaker view.²⁰³

In sum, following *fiqhi rukhsas* implies seeking the easiest opinion on an issue. *Talfeeq* refers to combining *madhhab* views not based on the evidence behind them but based on each view being an acceptable alternative in a manner of *taqleed*. Reviving or inventing *shaadh* opinions means to go against what is determined to be correct. None of these tools are tools for determining what is the strongest view and, hence, they are not means that the *mufti* could or should resort to. Indeed, the *mufti* must resist any temptation to resort to these practices.

To decide solely for the sake of Allah and in accordance with what Allah's guidance indicates, and not give in to any other demands, especially those of the masses, requires *taqwaa* on the part of the *mufti*. It is the burden on the *mufti's*

194- Quoted in al-Dausiri, p. 56.

195- Again, principles such as necessity and need are incorporated into the process but are not the overriding principle from the outset. Those are considered exceptional circumstances.

196- Ibn Abdul Barr, Jaami Bayaan al-Ilm, vol. 2, pp. 902-3; al-Nawawi, Raudhah, vol. 11, p. 111; ibn al-Qayyim, Ilaam, vol. 4, p. 163.

197- Shihaab al-Deen Ahmad al-Qaraafi, al-Ihkaam fi Tamyeez al-Fataawaa an al-Ahkaam wa Tasarrufaat al-Qaadhi wa al-Imaam (Beirut, Lebanon: Daar al-Bashaair al-Islaamiyyah, 1995), p. 93.

198- Fakhar al-Deen al-Raazi, al-Mahsool fi Ilm al-Usool (Beirut, Lebanon: Muassasah al-Risaalah, 1997), vol. 6, p. 40.

199- Abu al-Abbaas Ahmad al-Qurtubi, Al-Mufhim limaa Ashkala min Talkhees Kitaab Muslim (Damascus, Syria: Daar ibn Katheer, 1996), vol. 3, p. 257.

200- Alaa al-Deen Abdul Azeez al-Bukhaari, Kashf al-Asraar an Usool Fakhr al-Islaam al-Bazdawi (Beirut: Daar al-Kutub al-Ilmiyyah, 1997), vol. 4, p. 110.

201- Zain al-Deen ibn Nujaim, al-Bahr al-Raiiq Sharh Kanz al-Daqaiiq (Daar al-Kutub al-Islaami, n.d.), vol. 4, p. 77.

202- Muhammad Ameen ibn Aabideen, Radd al-Muhtaar ala al-Darr al-Mukhtaar (Beirut, Lebanon: Daar al-Fikr, 1993), vol. 1, p. 74.

203 - See Khaalid Ali, "Adm Jawaaz al-Itibaar bi-l-Qaul al-Marjooh," <http://fiqh.islammessage.com/NewsDetails.aspx?id=6827>

shoulders that he take this step, set the example for the followers and guide them to follow what is correct and not necessarily what is most convenient.²⁰⁴

All Muslims should be seeking the Straight Path—not the easiest path. Throughout the day, Muslims are supposed to ask Allah to guide them to that Straight Path. In times of conflicting views, it may be difficult to see the Straight Path but the Prophet (peace and blessings of Allah be upon him) set the example of asking to be guided to the truth when people differ, not guided to the easiest of views: Aishah was asked what supplication the Prophet (peace and blessings of Allah be upon him) would begin his late-night prayers with and she replied it was the following:

لِلّٰهِمَّ رَبَّ جَبْرَائِيْلَ، وَمِيكَائِيْلَ، وَإِسْرَافِيْلَ، فَاطِرَ السَّمَاوَاتِ وَالْأَرْضِ، عَالِمَ الْغَيْبِ وَالشَّهَادَةِ، أَنْتَ
تَحْكُمُ بَيْنَ عِبَادِكَ فِيمَا كَانُوا فِيهِ يَخْتَلِفُونَ، اهْدِنِي لِمَا اخْتَلَفَ فِيهِ مِنَ الْحَقِّ بِإِذْنِكَ، إِنَّكَ تَهْدِي مَنْ تَشَاءُ إِلَى صِرَاطٍ
مُسْتَقِيمٍ

"O Allah, Lord of Gabriel, and Michael, and Israafeel, the Creator of the heavens and the earth, Who knows the unseen and the seen; You decide among Your servants concerning their differences. Guide me with Your permission in the divergent views (which the people) hold about Truth, for it is You Who guides whom You will to the Straight Path." (Recorded by Muslim.)

204- It does take taqwaa to sacrifice what is easy or beneficial for what is right and true. Lay people need good examples set for them as otherwise they may simply go "fatwaa-shopping" or "madhhab shopping." (With the different jurisdictions in the world today, "forum shopping" has become a common practice.) Shaham provides an interesting example of how far people will go to find that which is expedient even if other considerations would point them in a different direction. Shaham writes, while speaking about Egyptian Coptic Christians who turned to Shareeah courts to have their cases settled, "On the one hand, the resort to the sharia courts promised material advantages, namely laws which were more convenient than Christian laws and an efficient enforcement of court verdicts. On the other hand, a Christian who applied to a sharia court had to consider the negative religious, social and political implications of his or her strategy. Applying to a Muslim court signified the infringement of Christian religious law, the breaking of communal consensus and the encouragement of state intervention in the autonomy of the Christian community. My impression is that considerations of personal benefits were often stronger than moral, religious, or social commitments. Egyptian Copts took from the sharia what best suited their needs without obliging themselves to the sharia as a whole." Ron Shaham, "Shopping for Legal Forums: Christians and Family Law in Modern Egypt," in Muhammad Khalid Masud, Rudolph Peters and David S. Powers, eds., *Dispensing Justice in Islam: Qadis and their Judgements* (Leiden, the Netherlands: Brill, 2012), p. 467.

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