



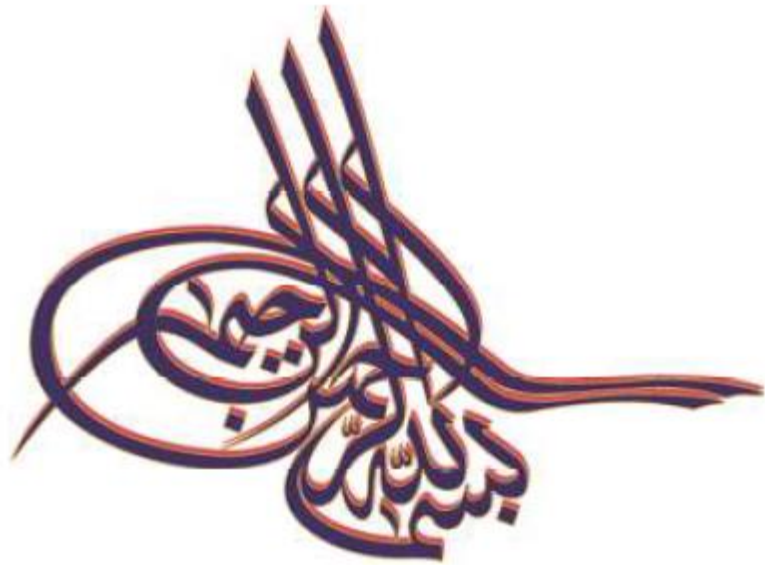
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The Renewal of Islamic Discourse A Religious Obligation and Communal Necessity

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"الأراء الفقهيية في هذا البحث تعبر عن رأي الباحث و ليس بالضرورة عن رأي أمجا"
Fiqh opinions in this research is solely those of its author and do not represent AMJA



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In the name of Allah, the Most Merciful, the Grantor of Mercy

Introduction

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

First, let me state here that it is only expected of any Muslim who believes that Prophet Muhammad (ﷺ) received a revelation from God to submit to that revelation and acknowledge its infallibility. After all, God is deemed above any error. However, the religious discourse that is subject to this discussion is in part a human product that should not be conflated with the revelation itself or treated as sacred. Infallibility is the characteristic only of the explicit text of the revelation (the Qur'an and the Sunnah) and of the bona fide, explicit scholarly consensus. Our understanding of the text may be far from what is intended. For example, our misunderstanding of some of our religious teachings may be contributing to the lack of righteous governance and the high level of corruption in the vast majority of Muslim countries. If someone, however, claimed the responsibility of Islam itself for this situation, then the simple answer is that the contemporary Muslim generations are not better Muslims than the Companions of the Messenger. They were successful in establishing righteous governance. In fact, the *Columbia History of the World* notes that 'Umar established a system of government superior to the bureaucracy of the Roman Empire, which had preceded Muslim rule.¹

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

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

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

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

Most people will agree on the legitimacy of the concept. Nonetheless, many disagree on what it means and exactly what part needs to be renewed. Some would accept the concept of *tajdeed* as long as it is limited to the techniques of delivering *da'wah*. Once the content is addressed, many ‘conservative’ Muslims feel instantly uncomfortable. Some of us do this out of fear of the unknown. This is partly because our *ummah* suffers from a great deal of weakness and disunity, which fosters an environment of defensiveness and mistrust. However, our fears stemming from the call to *tajdeed* may not all be unjustifiable. After all, many of the callers to *tajdeed* of the *deen* are utterly unqualified for the job. They dismiss much of the established Sunnah and, with complete disregard for the cumulative tradition, defy the definitive implications of the text of revelation. They are quick to dismiss the great jurists of Islam, claiming that they were but a product of their culture and were blindfolded by their biases. It also seems to the ‘conservative’ Muslim that much of the proposed *tajdeed* is simply an act of unconditional surrender to the mainstream modern culture, making the Divine instruction subject to the influence of people’s relative and changing thoughts and social constructs. However, the problem that may result from our timidity to contribute to this discourse about *tajdeed* is that others may hijack its banner. All the people who are frustrated with the condition of the *ummah* and are yearning for a change will be tempted to follow them.

This paper is meant to discuss certain aspects about the renewal of the religion, mainly the following points:

- The validity of the concept of *tajdeed* and its scope
- Tajdeed* is mainly about restoration and adaptation
- Do we need to renew the methodology of deduction itself (or the science of *uṣool ul-fiqh*)?
- Uṣool*-related *ijtihâd*³ that may have impeded the renewal of religious discourse
- The problem of over-reporting consensus

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

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

Departure from the agreement of the four *madhâhib*⁴ and when a position outside them can be validated

Existing flexibility in the discipline of *uṣool ul-fiqh*

The role of *maqâṣid* (objectives) in the renewal of the religion

The role of human intellect

Suggestions for incremental renewal within juridical theory

Practical examples of intended and unintended *tajdeed*

4- *madhhab* (pl. *madhâhib*): a school of juridical or legal thought. The four schools in Sunni Islam are the Ḥanafî, Shâfi'i, Mâlîki and Ḥanbalî.

6 AMJA 15th Annual Imams' Conference [Principles of Giving Religious Rulings (Fatwaa)]
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The Validity of the Concept of *Tajdeed* (Renewal) and Its Scope

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

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

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

6- *raḍiya Allâhu 'anhu*: may Allah be pleased with him

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

it was undisputed among the early *Ḥanafī* scholars that taking a wage for teaching the Qur'an was unlawful; they later consented to allow Qur'an teachers to receive payment when volunteers became few in number – out of fear that knowledge of the Qur'an would be lost.

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

{اتَّخَذُوا أَحْبَارَهُمْ وَرُهَبَانَهُمْ أَرْبَابًا مِّن دُونِ اللَّهِ}

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

The Messenger of Allah (ﷺ) explained to 'Adi ibn Ḥatīm (ra) that this occurred by following them in considering the unlawful as permissible and the permissible as unlawful.⁸ Moreover, would this not be exactly what the Messenger of Allah (ﷺ) prohibited when he said:

"مَنْ أَحْدَثَ فِي أَمْرِنَا هَذَا مَا لَيْسَ مِنْهُ فَهُوَ رَدٌّ"

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

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

To further clarify, let us take the example of receiving wages for teaching the Qur'an. Its prohibition was a matter of agreement among the early *Ḥanafī* scholars, but then the practice was later permitted by them. The question is, were the prohibition and permission with regard to the same thing? It appears that way, but upon taking a closer look, it becomes clear that we cannot equate between accepting a wage for teaching the Qur'an during an era when many were enthusiastic about teaching it as an act of devotion to Allah, and were supported financially from the

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

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

state treasury, and the same action during a period in which teachers were no longer sustained by the state treasury. In the latter situation, if they occupied themselves with teaching, their families would be lost, and if they occupied themselves with earning a livelihood, their students would be lost.

Thus, a particular scenario may call for different sets of rulings that suit it, and the *mujtahid* (the one who engages in expert reasoning) chooses from among these rulings what is most suitable to it. Sometimes, the matter may fall between two rulings or two principles, in which case the *mujtahid* attributes the matter to whichever of the two it seems closer to. This is obviously pertinent only to rulings which are affected by people's customs and interests. Regarding this, Imam ash-Shâṭ ibi (rh)¹⁰ said:

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

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

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

all matters of creed
the pillars of Islam

10- *Rahimahu Allah*: may Allah bestow mercy on him

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

rulings in the sphere of worship that have incomprehensible causes, such as the times of the different prayers and their composition, and the rituals of hajj and fasting

quantified injunctions of the Shariah (*muqaddarât*) that were fixed by the text of revelation, such as expiations (*kaffârât*), duration of the waiting period (*'iddah*), and entitlements in inheritance

matters about which there is an explicit text with definitive implication and certain transmission, and their effective cause is still operative

matters about which there is a clear genuine consensus: the consensus must not be based on circumstantial variables such as in cases where the common interest (or weighing harm vs. benefit) is the deciding factor

basic rulings of morality and those that define the Islamic value system, such as the prohibition of arrogance, prejudice, murder, fornication, usury, gossip, slander, etc.; the obligation of mutual agreement in contracts; and the protection of basic human rights, such as the sacredness of life, property, and reputation: regarding these issues change may only be related to the means of ensuring the preservation of those values and rights

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

Mainly restoration and adaptation

After affirming that we do not consider the content of our *fiqhi* legacy immune to critical examination and that many of the rulings issued by our esteemed imams and scholars are subject to change because of changes in the geopolitical, economic, and social conditions of the world, it is important to assert that most *tajdeed* has nothing to do with this content. It is about restoration of the values and principles of the religion that were upheld by the earlier generations in a completely different world environment; so, it is restoration with adaptation, or meaningful restoration. This could be accomplished by a few changes in our contemporary *da'wah* narrative.¹² What our contemporary religious discourse needs the most, in this

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

author's assessment, is a change of emphasis, along with combating zealotry, partisanship, and demagoguery, while promoting intellectual honesty and objectivity.

Change of emphasis

As the news media can change the awareness of their audience by spinning the truth, preachers could do the same. However, the impact of the preachers may be deeper and longer lasting, because it is about changing and reshaping people's religious convictions. If a single story is repeated one hundred times, and there are fifty stories that counter that one story, but each counter story is presented only once, you will have managed to skew people's perception of the reality, and to alter their convictions. Can we say the same thing about the prophetic traditions?

Absolutely. What the *da'wah* narrative needs nowadays is some change of emphasis from technicality to spirituality and morality, from the minor details to the major foundations, and from focusing on the form and the exterior to concentrating on the substance and the interior. This is not in any way an attempt to show disregard for the Shariah or for the Sunnah of our beloved, or to call for an unjustifiable esoteric interpretation of them, but simply to rearrange the priorities of the religion into the proper order.

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

Combating zealotry and partisanship

When a young man or woman chooses a certain affiliation around the age of twenty, you usually find them at age fifty still allied to the same group or organization, upholding its convictions and defending its stances, despite thirty years of growth. This is true across the different factions and groups that make up the bulk

of our *umma*. Naturally, strong social bonds develop among people of the same group, and this means that a change in an individual's convictions becomes socially and emotionally costly. Allah mentions this phenomenon:

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

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

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

Combating demagoguery while promoting intellectual honesty and objectivity

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

Reform of the Content

The need for reform and renewal is recognized by the vast majority of Muslim scholars. Recognition and acknowledgement of the stagnation that has taken place over centuries and affected the development of our juridical theory and laws is essential to generating the resolve for the desired renewal. A seasoned Azhari scholar of the fourteenth century, Sh. Abdul-Wahhâb Khallâf, traces the stagnation that took place in *ijtihâd* to four reasons: 1) political division and infighting within the Muslim state that derailed scholars in all fields from developing their respective disciplines; 2) *madhhab*-based partisanship that made many scholars preoccupied with a keen interest in supporting their own *madhhab* (school of thought) and proving it correct, precluding an impartial inquiry into the body of evidences, particularly the Qur'an and the Sunnah; 3) the "fatwa chaos" that the scholars had failed during that time to control,¹³ so they preemptively closed the door of *ijtihâd* out of caution, which resulted in considerable stagnation; and 4) Moral decay that affected many scholars, causing them to envy and disparage anyone who attempted independent *ijtihâd*.¹⁴

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

14- *Ilm usool al-fiqh* by Abdul Wahhâb Khallâf, p. 260. Retrieved from *Shamilah* [computer software].
 "ووقفت حركة الاجتهاد والتقنين، وماتت في العلماء روح الاستقلال الفكري، فلم يردوا المعين الذي لا ينضب ماؤه وهو القرآن والسنة، بل راضوا أنفسهم على التقليد، ورضوا أن يكونوا عالة على فقه الأئمة السابقين: أبي حنيفة، ومالك، والشافعي، وأحمد، وأقرانهم، وحصروا عقولهم في دوائر محدودة من فروع مذاهب هؤلاء الأئمة وأصولها. وحرموا على أنفسهم أن يخرجوا عن حدودها، وبذلوا جهودهم في ألفاظ أئمتهم، وعباراتهم لا في نصوص الشارع ومبادئه العامة، وبلغ من ركونهم إلى أقوال أئمتهم أن قال أبو الحسن الكرخي من العلماء الحنيفة: كل آية أو حديث يخالف ما عليه أصحابنا فهو مؤول أو منسوخ. وبهذا وقف التشريع عند ما وصل إليه أئمة العهد السابق، وقصر عن مسامرة ما يجد من التطورات، والمعاملات، والأقضية، والوقائع. أسباب وقوف حركة الاجتهاد: وأهم العوامل التي أدت إلى هذا الوقوف والتزام تقليد السابقين أربعة: أولاً: انقسام الدولة الإسلامية إلى عدة عمالك يتناحر ملوكها وولايتها وأفرادها، فهذا الانقسام شغل لالة الأمور بالحروب والفتن، واقتناء المكاييد، وتديير وسائل القهر والغلبة، وشغل الناس معهم، فذب الانحلال العام وفترت الهمم في العلوم والفنون، وكان لهذا الانحلال أثره في وقوف حركة التشريع. كل حزب بالانتصار لمذهبهم، وتأييد أصوله وفروعه بكل الوسائل. فتارة كان التأييد بإقامة البراهين على صحة ما ذهبوا إليه وبطلان ما خالفه، وتارة كان التأييد بالإشادة بزعمائهم ورؤوسهم، وعد آيات نبوغهم ومقدرتهم. وهذا وذلك شغل علماء المذاهب وصر فهم عن الأساس التشريعي الأول وهو القرآن والسنة. و صار الواحد منهم لا يرجع إلى نص قرآني أو حديث إلا ليلتمس فيه ما يؤيد مذهب إمامه، ولو بضر من التعسف في الفهم أو التأويل، وبهذا فنيت شخصية العالم وماتت روح استقلالهم العقلي، وصار الخاصة كالعامه أتباعا مقلدين. وثالثاً: أنه لما أهمل المسلمون تنظيم السلطة التشريعية، ولم يضعوا نظاماً كفيلاً بالألا يجترئ على الاجتهاد إلا من هو أهل له، دببت الفوضى في التشريع والاجتهاد وادعى الاجتهاد من ليس أهله وتصدى لإفتاء المسلمين جهال عبثوا بنصوص الشريعة، وبحقوق الناس ومصالحهم، وبهذا تعددت الفتاوى وتباينت، وتبع هذا تعدد الأحكام في الأفضية؛ حتى كان القضاء يختلف في الحادث الواحد، في البلد الواحد فتستحل دماء وأموال في ناحية من نواحي المدينة، وتستباح من ناحية أخرى منها، وكل ذلك نافذ من المسلمين وكله يعتبر من أحكام الشريعة، فلما فرغ من هؤلاء العلماء حكموا في أواخر القرن الرابع بسد باب الاجتهاد، وتقبيد المفتين والقضاة بأحكام الأئمة السابقين، فعالجوا الفوضى بالجمود. ورابعاً: أن العلماء فشئت فيهم أمراض خلقية، حالت بينهم

Is renewable content limited to law?

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

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

وبين السمو إلى مرتبة الاجتهاد، فقد فشا بينهم التحاسد والأنانية، فكانوا إذا طرق أحدهم باب الاجتهاد، فتح على نفسه أبواباً من الشهير به، وحط أقرانه من قدره، وإذا أفتى في واقعة برأيه، قصدوا إلى تسفيه رأيه تفنيده ما أفتى به بالحق والباطل، فلهذا كان العالم يتقي كيد زملائه وتجربتهم بأنه مقلد وناقل، لا يجتهد ومبتكر، وبهذا ماتت روح النبوغ ولم ترفع في الفقه رءوس و ضعفت ثقة العلماء بأنفسهم وثقة الناس بهم، فولوا وجههم مذاهب الأئمة السابقين".

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

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

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

It is obvious then that the science of *uşool al-fiqh* was not meant to be a closed system, since that makes it subject to stagnation and demise. Nevertheless, this author posits here that there is no need to overhaul the science of *uşool al-fiqh*; it is a solid structure with remarkable flexibility. It is our failure to utilize its flexibility and discover its *tajdeed*-enabling principles that makes some of us hastily desire to overhaul it. What we really need is learned incremental renewal in this science. Having said that, one must admit that there have been positions, sometimes adopted by the majority, that caused some stagnation and rigidity in juridical theory and its practical use. These positions were mainly in the domain of *ijtihad*. I will start here

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

by addressing some of those positions and their impact on the development of the law; then I will talk about the existent flexibility within the science of *uṣool al-fiqh* that should be used to serve the purposes of adaptation and renewal of our religious discourse. Finally, I will suggest some areas where change may be desirable.

Positions impeding the ongoing renewal of discourse¹⁶

Over-reporting of consensus

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

The question that remains is whether they [the Companions] truly reached consensus on a particular issue that was presented to them, while it is considered subject to *ijtihād*. We may be able to answer this and say that there are many issues about which we do not know of any disagreement among the Companions regarding them. This is the most we could say. As far as claiming that they all reached a positive consensus, that is a claim that lacks supporting proofs. As for the following generations, after the expansion of Muslim territories and the relocation of the jurists to different Muslim lands, and many of the jurists among the followers of the Companions (*tâbi'een*) and others reaching distinction, whose numbers grew beyond count, with their variant political ideologies and personal interests, the claim of the establishment of a consensus then is not easy for one to accept. This is even though many issues during these times were not known to be subjects of disagreement. On such basis, we may be able to understand the statement of Aḥmad ibn Ḥanbal, "Whoever claimed a consensus has lied; maybe they disagreed; he should rather say, 'I don't know that they disagreed,' if he did not hear of a disagreement." Some

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

Ḥanbali scholars posited that the imam means a consensus other than that of the Companions.¹⁷

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

It is vital that we appreciate the beauty of the doctrine of *ijmâ'*¹⁹, which is not only a tool of preservation, but also an antidote to clerical autocracy. In a nation where no one after the Messenger (ﷺ) speaks on behalf of God, this doctrine provided an instrument not only for conservatism, but also for efficiency, tolerance, and adaptability. However, we need an objective examination of the reported consensuses and we need to apply stringent criteria before we accept them, since mere acceptance would be conferring definitiveness on a certain position and putting an end to the scholarly debate. We apply rigorous criteria before we authenticate the prophetic traditions, even though they may not confer the same decisiveness as a consensus, because of their often-speculative implications. Additionally, we should treat the validated *ijmâ' sukooti* (tacit *ijmâ'*²⁰), which constitutes the bulk of *ijmâ'*, as only a corroborative evidence because of its presumptive nature.

Can there be truth outside the four *madhâhib*?

The four *madhâhib* in Sunni Islam are intellectual accomplishments that any Sunni Muslim should feel proud of. Thousands of scholars contributed through

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

"ويبقى هذا السؤال، وهو: هل أجمعوا فعلاً على الفتوى في مسألة عرضت عليهم، وهي من المسائل الاجتهادية؟ ويمكن الجواب على ذلك بأن هناك مسائل كثيرة لا نعلم فيها خلافاً بين الصحابة في هذا العصر، وهذا أكثر ما يمكن الحكم به، أما دعوى العلم بأنهم جميعاً، أفتوا بآراء متفقة، والتحقق من عدم المخالف فهي دعوى تحتاج إلى برهان يؤيدها. أما بعد هذا العصر، عصر اتساع المملكة، وانتقال الفقهاء إلى أمصار المسلمين، ونبوغ فقهاء آخرين من تابعهم لا يكاد يحصرهم العدد، مع الاختلاف في المنازح السياسة والأهواء المختلفة، فلا نظن دعوى وقوع الإجماع، إذ ذاك، مما يسهل على النفس قبوله، مع تسليم أنه وجدت مسائل كثيرة في هذا العصر، أيضاً، لا يعلم أن أحداً خالف في حكمها. ومن هنا نفهم عبارة أحمد بن حنبل من ادعى الإجماع فهو كاذب، لعل الناس قد اختلفوا، ولكن يقول: لا نعلم الناس اختلفوا إذا لم يبلغه. وبعض فقهاء الحنابلة يرى أن الإمام يريد غير إجماع الصحابة..."

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

19- *ijmâ'*: consensus; a method of deriving rulings in jurisprudence

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

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

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

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

Having said that, this is not a discussion of the importance of the legacy of the four *madhâhib* or an attempt to referee between the contestants on the two ends of the spectrum concerning them. The discussion here is about the existence of truth outside their agreement, which many Muslim scholars treat as a binding consensus.

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

Some scholars have gone as far as claiming that there is a consensus that in the spheres of fatwa and judging at least, no scholar may take a position outside that of the four schools.²² According to Dâr al-Iftâ' al-Miṣriyyah (the Egyptian fatwa agency), this agreement is subject to change with time, people's customs, and the acceptance of and trust in other positions. It is also subject to enforcement by the state.²³ The most someone can say about this agreement—and this is extremely hard to establish—is that it was a procedural decision that may have had some merit at some point, but not in any way a binding consensus that the *umma* must indefinitely abide by. It is interesting to note here that the disagreement between the earlier scholars was not about the obligation for a *mujtahid* to follow the opinion of another *mujtahid*, but about its permissibility. Imam Abu Ḥanifah (rh) allowed it, whereas Imam ash-Shâfi'i (rh) prohibited it: the latter argued that the level of certainty someone acquires through his or her own *ijtihad* must exceed that which could be ever acquired through someone else's *ijtihad*.²⁴

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

While it is commendable for Muslims to be wary of positions that conflict with the agreement of the four imams, this aversion should not completely rule out the

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

"وَحَاصِلُ الْمُعْتَمَدِ مِنْ ذَلِكَ أَنَّهُ يَجُوزُ تَقْلِيدُ كُلِّ مِنَ الْأَرْبَعَةِ الْأَرْبَعَةِ، وَكَذَا مَنْ عَدَاهُمْ مِمَّنْ حُفِظَ مَذْهَبُهُ فِي تِلْكَ الْمَسْأَلَةِ وَدُونَ حَتَّى عُرِفَتْ شُرُوطُهُ وَسَائِرُ مُعْتَبَرَاتِهِ فَأَلِجْمَاعُ الَّذِي نَقَلَهُ غَيْرٌ وَاحِدٌ عَلَى مَنَعِ تَقْلِيدِ الصَّحَابَةِ يُحْتَمَلُ عَلَى مَا فَقِدَ فِيهِ شَرْطٌ مِنْ ذَلِكَ وَيُسْتَرْطُ لِصِحَّةِ التَّقْلِيدِ أَيْضًا أَنْ لَا يَكُونَ مِمَّا يُنْقَضُ فِيهِ قَضَاءُ الْقَاضِي هَذَا بِالنِّسْبَةِ لِعَمَلِ نَفْسِهِ لَا لِإِفْتَاءٍ، أَوْ قَضَاءٍ فَيَمْتَنِعُ تَقْلِيدُ غَيْرِ الْأَرْبَعَةِ فِيهِ إِجْمَاعًا كَمَا يُعْلَمُ."

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

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

(فَائِدَةٌ) اِخْتَلَفَ الْعُلَمَاءُ فِي تَقْلِيدِ الْحَاكِمِ الْمُجْتَهِدِ لِجَهْتِهِ آخَرَ فَأَجَازَهُ بَعْضُهُمْ لِأَنَّ الظَّاهِرَ مِنَ الْمُجْتَهِدِينَ أَنَّهُمْ أَصَابُوا الْحَقَّ، فَلَا فَرْقَ بَيْنَ مُجْتَهِدٍ وَمُجْتَهِدٍ فَإِذَا جَازَ لِلْمُجْتَهِدِ أَنْ يَتَّبِعَ عَلَى ظَنِّهِ الْمُسْتَقَادَ مِنَ الشَّرْعِ فَلَيْمَ لَا يَجُوزُ لَهُ الْإِعْتِيَادُ عَلَى ظَنِّ الْمُجْتَهِدِ الْمُعْتَمَدِ عَلَى أدَلَّةِ الشَّرْعِ، وَلَا سِيَّيَا إِذَا كَانَ الْمُقَلِّدُ أَتْبَلَ وَأَفْضَلَ فِي مَعْرِفَةِ الأدَلَّةِ الشَّرْعِيَّةِ، وَمَنْعَهُ الشَّافِعِيُّ وَغَيْرُهُ، وَقَالُوا ثِقَّةً بِمَا يَجِدُهُ مِنْ نَفْسِهِ مِنَ الظَّنِّ الْمُسْتَقَادِ وَمِنْ أدَلَّةِ الشَّرْعِ أَقْوَى مِمَّا يَسْتَفِيدُهُ مِنْ غَيْرِهِ وَلَا سِيَّيَا إِنْ كَانَ هُوَ أَفْضَلَ الْجَمَاعَةِ، وَخَيْرَ أَبُو حَنِيفَةَ فِي تَقْلِيدِ مَنْ شَاءَ مِنَ الْمُجْتَهِدِينَ لِأَنَّ كُلَّ وَاحِدٍ مِنْهُمْ عَلَى حَقٍّ وَصَوَابٍ، وَهَذَا ظَاهِرٌ مُتَّبَعٌ إِذَا قُلْنَا كُلُّ مُجْتَهِدٍ مُصِيبٌ.

possibility that the truth may be outside of their agreement. Abu al-Khattâb (rh) (d. 510 AH) stated in his book *At-tamheed fi uṣool al-fiqh*,

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

Ibn Taymiyyah (rh) held the same opinion and mentioned several instances where some followers of the four imams dissented from their agreement.²⁶ While Imam al-Qarâfi (rh) was one of the scholars who reported from Ibn aṣ-ṣalâḥ (rh) the agreement on following one of the four madhâhib, he said in a different context that a consensus was established during the time of the Companions that whoever converts to Islam may ask any of the scholars and is not bound to ask certain ones, and that one who asked Abu Bakr and 'Umar may still ask Mu'âdh and Abu Hurayrah and others, and he challenged anyone who claimed those consensuses had been revoked to produce evidence for that.²⁷ Imam Ibn Ḥajar al-Haytami ash-Shâfi'i (rh)

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

قولنا: أن أدلة (الإجماع) لا تتناولهم، لأنهم بعض المؤمنين وبعض الأمة، ولأن الإمامة لا تأثير لها في الإجماع، فكذلك الأربعة، وإنما التأثير (للاجتهاد) والعلم، وغيرهم في الاجتهاد بمنابتهم.

26- *Majmoo' al-fatâwâ* by Ibn Taymiyyah, Taqi ad-Deen Ahmad, Cairo: Maktabat Ibn Taymiyyah, 20/10. معنى الإجماع: أن تجتمع علماء المسلمين على حكم من الأحكام. وإذا ثبت إجماع الأمة على حكم من الأحكام لم يكن لأحد أن يخرج عن إجماعهم؛ فإن الأمة لا تجتمع على ضلالة ولكن كثير من المسائل يظن بعض الناس فيها إجماعا ولا يكون الأمر كذلك بل يكون القول الآخر أرجح في الكتاب والسنة. وأما أقوال بعض الأئمة كالفقهاء الأربعة وغيرهم؛ فليس حجة لازمة ولا إجماعا باتفاق المسلمين بل قد ثبت عنهم - رضي الله عنهم - أنهم نهوا الناس عن تقليدهم؛ وأمروا إذا رأوا قولاً في الكتاب والسنة أقوى من قولهم: أن يأخذوا بها دل عليه الكتاب والسنة ويدعوا أقوالهم. ولهذا كان الأكابر من أتباع الأئمة الأربعة لا يزالون إذا ظهر لهم دلالة الكتاب أو السنة على ما يخالف قول متبوعهم اتبعوا ذلك مثل مسافة القصر؛ فإن تحديدها بثلاثة أيام أو ستة عشر فرسخاً لما كان قولاً ضعيفاً كان طائفة من العلماء من أصحاب أحمد وغيرهم ترى قصر الصلاة في السفر الذي هو دون ذلك كالسفر من مكة إلى عرفة؛ فإنه قد ثبت أن أهل مكة قصرُوا مع النبي ﷺ بمنى وعرفة. وكذلك طائفة من أصحاب مالك وأبي حنيفة وأحمد قالوا: إن جمع الطلاق الثلاث محرم وبدعة؛ لأن الكتاب والسنة عندهم إنما يدلان على ذلك وخالفوا أئمتهم. وطائفة من أصحاب مالك والشافعي وأبي حنيفة رأوا غسل الدهن النجس؛ وهو خلاف قول الأئمة الأربعة. وطائفة من أصحاب أبي حنيفة رأوا تحليف الناس بالطلاق وهو خلاف الأئمة الأربعة بل ذكر ابن عبد البر أن الإجماع منعقد على خلافه. وطائفة من أصحاب مالك وغيرهم قالوا: من حلف بالطلاق فإنه يكفر يمينه؛ وكذلك من حلف بالعقاق وكذلك قال طائفة من أصحاب أبي حنيفة والشافعي؛ قالوا: إن من قال: الطلاق يلزمه لا يقع به طلاق ومن حلف بذلك لا يقع به طلاق وهذا منقول عن أبي حنيفة نفسه. وطائفة من العلماء قالوا: إن الحالف بالطلاق لا يقع به طلاق ولا تلزمه كفارة وقد ثبت عن الصحابة وأكابر التابعين في الحلف بالعقاق أنه لا يلزمه؛ بل تجزئه كفارة يمين وأقوال الأئمة الأربعة بخلافه فالحلف بالطلاق بطريق الأولى ولهذا كان من هو من أئمة التابعين يقول: الحلف بالطلاق لا يقع به الطلاق ويجعله يميناً فيه الكفارة. وهذا بخلاف إيقاع الطلاق فإنه إذا وقع على الوجه الشرعي وقع باتفاق الأمة ولم تكن فيه كفارة باتفاق الأمة بل لا كفارة في الإيقاع مطلقاً وإنما الكفارة خاصة في الحلف. فإذا تنازع المسلمون في مسألة وجب رد ما تنازعوا فيه إلى الله والرسول فأبي القولين دل عليه الكتاب والسنة وجب اتباعه.

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

explained that it is permissible for a scholar to follow an *ijtihâd* outside the four *madhâhib* as long as it is well documented, and its conditions and all necessary details are known, and he attributed it to Imam as-Subki (rh).²⁸ Imam an-Nafrâwî al-Maliki (rh) attributed this position to some of the verifying scholars - without limiting the permissibility of *taqlêd* to the scholars.²⁹

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

"قاعدة: انعقد الإجماع على أن من أسلم فله أن يقلد من شاء من العلماء بغير حَجْرٍ. وأجمع الصحابة رضوان الله عليهم على أن من استفتى أبا بكر وعمر رضي الله عنهما وقُلدهما فله أن يستفتي أبا هريرة ومعاذ بن جبل وغيرهما، ويعمل بقولهم من غير تكبير. فمن ادعى رفع هذين الإجماعين فعليهما الدليل.."

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

وَأَجْرَى السَّبْكِيُّ ذَلِكَ وَتَبِعُوهُ فِي الْعَمَلِ بِخِلَافِ الْمَذَاهِبِ الْأَرْبَعَةِ أَيَّ مِمَّا عَلِمَتْ نَسَبَتُهُ لِمَنْ يَجُوزُ تَقْلِيدُهُ، وَجَمِيعُ شُرُوطِهِ عِنْدَهُ وَحَمَلٌ عَلَى ذَلِكَ قَوْلُ ابْنِ الصَّلَاحِ لَا يَجُوزُ تَقْلِيدُ غَيْرِ الْأَيْمَةِ الْأَرْبَعَةِ أَيَّ فِي قَضَاءٍ أَوْ إِفْتَاءٍ وَحَمَلٌ ذَلِكَ وَغَيْرِهِ مِنْ سَائِرِ صُورِ التَّقْلِيدِ مَا لَمْ يَتَّبِعِ الرَّحْمَنُ بِحَيْثُ تَنْحَلُّ رِبْقَةُ التَّكْلِيفِ مِنْ عُنُقِهِ، وَإِلَّا أَيْمَ بِهِ بَلْ قِيلَ فَسَقَ وَهُوَ وَجِيهٌ قِيلَ وَحَمَلٌ صَغَفِهِ أَنْ تَتَّبِعَهَا مِنَ الْمَذَاهِبِ الْمُدَوَّنَةِ وَإِلَّا فَسَقَ قَطْعًا وَلَا يَنَافِي ذَلِكَ قَوْلُ ابْنِ الْحَاجِبِ كَالْأَمْدِيِّ مَنْ عَمِلَ فِي مَسْأَلَةٍ يَقُولُ إِمَامٌ لَا يَجُوزُ لَهُ الْعَمَلُ فِيهَا يَقُولُ غَيْرُهُ اتِّفَاقًا لِيَتَّعِنَ حَمْلُهُ عَلَى مَا إِذَا بَقِيَ مِنْ أَثَارِ الْعَمَلِ الْأَوَّلِ مَا يَلْزَمُ عَلَيْهِ مَعَ الثَّانِي تَرَكُّبٌ حَقِيقَةٌ لَا يَقُولُ بِهَا كُلُّ مَنْ مِنَ الْإِمَامِينَ كَتَقْلِيدِ الشَّافِعِيِّ فِي مَسْحِ بَعْضِ الرَّأْسِ وَمَالِكٍ فِي طَهَارَةِ الْكَلْبِ فِي صَلَاةٍ وَاحِدَةٍ.

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

وَقَدْ اِنْتَعَدَ إِجْمَاعُ الْمُسْلِمِينَ الْيَوْمَ عَلَى وَجُوبِ مِتَابَعَةِ وَاحِدٍ مِنَ الْأَيْمَةِ الْأَرْبَعِ: أَبِي حَنِيفَةَ وَمَالِكٍ وَالشَّافِعِيِّ وَأَحْمَدَ بْنَ حَنْبَلٍ - رَضِيَ اللَّهُ عَنْهُمْ - وَعَدَمِ جَوَازِ الْخُرُوجِ عَنْ مَذَاهِبِهِمْ، وَإِنَّمَا حَرَّمَ تَقْلِيدَ غَيْرِ هَؤُلَاءِ الْأَرْبَعَةِ مِنَ الْمُجْتَهِدِينَ، مَعَ أَنَّ الْجَمِيعَ عَلَى هُدًى لِعَدَمِ حِفْظِ مَذَاهِبِهِمْ لِيُوتَ أَصْحَابِهِمْ وَعَدَمِ تَدْوِينِهَا، وَلِذَا قَالَ بَعْضُ الْمُحَقِّقِينَ: الْمُعْتَمَدُ أَنَّهُ يَجُوزُ تَقْلِيدُ الْأَرْبَعَةِ، وَكَذَا مِنْ عَدَاهُمْ مِمَّنْ يَحْفَظُ مَذَهَبَهُ فِي تِلْكَ الْمَسْأَلَةِ وَدُونَ حَتَّى عَرَفَتْ شُرُوطُهُ وَسَائِرُ مُعْتَبَرَاتِهِ، فَالْإِجْمَاعُ الَّذِي تَقَلَّهَ غَيْرُ وَاحِدٍ كَانِ الصَّلَاحُ وَإِمَامُ الْحُرَمَيْنِ وَالْقَرَفِيُّ عَلَى مَنَعِ تَقْلِيدِ الْأَصْحَابَةِ يُحْتَمَلُ عَلَى مَا قَبِدَ مِنْهُ شَرْطٌ مِنْ ذَلِكَ مِنْ شَرْحِ شَيْخِ مَسَاحِينَا اللَّقَائِي، وَإِنَّمَا قَالَ الْمُصَنِّفُ فِي الْقُرُوعِ وَالْحَوَادِثِ لِإِخْتِرَازِ عَنِ أَسْوَاقِ الدِّينِ وَسَائِرِ عَقَائِدِ الْإِسْلَامِ الْمُتَعَلِّقَةِ بِمَا يَجِبُ لِلَّهِ وَمَا يَجُوزُ وَمَا يَسْتَحِيلُ فَلَا يَصِحُّ الْإِخْتِلَافُ فِي شَيْءٍ مِنْهَا.

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

"نعم يجوز لغير عامي من الفقهاء المقلدين تقليد غير الأربعة في العمل لنفسه إن علم نسبه لمن يجوز تقليده وجمع شروطه عنده لكن بشرط أن لا يتبع الرخصة بأن يأخذ من كل مذهب الأهون بحيث تنحل ريقة التكليف من عقده وإلا لم يميز خلافا لابن عبد السلام حيث أطلق جواز تتبعها وقد يحمل كلامه على ما إذا تتبعها على وجه لا يصل إلى الانحلال المذكور، وحكى الزركشي- أن القاضي أبا الطيب أقيمت صلاة الجمعة بهم بالتكبير فذرق عليه طير فقال أنا حنبلي فأحرم ولم يمنعه عمله بمذهبه من تقليد المخالف عند الحاجة ومن جرى على ذلك السبكي فقال: المنتقل من مذهب لآخر له أحوال: الأول أن يعتقد رجحان مذهب الغير فيجوز عمله به اتباعا للحاج في ظنه الثاني أن يعتقد رجحان شيء فيجوز الثالث أن يقصد بتقليده الرخصة فيما يحتاجه لحقته أو ضرورة أرهاقته فيجوز الرابع أن يقصد مجرد الترخيص فيمتنع لأنه متبع لهواه لا للدين الخامس أن يكثر ذلك ويجعل اتباع الرخص ديدنه فيمتنع لما ذكر ولزيادة فحشه السادس أن يجتمع من ذلك حقيقة مركبة متمتعة بالإجماع فيمتنع السابع أن يعمل

in our discussion of the existing flexibility within the juridical theory, they also allowed the use of unauthorized positions in the *madhâhib* for valid reasons.

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

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

بتقليد الأول كحنفي يدعي شفعة جوار فيأخذها بمذهب الحنفي فتستحق عليه فريد تقليد الإمام الشافعي فيمتنع لخطئه في الأولى أو الثانية وهو شخص واحد مكلف".

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

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

agencies in many Muslim countries, including Egypt, Syria, and Jordan, has conferred it with mainstream acceptance. In summary, one may say that the mainstreaming of positions outside the agreement of the four *madhâhib* should be contingent upon their validation by collective *ijtihâd* or acceptance by a large group of verifying scholars.

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

Objectives of Shariah and reform

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

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

The middle position between the people who exaggerate in the utility of *maqâşid* and those who reject their role in guiding the *ijtihâd* of the *faqeeh*, in my belief, is that the *faqeeh* must always be mindful of the *maqâşid* (as addressed in the discussion of the rational proofs), but he or she would not circumvent the detailed

rulings, the methodology of deduction, or the legal maxims to realize those objectives. They must provide valid justification if they decided to use *istihsân* or other legal devices to achieve those *maqâsid*. It is those legal experts that are most suited to employ the *maqâsid* without compromising the methodology of deduction laid out in *uṣool al-fiqh*. They will always be capable of finding a way to their proper realization through the proper understanding of the textual proofs and legal maxims (*al-qawâ'id al-fiqhiyyah*); the latter are a lower level of abstraction than the *maqâsid*, and thus much more reckonable.

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

The role of human intellect

The pressing question here is whether human intellect can suffice in realizing the *maqâsid* mentioned above. The scholars have disagreed regarding the ability of humankind to discern between good and bad (*ḥasan* and *qabeeh*). The Mu'tazilah believed that human intellect is totally capable of this (and liable for it as well). Many Ash'aris and some Atharis said it is not (but they still employed rational thought in the matters of law). Many Maturidis and Atharis, including Ibn Taymiyyah,³³ maintained a middle position and said that human intellect is partially capable of that discernment; however, it is incomplete and clouded by ego, prejudice, ignorance, and so on. They also maintained, like the Ash'aris, that people are not liable based on this discernment until they receive a revelation from God. The last position has great merits, because all humans agree at some level on an objective consistent system of basic moral values. The Shariah acknowledges that discernment mechanism which exists in every human being; it calls it *fitrah* (natural disposition). Based on this position, which Ibn Taymiyyah (rh) attributed to the majority of *Ahl us-Sunnah*,³⁴ the intellect has a great role in drawing that roadmap by ensuring a solid understanding of the Shariah and its *maqâsid* and a clear understanding of the reality in which the Shariah operates.

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

34- *Ibid*.

Before we talk about the interplay between the intellect and Shariah, we must ask about their respective scopes of operation. What parts and how much of our lives are controlled by the Shariah and how much is left for human thought? As Muslims, we comply with the Divine. Life itself is a gift from Him. We live it by Him and for Him. However, how much did the Divine leave for us to decide for ourselves, while still being under His authority? Contention between the Divine and the secular in our modern discourse as Muslims is intense. Many times, the proponents of secularism assault the place of the Divine in the 'public space.' However, we need to ask ourselves if the opposite is also true. When you hear of clinics that claim to treat patients with prophetic medicine, you must find the idea offensive to the Prophet himself and his teachings. Was he (ﷺ) not the one to say,

"أَنْتُمْ أَعْلَمُ بِأَمْرِ دُنْيَاكُمْ."

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

It is true that the Prophet (ﷺ) did prescribe some medications. However, only very few of these prescriptions have an indication that their source was Divine revelation. Otherwise, the Prophet (ﷺ) used the same medicines available to him at the time and in the place he lived. While some scholars, like Ibn al-Qayyim (rh), believed that all of his prescriptions are infallible, others, like al-Qâfi 'Iyâd (rh) and Ibn Khaldoon (rh), believed they are not. Excluding the few prescriptions that have some indication of a Divine origin, the second position seems more consistent with the hadith above, and as Ibn Khaldoon pointed out, he (ﷺ) came to teach us about the religion, not about medicine and the like.³⁵ Whichever position you are more comfortable with, the fact that should not be missed is that there is no separate genre of medicine called 'prophetic medicine.'

The matter gets more contentious when the discussion pertains to politics, economics, or other aspects of public policy. It is only expected that there would be Islamic instructions and guidelines regarding these matters. It seems though that we selectively abandoned some of the most obvious ones, like the concept of *shoorâ* (consultation), which, if we consider it binding, may be translated as 'majority rule.' Having said that, it seems that those areas were left very lightly regulated and without detailed instruction to allow for human creativity and leave ample room for human intellect to decide what is suitable in different times and places. If we had been commanded to abide by direct democracy, the command would have been

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

inapplicable for more than twelve centuries because it was simply logistically impossible. It would have also barred the people from choosing some form of representative oligarchy if they found it more suitable in certain circumstances. The endless debate over Islam being more capitalist or socialist or a completely separate system is an indication of the light regulation in this area that has allowed this discussion to take place between sincere scholars and thinkers.

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

The Shariah is based on wisdom and the pursuit of the welfare of humanity in their fleeting life and in the life to come. It is entirely just, wise, beneficial, and merciful. Anything that veers from justice into injustice, from mercy to its opposite, from wisdom to foolishness, and from the welfare of humanity to its harm, is not part of the Shariah, even if it has been included therein by misinterpretation.³⁶

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

The intellect has another role here that relates to the changing realities. A fatwa is a specific ruling, or the application of Shariah in a tailored detail, so it is the customization of the ruling for a certain situation. There is even more of a human element here—and subsequently a greater margin of error—since a fatwa requires understanding the texts of the Shariah and then an understanding of the situation being judged. When you add to this the enormous changes that have taken place in the world in the last two hundred years, you will be able to appreciate how much

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

فإن الشريعة مبناه وأساسها على الحكم ومصالح العباد في المعاش والمعاد، وهي عدل كلها، ورحمة كلها، ومصالح كلها، وحكمة كلها؛ فكل مسألة خرجت عن العدل إلى الجور، وعن الرحمة إلى ضدها، وعن المصلحة إلى المفسدة، وعن الحكمة إلى البعث؛ فليست من الشريعة وإن أدخلت فيها بالتأويل؛ فالشريعة عدل الله بين عباده، ورحمته بين خلقه، وظله في أرضه، وحكمته الدالة عليه وعلى صدق رسوله صلى الله عليه وسلم أتم دلالة وأصدقها، وهي نوره الذي به أبصر المبصرون، وهداه الذي به اهتدى المهتدون، وشفاهه التام الذي به دواء كل عليل، وطريقه المستقيم الذي من استقام عليه فقد استقام على سواء السبيل.

effort should be spent in examining the fatwas in classical *fiqh* books before we rush to apply them to current realities. If we go by the expression of Imam ar-Râzi (rh),³⁷ there will be a lot of rational abrogation, which is abrogation of a ruling because of the absence of its sphere of operation (*dhahâb al-mahâl*). However, the word 'abrogation' here may be used loosely by ar-Râzi (rh). We can simply say that the rule is inapplicable due to the absence of the conditions of its application, as Imam al-Qarâfi (rh) remarked.³⁸ For example, the condition of the imam (head of the Muslim state) being from the tribe of Quraysh may have been simply, as Ibn Khaldoun maintained, to defuse conflict and chaos in the immediate succession to the Prophet (ﷺ). Nowadays, millions of people trace their roots back to Quraysh, and there is no dependable way of verifying the veracity of that. The ruling is, therefore, considered by many to be inapplicable.

Those who master the different sciences and fields of human activity would be the best people to employ the Islamic value system in them. The scholars need to have some mastery of those fields to provide proper guidance in them. Then, we must resort to the division of *ijtihâd*, where scholars may be most sought for fatwas in the areas of their specialization. If that is not always possible, then it may be required that fatwas in such matters be undertaken collectively with the *faqeeh* being the last signatory, after listening to various experts and learning sufficiently about the issue at hand.

Expansion of our use of rational proofs

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

For example, the different forms of *qiyâs* provide great malleability and strength to the body of *fiqh*; this is particularly true of the less technical *qiyâs*, which is more observant of the *maqâsid* and the principle of equity. Also, using the *hikmah*

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

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

(wisdom; which is the primary reason behind the legislation of a particular ruling) in addition to the *'illah* (which is the immediate contingency of the ruling) will give great vitality to *qiyâs*. Using the *hikmah*, when it is apparent (*zâhir*) and measurable (*mundabit*) is the position of al-Âmidi, Ibn al-Ĥâjib, aṣ-ṣafiy al-Hindi, and many Ḥanbalis.³⁹ This is also the way in which the Qur'an attaches the rulings to the ultimate wisdom of their legislation. Even when some scholars stress that *qiyâs* cannot be based on the *hikmah*, you find them considering it in their application of *qiyâs*. A good example of this is the ruling on combining the prayers for the sick, which lacks any specific proof in the text of revelation: you find the Mâlikis, the Ḥanbalis, and many Shâfi'is allowing it, using analogy to the rule on combining prayers for travel and for prolonged bleeding, on the basis of preventing hardship. Hardship is not the *'illah* (immediate effective cause) in combining the prayers for traveling; it is rather the *hikmah* (wisdom behind the legislation). We find the Ḥanbalis using that rationale to further expand the list of valid excuses for combining prayers to include various reasons that may cause hardship or harm to a person concerning his or her health, dignity, or even livelihood.⁴⁰ Ibn Taymiyyah (rh) expounded upon this to include a baker who fears that his dough will get spoiled if he leaves it.⁴¹ It was also Ibn Taymiyyah's understanding of the wisdom of the prohibition of intoxication that led him to keep his disciples from preventing the Tatar soldiers from drinking. He reasoned that if the invaders became intoxicated, people might be safe for a while from their evil, because whenever they were sober, they pillaged the city and spread mischief.

The consideration of *hikmah* is not limited to using it in *qiyâs*, but it affects the understanding of the *naṣṣ* (text of revelation) itself. For example, you find the Ḥanafis and Mâlikis considering, in addition to other factors, the ultimate wisdom behind the legislation of *tayammum* (dry ablution) where they consider any surface

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

"المذهب الثالث: التفصيل، بيانه: إن كانت الحكمة ظاهرة منضبطة بنفسها، فإنه يجوز التعليل بها. وإن كانت الحكمة خفية مضطربة، فإنه لا يجوز التعليل بها. وهو ما ذهب إليه الأمدى، وابن الحاجب، والصفى الهندي، وكثير من الحنابلة."

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

(وَ) الْحَالُ السَّابِعَةُ وَالثَّامِنَةُ (لَنْ لَمْ تُشْغَلْ أَوْ عَذْرٌ تُبَيِّحُ تَرْكَ الْجُمُعَةِ وَالْجَمَاعَةِ) كَخَوْفٍ عَلَى نَفْسِهِ أَوْ حُزْمِهِ أَوْ مَالِهِ، أَوْ تَضَرُّرٍ فِي مَعِيشَةٍ يَحْتَاجُهَا بَتْرُكُ الْجَمْعِ وَنَحْوِهِ.

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

واختار الشَّيْخُ تَقِيُّ الدِّينِ، جَوَازَ الْجَمْعِ لِلطَّبَّاحِ، وَالْحَبَّازِ وَنَحْوِهِمَا، مَن يَخْشَى فَسَادَ مَالِهِ وَمَالِ غَيْرِهِ بَتْرُكِ الْجَمْعِ.

of the earth suitable for it, unlike those who, based on the wording of one report, limited it to mean soil.

The consideration of *hikmah* is also behind the concept of *istihsân*, which is an antidote to the literalism and technicality that may frustrate rather than serve the ideals and objectives of Shariah. It is setting aside an established analogy in favor of an alternative one that serves the ideals of justice and public interest in a better way. This form of *istihsân* originally considered by Imam Abu Ḥanifah (rh) and his main disciples, as Ibn Taymiyyah noted, is not the form that was denounced by Imam ash-Shâfi'i and Imam Aḥmad when they encountered some of the later Ḥanafi scholars practicing it.⁴² Al-Âmidî (Shâfi'i jurist) stated that notwithstanding his explicit denunciation of *istihsân*, Imam al-Shâfi'i (rh) himself resorted to *istihsân* on several occasions.⁴³

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

The place of *maṣlahah* in the Shariah is established, whether, the jurists recognize *istiṣlâḥ* (acquisition of benefit) in theory as a source of legislation or not. The fact is that all of them in their actual deduction of rulings considered *maṣlahah*. The question is not about the consideration of *maṣlahah* but rather the strength of this in the face of the explicit or implicit meaning of the text of revelation. One finds that scholars differ regarding this: their opinions fall on a wide spectrum from Najm-ud-Deen aṭ-Ṭoofi (rh) who gave *istiṣlâḥ* almost unchecked authority, to others who limit it to instances where there is no superior basis for legislation in the revelation;

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

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

"وَقَدْ نُقِلَ عَنِ الشَّافِعِيِّ أَنَّهُ قَالَ: أَسْتَحْسِنُ فِي الْمُنْعَةِ أَنْ تَكُونَ ثَلَاثِينَ دِرْهَمًا، وَأَسْتَحْسِنُ ثُبُوتَ الشُّفْعَةِ لِشَوْفِيعٍ إِلَى ثَلَاثَةِ أَيَّامٍ، وَأَسْتَحْسِنُ تَرْكَ قَيْءٍ لِلْمَكَاتِبِ مِنْ نُجُومِ الْكِتَابَةِ. وَقَالَ فِي السَّارِقِ إِذَا أَخْرَجَ يَدَهُ الْيُسْرَى بِدَلِّ الْيُمْنَى فَقَطَّعَتْ: الْقِيَاسُ أَنْ تَقْطَعَ يَمِينًا، وَالْإِسْتِحْسَانُ أَنْ لَا تَقْطَعَ. فَلَمْ يَبْقَ الْخِلَافُ إِلَّا فِي مَعْنَى الْإِسْتِحْسَانِ وَحَقِيقَتِهِ."

and even then, this particular *maṣlaḥah* has to be recognized by the Shariah.⁴⁴ If we tie this into the role of *maqâṣid* in *tajdeed*, we can simply expand the recognizable *maṣlaḥah* to include any benefit that is harmonious with the *maqâṣid* of the Shariah: that is, all the benefits that are recognized by sound intellect. Where there is a conflict between the perceived benefit and the text of revelation, a careful examination of both is warranted by qualified masters of *fiqh*. There is always an error, whether in the estimation of the benefit, or due to overlooking the overriding associated harms, or in our understanding of the *naṣṣ*.⁴⁵

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

Allah says,

{حُذِّ الْعَفْوَ وَأْمُرْ بِالْعُرْفِ وَأَعْرِضْ عَنِ الْجَاهِلِينَ}

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

Allah also says,

{وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ}

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

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

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

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

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

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

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

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

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

Imam Ibn al-Qayyim wrote:

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

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

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

"وَعَلَى هَذَا الْقَانُونِ تُرَاعَى الْفِتَاوَى عَلَى طُولِ الْأَيَّامِ فَمَهْمَا تَجَدَّدَ فِي الْعُرْفِ اعْتَبَرَهُ وَمَهْمَا سَقَطَ أُنْقِطَهُ وَلَا تَحْمُذُ عَلَى الْمُسْطَوْرِ فِي الْكُتُبِ طَوْلٌ عُنْدَكَ بَلْ إِذَا جَاءَكَ رَجُلٌ مِنْ غَيْرِ أَهْلِ إِقْلِيمِكَ يَسْتَفْتِيكَ لَا تَحْجِرْهُ عَلَى عُرْفِ بَلَدِكَ وَأَسْأَلْهُ عَنْ عُرْفِ بَلَدِهِ وَأَجْرُهُ عَلَيْهِ وَأَفِيهِ بِهِ دُونَ عُرْفِ بَلَدِكَ وَدُونَ الْمُقَرَّرِ فِي كُتُبِكَ فَهَذَا هُوَ الْحَقُّ الْوَاضِحُ. وَالْجُمُودُ عَلَى الْمُنْقُولَاتِ أَبَدًا ضَلَالٌ فِي الدِّينِ وَجَهْلٌ بِمَقَاصِدِ عُلَمَاءِ الْمُسْلِمِينَ وَالسَّلَفِ الْمَاضِينَ."

48- *I'lâm al-muwaqqi'een*, 3/66.

"وَمَنْ أَفْتَى النَّاسَ بِمَجَرَّدِ الْمُنْقُولِ فِي الْكُتُبِ عَلَى اخْتِلَافِ عُرْفِهِمْ وَعَوَائِدِهِمْ وَأَزْمَتِهِمْ وَأَمَكَّتِيهِمْ وَأَخْوَالِهِمْ وَقَرَائِنِ أَخْوَالِهِمْ فَقَدْ خَسَلَ وَأَصْلَلَ، وَكَانَتْ جِنَايَتُهُ عَلَى الدِّينِ أَعْظَمَ مِنْ جِنَايَةِ مَنْ طَبَّبَ النَّاسَ كُلَّهُمْ عَلَى اخْتِلَافِ بِلَادِهِمْ وَعَوَائِدِهِمْ وَأَزْمَتِهِمْ وَطَبَّاعِهِمْ بِمَا فِي كِتَابٍ مِنْ كُتُبِ الطَّبِّ عَلَى أَبْدَانِهِمْ، بَلْ هَذَا الطَّبِيبُ الْجَاهِلُ وَهَذَا الْمُفْتِي الْجَاهِلُ أَضُرُّ مَا عَلَى أَدْيَانِ النَّاسِ وَأَبْدَانِهِمْ وَاللَّهُ الْمُسْتَعَانُ."

Flexibility in the existent theory on *ijtihad*

Quoting earlier scholars, Imam Ibn Taymiyyah stated,

إجماعهم حجة قاطعة واختلافهم رحمة واسعة.

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

The vastness of our *fiqhi* legacy and the many disagreements among the different *madhâhib* and independent *mujtahideen* cause frustration to some students of *fiqh* and junior *fuqahâ'*. This is, however, a major source of flexibility that enables renewal. Many followers of the four most reputable schools allowed transfer (*tanaqqul*), even for the public,⁵⁰ from one *madhhab* to another, and *takhayyur*

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

50- *At-taqreer wal-tahbeer 'ala tahreer al-kamâl*, 3/352.

وَقَالَ الرَّوْيَانِيُّ: يَجُوزُ تَقْلِيدُ الْمَذَاهِبِ وَالْإِنْتِقَالُ إِلَيْهَا بِثَلَاثَةِ شُرُوطٍ أَنْ لَا يَجْمَعَ بَيْنَهُمَا عَلَى صُورَةِ تَخَالُفِ الْإِجْمَاعِ كَمَنْ تَزَوَّجَ بَعِيرَ صَدَاقٍ وَلَا وَبِيٍّ وَلَا شُهْرُودٍ فَإِنَّ هَذِهِ الصُّورَةَ لَمْ يَقُلْ بِهَا أَحَدٌ وَأَنْ يَعْتَقِدَ فِيمَنْ يُقَلِّدُهُ الْفَضْلَ بِوُضُوحٍ أَوْ بِإِجْمَاعٍ أَوْ بِإِجْمَاعٍ أَوْ الْقَوَاعِدِ أَوْ النَّصِّ أَوْ الْقِيَّاسِ الْجَلِيِّ فَهُوَ حَسَنٌ مُتَعَيِّنٌ فَإِنَّ مَا لَا هَذَا بَأْتَهُ إِنْ أَرَادَ بِالرُّحْصِ مَا يُنْقَضُ فِيهِ قَضَاءُ الْقَاضِي وَهُوَ أَرْبَعَةٌ مَا خَالَفَ الْإِجْمَاعَ أَوْ الْقَوَاعِدَ أَوْ النَّصَّ أَوْ الْقِيَّاسَ الْجَلِيَّ فَهُوَ حَسَنٌ مُتَعَيِّنٌ فَإِنَّ مَا لَا تُعْرَفُ مَعَ تَأْكِيدِهِ بِحُكْمِ الْحَاكِمِ فَأَوْلَى أَنْ لَا تُعْرَفُ قَبْلَ ذَلِكَ، وَإِنْ أَرَادَ بِالرُّحْصِ مَا فِيهِ سَهْوَةٌ عَلَى الْمُكَلَّفِ كَيْفَمَا كَانَ يَلْزُمُهُ أَنْ يَكُونَ مَنْ قَلَّدَ مَالِكًا فِي الْيَمَاءِ وَالْأَزْوَاجِ وَتَرَكَ الْأَلْفَاطِ فِي الْعُقُودِ مُخَالِفًا لِتَقْوَى اللَّهِ، وَلَيْسَ كَذَلِكَ وَتَعَقَّبُ الْأَوَّلَ بِأَنَّ الْجَمْعَ الْمَذْكُورَ لَيْسَ بِضَائِرٍ فَإِنَّ مَالِكًا مَثَلًا لَمْ يَقُلْ إِنَّ مَنْ قَلَّدَ الشَّافِعِيَّ فِي عَدَمِ الصَّدَاقِ أَنْ يَنْكَحَهُ بِاطِّلٍ وَإِلَّا لَزِمَ أَنْ تَكُونَ أَنْكِحَةُ الشَّافِعِيَّةِ عِنْدَهُ بَاطِلَةٌ، وَلَمْ يَقُلْ الشَّافِعِيُّ إِنَّ مَنْ قَلَّدَ مَالِكًا فِي عَدَمِ الشُّهُودِ أَنْ يَنْكَحَهُ بِاطِّلٍ، وَإِلَّا لَزِمَ أَنْ تَكُونَ أَنْكِحَةُ الْمَالِكِيَّةِ بِمَا شُهِدَ عِنْدَهُ بَاطِلَةٌ. قُلْتُ: لَكُنْ فِي هَذَا التَّوَجُّهِ نَظَرٌ غَيْرٌ خَافٍ وَوَأَفَقَ ابْنُ دَقِيقِ الْعِيدِ الرَّوْيَانِيُّ عَلَى اشْتِرَاطِ أَنْ لَا يَجْتَمِعَ فِي صُورَةِ يَفْعِ الْإِجْمَاعِ عَلَى بَطْلَانِهَا، وَأَبْدَلَ الشَّرْطَ الثَّلَاثَ بِأَنْ لَا يَكُونَ مَا قَلَّدَ فِيهِ بِمَا يُنْقَضُ فِيهِ الْحُكْمُ لَوْ وَقَعَ وَاقْتَصَرَ الشَّيْخُ عَزَّ الدِّينُ بْنُ عَبْدِ السَّلَامِ عَلَى اشْتِرَاطِ هَذَا وَقَالَ: وَإِنْ كَانَ الْمَأْخُذَانِ مُتَقَارِبَيْنِ جَارَيْنِ. وَالشَّرْطُ الثَّانِي أَنْ يَشْرَحَ صَدْرَهُ لِلتَّقْلِيدِ الْمَذْكُورِ وَعَدَمَ اغْتِيَابِهِ لِكُونِهِ مُتَلَاعِبًا بِالَّذِينَ مَتَسَاهَلًا فِيهِ وَدَلِيلَ هَذَا الشَّرْطِ قَوْلُهُ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - «وَالْإِنَّمُ مَا حَاكَ فِي الصَّدْرِ» فَهَذَا تَضْرِيحٌ بِأَنَّ مَا حَاكَ فِي النَّفْسِ فَعَلَهُ ثُمَّ اهـ. قُلْتُ: أَمَّا عَدَمُ اغْتِيَابِ كَوْنِهِ مُتَلَاعِبًا بِالَّذِينَ مَتَسَاهَلًا فِيهِ فَلَا بُدَّ مِنْهُ وَأَمَّا اشْتِرَاحُ صَدْرِهِ لِلتَّقْلِيدِ فَلَيْسَ عَلَى إِطْلَاقِهِ كَمَا أَنَّ الْحَدِيثَ كَذَلِكَ أَيْضًا وَهُوَ يَلْفِظُ «وَالْإِنَّمُ مَا حَاكَ فِي نَفْسِكَ وَكَرِهْتَ أَنْ يَطَّلِعَ عَلَيْهِ النَّاسُ» فِي صَحِيحِ مُسْلِمٍ وَيَلْفِظُ «وَالْإِنَّمُ مَا حَاكَ فِي الْقَلْبِ وَتَرَدَّدَ فِي الصَّدْرِ، وَإِنْ أَفْتَاكَ النَّاسُ وَأَفْتَوْكَ» فِي مُسْنَدِ أَحْمَدَ فَقَدْ قَالَ الْحَافِظُ الْمُتَّقِنُ ابْنُ رَجَبٍ فِي الْكَلَامِ عَلَى هَذَا الْحَدِيثِ مُشِيرًا إِلَيْهِ بِاللَّفْظِ الْأَوَّلِ أَنَّهُ إِسْرَافٌ إِلَى أَنَّ الْإِنَّمُ مَا أَتَرَفِي الصَّدْرِ حَرَجًا وَضِيْقًا وَقَلْفًا وَاضْطِرَابًا فَلَمْ يَنْشُرْ لَهُ الصَّدْرُ وَمَعَ هَذَا فَهُوَ عِنْدَ النَّاسِ مُسْتَنْكَرٌ بِحَيْثُ يُكْرَهُ عِنْدَ إِطْلَاعِهِمْ عَلَيْهِ وَهَذَا أَعْلَى مَرَاتِبِ مَعْرِفَةِ الْإِنَّمِ عِنْدَ الْإِسْنِيَّانِ، وَهُوَ مَا اسْتَنْكَرَهُ النَّاسُ فَاجْلَهُ وَغَيْرَ فَاعِلِهِ وَمِنْ هَذَا الْمَعْنَى قَوْلُ ابْنِ مَسْعُودٍ مَا رَأَى الْمُؤْمِنُونَ حَسَنًا فَهُوَ عِنْدَ اللَّهِ حَسَنٌ وَمَا رَأَى الْمُؤْمِنُونَ قَبِيحًا فَهُوَ عِنْدَ اللَّهِ قَبِيحٌ وَمُشِيرًا إِلَيْهِ بِاللَّفْظِ الثَّانِي يَعْني مَا حَاكَ فِي صَدْرِ الْإِنْسَانِ فَهُوَ الْإِنَّمُ، وَإِنْ أَفْتَاهُ غَيْرُهُ بِأَنَّهُ لَيْسَ بِإِنَّمٍ فَهَذِهِ مَرْتَبَةٌ ثَانِيَةٌ وَهُوَ أَنْ يَكُونَ الشَّيْءُ مُسْتَنْكَرًا عِنْدَ فَاعِلِهِ دُونَ غَيْرِهِ وَقَدْ جَعَلَهُ أَيْضًا إِثْمًا وَهَذَا إِثْمًا يَكُونُ إِذَا كَانَ صَاحِبُهُ يَمُنُّ شَرَحَ صَدْرُهُ بِالْإِيْتَانِ وَكَانَ الْمُقْتَبِيُّ لَهُ يُفْعِي بِمُجَرَّدِ ظَنٍّ أَوْ مَيْلٍ إِلَى هَوَى مِنْ غَيْرِ دَلِيلٍ شَرْعِيِّ.

فأما ما كان مع المفتي به دليل شرعي فالواجب على المستفتي الرجوع إليه، وإن لم ينشرح له صدره وهذا كالرخص الشرعية مثل الفطر في السفر والمرض وقصر الصلاة ونحو ذلك مما لا ينشرح به صدر كثير من الجهال فهذا لا عبرة به، وقد « كان النبي صلى الله عليه وسلم أحياناً يأمر أصحابه بما لا ينشرح به صدر بعضهم فيمتنعون من فعله فيغضب من ذلك » كما أمرهم بفسخ الحج إلى العمرة فكرهه من كرهه منهم وكما أمرهم بنحر هديهم والتحلل من عمرة الحديبية فكرهوه وكرهوا مقاضاته لقريش على أن يرجع من عامه وعلى أن من أتاه منهم يرده إليهم .

وفي الجملة فما ورد النص به فليس للمؤمن إلا طاعة الله ورسوله كما قال تعالى (وما كان لمؤمن ولا مؤمنة إذا قضى الله ورسوله أمراً أن يكون لهم الخيرة من أمرهم) وينبغي أن يتلقى ذلك بانشرح الصدر والرضا فإن ما شرعه الله ورسوله يجب الرضا والإيمان به والتسليم له كما قال - تعالى - : (فلا وربك لا يؤمنون حتى يحكموك فيما شجر بينهم ثم لا يجدوا في أنفسهم حرجاً مما قضيت ويسلموا تسليماً) وأما ما ليس فيه نص عن الله

(expert selection) or patching positions (*talfeeq*) from the different *madhâhib*; something that is frequently done in contemporary *fiqh* assemblies by scholars who are otherwise wholly committed to their own *madhâhib*.

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

It is permissible to follow any *mujtahid* one pleases, even after the codification of the *madhâhib* as is the case today. It is also permissible for him to transfer from his *madhhab*, but he should not seek out the concessions (*rukhaṣ*), and if he did, would he be a deviant (*fâsiq*)? [There are] two views. The commentator said, the most eminent view: [he is] not; and Allah knows best. In the beginning of *At-tatârkhaniyah*, [the author] wrote two chapters on religious decrees; the summary of the first is that Abu Yusuf said that issuing a fatwa is permissible only

ورسوله ولا عن يفتدى بقوله من الصحابة وسلف الأمة فإذا وقع في نفس المؤمن - ص 353 - المظنن قلبه بالإيمان المنشرح صدره بنور المعرفة واليقين منه شيء ، وحاك في صدره لشبهة موجودة ولم يجد من يفتي فيه بالرخصة إلا من يخبر عن رأيه وهو ممن لا يوثق بعلمه ويدينه بل هو معروف باتباع الهوى فهنا يرجع المؤمن إلى ما حاك في صدره ، وإن أفتاه هؤلاء المفتون وقد نص الإمام أحمد على مثل هذا اهـ .
بقي هل بمجرد وقوع صحة جواب المفتى وحقيقته في نفس المستفتي يلزمه العمل به ؟ . فذهب ابن السمعاني إلى أن أولى الأوجه أنه يلزمه وتعقبه ابن الصلاح بأنه لم يجده لغيره قلت وما ذكره ابن السمعاني موافق لما في شرح الزاهدي على مختصر القدوري وعن أحمد العياضي العبرة بما يعتقده المستفتي فكل ما اعتقده من مذهب حل له الأخذ به ديانة ، ولم يحل له خلافه اهـ .
وما في رعاية الخنابلة ولا يكفيه من لم تسكن نفسه إليه وفي أصول ابن مفلح الأشهر يلزمه بالتزامه وقيل وبظنه حقا وقيل ويعمله به ، وقيل : يلزمه إن ظنه حقا ، وإن لم يجد مفتيا آخر لزمه كما لو حكم به حاكم اهـ . - يعني ولا يتوقف ذلك على التزامه ولا سكون نفسه إلى صحته كما صرح به ابن الصلاح وذكر أنه الذي تقتضيه القواعد وشيخنا المصنف رحمه الله على أنه لا يشترط ذلك لا فيما إذا وجد غيره ولا فيما إذا لم يوجد كما أسلفنا ذلك عنه في ذيل مسألة إفتاء غير المجتهد حتى قال لو استفتى فقيهين أعني مجتهدين فاختلفا عليه الأولى أن يأخذ بما يميل إليه قلبه منها ، وعندني أنه لو أخذ بقول الذي لا يميل إليه جاز ؛ لأن ميله وعدمه سواء ، والواجب تقليد مجتهد وقد فعل أصحاب ذلك المجتهد أو أخطأ اهـ .
لكن عليه أن يقال ما قدمناه من أن القياس على تعارض الأقيسة بالنسبة إلى المجتهد يقتضي - وجوب التحري على المستفتي والعمل بما يقع في قلبه أنه الصواب فيحتاج العدول عنه إلى الجواز بدونه إلى جواب ثم في غير ما كتاب من الكتب المذهبية المعتبرة أن المستفتي إن أمضى قول المفتي لزمه ، وإلا فلا حتى قالوا إذا لم يكن الرجل فقيها فاستفتى فقيها فأفتاه بحلال أو حرام ولم يعزم على ذلك حتى أفتاه فقيه آخر بخلافه فأخذ بقوله وأمضاه لم يميز له أن يترك ما أمضاه فيه ويرجع إلى ما أفتاه به الأول ؛ لأنه لا يجوز له نقض ما أمضاه مجتهدا كان أو مقلدا ؛ لأن المقلد متعبد بالتقليد كما أن المجتهد متعبد بالاجتهاد ثم كما لم يميز للمجتهد نقض ما أمضاه فكذا لا يجوز للمقلد ؛ لأن اتصال الإمضاء بمنزلة اتصال القضاء واتصال القضاء يمنع النقض فكذا اتصال الإمضاء هذا وذكر الإمام العلائي أنه قد يرجع القول بالانتقال في أحد صورتين إحداهما إذا كان مذهب غير إمامه يقتضي - تشديدا عليه أو أخذًا بالاحتياط كما إذا حلف بالطلاق الثلاث على فعل شيء ثم فعله ناسيا أو جاهلا أنه المحلوف عليه وكان مذهب إمامه الذي يقلده يقتضي - عدم الحنث بذلك فأقام مع زوجته عاملا به ثم تخرج منه لقول من أوقع الطلاق في هذه الصورة فإنه يستحب له الأخذ بالاحتياط والتزام الحنث ؛ ولذلك قال أصحابنا : إن القصر - في سفر جاوز ثلاثة أيام أفضل من الإتمام والإتمام فيها إذا كان أقل من ذلك فأفضل احتياطا للخلاف في ذلك .

والثانية إذا رأى للقول المخالف لمذهب إمامه دليلا صحيحا من الحديث ولم يجد في مذهب إمامه جوابا قويا عنه ولا معارضا راجحا عليه إذ المكلف مأمور باتباع النبي صلى الله عليه وسلم فيما شرعه فلا وجه لمنعه من تقليد من قال بذلك من المجتهدين محافظة على مذهب التزم تقليده اهـ .
قلت وهذا موافق لما أسلفناه عن الإمام أحمد والقدوري وعليه مشى طائفة من العلماء منهم ابن الصلاح وابن حمدان ، والله سبحانه أعلم .

for a *mujtahid*, while Muhammad permitted it for anyone whose correct views are more numerous than his errors. It is reported from *Al-iskâf* that the most knowledgeable in a town has no excuse to avoid [issuing fatwas].⁵¹

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

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

The Ḥanbalis agree with this concept, and Abu al-Khaṭṭâb al-Kalodhani (rh) even cites consensus on it.⁵³ Al-Qâḍî Abu Ya'îlâ (rh) cites several reports from Aḥmad allowing his disciples and other people who asked him to find a concession in fatwas by other scholars, referring them at times to Abdul Wahhâb al-Warrâq, Iṣḥâq, or Abu Thawr, and even to locations where scholars gathered to ask any of them.⁵⁴ It is

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

"(فَضَّلَ يَجُوزُ تَقْلِيدُ مَنْ شَاءَ مِنَ الْمُجْتَهِدِينَ) وَإِنْ دُونَتْ الْمَذَاهِبُ كَالْيَوْمِ وَلَهُ الْإِنْتِقَالُ مِنْ مَذْهَبِهِ لَكِنْ لَا يَتَّبِعُ الرَّحْصَ فَإِنْ تَبِعَهَا مِنَ الْمَذَاهِبِ فَهَلْ يَفْسُقُ وَجَهَانِ أَمْ... قَالَ الشَّارِحُ أَوْجَهُمَا لَا وَاللَّهِ سُبْحَانَهُ أَعْلَمُ، وَقَدْ عَقِدَ فِي أَوَّلِ التَّارِيخِيَّةِ فَضْلَيْنِ فِي الْفَتْوَى حَاصِلِ الْأَوَّلِ أَنَّ أَبَا يُوسُفَ قَالَ لَا يَحِلُّ الْفَتْوَى إِلَّا لِجُتْهِدٍ وَمُحَمَّدٌ جَوَّزَهَا إِذَا كَانَ صَوَابُ الرَّجُلِ أَكْثَرَ مِنْ حَظِيصِهِ وَعَنِ الْإِسْكَافِ أَنَّ الْأَعْلَمَ بِالْبَلَدِ لَا يَسَعُهُ تَرْكُهَا."

52- *Asna al-Maṭâlib fi Sharḥ Rawd at-Tâlib* by Zakariyâ al-Anṣârî, Cairo: Dâr al-Kitâb al-Islâmî, 4/286. (فَرَعَ يَجُوزُ) لَغَيْرِ الْمُجْتَهِدِ (تَقْلِيدُ مَنْ شَاءَ مِنَ الْمُجْتَهِدِينَ) إِنْ دُونَتْ الْمَذَاهِبُ كَالْيَوْمِ) فَهَلْ أَنْ يُقْلَدَ كَلًا فِي مَسَائِلٍ؛ لِأَنَّ الصَّحَابَةَ كَانُوا يَسْأَلُونَ تَارَةً مِنْ هَذَا وَتَارَةً مِنْ هَذَا مِنْ غَيْرِ نَكِيرٍ (وَلَهُ الْإِنْتِقَالُ مِنْ مَذْهَبِهِ) إِلَى مَذْهَبٍ آخَرَ سِوَاهُ فَلَمَّا يَلْزِمُهُ الْاجْتِهَادُ فِي طَلْبِ الْأَعْلَمِ أَمْ خَيْرُنَاهُ كَمَا يَجُوزُ لَهُ أَنْ يُقْلَدَ فِي الْقَبْلَةِ هَذَا أَيَّامًا، وَهَذَا أَيَّامًا (لَكِنْ لَا يَتَّبِعُ الرَّحْصَ) لِمَا فِي تَتْبُعِهَا مِنْ أَنْحِلَالِ رِبْقَةِ التَّكْلِيفِ (فَإِنْ تَتَّبِعَهَا مِنَ الْمَذَاهِبِ الْمَدُونَةِ فَهَلْ يَفْسُقُ) أَوْ لَا (وَجَهَانِ) أَوْجَهُمَا لَا بِخِلَافٍ تَتَّبِعُهُمَا مِنَ الْمَذَاهِبِ غَيْرِ الْمَدُونَةِ فَإِنْ كَانَ فِي الْعَصْرِ الْأَوَّلِ فَلَا يَفْسُقُ قَطْعًا وَإِلَّا فَيُظْهِرُ أَنَّهُ يَفْسُقُ قَطْعًا.

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

واجتج: بأنه لو كان الحق في واحد ما أجمع على التسويغ للعامة تقليد من شاء من المجتهدين، فلما أجمعوا على ذلك دل على أن كل مجتهد مصيب.

54- *Al-'uddah fi uṣool al-fiqh* by Abu Ya'îlâ al-Farrâ', 5/1571. Retrieved from *Shamilah* [computer software]. وأما تسويغ العامة تقليد من يشاء من المجتهدين فلعمري انه كذلك. وهو ظاهر كلام أحمد -رحمه الله- في رواية الحسين بن بشار المخرمي وقد سأله عن مسألة من الطلاق فقال: "إن فعل حنث. فقال له: يا أبا عبد الله إن أفتاني إنسان، يعني: لا يحنث؟ فقال له: تعرف حلقة المدنيين بالرصافة؟ قال له: فإن أفتوني يحل؟ قال نعم". وهذا يدل على أنه لا يلزمه الاجتهاد في أعيان المفتين؛ لأنه أرشده إلى حلقة المدنيين، ولم يأمره بالاجتهاد في ذلك. ويدل أيضا على أن العامي إذا سأل عالمن، فأفتاه أحدهما بالخطر والآخر بالإباحة أنه يجوز له أن يأخذ بقول من أفتاه بالإباحة. وكذلك نقل ابن القاسم الحنبلي أنه قال لأحمد -رحمه الله-: ربما اشتد علينا الأمر

obvious that, to Abu Ya'la (d. 458 AH), the concept was not limited to the four *madhâhib*.

The utility of weak or unauthorized positions

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

وَكُونِهِ يُلْجَى إِلَيْهِ الضَّرُّرُ إِنْ كَانَ لَمْ يَشْتَدَّ فِيهِ الْحَوْرُ
وَتَبَّتْ الْعَزْوُ وَقَدْ تَحَقَّقَا ضُرًّا مِّنَ الضَّرِّ بِهِ تَعَلَّقَا

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

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

That one does not seek out concessions wherever they are.

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

مَا أَحِبُّ أَنْ أَضْحَابَ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لَمْ يَخْتَلِفُوا؛ لِأَنَّهُ لَوْ كَانُوا قَوْلًا وَاحِدًا كَانَ النَّاسُ فِي ضَيْقٍ
وَلِإِنَّهُمْ أُمَّةٌ يُقْتَدَى بِهِمْ وَلَوْ أَحَدٌ رَجُلٌ بِقَوْلِ أَحَدِهِمْ كَانَ فِي سَعَةٍ

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

من جهتك فمن نسأل؟ فقال: "سلوا عبد الوهاب [الوراق]. وكذلك نقل الحسن بن محمد بن الحارث عن أحمد -رحمه الله- أنه سئل عن مسألة فقال: "سل إسحاق بن راهويه". وكذلك نقل أحمد بن محمد البرائي عن أحمد أنه سئل عن مسألة فقال: "سل غيرنا، سل العلماء، سل أبا ثور."

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

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

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

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

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

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

57- *Sharh tanqeeh al-fuṣool*, p. 432.

"الفرع الثاني: التنقل من مذهب إلى آخر... الثاني: قال الزَّنَاتِي: يجوز تقليد المذاهب في النوازل، والانتقال من مذهب إلى مذهب بثلاثة شروط: - ألا يجتمع بينهما على وجه يخالف الإجماع، كمن تزوج بغير صدق ولا ولي ولا شهود، فإن هذه الصورة لم يقل بها أحد. - وأن يعتقد فيمن يقلده الفضل بوصول أخباره إليه، ولا يقلده* زمياً في عناية. - ألا يتتبع رخص المذاهب كلها مسالك إلى الجنة، وطرق إلى الخيرات، فمن سلك منها طريقاً وصله. تنبيه: قال غيره: يجوز تقليد المذاهب والانتقال إليها في كل ما لا ينقض فيه حكم الحاكم وهو أربعة: ما خالف الإجماع، أو القواعد، أو النص، أو القياس الجلي. فإن أراد رحمه الله [الزَّنَاتِي] بالرخص هذه الأربعة فهو حسن متعين، فإن ما لا نقره مع تأكده بحكم الحاكم فأولى الأقره قبل ذلك، وإن أراد بالرخص ما فيه سهولة على المكلف كيف كان - يلزمه أن يكون من قلد مالكا رحمه الله في الميأه [وهو ترخيصه في ماء قليل تحله نجاسة يسيرة ولم تغيره] والأزوات [وهو ترخيصه في الصلاة بالخف أو النعل تتلطخ بأرواث الدواب وأبوالها بعد ذلكها] وترك الألفاظ في العقود مخالفاً لتقوى الله تعالى وليس كذلك."

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

البحر المحيط في أصول الفقه (375 / 8) أبو عبد الله بدر الدين محمد بن عبد الله بن بهادر الزركشي (المتوفى: 794هـ) وحكى الرافعي عن أبي الفتح الهروي أحد أصحاب الإمام أن مذهب عامة أصحابنا أن العامي لا مذهب له. الدر المختار وحاشية ابن عابدين (رد المحتار) (1 / 48) ثم اعلم أنه ذكر في التخرير وشرحه أيضاً أنه يجوز تقليد المفضول مع وجود الأفضل. وبه قال الحنفية والمالكية وأكثر الحنابلة والشافعية. وفي رواية عن أحمد وطائفة كثيرة من الفقهاء لا يجوز. ثم ذكر أنه لو التزم مذهباً معيناً. كأبي حنيفة والشافعية، فقبل يلزمه، وقيل لا وهو الأصح اهـ وقد شاع أن العامي لا مذهب له.

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

One may add another condition here, which is that the follower of the weaker position must not have certain knowledge of its faultiness. Imam ash-Shâfi'i stated,
 أجمع المسلمون على أن من استبان له سنة رسول الله ﷺ لم يكن له أن يدعها لقول أحد من الناس.

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

While he was talking about the scholars, the same may apply to all people who are certain of the erroneousness of some position.⁶³ Wâbisah bin Ma'bad (ra) said: I came to the Messenger of Allah (ﷺ) and he said, "You have come to ask about righteousness." I replied, "Yes." He (ﷺ) said,

”اسْتَمْتِ قَلْبِكَ؛ الْبِرُّ مَا اطْمَأَنَّتَ إِلَيْهِ النَّفْسُ وَاطْمَأَنَّ إِلَيْهِ الْقَلْبُ، وَالْإِثْمُ مَا حَاكَ فِي النَّفْسِ وَتَرَدَّدَ فِي الصَّدْرِ
 وَإِنْ أَفْتَاكَ النَّاسُ وَأَفْتَوْكَ”

“Consult your heart. Righteousness is that about which the soul feels at ease and the heart feels tranquil. And *ithm* (sin) is that which wavers in the soul and

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

60- Ibid.

61- *Sharḥ tanqeeh al-fuṣool*, p. 432.

62- *I'lâm al-muwaqqi'een*, 1/6.

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

causes uneasiness in the breast, even though people have repeatedly given you their legal opinion."⁶⁴

Suggestions for Incremental Renewal

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

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

Placing a greater emphasis on the sources of rational evidences discussed above.

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

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

In the chapters on *ijtihād*, greater emphasis should be placed on collective *ijtihād*, as discussed earlier, and experts from various fields need to be included in this process.

There is also a need for placing greater emphasis on specialized *ijtihād*, the so called *tajazzu' al-ijtihād* (division of juristic reasoning). This allows jurists to specialize in certain areas of the law, so that they may become more competent in those areas. This is not a new concept; in fact, *tajazzu' al-ijtihād* is sanctioned by the majority of the scholars as pointed out by Imam Ibn an-Najjâr al-Futooḥi al-Ḥanbali (rh), who wrote, "[*Ijtiḥād* is divisible] according to our fellows and the majority, and it is the correct position."⁶⁵

Finally, there is a need for reexamination of *uṣooli* positions that may have hindered the development of the *fiqhi* legacy, such as the over-reporting of consensus and the requirement of following only one of the four *madhâhib* while avoiding any alternative *ijtihād*, even from qualified scholars.

Some Practical Examples of *Tajdeed*

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

Was war during the time of the Prophet (ﷺ) like war is today? Lexically speaking, yes. However, we must ask ourselves if the one-on-one confrontation of thousands of individual soldiers sparring in a battlefield is like the mass and indiscriminate devastation that ensues from modern war. If Imam Ibn Taymiyyah says that a catapult may not be used in other than the necessary jihad (to repel the enemy),⁶⁶ what would he have said concerning modern war? Should the difference be consequential? Should it make war an even remoter last resort? Did the early

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

قال: " (الإجتِهَادُ يَتَجَرَّدُ) {عِنْدَ أَصْحَابِنَا وَالْأَكْثَرِ} وهذا هو الصحيح ."

66- *Majmoo' al-fatâwâ*, 24/69.

"وإذا كان أكل الميتة واجبا والتداوى ليس بواجب لم يجز قياس أحدهما على الآخر فإن ما كان واجبا قد يباح فيه ما لا يباح الواجب لكون مصلحة أداء الواجب تغمر مفسدة المحرم والشارع يعتبر المفسد والمصالح فإذا اجتمعا قدم المصلحة الراجعة على المفسدة المرجوحة ولهذا أباح في الجهاد الواجب ما لم يبيحه في غيره حتى أباح رمي العدو بالمنجنيق وإن أفضى ذلك إلى قتل النساء والصبيان وتعمد ذلك بحرم ونظائر ذلك كثيرة في الشريعة والله أعلم"

Muslims fight for humanity or against it? We are sure they fought and sacrificed their lives to achieve the cause of Divine justice and to liberate humanity from tyranny, to afford people the right to worship their Lord. If so, will the fact that most nations allow their subjects freedom of religion be consequential?

When the Prophet (ﷺ) prohibited women from travelling alone, was travel then like travel now? Would a difference be consequential? It would, at least according to the scholars who rule as acceptable travelling with a safe company; they must have understood that there is some identifiable 'illah for the prohibition. As mentioned before, sometimes, erudite scholars will even make the well-defined *hikmah* consequential to the rulings. Some may claim that, using the same rationale, we may also do away with hijab or the rules of proper conduct between the two sexes, since the human community has matured and it is safer for women to go out in whichever attire they please. This would be in defiance of the clear text and of the unchanging human nature as well. The Islamic rules of modesty were to protect women, men, and entire societies from an avalanche of evil that would result from failure to observe them. It must be also observed that the societies of the modern and 'civilized' humans of the twenty-first century, when compared to societies of earlier eras, are not experiencing lower rates of infidelity, family breakdown, rape, or psychological disorders related to sex. There is no level of education or cultural sophistication that has proved to be protective against any of these ills.

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

{وَالْمُطَلَّاتِ مَتَاعٌ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ}

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

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

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

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

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

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

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

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

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

I believe that a reasoned incorporation of the tangible evidences in what counts as admissible proofs is completely warranted. This was the position of

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

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

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

luminaries like Ibn al-Qayyim⁷², Ibn Taymiyyah⁷³, and Ibn Farḥoon⁷⁴, of the Mâlikis, in addition to Ibn al-Ghars⁷⁵ of the Ḥanafis, and some Ḥanbalis⁷⁶. The use of *qarâ'in* is emphatically not like redefining the admissible proofs or equating the testimony of women in financial matters to that of men. These actions would be in defiance of a clear text, while using corroborative evidences is not. There is reason to believe that there are specific differences between men and women that made the testimony of two women equal to that of one man in financial matters, while a woman's testimony is of the same or higher value than a man's in other areas of knowledge, such as childbirth and breastfeeding.

Sometimes we create rigidity, and fear of 'walking away' from what we created. Neither the Prophet (ﷺ) nor 'Umar⁷⁷ (ra) decreed that the *tarâweeh* prayer should be done in congregation, or that it should be eight or twenty *raka'ât* or that one *juz'* ought to be completed every night. In fact, Imam Mâlik and Imam ash-Shâfi'i consider it superior if *tarâweeh* prayers are done at home. Yet today, we adhere to a particular number of *raka'ât* in *tarâweeh* and/or a specific length for its recitation, without this being binding on us. Now, with the time for '*ishâ'*' starting very late in North America and other extremely northern or extremely southern lands during the summer, and the many differences between the era of the Companions and our own, should we adhere to a particular format for the *tarâweeh* when none has been designated by Allah, His Messenger (ﷺ), or even any of the Companions? Should there be more time for reflection in the local language over the meanings of what is being recited? Should there be more time left for socialization and creating a bond between the 'Ramadan only' congregants and their local *masjid*? I believe all of this is warranted. On the other hand, if someone said that we should do away with the *tarâweeh* prayers in congregation, then he would be calling for the cessation of an agreed-upon practice that has been ongoing since the time of 'Umar (ra). Once again, that is not in any way a form of *tajdeed*.⁷⁸

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

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

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

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

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

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

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

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

In the attempts by Muslim countries to re-normalize Islam's position in the public sphere, they will have to answer many questions. In fact, we have to develop a new *fiqh* that is conscious of the new world we live in: again, without departing from the objectives of the law or the constants of the revelation. The relationship between the ruler and the ruled must be re-evaluated. The consensus reported about the prohibition of rebellion against the oppressive ruler must be re-examined—at least, with regard to its modern implications.⁷⁹ If we were to accept it, we must ask whether it applies to a sectarian effort to topple a ruler or a popular uprising by the nation. Would it apply to populist revolutions, even if they were unarmed? What if it were supported by *ahl ul-hall wal-'aqd*?⁸⁰ Is there an effective alternative to end the tyrannical regimes that have become a signature characteristic of the Muslim-majority countries?

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

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

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

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

Finally, this *ijtihâd*-based renewal can only be exercised by the most distinguished *mujtahid* scholars of each era. If the matter is left to those who have not reached this degree of *ijtihâd*, the religion would fall into peril and be subject to distortion, and the enormity committed by non-scholars who engage in this is beyond needing to be mentioned. This involves the greatest calamity: forging lies about Allah—the Mighty and Majestic—and speaking about Him without knowledge.

Allah (st) says:

{وَلَا تَقْفُ مَا لَيْسَ لَكَ بِهِ عِلْمٌ إِنَّ السَّمْعَ وَالْبَصَرَ وَالْفُؤَادَ كُلُّ أُولَئِكَ كَانَ عَنْهُ مَسْئُولًا}

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

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

heart) and upholding the law, true beacons of light that—by Allah’s bounty—no era in the life of this *ummah* may be void of. They are those who remained fighting to revive the true teachings of Islam that have been subverted by heedlessness and corrupted customs, and make these teachings guide the life of the *ummah* once again.

I hope that some of the examples mentioned above clarify, to some extent, what I mean by *tajdeed*. Some readers may justifiably ask what my role is in this effort. It is understandable that *ijtihâd*-based *tajdeed* is the lot of the *mujtahideen*. However, the public can always engage in restorative *tajdeed*. It is also the public that will establish foundations and institutions to foster *ijtihâd*-based *tajdeed*. If we are still struggling to build mosques, when might we have endowments that could support independent and authentic research institutes?

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