Liyakat Takim

Shi'ism Revisited

Ijtihād & Reformation in Contemporary Times

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LIYAKAT TAKIM

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To my grandchildren
Alisha, Ariana, Aliyah, Haydar, Sakina, Layla, and Ayana

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Wa ila Allahi-l-masir,
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August 2021

Introduction

My interest in an Islamic reformation was first triggered in 2011 during a sabbatical sojourn in Qum, Iran. It was during that period that I engaged in extensive conversations with Iranian youth, many of whom spoke passionately about the topic and expressed their disappointment at how Shi'i jurisprudence was seemingly out of touch with the sociopolitical realities in Iran. It was also at this time that I engaged in extensive debates and conversations with some prominent jurists in Qum. The result of my research work and deliberations with various groups of students and jurists are in the book in front of you.

To be sure, topics such as religion and gender equality, the inalienable rights and dignity of all human beings, the rights of gays and lesbians, transgender surgery, cloning, and ecology are now some of the most important and pressing questions of our age. As I read through the writings and views of jurists in the seminaries like Ayatullahs Yusuf Sane'i, Fadlallah, Bujnurdi, Muhaqqiq Damad, Mohsen Kadivar, Kamal Haydari, Shaykh Muhsin Sa'idzadeh, Edalatzadeh, and Mahdi Mahrizi, I felt that it was important to make the ongoing debates and conversations in Iran known to other scholars, especially those in the West. The lack of a centralized learning system and financial independence from the political entity offer an opportunity for reformist scholars in the seminaries to challenge and critique the works of other scholars, engendering, in the process, a dynamic intellectual environment. As I discuss later, some reform-minded seminarians have vigorously challenged the epistemological foundations and genre of rulings issued by the religious elite. Contrary to what is reported in the popular and social media, I found that some of the most intellectually stimulating discussions were conducted in the seminaries in Qum. Not only are the discussions invigorating but also it would not be an exaggeration to say that there is an ongoing intellectual struggle between the conservative and reformist scholars in the seminaries.

In this work I demonstrate that engaging the Islamic sacred sources is essential so as to revitalize Islamic thought and that the reformists' engagement with juridical and textual hermeneutics have generated an increasingly liberal interpretation and appraisal of Islamic juristic literature. In the process, I analyze the intersections of law, hermeneutics, and modernity in Shi'i Islam. In my analysis, I highlight reformist ideas that emerge from both inside and outside the traditional Shi'i seminaries in Qum and Najaf. However, this should not be construed

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as implying that all jurists subscribe to the reformist agenda. On the contrary, many jurists, especially the senior ones, are critical of any reformation in Islam.

Ideas surrounding reformation, diversity, and changes in legal rulings are not alien to Shiʿism. In fact, given the changes in juristic rulings over the course of centuries, it could be argued that they are as old as Shiʿi jurisprudence itself. What is novel about the current reformist discourse is the call for revisions in the fundamental foundations and epistemology that undergird Islamic legal theory (*usul al-fiqh*). My aim in this study is therefore to examine, analyze, and contribute to the ongoing debate on a Shiʿi understanding of reformation. More specifically, I explore and analyze how Shiʿi jurists have reacted to the nexus of Islamic law and modernity. The study seeks to move beyond theoretical questions revolving around reformation to address important issues such as how Islamic law is being revisited and revised by jurists on a wide range of topics ranging from women's testimony and inheritance, their right to divorce, and freedom of conscience, to bioethics and the challenges facing diasporic Muslims. Such questions have required legal scholars to apply *ijtihad* (independent reasoning) so as to provide solutions to the pressing questions in the religious and social fields. The absence of a central authority in Islam means that the interpretations and edicts of erstwhile scholars have frequently been challenged, resulting in diversity and plurality in Islamic laws. This suggests the critical importance of examining not just the theory of Islamic law but also its application.

By examining the principles and application of *usul al-fiqh*, as well as the current discourse on juristic hermeneutics and the basis of a new *ijtihad*, it is my hope that this research will generate great interest in and contribution to the field of Islamic reformation. More importantly, since this topic has been largely neglected by Western scholarship, I hope that my study will provide a groundbreaking perspective on *ijtihad* and reformation in the Shiʿi world. My exploration of *ijtihad* and Islamic reformation is divided into five chapters, introduced in the following sections.

The Concept of an Islamic Reformation

Before I introduce the chapters of this book, a word of caution is in order. Some readers might find the second chapter, with its technical details and legal jargon, to be abstract, tedious, and, at times, heavy reading. For those who feel that way, I suggest they skip the sections that contain technical details and proceed to chapters 3 and 4, which, in the words of one of the reviewers, are "path-breaking."

The first chapter defines reformation and examines what it means in a specifically Shiʿi context. It compares reformation in Islam and Christianity and argues that an Islamic reformation has to be an indigenous exercise, one that does not

have to capitulate to the demands of a secular or exogenous religious tradition. The chapter also considers why reformation in Shi'ism started much later than it did in Sunnism.

For most reformers, *ijtihad* is the primary interpretive tool in the process of reforming Islamic jurisprudence. *Ijtihad* is connected to reformation precisely because it furnishes a jurist with indispensable interpretive tools and principles to help him revise earlier edicts or devise newer ones. I argue that the current form of *ijtihad* in Shi'ism is not capable of addressing some of the most pressing moral and ethical issues that have arisen as a consequence of changes in times and circumstances.

Since an Islamic reformation is interwoven with an understanding and reinterpretation of textual sources, the first chapter also discusses the concept of hermeneutics and its effects on the reading of sacred texts. I argue that a hermeneutical approach is important to a discussion of Islamic reformation because of its insistence that the meaning of a text depends on various textual, contextual, and intertextual factors. Invoking hermeneutical theories postulated by various scholars also means that legal precepts and interpretations issued by eminent jurists over the centuries can be challenged and modified based on the needs of contemporary times. This is because textual hermeneutics is an endless exercise.

A discourse on Islamic reformation requires a detailed analysis of *ijtihad*. This is because the latter is an essential interpretive tool that jurists use in the derivation of legal injunctions. Rather than detailing the intricacies and complexities of *usul al-fiqh*, chapter 2 traces the genesis and development of both *ijtihad* and *usul al-fiqh* in Shi'i intellectual history and then explicates some of the principles that jurists employ in extrapolating legal prescriptions. The chapter argues that the concern for knowledge and certitude, which characterized much of Shi'i juristic literature in its formative period, was displaced with a recognition and acceptance of doubt as an inalienable feature of the law. While the transition from certitude to conjecture was a development that took place over centuries, the critical phase of this movement can be located in the lifetime of the scholars of Hilla in the thirteenth and fourteenth centuries. They elaborated and definitively developed a specific Shi'i theory of *ijtihad*. Whereas earlier scholars had ruled on areas where there was probability or certainty that their judgments indicated the wishes of the Lawgiver, Shaykh Ansari (d. 1864) constructed and methodically explored the epistemological categories of certainty, speculation, and doubt. I argue that this was another important transitional period in Shi'i legal history, because it empowered jurists to issue rulings on many spheres of law that had hitherto remained beyond their realm, broadening, in the process, the scope of Islamic law and the possibilities of its revision.

Besides the textual sources and procedural principles, jurists can employ other rationally derived tools and devices to either modify earlier legal enactments or

formulate new ones. These are key components in the Islamic reformation process. Chapter 3 considers the application of some principles and legal devices and their capability to shape new rulings or revise earlier ones. I argue that, at best, these devices can provide only partial and temporary amendments to existing legal injunctions. This is because they are motivated primarily by pragmatic and often short-term considerations. Notions like ethics, reason, justice, the function of local custom in the interpretation and application of the law, and the practices of the people of sound mind (*sira al-ʿuqala'*) have, so far, played limited roles in juridical decision-making, as they are predicated on rational and hermeneutical strategies rather than on prescriptions in the textual sources.

An important segment of chapter 3 examines the role of custom (*ʿurf*) in juristic interpretive enterprises. I contend that, in the absence of well-defined procedures and stipulations on deriving and instituting laws, the Qur'an presumes that its legal rulings will be understood based on prevalent customary practices and values. A consequence of this observation is that current jurists who insist on enforcing edicts issued in the past need to be cognizant of the fact that they are, in effect, frequently validating eighth-century and pre-Islamic Arabian cultural values and imposing them on contemporary Muslims.

The chapter also demonstrates that engaging in *ijtihad* today entails a bifurcation of laws and values from the cultural accretions in the early period of Islam. It also means that since the law is inveterated in and responds to cultural exigencies, some of the laws that were instituted in a distinct cultural context will have to be revised especially when they interact with a different cultural framework. I argue that just as pre-Islamic custom (*ʿurf*) was endorsed by the early generation of Muslims, the local *ʿurf* that Muslims encounter today can be approbated and sanctioned on the same basis. Chapter 3 also explores how local custom that is endorsed by people of sound mind (*ʿuqala'*) can legislate laws in today's context.

Chapter 4 argues that the Shiʿi claim that the moral value of an act can be known objectively without scriptural validation accentuates the role of reason in perceiving moral values and simultaneously, enables a jurist to deduce new injunctions based on moral rationalist considerations, especially if a particular topic is not addressed in the revelatory texts. By emphasizing the rational character of *fiqh*, reason becomes a cogent hermeneutical tool in Islamic jurisprudence, and an important component in the reformation of the law. In the process, reason also becomes a principle for the construction of a moral framework of the law.

The chapter also argues that legal determinations based on rational and ethical considerations can empower a jurist to legislate on topics that are congruent with the views of the people of sound mind. In principle, such proclamations can even override laws that are derived from the textual sources when necessary. However, most *fuqaha'* (jurists) have undermined

the ethical-moral vision of the Qur'an in favor of a neatly defined textually documented legal process. I demonstrate that disregarding the role of ethics in legal deliberations has led to the inference and issuance of iniquitous statements by the very scholars who uphold the Islamic ethical and legal tradition. The chapter also argues that in order to make Islamic jurisprudence more ethical, Muslim scholars will have to incorporate principles like justice, dignity, and judgments of reason (*'aql*) in their legal deliberations so that these principles play more central and decisive roles in determining how the sources are interpreted and applied.

Given the deficiencies of traditional *ijtihad* highlighted in the previous chapters, chapter 5 seeks to evaluate and reconsider some of the interpretive strategies and epistemological foundations of the current form of *ijtihad*. The basic thesis here is that, in the context of the present discourse on an Islamic reformation, the moral rationalist presuppositions of Muslim reformers are diametrically opposed to the traditional jurists' text-centered epistemological assumptions.

I also contend that the current form of inferential jurisprudence (*al-fiqh al-istidlali*) should be replaced by what I call *neo-ijtihadism* and that, should this transition occur, it will engender major paradigmatic shifts in the genre of rulings pronounced. More specifically, I contend that an Islamic reformation necessitates a re-examination and revision of the epistemological and methodological foundations that undergird the current Islamic legal system. These are the key principles and procedures that guide a jurist in his interpretation and application of the information he deduces from the sources. I postulate different exegetical and hermeneutical strategies that neo-*ijtihadism* could adopt and propose solutions that synthesize hermeneutical strategies with current exigencies so as to make *ijtihad* more moral, rational, and practical.

Methodology and Approach

To some degree, this work is a study of the history and evolution of juristic constructs, ideas, and heuristic tools. However, it also presents variegated ways of interpreting religious texts and examines the relationship between the author, the text, and its readers. I have used various approaches and strategies in my study of an Islamic reformation. Primarily, my work applies textual, phenomenological, chronological, rationalist, and hermeneutical methods to the study of juridical, theological, historical, and other genres of literature. While my methodology primarily involves textual analysis, I also discuss and critique the juristic usage of various hermeneutical and epistemological tools in constructing a proper Shi'i legal system.

Scholarship to Date

A number of works have discussed aspects of reformation in Shiʿism. However, none have examined or discussed the subject as extensively as I have in my monograph. Thus, it is my hope that this book will fill a major vacuum that currently exists on the discourse on reformation in Shiʿism. Ali Rahnema's *Shiʿi Reformation in Iran: The Life and Theology of Shariat Sangelaji*[1] examines a Shiʿi jurist's challenge to certain popular beliefs in his time. His reformist discourse is framed from a purely theological and traditional point of view. The book deals with some of the key debates in Iran in the 1940s, especially those pertaining to issues related to dogma that Sangelaji challenged and attempted to revise. Besides being outdated, the book is primarily concerned with challenging certain doctrinal theories rather than critiquing and reforming Islamic legal theory and its epistemology.

Mehran Kamrava's *Innovation in Islam: Traditions and Contributions*[2] comprises a series of essays by a multidisciplinary group of scholars and their analysis of the history, causes, and impediments to an Islamic reformation. The book barely touches on reformation in the Shiʿi world. Collectively, the various essays in the book provide a broad introduction into innovation in Islam. Similarly, Kamrava's other book, *Iran's Intellectual Revolution*,[3] focuses on the internal politics and foreign relations in Iran. It contains only one chapter on the reformist discourse in Iran. The brief discussion on reformation is limited to an examination of the views of Iranian intellectuals like Abdolkarim Soroush, Mohsen Kadivar, and Mojtahed Shabistari.

Hamid Mavani's *Religious Authority and Political Thought in Twelver Shiʿism*[4] provides a detailed and theoretical discussion of the doctrine of leadership in Shiʿism from different perspectives. Although he discusses aspects of Shiʿi legal reformation and the hermeneutical strategies of some reformers, his work is more concerned with religious and political authority than with reform in the Shiʿi legal tradition.

Shireen Hunter's edited work *Reformist Voices of Islam*[5] explores the development of Islamic reformist discourses among various social and intellectual groups. Hunter's work demonstrates that these groups advocate an Islamization program that is more embracing and universal, and that they adopt a more

[1] ʿAli Rahnema, *Shiʿi Reformation in Iran*: *The Life and Theology of Shariʿat Sangelaji* (Ashgate: Burlington, 2015).

[2] Mehran Kamrava, ed., *Innovation in Islam: Traditions and Contributions* (Berkeley: University of California Press, 2011).

[3] Mehran Kamrava, *Iran's Intellectual Revolution* (Cambridge: Cambridge University Press, 2008).

[4] Hamid Mavani, *Religious Authority and Political Thought in Twelver Shiʿism: From ʿAli to Post-Khomeini* (New York: Routledge, 2013).

[5] Shireen Hunter, ed., *Reformist Voices of Islam* (London: Sharpe, 2009).

rational and hermeneutical approach in understanding religious texts. Her work includes only one essay that deals with reformation in Shi'ism. The essay focuses on reformist thinking in Iran and explores political concepts such as democracy and freedom.

Ali Akbar's recent work *Contemporary Perspectives on Revelation and Qur'anic Hermeneutics*[6] examines the views of four major proponents of a humanist theory of Islamic revelation. His study demonstrates the consequences of adopting a humanist approach to the understanding of revelation and interpreting Qur'anic sociopolitical precepts. Although the work is important in that it opens up a new horizon in contemporary Islamic discourse, it does not explore or discuss the topic of an Islamic reformation extensively.

Ashk Dahlen's *Islamic Law, Epistemology and Modernity: Legal Philosophy in Contemporary Iran*[7] analyzes the philosophical debate on the *shari'a* and the discourse on epistemology, methodology, and hermeneutics in contemporary Iran. Initially, the work describes and examines the methodological, hermeneutical sources and principles of Shi'i law. Dahlen also explores the main legal-theological discourse and engages in a semantic analysis of the main legal terms employed by Abdolkarim Soroush. Dahlen's work also examines some of the hermeneutical theories that I discuss in chapter 1 of the present study.

Although valuable in their own ways, none of these works engages the classical and contemporary literature on the subject of reformation in Shi'ism as I do. As a contribution to comparative debates about religious reformation, it is my hope that the present study will address and resolve the assiduous tension and conflict between those who view the interpretation of Islamic canonical texts as immutable and perduring and those who claim that these texts were directed for a specific time and place and are therefore subject to revision and reinterpretation. This study also aims to provide a hermeneutical and comparative perspective of transformations in Islamic law in spheres that have so far been largely untreated in Western scholarship on Islam.

It is my hope that this book will encourage scholars to conduct further research on the role of textual hermeneutics in responding to questions raised by the interaction of religion and modernity. At the same time, my work challenges scholars in both the seminaries and universities to review and contribute fresh perspectives on reformation at both the level of theory and detailed research. This study should stimulate them to continue efforts that I have begun in a variety of research projects to undertake conversations around the thematic issues surrounding law and reformation in modern times.

[6] Ali Akbar, *Contemporary Perspectives on Revelation and Qur'anic Hermeneutics* (Edinburgh: Edinburgh University Press, 2020).

[7] Ashk Dahlen, *Islamic Law, Epistemology and Modernity: Legal Philosophy in Contemporary Iran* (New York: Routledge, 2003).

A number of issues that I deal with in this study are designed to address the general public and to enrich public discourse through debate and discussion in the media. I seek to engage policymakers and informed citizens around critical themes of reformation in the law regarding the rights of women, minorities and human rights, and the role of Muslim minorities in the West.

In closing, I would like to make it clear that I do not claim to write as a dispassionate scholar who merely critiques and analyzes religious traditions and texts. While I do observe the academic standards of engagement with canonical texts and take a critical approach to the study of an Islamic reformation, I also write as a concerned Muslim who is consciously aware of the current social and religious upheavals in the Muslim world. Therefore, I sometimes advocate certain prescriptive and nonacademic positions by proposing possible solutions for revising or reforming certain aspects of Shiʿi law. Hence, I cannot pretend that my stance is always a historical or neutral one. Sometimes, it is unashamedly more prescriptive than descriptive or analytical. For those who do not agree with my stance and views, I hope we will agree to disagree agreeably.

1
The Concept of an Islamic Reformation

Contemporary Muslims face the task of defining and navigating the relationship between a legal edifice that was conceptualized and constructed in the classical period of Islam (the eighth and ninth centuries) and its response to the multitudinous challenges that present-day Muslims encounter. They have to deal with issues such as how a religion, which they believe is immutable and Divinely revealed, can engage with and respond to the needs of a modern and vibrant Muslim community. How can they avoid the pressures of secularism and live in the context of a minority group in the West while adhering to the religious system that they have inherited? Should contemporary Muslims engage in an Islamic reformation? If so, where should the reformation process begin, and what form or path should it take? These and other related issues are just some of the topics that I intend to explore in this work.

To examine whether there is a need for and the process of reformation within Islam, it should be noted from the outset that contemporary Muslims depend on a legal system that was initially conceptualized by the *fuqaha*' (jurists) in the classical period of their history. It was during this period that some Muslims are reported to have acquired proficiency in legal matters. In formulating a system of jurisprudence, they tried to delineate and articulate an Islamic legal system to respond to issues that impacted them, especially on matters that pertained to rituals, inheritance, commercial transactions, spousal relationships, slavery, and so forth. Guided by Qur'anic precepts and Prophetic practices, customary laws, and their own understanding of the sources, the scholars systematically constructed a legal structure that came to be known as Islamic jurisprudence.[1] Where necessary, they also incorporated a wide array of interpretive strategies to respond to the challenges and questions they encountered. In the process, they developed and deployed various principles like those of *maslaha* (implementation of a ruling that is conducive to public welfare), *qiyas* (analogy), *ra'y* (personal opinion), *istihsan* (juristic preference), and other hermeneutical strategies to respond to different challenges and requirements.[2]

[1] See Liyakat Takim, *The Heirs of the Prophet: Charisma and Religious Authority in Shi'ite Islam* (Albany: SUNY Press, 2006), chapter 1, for more details.

[2] As I discuss in the following chapters, Shi'i jurists rejected some of these principles and stratagems.

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With time, the *shariʿa*, as formulated by the *fuqaha'*, evolved into a well-defined and comprehensive legal system that was supposed to regulate every aspect of a believer's life. Usage of various exegetical devices, exposure to and under the influence of various cultures, and a variegated interpretation of the revelatory texts and Prophetic practices led to major disparities between the schools of law (*madhahib*) and impinged on the juristic opinions issued. Significantly, due to the disparate methodologies and legal tools devised by the jurists, there was no unified or monolithic legal system that was acknowledged and accepted by all Muslims. The law was, in fact, open to a multiplicity of interpretations. Therefore, no jurist could impose his rendition of the law on others.

Contemporary reformers, whether Sunni or Shiʿi, have argued that the opinions of the classical jurists are not always germane or applicable to the modern world.[3] They also contend that for Muslims to respond to the various sociopolitical challenges in present times, there is a need to revisit, and where necessary revise, the Islamic legal tradition based on present-day requirements. In this chapter, I propose to deal with some of these issues that have, so far, received little attention by Western scholarship on Islam. I should make it clear that my study is confined to an examination of reformation that pertains to Islamic jurisprudence. More specifically, I intend to examine the current debate on reformation in the Shiʿi legal system. Hence, I do not intend to discuss transformations in political institutions and structures or to engage in debates on democracy and human rights. Nor do I intend to explore the contentious topic of the various forms of political governance that Muslim communities should embrace.

The Protestant Reformation and Islam

Conceptually, the term "reformation" can refer to a wide array of concepts ranging from a transformation of prevalent religious and political institutions and structures to the adoption of disparate ritual practices and alternative forms of religious authority. It can also mean engaging the sacred sources by examining their relevancy in contemporary times involving, at times, fresh interpretations of its teachings or of those of the founder of the religion. Reformers often seek a change in the religious tradition by advocating for a break with

[3] There is no consensus as to what "modernity" means. Generally speaking, the process of modernization refers to replacing old patterns of thought, action, association, and belief with new ones. It can also include aspects such as increasing urbanization, political participation, and the ability to control nature via modern technology. See Nader Hashemi, *Islam, Secularism and Liberal Democracy* (New York: Oxford University Press, 2009), 27–28. For others, modernity means continuous change in which reason plays a central role. Others understand it as an era in which tradition is not upheld and is often challenged. For a more detailed discussion on the different understandings of modernity, see Kamrava, *Iran's Intellectual Revolution*, 179–80.

the past or replacing the conventions and regulations within their traditions. Whatever form it takes, reformation has major social, religious, and structural ramifications. Initially, at least, a reform movement is neither coherent nor monolithic. On the contrary, it is often diffuse and amorphous, with a heterogeneous vision of what should be transformed and what a revised version of a religious tradition should look like.

Reformation also entails a new way of interpreting or looking at an issue and involves some form of inversion (*taqlib*) of the old. In other words, it amounts to a questioning and revising of the structure of epistemological basis of a mode of reasoning or ways of inferring a legal judgment.[4] Reformation also leads to a reinterpretation of religious ideas and can accommodate principles that had been previously abjured, like those pertaining to women, minorities, human rights, secularization, freedom of conscience, and liberal democracy. Significantly, for reformation to be genuine, it cannot be haphazard or arbitrary; rather, it should be anchored on specific principles and guidelines.

Within Muslim circles, ideas regarding an Islamic reformation have circulated especially since the eighteenth century, when Muslim military, political, and economic ascendancy began to decline in the midst of emerging European encroachment and the onset of colonialism. Muslim political leaders like Muhammad ʻAli Pasha (d. 1849), the Ottoman ruler in Egypt, saw the expansion of European power and the diffusion of new ideas and technology as a challenge to which they had to respond by initiating changes within their own societies. Reformers embarked on various administrative, military, cultural, and religious projects to reform their nations.[5] A common theme that characterized the Muslim reformers' agenda was an attempt to appropriate and assert many features found in European democratic political systems within their countries. The reformers, who originated from various parts of the Muslim world, advocated the appropriation of Western traits like democracy, greater women's rights in Islamic law and their access to and participation in the public realm, human rights, and fresh interpretations of Muslim sacred texts. The concept of an Islamic reformation was therefore, at least initially, a response to an external threat that postulated the European model as normative in the relationship between religion, society, and state formation.[6]

Discussing the concept of reformation in the Islamic world inevitably raises comparisons with the Protestant reformation in sixteenth-century Europe. In

[4] Wael Hallaq, *Reforming Modernity: Ethics and the New Human in the Philosophy of Abdurrahman Taha* (New York: Columbia University Press, 2019), 38.

[5] On some of the changes that Muhammad ʻAli Pasha instituted, see Albert Hourani, *Arabic Thought in the Liberal Age: 1798–1939* (Cambridge: Cambridge University Press, 1962), 52–53.

[6] Mohammad Nafissi, "Reformation as a General Ideal Type: A Comparative Outline," *Max Weber Studies* 6, no. 1 (2006): 69–110.

The Future of Islam, Wilfrid Blunt states unequivocally that Islam needs to "work out for itself a Reformation" resembling that which transpired in Europe. He calls for a Muslim Martin Luther so that the prevalent religious authority can be pressured to introduce newer ideas and laws.[7] Blunt's call for a Western-style reformation in the Muslim world smacks of Western cultural and intellectual hegemony. He was not the only one to call for reformation in the Muslim world. Several Muslims thinkers have also maintained that Islam needs a Luther-like figure. Even ʿAli Shariʾati (d. 1977), the Iranian thinker, "urged Muslims to embrace an Islamic Protestantism similar to that of Christianity in the Middle Ages."[8]

Whereas notions of Christian and Islamic reformation may bear some resemblance, their specific arguments and distinct forms are very different.[9] For example, Martin Luther (d. 1546) started his critique of the Church by nailing ninety-five theses to a door of the Castle Church in Wittenberg, Germany. He was critical of the Church's abuse of the sale of indulgences and the extensive authority wielded by the pope. Luther also accused the Church of widespread misuse of authority. His accusations and the movement that ensued were understood as attacks against the pope and his infallibility. He was able to challenge and undermine the established religious authority and alter the Church's dogma held for centuries. Luther also maintained that the scripture must be its own interpreter. In fact, he is reported to have asked his students to disregard the notes and commentaries transmitted from the early Church figures and to begin a new history of interpretation.[10] Luther's ideas and demands for changes within the church establishment precipitated a religious movement that drastically transformed European societies forever.

While the Reformation is commonly agreed to have begun on October 31, 1517, when Luther posted his theses on the doors of the church, Luther was not a political figure. Rather, he probably saw himself as a reformer within the Catholic Church. As Luther's ideas began to circulate widely in Europe, particularly in its northern regions, many of the ruling kings and princes saw Lutheranism as a valuable tool for augmenting their political power and increasing land and taxes within their territories. The princes and kings of Europe used religious figures such as Luther, John Calvin (d. 1564), and Ulrich Zwingli (d. 1531) and the movements they founded to free themselves from the financial and political control of the Catholic Church and the power of the papacy. Eventually, this led to

[7] Wilfrid Scawen Blunt, *The Future of Islam* (Cairo: n.p. 1882), 133.

[8] Michaelle Browers and Charles Kurzman, eds., *An Islamic Reformation?* (Lanham, MA: Lexington Books, 2004), 4–6.

[9] For some of the similarities between the two forms of reformation, see Rahnema, *Shiʿi Reformation in Iran*, 2.

[10] Michaelle Browers, "Islam and Political *Sinn*: The Hermeneutics of Contemporary Islamic Reformists," in Browers and Kurzman, *An Islamic Reformation?* 55.

the bifurcation of the church and state and the emergence of secularism in the West.[11]

Christian and Islamic Reformation: A Comparison

In their calls for changes, reformers in the Christian world were reacting to the abuse of clerical authority of the church and the extensive powers of the pope. Such a line of thinking is clearly alien to Islam, in which concepts such as the papacy, a church, an official creed, and the problem of accessing normative sacred texts do not exist. Unlike Christianity, Islam did not develop a priestly class that could act as an intermediary with the Divine or produce an order capable of authoritatively defining and delineating the parameters of a sacred canon. In fact, Islamic revelation did not envisage a central figure or a hierarchical authority against whom reformers could dissent or form the object of reformation. Hence, it is difficult to use the term "orthodoxy" in an Islamic context. This is because Islam has never created a legal mechanism or an authoritative council that could articulate or enforce the "right doctrine" or practices or excommunicate a purported heretic.

Since there was no official church or priesthood in Islam that could demarcate and impose normative beliefs and praxis, it was the juristic interpretive community that could and did define the law. Using the sacred sources and hermeneutical principles and tools they created, classical Muslim jurists proffered a wide array of legal opinions on issues like a woman's right to adjudicate in legal matters and to bear testimony, forms of punitive measures, whether a girl can marry without the consent of her guardian, and whether the testimony of slaves is acceptable.

With no central authority to challenge, Islam is, and has been since its inception, "Protestant" in its structure and organization. Like Protestantism, all believers are theologically on the same level, and each believer is responsible for understanding God's revelation and implementing it in his/her life. The scholars in both Islam and Protestantism have no superior standing or claim to special status. Their authority is premised on the charting and delineating of a morally upright form of life, erudition and specialization in navigating through the sacred sources, their interpretive skills, and the ability to provide religious guidance to members of their community. Hence, it is correct to state that Islam is inherently discursive and open to a multiplicity of interpretations, with no church or priesthood to define a singular or authoritative binding "Islamic position" on any issue.[12]

[11] I explore the connection between reformation and secularism in what follows.
[12] Browers and Kurzman ed., *An Islamic Reformation*?, 4–6.

Differences between Christian and Islamic concepts of reformation become more apparent when we bear in mind that Muslim reformers have called for renewed interpretations of the revelatory sources rather than challenging the authority of a nonexistent central papal figure or overthrowing Muslim religious institutions. They have questioned the validity of the juridical rulings of classical jurists and the applicability of their pronouncements in modern times. As we shall see, reformers have invoked the revelatory sources to advocate and legislate for religious tolerance and equal gender and minority rights, emphasizing, in the process, values such as the intrinsic dignity of all human beings, justice, freedom of conscience, and the equality of all beings.

Reform in an Islamic context should not be construed as reforming the revelatory sources or as questioning the Divine nature of the Qur'an; rather, it refers to revisiting, reinterpreting, and applying a fresh understanding of the sacred texts. Stated differently, an Islamic reformation attempts to rekindle the spirit of the revelation through a new understanding rather than imitating or imposing previous readings of the sacred texts. It also challenges some of the exegetical and epistemological foundations that undergird the Islamic legal system.

An important denouement of the Christian reformation was the development of a multiplicity of views—even more pronounced within the reform movement itself. Similarly, in the absence of an ecclesiastic body that could issue normative or official pronouncements for the entire *umma* (community), heterogeneity and a multiplicity of scholarly views have been perduring features of Islam throughout the ages. Hence, on controversial issues like human cloning or a woman's right to abortion following rape or incest, one finds a wide spectrum of divergent and, at times, conflicting opinions issued by Muslim legists. It is correct to state that most reformation discourse in Islam is centered on challenging juristic opinions given by previous and contemporary scholars and proffering newer ones instead.

Muslim reformers have also challenged the rigidity of the Islamic legal system, the superstitions prevalent in Muslim practices, the slavish imitation of the past, and the lack of the application of reasoning.[13] The Islamic reformist agenda has also advocated for a rereading and revision of religious texts, a hermeneutical process based on different epistemological bases, an insertion of rational and ethical components in juristic decision-making, and a revamping of its legal system so that reason (*ʿaql*) and ethics can play more significant roles in valorizing traditions.[14]

[13] For other examples, see Rahnema, *Shiʿi Reformation*, 10; Browers, "Islam and Political *Sinn*," 55–56.

[14] On this, see Abdelwahab El-Affendi, "The People on the Edge: Religious Reform and the Burden of the Western Muslim Intellectual," *Harvard Middle Eastern and Islamic Review* 8 (2009): 19–50.

Although there are some similarities between Christian and Islamic thinkers, reformers in both faith traditions accentuate the peculiarities within their own belief system and cite references to specific discourses within their faiths, rendering their respective ideas and solutions unique and specific to their own creed. Thus, whereas both traditions challenge the endemic superstitions predominant in their communities and the popular intermediaries between human and the Divine in their traditions, the notion of salvation "by grace alone" is completely alien to Islam. For example, the twentieth-century Shi'i thinker Shariat Sangelaji (d. 1944) rejected the notion that a Shi'i would be automatically redeemed because of his/her religious affiliation.[15] Contrary to the Protestant reformers who argued for justification by faith, Muslim thinkers maintained that righteous acts and correct faith are indispensable for salvation. Moreover, unlike the Christian reformation movement, in the Islamic reformist discourse there is no discussion of the sale of indulgences, the legitimacy or authority of priests, or the authority of the church, points that were highly contentious and divisive in the reformation movement in Christianity. Hence, in many ways, the Christian experience of religious reformation is alien to its Muslim counterpart.

Unlike Christianity, the major grievance of proponents of an Islamic reformation like Rifa'a al-Tahtawi (d. 1873), Jamal al-Din al-Afghani (d. 1897), Muhammad 'Abduh (d. 1905), Rashid Rida (d. 1935), and Mustafa 'Abd al-Raziq (d. 1947) was that a culture of rigidity and stagnation had been instilled in the Muslim psyche. They sought to free the Muslim mind from what they termed as the chains of imitation (*taqlid*). Their arguments centered on the need for a Muslim awakening in response to Western intellectual, military, economic, and political encroachment. As a matter of fact, Muslim reformers were more concerned with reawakening and rejuvenating the Muslim mind and reforming aspects of their legal system than with challenging the authority of the *'ulama'* (scholars) and fighting against institutional structures like mosques and the schools of learning (*madrasa*) or the sale of indulgences. They also challenged the idea of an official "Islamic position" on any topic. These reformers were also reacting to challenges engendered by colonization and the imposition of Western values on Muslim lands.

This does not mean that the *'ulama'* were immune to criticism or rebuke. Reformers like al-Afghani, 'Abduh, and Rashid Rida excoriated them for their lack of innovative thinking and apish imitation of and reliance on the views of erstwhile scholars. These thinkers were reacting to the paucity of (re)interpretation of the sacred scriptures in modern times and to the reliance of the *'ulama'* on, and imposition of, previous rulings and scholarly consensus.[16] Reformers

[15] Rahnema, *Shi'i Reformation*, 6.

[16] See, for example, Rashid Rida's attacks against the *'ulama'* cited in Hamid Enayat, *Modern Islamic Political Thought* (Austin: University of Texas Press, 1982), 73.

like al-Tahtawi, Iqbal (d. 1938), al-Afghani, and ʿAbduh also called for an interpretation of normative texts along more rational and egalitarian lines.[17]

As discussed in later chapters, Shiʿi scholars like Mohsen Kadivar (b. 1959), Abdolkarim Soroush (b. 1945), and Mojtahed Shabistari (b. 1936) have also been critical of the Shiʿi *ʿulama*' and their lack of innovative thinking.[18] Referring to some scholars in the religious seminaries, Ayatullah Saneʿi (d. 2020), himself a *mujtahid* (jurist) in the Iranian seminary in Qum, was highly critical of his peers. He complained of the presence of "petrified fossilized devout ignoramuses" who prevent any meaningful transformation in Islamic law to occur.[19]

It is important that we avoid reducing the discourse on the reform movement in Islam to a comparison with the Protestant reformation in sixteenth-century Europe. Christianity's historical experience with reformation and the subsequent social and political upheavals in the West cannot be construed as a universal norm to be imposed on the Muslim world. Attempts to assess the compatibility between Islamic and Western reformation is an implicit universalization of a particular ideology and movement that developed in premodern Europe. A reformation that replicates the transformative experience of another religious tradition that occurred under completely different circumstances and period is bound to fail. Furthermore, to impose Western value-laden beliefs and praxis on Muslim countries under the guise of an Islamic reformation will precipitate major conflicts within the Muslim world and will inevitably induce an antireformation movement.

More importantly, an Islamic reformation has to be an indigenous exercise, one that must revive and rejuvenate the religion, rather than comply to the categories and values of another religious tradition. A genuine religious reformation must emerge from a commitment to make a particular religious experience relevant to the contemporary needs of its followers. More specifically, Muslim reformers need to be aware of and sensitive to the distinct religious traditions that are enunciated in the Muslim sacred literature. They should also be cognizant of the customs and normative culture of the community they address. Therefore, Islam should be engaged on its own terms and an Islamic reformation does not necessitate an importation or imposition of Western values and traditions to the Islamic world. Hence, the assiduous calls for a Muslim Martin Luther are surely misplaced.

[17] See Muhammad ʿAbduh, *Risala al-Tawhid* (Cairo: n.p., 1943), 42ff, for his elucidation of the importance of reason in establishing normative values.

[18] For Kadivar's criticisms of the *ʿulama*', see Mohsen Kadivar, "*Ijtihad* in *Usul al-Fiqh*: Reforming Islamic Thought through Structural *Ijtihad*," *Iran Nameh* 30, no. 1 (2015): 3.

[19] Ziba Mir-Hosseini, *Islam and Gender: The Religious Debate in Modern* Iran (Princeton: Princeton University Press, 1999), 160.

Muslim Opposition to Reformation

Due to its association with the Protestant movement, the term "reformation" is often viewed pejoratively in the Muslim world. Whereas Muslims welcome economic, industrial, military, and educational reforms, there is strong resistance to reform in the religious field. Many Muslims believe that since revelation is from God, it is immutable and eternally binding, even though many statements in the sacred sources are culturally, historically, and socially conditioned. Hence, any attempt at contextualizing or revising them have met with severe resistance. Within the Shi'i context, opponents of reformation within the legal tradition quote traditions like the following from Zurara b. A'yan (d. 767), a disciple of Ja'far al-Sadiq (d. 765), the sixth Shi'i Imam. He reportedly asked the Imam about the *halal* and *haram* (the lawful and the prohibited). The Imam replied: "the *halal* of Muhammad is *halal* until the Day of Judgment and his *haram* is *haram* until the Day of Judgment."[20]

Ayatullah Muhammad Taqi Mesbah Yazdi (d. 2021), a prominent philosopher and political figure in Iran, criticizes religious reforms. He states,

> There is no need for a change in Islamic law. Sometimes, specific executive laws are required to be established for certain things which it is left to the Islamic ruler to decide on them. [. . .] Therefore, such needs can be addressed by governing rules under the supervision of Vali-e Faqih [the supreme leader], but there is no need to change the main and fixed Islamic rules and there is no justified evidence for it. Not only do we not have any reason to claim that they must be changed, but we also have evidence for why they must not be changed.[21]

Yazdi goes on to quote al-Sadiq's tradition, cited previously, to vindicate his view that no reform in Islamic law is justified. Statements such as these suggest that reforming any aspect of Islam amounts to a challenge to or violation of the Divine will.

Opponents of an Islamic reformation (often called traditionalists or conservatives) also claim that since revelation is from God it is immutable and perfect.[22] Therefore, any alteration or change would imply an imperfection in God's revelation or planning that needs to be addressed. For them, any

[20] Muhammad b. Ya'qub al-Kulayni, *al-Kafi fi 'Ilm al-Din*, 4 vols. (Tehran: Dar al-Kutub al-Islamiyya, 1968), 1/58.

[21] "Pasokh be Barkhi Shubahat Piramun-e Niyaz-e Bashar be Din." http://pajoohesh.howzehtehran.com/Files/mahfel.php?idVeiw=4767&level=4&subid=4767.

[22] The distinction between traditionalists or conservatives and reform-minded scholars can be arbitrary and misleading. A scholar can be conservative on one issue yet a reformist on another. For example, Ayatullah al-Muntaziri is quite conservative on gender and other social issues, yet he argues against the death penalty for apostasy. I discuss the views of some conservative scholars in chapters 3 and 4.

reformation or exegetical judgment by current reformers as to what constitutes the intention of the legislator also suggests that God is less than perfect. No revisions can be made even if some rules are meant for culturally specific contexts. As I demonstrate later in this chapter, this view can be countered by the fact that Islamic law has been amenable to revision and modifications based on certain principles like time and place (*zaman wa-makan*). Hence, opposition to an Islamic reformation is unwarranted because in the past, Muslim scholars themselves maintained that juristic laws are conditioned by external factors like the sociopolitical conditions surrounding the Muslim community or other extenuating exigencies. When those circumstances change, rulings governing Muslim legal praxis need to be revised accordingly.

Others oppose reformation, as it apparently contravenes the concept of the finality of the mission of the Prophet, whose practices form the foundation of much of Islamic law. In particular, they cite verse 5:3 in the Qur'an, "This day I have perfected your religion for you, completed My favor upon you, and have chosen for you Islam as your religion," in support of their argument. The verse explicitly argues for the completion and perfection of Islam. In this regard, it should be noted that the Arabic equivalent for the term reformation, *islah*, implies improving, purifying, or repairing. Thus, contrary to what many traditionalists believe, reformation entails the revision of or alteration to the reading, interpretation, and application of the revelatory sources, rather than changes to the core beliefs of Islam.

Some opponents of an Islamic reformation reject the view that previous juridical determinations were predicated on the sociohistorical conditions in the seventh and eighth centuries. They claim that Islamic law, as it was interpreted and articulated by the *fuqaha'* at that time, conformed to the Divine will and was expressed in the revelatory texts.[23] However, the fact that jurists in the early period of Islam differed and disputed among themselves and proffered a wide range of juristic opinions on various personal and social issues indicates that Islamic law was not completely based on the Divine will. It also suggests that, from the very beginning, the legal system was inherently pluralistic in nature. Despite the all-encompassing nature of Islamic law, there was never an enshrined or codified universal legal system that was accepted and acknowledged by all Muslims.

Other Muslims oppose any revisionist readings of Islamic texts as they deem these to be Western secular/liberal concepts that Muslim reformers, who are infatuated by the West, seek to impose on or replicate within the Muslim community. Many of the Muslim reformers are either Western trained or influenced, alienating themselves thereby from the Muslim populace. In their discourse on

[23] See, for example, the statements of Ali Akbar Rashad, the head of Tehran's Hawza (seminary) Council. https://www.neshasteasatid.com/node/1016.

reformation and hermeneutics, scholars such as Fazlur Rahman (d. 1988), Nasr Abu Zayd (d. 2010), Abdolkarim Soroush, Mojtahed Shabistari, and Mohsen Kadivar either quote or rely heavily on concepts and principles appropriated from Western philosophy and hermeneutical studies. Since they were influenced by Western scholars such as Friedrich Schleiermacher (d. 1834), Hans-Georg Gadamer (d. 2002), and Martin Heidegger (d. 1976), their reformist ideas have been rejected by traditional Muslim scholars trained in the seminaries (*hawzas*). The seminarians also believe that the views espoused by the reformers contradict the basic ethos of the Qur'an and Prophetic practices. They further accuse reformers of contravening the *ijma'* (consensus) reached by scholars on many points of law or of contradicting the rules stipulated in Islamic legal theory.

The concept of an Islamic reformation is also resisted by many Muslims, as it conjures up notions of Western hegemony, liberalism, and secularism, concepts which many Muslims deem to be alien to Islam. Reforming Islam is construed as a Western conspiracy designed to engender further schisms within the community or a Western desire to "modernize" and "westernize" Islam. Consequently, they try to invert what they perceive to be an asymmetrical reformist discourse between Islam and the West. Ayatullah Mohammad Mehdi Mirbagher, the head of the Qum Academy of Islamic Sciences and Culture and a member of the Assembly of Experts in Iran calls Western reform a "pit" and argues that falling into the pit of Western reform is the result of holding to the rope of "[Western] Modernity."[24]

In their defense, Muslim reformers insist that the issues they raise such as human rights, gender equality, the rights of minorities, and freedom of conscience are universal rather than Western concepts. The discussion by Muslims who engage in such issues is framed not by appropriating them from Western debates but rather because such topics are key to any reformation discourse. Furthermore, reformers maintain that an Islamic reformation does not seek to generate a "Protestant" as opposed to a "Catholic" Islam. They also claim that they do not intend to divide or polarize the Muslim community further. Rather, they seek solutions to respond to contemporary challenges confronting the *umma*.[25]

[24] https://rasanews.ir/fa/news/662222/%DA%AF%D8%B1%D9%81%D8%AA%D8%A7%D8%B1%DB%8C-%D8%AF%D8%B1-%DA%86%D8%A7%D9%87-%D8%A7%D8%B5%D9%84%D8%A7%D8%AD%D8%A7%D8%AA-%D8%BA%D8%B1%D8%A8%DB%8C-%D8%B9%D8%A7%D9%82%D8%A8%D8%AA-%DA%86%D8%B3%D8%A8%DB%8C%D8%AF%D9%86-%D8%A8%D9%87-%D8%B7%D9%86%D8%A7%D8%A8-%D9%85%D8%AF%D8%B1%D9%86%DB%8C%D8%AA%D9%87.

[25] Omid Safi, "Islamic Modernism," in Lindsay Jones et al., ed., *Encyclopedia of Religion* (Farmington Hills, MI: Macmillan, 2005), 6095–6100.

Even the frequent calls to respect democracy, freedom of expression, and equal gender rights within Muslim communities are viewed by some as an imposition of Western concepts designed to undermine Islamic social and religious norms. Notions like the equality of all human beings endowed with inherent dignity and freedom of conscience have also been opposed by many as Western cultural encroachment and imposition on Muslims. They argue that Muslims cannot be expected to absorb concepts that the West has conjured up based on its own sociopolitical and cultural experience and vested interests.[26]

Muslims who resist reformation also fear that an Islamic reformation will lead to issues endemic to the Christian world, the creation of a liberal or secular society in which Islam will be relegated to the periphery of Muslim societies and Western values and customs will infiltrate Muslim communities. Liberalism is abjured by many Muslims since it conceives of society as a collective that is composed of atomized individuals. It further assumes that the individual is "conceptually and ontologically prior to society."[27] Muslims conjoin secularization with notions such as individualism and moral relativism, ideas that are alien to the Islamic worldview of a just social order.

Given the primacy of the idea of the moral autonomy of individuals in a liberal society, there is almost an ineluctable association between liberal democracy and the doctrine of secularism. Traditionalists argue that concepts that marginalize the role of religion in public space are alien to Islam especially as, in the secular world, public morality and religious observance are relegated to the private sphere. They further argue that reformation in the Western world has resulted in the bifurcation of the spiritual and temporal domains in their societies.[28] These spheres were gradually accepted in the West to meet the demands of multifaith and multicultural societies so as to harmonize relationships between peoples of various faiths and culture. Given that the delinking between the spiritual and temporal domains is perceived to be a Western concoction, Western secularism and the concomitant marginalization of religion from the public sphere are both rejected by many Muslims.[29]

Since reformation is often associated by many Muslims with the secularization of societies, it is essential to define and note the distinction between the

[26] Muhsin Saʿidzadeh, an Iranian cleric, was excoriated for voicing reformist views and for questioning the limits of Islamic debate. See Charles Kurzman, "Critics Within: Islamic Scholars' Protests against the Islamic State in Iran," in Browers and Kurzman, *An Islamic Reformation*, 87.

[27] B. Parekh, "The Cultural Particularity of Liberal Democracy," *Political Studies* 40 (1992): 162.

[28] For critiques of reformation in the West, see Valiullah Abbasi, "Nigahi be Islahgari-yi Islami va Gharbi," *Ravaq-e Andishe* 16, no. 3 (2003): 101–18, https://www.noormags.ir/view/fa/articlepage/24716. See also Mousa Najafi, "Islah Talabi-yi Gharbi va Falsafi-yi Tajaddud-ye Irani," *Kitab-e Naqd* 16, no. 4 (2000): 226–41, https://www.noormags.ir/view/fa/articlepage/61904

[29] Some Sunni *'ulama'* have also opposed an Islamic reformation. For some of them, even *ijtihad* is perceived as a threat to the religious authority. Felicitas Opwis, "Changes in Modern Islamic Legal Theory: Reform or Reformation?," in Browers and Kurzman, *An Islamic Reformation*, 36, 40.

terms "secularization" and "secularism" and their connection to reformation. Secularization "refers to a comprehensive socio-historical process whereby religion loses its significance in the individual and societal spheres."[30] This means that religion is excised from the public sphere, the church is separated from the state, and instead science and worldliness are prioritized.[31]

There is no consensus on the etymology and signification of the term "secularism." Generally speaking, "secularism has come to denote a philosophy that privileges the domain of the temporal and diminishes that of the spiritual."[32] It also refers to a systematic decline of the role of religion in terms of the role it plays in daily social transactions and human relationships. Most crucially though, "a political conception of secularism involves a separation, which can vary, between the institutions of the state and the forces of religion."[33] It is correct to state that secularism is the outcome of the process of secularization. Since secularism is regarded as responsible for the marginalization of religion from the public domain and since it is closely associated with reformation, both secularism and reformation have been resisted by the mainstream groups in Muslim societies. In addition, a binary opposition between Islam and both concepts was conceived from the outset that eventually left an imprint in the collective consciousness of Muslims.

Muslim trepidation regarding reformation and secularism has been further augmented by the French government's decision in 2004 to outlaw the wearing of the *hijab* in public schools. A similar ruling, which prevented a person whose face is covered from engaging in any form of public service, was enacted in Quebec, Canada, in 2017. Such measures, implemented under the guise of secularism, further corroborate the belief held by many Muslims that secularism is inherently anti-Islam. These measures also enhance the view, held by many Muslims, that in the name of freedom of expression, secularism has become averse to religion in public space. This applies especially in the case of Islam.

In Muslim countries where the public presence and expression of Islam is vital, secularism is a largely alien concept. This can be discerned from the fact that there is no accurate translation of the word in Arabic. The term *la-dini*, "nonreligious" or "irreligious" does not accurately capture what secularism means.[34] As Karen Armstrong has correctly observed, whereas in the West "secularization has been experienced as liberating," in Muslim societies, "secularization was experienced as a violent and coercive assault."[35]

[30] Naser Ghobadzadeh, *Religious Secularity: A Theological Challenge to the Islamic State* (New York: Oxford University Press, 2014), 8.
[31] Hashemi, *Islam, Secularism and Liberal Democracy*, 162.
[32] Cited from John Ruedy in ibid., 113–14.
[33] Nader Hashemi, "The Multiple Histories of Secularism: Muslim Societies in Comparison," *Philosophy and Social Criticism* 36, no. 3–4 (2010): 327.
[34] Ibid., 330.
[35] Quoted in Hashemi, *Islam, Secularism and Liberal Democracy*, 141.

Shariʿa and *Fiqh* in Islamic Reformation

In Muslim societies religion plays a crucial role in different realms ranging from the social and economic to political governance. Thus, any reform project must begin with a discussion and revision of texts that undergird these realms. To comprehend fully the need for and process of an Islamic reformation, it is important to distinguish between *shariʿa* and *fiqh*, terms which are frequently conflated and used interchangeably as if they were synonymous. Failure to comprehend the difference between the two terms has often led to Muslim reformers being accused of succumbing to Western attempts at distorting and extirpating Islam.

Shariʿa, in my understanding, refers to the normative legal and moral precepts contained in the Qur'an and established by the Prophet's practices. More specifically, it represents the normative set of sacred and immutable truths and reflects the ethical spirit of the Divine message. In contrast, *fiqh* or substantive law, is a discipline that studies the principles and dictates of the *shariʿa* in order to deduce specific laws and legal rules from the revelatory sources so as to translate this vision into legal norms. Stated differently, *fiqh* refers to the activities of Muslim legists to discern, discover, and express the Divine law and represents a jurisprudential methodology that is employed by scholars to produce legal opinions and determinations at a certain time and in specific contexts. Historically, *fiqh* was a product of a human epistemic enterprise that culminated in the formation of the *madhahib* (schools of law).

Thus construed, Islamic jurisprudence becomes an intellectual process of discerning the Divine intent by discovering the legal norms through a process of inference (*istinbat*) as embodied in the *shariʿa*.[36] In other words, *fiqh* represents a mutable realm of human legislation that approximates the *shariʿa* and is derived by using the rational faculties.[37] It is therefore correct to state that, whereas Muslims share the same *shariʿa*, they do not have a common *fiqh*. It is the *fiqh* rather than the *shariʿa* that needs to be refined and transformed in the reformation process.

[36] For other differences between *fiqh* and *shariʿa*, see ʿAbd al-Jabbar al-Rifaʿi, ed., *Maqasid al-Shariʿa: Tahrir wa'l-Hiwar* (Beirut: Dar al-Fikr al-Muʿasir, 2002), 143–45. This work is a collection of interviews and excerpts of the writings of a number of scholars regarding *maqasid al-shariʿa*. On the etymology of *shariʿa* and what it meant in early Muslim literature, see Kevin Reinhart, "Ritual Action and Practical Action: The Incomprehensibility of Muslim Devotional Action," in Kevin Reinhart and Robert Gleave, eds., *Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss* (Leiden: Brill, 2014), 55 ff.

[37] Ayman Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concepts of ʿUrf and ʿAdah in the Islamic Legal Tradition* (New York: Palgrave, 2010), 6–7. Also Bernard Weiss, *The Spirit of Islamic Law* (Athens: University of Georgia Press, 2006), 120; Khaled Abou el-Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld, 2001), 32; Tariq Ramadhan, *Radical Reform: Islamic Ethics and Liberation* (New York: Oxford University Press, 2008), 44.

Historically, the science of *fiqh* in the Sunni world emerged and developed when Muslims, as they conquered new territories after the Prophet's death, encountered new situations and were confronted with challenges which required answers that were not readily available in the revelatory sources. In response, Muslim legists appropriated and incorporated many political and administrative laws from existing mores and norms in their legal system. As a matter of fact, as I discuss in chapter 3, most contractual, social, and criminal laws currently practiced by Muslims were borrowed either from local Arab communities or from the societies that they conquered. Thus, to construe *fiqh* as emerging purely from and being contingent on the revelatory sources is incorrect.

The interpretive exercises involved in deciphering legal precepts means that there can be more than one response to a particular legal question and that no jurist can be confident that his findings reflect the actual intent of the Divine. Rather, at most, he is merely approximating the will of God. It should also be noted that *fiqh* injunctions are accidental rather than intrinsic to the legal system in the sense that they respond to the practical needs, challenges, and practices of the community of the time. If, for example, there was no law instituted on the payment of blood money (*diya*), retaliation, or treatment of concubines or if the prevalent laws on marriage and divorce were different at the time of the Prophet or when the jurists were formulating their rulings, the laws of Islam today would indubitably have been different on many of these and other legal issues.

The distinctive nature and function of Islamic jurisprudence is further underscored by the contemporary Iranian jurist, Ayatollah Muhammad Musawi Bujnurdi (b. 1942). He contends that what is stated in the works of jurisprudence should not be construed as exemplifying the absolute and immutable law of God. *Fiqh* constitutes the comprehension and interpretations of different jurists and, depending on various factors, their findings may change or be construed differently. He also claims that in the past, the *fuqaha*' have often held disparate and contrasting views on the same topic. On a particular issue, a *faqih* (jurist) may have prohibited an act while another legist may have allowed it. The opinions held by jurists are based on their divergent interpretations of the canonical sources. Bujnurdi cites the example of jurists who opine that a wife cannot inherit land from her husband. This view, he states, is based on their interpretation of the sources, and can change based on circumstances.[38] In an interview he gave to *Farzaneh*, an Iranian magazine, Bujnurdi states:

> In my personal opinion, many of the laws referenced to in *fiqh* and specific laws for men and women which seem to be discriminatory in nature, can be revised.

[38] http://en.farzanehjournal.com/index.php/articles/no-8/41-no-8-5-interview-with-ayatollah-bojnourdi-qfigh-and-womens-human-rightsq (accessed November 2011).

> Such issues as women providing evidence as a witness, inheritance from the deceased, retribution, *diya* (blood money), judgment in civil and penal codes, which are all considered as areas of discrimination by the outside world, can be looked upon in a broader perspective. In my opinion, if these issues are examined and revised by the jurists and law experts with an open view, a great number of these laws can be revised.[. . .] Therefore, I believe, in many of the cases which seem discriminatory between men and women, we can apply certain revisions from the point of view of *fiqh*. I believe many of the existing laws and rights of women in the Shia *fiqh* are not unalterable rules and can be interpreted and revised.[39]

Bujnurdi's remarks clearly indicate that, in his view, Islamic laws are not immutable and that revising them is a juristic enterprise that scholars should be continuously engaged in. His statements also suggest that the scholars' function of deducing and interpreting the revelatory texts is intertwined with their participation in the process of issuing legal injunctions (*fatawa*—pl. of *fatwa*) to the community. Bujnurdi's remarks also indicate that to claim that juristic inferences and proclamations are binding on all Muslim communities, regardless of time and space, is to sanctify and idealize an intellectual endeavor.

The Islamic Reformist Agenda

It is important to note that there is no concerted or coordinated reform movement in Islam. On the contrary, proponents of an Islamic reformation are concerned individuals who have distinctive visions and agendas regarding how to make Islamic laws more relevant and applicable to the lives of contemporary Muslims. It is equally important that we should not overlook the differences that distinguish the reformers. Nor should we ascribe superficial unity to their thoughts and vision. They are a small group of writers and thinkers who are perturbed at the stagnation and ossification in the current form of Islamic thought. They see themselves as possible vehicles for social and religious change. Frequently, there are more differences than similarities between them. Shiʿi reformers like Mojtahed Shabistari, Abdolkarim Soroush, Ahmad Qabil (d. 2012), and Mohsen Kadivar differ considerably in their outlooks and proposals for change. Some are more liberal and controversial than others. They agree primarily on the need to reform the Islamic legal system.

The need for a revised reading and interpretation of the sacred texts is also shared by many scholars within the seminaries. However, unlike the reformers

[39] Ibid. This site is no longer available.

who operate outside the seminaries, the seminarians do not advocate for an overhaul of the basic foundations and principles of Islamic legal theory. Nor is the discourse of the *'ulama'* centered around challenging the epistemological basis of Islamic legal theory. Rather, they engage different hermeneutical and exegetical principles so as to posit more equitable and pragmatic laws. The seminarians also differ in their agenda and vision for reform. As we shall see, there are many differences between the pronouncements of Ayatullahs Muhammad Musawi Bujnurdi, Yusuf Sane'i, Kamal Haydari (b. 1956), Mostafa Mohaghegh Damad (b. 1945), Ibrahim Jannati (b. 1933), Muhammad Husayn Fadlallah (d. 2010), Muhammad Taqi Mudarrisi (b. 1945), and Mahdi Shams al-Din (d. 2001).

There are several reasons why Muslim intellectuals have called for a reformation in recent times. Classical jurists synthesized the revelatory texts with a system they inherited from pre-Islamic Arabia. They were working within a particular patriarchal framework dictated by an Arabian culture that frequently violated human dignity and the respect owed to all human beings. Many of the laws that were transmitted were downright prejudicial and degrading to women and non-Muslim minorities. Calls for reformation within the Islamic world have arisen due to the practical difficulties of applying such laws in modern times. In addition, some of the juristic proclamations made by classical and medieval scholars are seen as unjust and unethical.[40]

Reformers are also responding to the literal understanding of the sacred texts, which has often precipitated a parochial application of the law. This has resulted in charges of barbarism and savagery against Islam due to the implementation of traditional punitive laws like public stoning, flogging, and the amputation of limbs. In recent times, through their myopic and literalist understanding of the Islamic sources, Muslim groups like the Taliban, al-Qa'eda, the Islamic State of Iraq and al-Sham (ISIS), and Boko Haram have institutionalized and legalized violence and discrimination against religious minorities, women, and even against fellow Muslims. ISIS even reintroduced slavery as an acceptable social and religious phenomenon. Such interpretations and applications of the law have reinvigorated the calls for reformation in Islamic law.

The need for reformation is further underscored by the fact that since the law was, at least in part, humanly constructed, it is possible to change some injunctions based on the community's needs in present times. Reformers seek to engage the juristic heritage by going beyond the normative texts, which have become increasingly irrelevant in modern times. For them, reconciliation between tradition and modernity cannot be facilitated by an apish imitation of the past or by regurgitating the rulings of and consensus reached by earlier jurists.

[40] These topics are discussed in more details chapter 4.

The proper way to reconcile between them is through the reconstruction of the Islamic legal system and Muslim institutions rather than by simply dismissing or blindly accepting them.

Reformers further maintain that the relevancy of Islamic law in modern times needs to be examined in the context of today's world, which insists that all citizens, regardless of their religious, cultural, and ethnic identities, be treated equally. Circumstances in the contemporary world also demand a reading of the revelatory sources along egalitarian and gender equitable lines, concepts that are largely absent in the classical manuals. Reformers are perturbed by a juridical corpus that has made women and non-Muslims legally invisible in the public domain. They are also concerned at laws that condemn apostates to death, grant a man the right to possess as many concubines as he wishes, and insist that the movement of women be supervised and limited. Consequently, reformers have sensed the need to cast a more appropriate interpretation of Islamic revelation that makes social interactions more humane, especially in those sections of the legal tracts that privilege Muslims and grant them more rights than non-Muslims.

As a matter of fact, cases of prejudice and discrimination abound in both Sunni and Shiʿi legal manuals. It must be remembered that traditionally, jurists were trained and taught in male-dominated religious seminaries that excluded female participation. The asymmetrical interpretation of juridical proclamations concomitant with a refusal of Muslim jurists to refine aspects of Islamic law that relate to women has often confined women to a life of seclusion and passive subordination. Since they do not participate in the seminaries, women are not able to dispute men's exclusive authority to define Islam or to contribute to the juristic discourse regarding female-related issues like the laws on sexual relations, inheritance, polygyny, female testimony, supervision by male guardians, domestic violence, and so forth. Women's issues are discussed and resolved by male jurists whose pronouncements often reflect the male-dominated and patriarchal norms and structures of Arab culture.

In many instances, the laws that were instituted were demonstrably unfair to women. A good example of gender-biased rulings and the need for reformation in the juridical corpus is the difference between the Sunni schools of law over the question of a husband who goes missing and cannot be located. The schools differed on the question of how long the wife had to wait before she was entitled to seek a judicial separation. Maliki law stipulated that she should wait 4 years, whereas the other Sunni schools stated that she should wait between 90 and 120 years.[41]

[41] Liyakat Takim, "Women, Gender, and Islamic Law," in Suad Joseph, ed., *Encyclopedia of Women and Islamic Cultures* (Koninklijke: Brill, 2004). Also https://www.al-islam.org/five-schools-islamic-law-sheikh-muhammad-jawad-mughniyya/al-iddah#wife-missing-husband.

The misogynistic character of legal decrees is evident in a wide spectrum of juristic texts. The thirteenth-century Shi'i scholar 'Allama Hasan b. Yusuf al-Hilli (d. 1325) states that men should precede women when offering prayers over the dead. The reasons he cites are striking. He states that men should stand in front of women because they are more complete than women, their prayers are more likely to be accepted, and it is more respectful to the dead that men precede women in prayers.[42]

Such juristic proclamations are not confined to the premodern era. The contemporary Iranian jurist Ayatullah Makarim Shirazi (b. 1926) vindicates the beating of a wife as mentioned in the Qur'an (4:34). After stipulating that the beating should be light without leaving a mark, he goes on to remark that psychiatrists say that some women suffer from "masochism" and that they like to be hit.[43] Ayatullah Muhammad 'Ali Geramin (b. 1938), another Iranian jurist, claims that men have superiority and authority over women due to their rational minds against women's tender emotions. For Geramin, gender hierarchy and some rulings relating to women cannot be altered.[44]

In his lectures on *ijtihad* and *taqlid*, al-Khu'i states that women cannot occupy the position of *marja'*.[45] Although there is no textual or rational proof prohibiting them from occupying such a position, al-Khu'i says that this would contravene the *madhaq al-shar'i*, that is, the spirit of the law.[46] He also recommends that women should refrain from going to offer *eid* prayers. This precaution need not be observed by old women.[47] Such interpretations and articulations of the *shari'a* confine women to a position of subjugation. If construed as permanent and immutable, they exclude Muslim women as important contributors in their children's upbringing and members of the Muslim community. They are also inconsistent with the ethic of the Qur'an, which honors and elevates the position of women. Such gender inequalities that are articulated in the texts are not among the essentials of Islam. They are part of its accidentals, which were inserted in the juridical manuals either due to the influence of seventh- and eighth-century sociocultural norms of Arabian society or due to the hermeneutics of later scholars who were influenced by their own horizons and presuppositions concerning the role of women in a society.

[42] 'Allama al-Hilli, *Tadhkira al-Fuqaha'* (Tehran: al-Maktaba al-Murtadawiyya, 1997), 2/46.

[43] Karen Bauer, *Gender Hierarchy in the Qur'an: Medieval Interpretations, Modern Responses* (New York: Cambridge University Press, 2015), 236.

[44] Ibid., 263.

[45] The term refers to a learned juridical authority in the Shi'i community whose juridical rulings are obeyed by those who acknowledge him as their source of reference or *marja'*.

[46] Abu'l-Qasim al-Musawi al-Khu'i, *al-Tanqih fi Sharh al-'Urwa al-Wuthqa* [transcribed notes of al-Khu'i's lectures by Mirza 'Ali al-Gharawi] (Najaf: Mu'assasa al-Khu'i al-Islamiyya, 2013), 1/18. See also Mahdi Mahrizi, *Mas'ala al-Mar'a: Dirasat fi Tajdid al-Fikr al-Dini fi Qadiyati al-Mar'a* (Beirut: Binaya al-Sabah, 2008), 136–37.

[47] https://www.al-islam.org/islamic-laws-ayatullah-abul-qasim-al-khui-sayyid-abu-al-qasim-al-khoei, #1537, p. 207.

Calls for a reformation in Islam have also surfaced in response to the discrepancies between the Qur'anic ideal of an egalitarian society and some of the legal enactments of jurists. The Qur'an, for example, permitted a non-Muslim to witness the will of a Muslim who died on a journey (5:106) when no Muslim was available. Abu Hanifa (d. 767), on the other hand, rejected their testimony under such circumstances. Abu Yusuf (d. 798) claimed that verse 65:2 had abrogated verse 5:106, which had authorized the testimony of a non-Muslim. The jurists in Medina rejected the evidence of non-Muslims altogether, even if they gave evidence against each other. Shafiʿi concurred with this ruling.[48]

As I elaborate in chapter 4, Muslim legists enacted a series of restrictions and rulings to enforce the inferior status of non-Muslims. For example, Jews or Christians were prohibited from dressing affluently. A Muslim was not allowed to wash a Jewish or Christian toilet.[49] Such laws are not confined to the past. Even in contemporary times, many rulings are blatantly discriminatory against non-Muslims. For example, Shiʿi jurists hold that a surgeon cannot dissect a Muslim body but can do so to a non-Muslim body without the permission of the person's relatives.[50]

Such treatment of women and non-Muslim minorities that are cited in both Sunni and Shiʿi legal manuals do not reflect the Qur'anic ethos of universal moral values or the equal status of those who do not accept the authority of the *shariʿa*. Yet, even today, Islamic jurisprudence continues to deny non-Muslims the same privileges and liberties that Muslims enjoy. The discriminatory rulings enunciated by various scholars over the centuries underscore the continuing influence of the tribal system and patriarchal customs under which these laws were instituted. Such formulations indicate that there is a need to re-evaluate the role of Islamic law in affirming the universal rights that accrue to all human beings.

The claim by some scholars of the immutability of traditions or laws enunciated by classical jurists confers on their works a sense of inviolability and sanctity. Questioning the humanly inferred juristic proclamations or scholarly consensus is often interpreted as challenging God's legislation. This is almost tantamount to claiming that the Divine speaks to or through the jurists. As a matter of fact, as we shall see, the sanctification of and overdependence on the

[48] Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Oxford University Press, 1950), 211–12. The twentieth-century Egyptian scholar Mahmud Shaltut rejects this view and argues that the testimony of non-Muslims is acceptable. See Kate Zebiri, *Mahmud Shaltut and Islamic Modernism* (New York: Oxford University Press, 1993), 102.

[49] John Alden Williams, *Themes of Islamic Civilization* (Berkeley: University of California Press, 1971), 159–60.

[50] Muhammad al-Qummi, *Kalimat Sadida fi Masa'il Jadida* (Qum: Mu'assasa al-Nashr al-Islami, 1994), 137–38; 176–77. Abu'l al-Qasim al-Khu'i, *Minhaj al-Salihin* (Qum: Mehr, n.d.), 2/426. The view that the dissection of Muslim bodies is not allowed is not restricted to Shiʿis. Some Sunni jurists like Salih al-Fawzan (b. 1933) have issued similar rulings. Abou el-Fadl, *Speaking in God's Name*, 200.

hadith literature combined with a reluctance to critically examine the contexts in they were uttered have been major stumbling blocks in the reformation process.

It is important to remember that an Islamic reformation does not challenge the authority of the Divine nor does it challenge the sanctity of the Qur'an. Rather, the reformation process seeks to revise the judgments and pronouncements of previous jurists exegetically so as to apply Islamic law more faithfully in modern times. At the same time, the reformation process highlights some of the shortcomings and flaws in earlier methodologies and epistemologies and the need to improvise and engender new techniques and methods for deriving fresh juridical rulings in present times.

Reformation in Shi'ism

Like their Sunni counterparts, Shi'i thinkers have also advocated for revisions of aspects of their legal tradition. Until recent times, there have been few calls for reformation within Shi'i circles.[51] In all probability, this is due to the structure of leadership within Shi'ism. The obligation imposed on lay Shi'is to follow the edicts of a *marja'* has meant that the pronouncements of the religious leaders in the seminaries in Qum and Najaf are binding on their followers. The need to follow and imitate the most learned contemporary religious figure is absent in Sunnism, where religious leadership is more amorphous and there is no obligation to follow the edicts of specific scholars who claim to have exclusive rights to interpret religious texts. The presence of Shi'i reformers who could challenge or revise the religious declarations of the *maraji'* (plural of *marja'*) has, until recently, not been possible, since such a movement would be construed as a direct challenge to the religious authority that is vested in the eminent religious scholars.

The paucity of reformers within Shi'ism is also due to the fact that authority, when it is strictly defined and hierarchical as it is in Shi'ism, greatly diminishes the possibility of digression and the scope for divergent hermeneutics. For most devout Shi'is, the edicts of the *maraji'* are final and beyond critique. Due to this factor, the Shi'i outlook is shaped by the pronouncements of the *maraji'* , which are deliberated in and disseminated from the religious seminaries.[52]

Moreover, the relatively late appearance of calls for reformation in Shi'ism is probably due to the fact that, in contrast to the Sunnis, Shi'is compose a minority

[51] One notable exception is Jamal al-Din al-Afghani. There is some dispute as to whether he was a Shi'i or not. His alleged training in Shi'i seminaries, his discourses on philosophy, and his general rationalistic outlook suggest that he was probably a Shi'i. In public at least, he never spoke on specifically Shi'i issues nor did he identify himself as a Shi'i. Hourani, *Arabic Thought*, 108.

[52] Liyakat Takim, *Shi'ism in America* (New York: New York Press, 2009), 147.

group that was not required to provide pragmatic guidance to a political entity or to people in their daily social and commercial transactions. Given the practical difficulties of applying classical pronouncements in a modern Islamic political entity, it was only after the establishment of an Islamic republic in Iran that Shiʿi jurists were forced to revisit and revise some of their earlier rulings. This observation can be corroborated by the fact that in recent times many seminars and conferences have been convened to deliberate on and discuss the application of *ijtihad* and the role of time and place in the derivation of *shariʿa* rulings. The proceedings of the conferences culminated in the publication of a fourteen-volume book titled *Ijtihad va-zaman va-makan* (*Ijtihad* and [the Role of] Time and Place).[53] Subsequently, many monographs have been published on the important role that *ijtihad* can play in the issuance of new legal precepts or in the revision of old ones.

The view that until recently Shiʿi jurists have not been required to revisit the sociopolitical dimensions of their rulings can be further substantiated by the fact that most Shiʿi traditions are in the form of questions posed to and answers received from the Imams. The questions raised by the companions of the Imams relate to personal matters concerning family law, rulings on ritual purity, prayers, inheritance, pilgrimage, and so on. Consequently, even scholars in the Shiʿi seminaries often complain that the legal treatises (*risala ʿamaliyya*) issued by the *maraji*ʿ do not discuss topics that relate to contemporary societies. Issues like human rights, the environment, social welfare, cloning, transgender surgery, social justice, forms of government, the authority of a political entity to infringe on the rights of an individual, racism, and poverty are absent in these manuals. Instead, topics like the distance a person has to travel so as to be able to offer the *qasr* (shortened) prayers, or the conditions and rewards for manumitting a slave are given greater attention.[54] In other words, Shiʿi jurists have been more concerned with providing their followers with guidance in personal matters than with addressing the sociopolitical and economic challenges that Shiʿis contend with in their daily lives. In the Shiʿi *fiqh* manuals, commitment to Islam is delinked from its economic, social, and political dimensions.

This view is confirmed by Ayatullah Muhammad Mahdi Shams al-Din, a Lebanese scholar who was trained in the seminary in Najaf. He complains that the sociopolitical dimensions have not been accentuated in Shiʿi jurisprudence. This is partly because Shiʿi jurists have traditionally detached themselves from the real world. For this reason, even in current times, their works on jurisprudence do not address economic or political topics that affect the well-being of

[53] *Ijtihad va-Zaman va-Makan*, 14 vols. (Qum: Muʾassasa Chap va-Nashr-i Uruj, 1995).

[54] Mustafa Ashrafi Shahrudi, "Hamsu-ye Fiqh ba Tahavvulat va Niyazha-ye Jamiʿ-e," in *Ijtihad va Zaman va Makan*, 1/119.

the community. Consequently, they have not explored or developed the socio-political jurisprudence of Islam. The *fuqaha'* have, instead, been more engrossed in personal issues such as the laws regarding ritual purity, prayers, and fasting.[55]

Shams al-Din attributes the malaise of contemporary *ijtihad* to the methodological approach pursued by jurists.[56] He suggests a revision in jurisprudence so as to formulate injunctions that are more linked to the current milieu (*fiqh al-bi'a*). Shams al-Din also states that a reformation should generate a different genre of *fiqh*, one that caters to the social and practical needs of the masses.[57] The current *fiqh* is largely theoretical (*tajrid nazari*) in nature and is bereft of issues that impact the real world.[58] He further states that when laws are articulated and promulgated without a proper understanding of contemporary challenges, they become abstract in their outlook; consequently, the context and place of application of the rulings are lost. To resolve this dilemma, he says, Shi'i jurisprudence must be historically contextualized and the derivation of laws must demonstrate a clear awareness of their ramifications on the community.[59]

The relevance of traditional Islamic laws to today's world is also raised by other scholars trained in the seminaries. The Iraqi jurist Ayatullah Kamal Haydari, for example, complains that even in today's world, juristic manuals deliberate on questions regarding the amount of water to be drawn from a well in order to purify it if a mouse falls in. This was a relevant and practical issue during the times of the Imams over a thousand years ago but is no longer germane. It is because of such irrelevant discourses that Ayatullah Muhammad Baqir al-Sadr (d. 1980) raised concerns that contemporary *fiqh* was stagnant and had not progressed since the time of Shaykh Tusi (d. 1067) and 'Allama al-Hilli.[60] Like Shams al-Din, Haydari blames the *'ulama'* for making *fiqh* abstract and irrelevant to the needs of contemporary society.[61]

In emphasizing the need for reformation, Ayatullah Fadlallah (d. 2010) also complains that, from the very beginning, most Shi'i *fiqh* works have emphasized those aspects of the law that cater to the personal needs of the masses. Apart from a few instances they do not accentuate principles that impact the community at large.[62] To some degree, this can be attributed to the fact that Shi'i legal works

[55] Al-Rifa'i, *Maqasid al-Shari'a*, 17. See also Liyakat Takim, "Maqasid al-Shari'a in Contemporary Shi'i Jurisprudence," in Adis Duderija, ed., *Maqasid al-Shari'a in Contemporary Reformist Thought: An Examination* (New York: Palgrave, 2014), 115.

[56] This is a view that is espoused by Fadlallah too. Ja'far Fadlallah, *Nazariyya fi al-Manhaj al-Ijtima'i* (Beirut: Markaz al-Islami al-Thaqafi, 2011), 61–62.

[57] Al-Rifa'i, *Maqasid al-Shari'a*, 18.

[58] Ibid., 23.

[59] Ibid., 24.

[60] Khalil Rizq, *Ma'alim al-Tajdid al-Fiqhi: Mu'alajatu Ishkaliyyat al-Thabit wa'l-Mutaghayyir fi al-Fiqh al-Islami* [transcribed notes of lectures by Kamal Haydari] (Qum: Dar Faraqad Publication, 2009), 91–92.

[61] Ibid., 92–93.

[62] Al-Rifa'i, *Maqasid al-Shari'a*, 47.

are composed of traditions narrated from the Imams. The *ahadith* (pl. of *hadith*) take the form of personal questions posed to the Imams by their companions. This propensity to accentuate the *juz'iyyat* (particular) issues is because they impact the lives of the people most.[63]

Reformers within the seminaries have argued that it is the understanding rather than substance of the text that needs to be altered. The view is best encapsulated by Ayatullah Saneʿi (d. 2020), a prominent jurist in the seminary in Qum. Referring to the situation of women in general and their ability to obtain divorce in particular, Saneʿi states, "since the subject [women's situation] has changed, the framework of civil laws must change too. Our current laws are in line with the traditional society of the past, whereas these civil laws should be in line with contemporary realities and relations in our own society."[64]

Similarly, another Iranian jurist, Muhsin Saʿidzadeh (b. 1956), maintains that many contemporary rulings are premised on the interpretations of the jurists in the medieval era that traditionally favored men. He further states that such laws should be revised to reflect the vicissitudes of times and circumstances.[65] Statements such as these coming from Shiʿi thinkers in the seminaries indicate that, for them, a different historical backdrop would have produced a divergent understanding and application of the revelatory texts. Furthermore, such remarks indicate that there is nothing inherently sacred about previous interpretations in these texts.

Most jurists in the seminaries are committed to upholding the traditional *fiqh* methodology as it has developed through the centuries and culminated in the legal theory posited by the famous jurist Murtada al-Ansari (d. 1864). The application of this theory and its relevance in contemporary times has been problematic. Calls for reformation have come not only from Western-trained or Western-influenced scholars but also, more significantly, from within the religious seminaries too. Scholars like Ayatullahs Yusuf Saneʿi, Ibrahim Jannati, Mohaghegh Damad, Muhsin Saʿidzadeh, Mohsen Kadivar, Muhammad Musawi Bujnurdi, Bayat Zanjani (b. 1941), Ahmad Qabil, and Yousef Eshkevari (b. 1950) have called for a revision and reformulation of juridical rulings on many current topics. This, in itself, is a tacit admission that Islamic law, as it was propounded in the past, is ill-equipped to respond to the issues confronting

[63] Ibid., 47–48. See also Shams al-Din's comments in Muhammad al-Husayni, *Al-Ijtihad wa'l-Hayat: Hiwar ala al-W*araq (Qum: Mu'assasa Da'ira al-Maʿarif, 2005), 20–21. The Iranian scholar ʿAli Rida Fayd looks at the subjects covered in the treatises and concludes that the *maraji*ʿ cover the same topics, reaching almost similar conclusions and ignore social issues that are more pertinent to the community. ʿAli Rida Fayd, *Vizhegiha-yi Ijtihad va-Fiqh-e Puya* (Tehran: Pizhuhghah ʿUlum Insani, 1997), 76.

[64] Mir-Hosseini, *Islam and Gender*, 160.

[65] Muhammad Qasim Zaman, *The 'Ulama' in Contemporary Islam: Custodians of Change* (Princeton: Princeton University Press, 2002), 186.

contemporary Muslims. Reformist ideas raised by the *'ulama'* will probably be seen as more credible and acceptable by the Shi'i community than those calls coming from scholars outside the seminaries. Such ideas emerging from within the seminaries are also more likely to resonate with their peers.

The Role of *Ijtihad* in Reformation

For most reformers, *ijtihad* is the primary interpretive tool in the process of reforming Islamic jurisprudence. The term *ijtihad* refers to an intellectual process that uses various principles enunciated in Islamic legal theory to infer juristic ordinances from the primary sources of Islamic law: the Qur'an, *sunna*, *ijma'* (consensus), and reason. The intent of this intellectual and hermeneutical enterprise is to reach a juridical determination that closely reflects God's intent on a subject. As we shall see in the next chapter, when the revelatory sources are silent on an issue, a jurist will often use other hermeneutical tools so as to arrive at a judicial verdict.

Ijtihad is connected to reformation precisely because it furnishes a jurist with indispensable interpretive tools and principles to help him revise earlier edicts or create newer ones. However, this view presumes that *ijtihad* is a panacea for all legal problems and that the reason for the current predicament confronting the Muslim community is because they have abandoned *ijtihad*. In fact, as Wael Hallaq has shown, the view that the doors of *ijtihad* were closed is a myth that never transpired.[66] Although Shi'is claim that the doors of *ijtihad* have always remained open within their legal school, the fact of the matter is that, as I argue in subsequent chapters, *ijtihad* has been focused on scripture rather than on reason. Hence, its sphere of influence has been strictly circumscribed. So far, juristic solutions to contemporary challenges have centered on issuing rulings on an ad-hoc basis, which does not fully exemplify a properly formulated and well-articulated legal system. In short, the current form of *ijtihad* in Shi'ism is not capable of resolving some of the most pressing moral and ethical dilemmas that have arisen due to changes in times and circumstances. Using old techniques and interpretations to resolve newer challenges will result in the ossification rather than the revival of Islamic jurisprudence.

Many jurists have highlighted the problems inherent in the traditional form of *ijtihad*. Ayatullah Khumayni (d. 1989), for example, said, "*Ijtihad* as understood and practiced by the *hawzeh* (seminary) is insufficient."[67] More importantly, the

[66] Wael Hallaq, "Was the Gate of Ijtihad Closed?" *International Journal of Middle East Studies* 16, no. 1 (1984): 3–41.

[67] Mahmoud Sadri and Ahmad Sadri, *Reason, Freedom and Democracy in Islam*: *Essential Writings of Abdolkarim Soroush* (Oxford: Oxford University Press, 2000), 29.

laws deduced by a *mujtahid* (jurist) have to be mindful of the necessities of different times and places and have to be flexible so as to address the challenges people face in their daily lives. These sentiments were echoed by Murtada Mutahhari (d. 1979), who was also critical of the current form of *ijtihad*.[68] In his discourse on the application of contemporary *fiqh*, Ayatullah Fadlallah also stresses the need to reinvigorate *ijtihad*. This can only be accomplished by taking into consideration the concerns and needs of the community so as to deduce social laws (*fiqh al-mujtama*ʿ). Like other jurists, Fadlallah premises his inference of legal precepts on the revelatory texts. He also believes that legal injunctions should take into consideration moral and ethical judgments. These must undergird any systematic derivation or revision of laws in contemporary times.[69]

To be efficacious in reformation, *ijtihad* has to incorporate newer tools and hermeneutical devices. The format of teaching and curriculum in the *hawza* is largely based on a pedagogical system that was determined in the medieval period. Subjects that are normally taught in social sciences like sociology, philosophy, psychology, political science, and topics that impact the community are not offered in the seminaries. The *'ulama'* are also not trained in subjects like hermeneutics and the interpretive modes of reformation. Rarely do they talk the language of reformers like the expansion or contraction of religious knowledge, historiography, hermeneutics, textual criticism, and the cycle of interpretations of texts or how to go beyond the parameters established in the juridical manuals. Similarly, even within the *hawza* (seminaries), there has been very limited discussion on the method or principles of reformation nor have the *'ulama'* articulated a vision of a "reformed Islam." Although they do critique and challenge the conclusions of contemporary and previous jurists, their methodology, mode of discourse, and argumentation strictly follow traditional lines.

Since the genres of subjects offered are limited, most scholars who graduate from the seminaries are not equipped to critically address and offer viable solutions to modern-day issues like human rights, gender inequality, and the rights of minority groups in Muslim states. Frequently their responses replicate the solutions offered by classical scholars. In reality, the seminaries are ill-equipped to engage in extensive reformation, especially one that would revamp the methodology or epistemological foundations of current *ijtihad*. With the exception of a few scholars, jurists within the seminaries have not been able to engender an intellectual link with the outside world.

Furthermore, the revised rulings that have been suggested or articulated in the seminaries have often been on an ad hoc basis and in response to particular

[68] Ibid.

[69] See his arguments in Muhammad Husayn Fadlallah, *al-Faqih wa'l-Umma: Ta'mmulat fi al-Fikr Haraki wa'l-Siyasi wa'l-Manhaj al-Ijtihadi 'ind al-Imam al-Khumayni* (Beirut: Dar al-Milak, 2000), 231–38.

issues that have arisen. It is because of the rigorous adherence of the *'ulama'* to the methodology and principles enunciated in *usul al-fiqh* that charges of inertia and stagnation have been leveled against them.

The casuistic and ad hoc nature of revisions discussed within the juristic community can be illustrated from the revisions suggested by the Iranian scholar Sharia Sangelaji, who was trained in the traditional seminary in Qum. Reforms suggested by thinkers like Sangelaji have often targeted the revision of certain points of laws or particular theological beliefs. Thus, for example, he insists on removing all intermediaries between human beings and the Divine, especially the belief that mediators could dispense blessings and avert calamities.[70] He is also critical of Shi'i doctrines like *raj'a* (the return of the dead at the of time)[71] and the belief in *shafa'a* (intercession).[72] He also challenges the proscription on listening to all genres of music.[73] Sangelaji is also critical of various superstitions practiced by ordinary believers, like the belief that wearing rings made from certain stones can protect or cure a person.[74] He also challenges certain Shi'i mourning practices and exaggerated beliefs in the miraculous prowess of the Imams.[75]

Sangelaji argues that irrational traditions and superstitions had permeated Shi'i *hadith* literature. In particular, he highlights a tradition which claims that in his infancy, the Prophet was breastfed by his uncle Abu Talib.[76] For Sangelaji, secondary literature like the *hadith* has replaced the Qur'an as the primary source of reference in the lives of the Shi'is. In particular, he singles out Shi'i dependence on the works of the Safavid scholar Muhammad Baqir al-Majlisi (d. 1699). Muslims, he argues, need to return to the Qur'an so as to practice the pristine and original Islam.[77] Sangelaji was criticized by his peers for rejecting many important Shi'i beliefs and juridical rulings. His line of thinking strongly resonates with Wahhabi ideology, which attempts to purify Muslim beliefs and practices of all cultural accretions.

As Rahnema has shown, Sangelaji's primary targets were fellow Shi'i scholars who, he felt, had compromised essential Shi'i beliefs and practices. Although he was vociferous in criticizing the prevailing Shi'i theology and legal system,

[70] Rahnema, *Shi'i Reformation*, 8.
[71] Ibid., 123.
[72] Ibid., 41–42.
[73] Ibid., 61–62. For other reforms that Sangelaji sought, see ibid., 168.
Thinkers like Kasravi argued Islam was incapable of reform. A new religion that is pure of deviations is required in its place. Ibid., 47.
[74] Ibid., 40–41.
[75] Ibid., 123, 125.
[76] Ibid., 92. al-Kulayni, *al-Kafi fi 'Ilm al-Din*, 2/339. Sangelaji's reformist agenda included undermining the *hadith* literature ,which is the basis for many Shi'i beliefs regarding the Imams. See Rahnema, *Shi'i Reformation*, 106–107.
[77] Ibid., 68–69.

Sangelaji did not articulate a new methodology or vision of to how to revise the principles of Islamic legal theory or to privilege the Qur'an over *hadith*. Neither did he postulate a systematic and detailed strategy on overhauling or reforming the method of inferring juridical rulings.

In seeking solutions to contemporary challenges, many traditional *'ulama'* have expressed the need to apply *ijtihad*. However, few have demonstrated how to exercise a new form of *ijtihad*. Instead, they have resorted to a revision of earlier rulings, or to the application of secondary principles or laws based on expediency or the principle of public welfare. For them, in the absence of explicit declarations in the sacred sources, temporary measures such as necessity (*darura*) or the principle of no harm or harassment (*la darar wa-la dirar*) are sufficient to furnish new legal injunctions. Such postulations are haphazard and random at best. To be meaningful, Islamic reformation must transcend superficial and temporary measures.

The Role of Time and Place in the Reformation Process

It would be erroneous to conceive of Islamic law as inflexible and incapable of addressing the demands of changing conditions and circumstances. In the past, Shiʿi jurists responded to new challenges the community encountered by modifying the edicts they had previously issued. At the same time, Shiʿi jurists have often differed with their compatriots in their rulings. For example, even in the eleventh century, the differences between the *fatawa* (legal edicts) of Shaykh al-Mufid (d. 1022) and his student al-Sharif al-Murtada (d. 1044) exceeded one hundred.[78] Al-Mufid himself issued four different rulings regarding the number of days a mother should abstain from fasting after giving birth.[79]

Within Shiʿi circles, many traditions from the Imams stress that Islamic laws are interwoven to time and space and that legal enactments can be revised based on changing circumstances. This is a tacit acknowledgment that rather than being rigid and inflexible, Islamic law is malleable and can accommodate different circumstances and times. The theory that changes in *zaman wa makan* (time and place) demand a revision in rulings can be supported by many traditions. For example, ʿAli b. Abi Talib was asked about a Prophetic tradition that instructed his followers to dye their hair when they turned gray. This was apparently done so as to differentiate them from the Jews residing in Medina. ʿAli stated that since there were few Muslims in Medina during that period of the Prophet's life, there was a

[78] Mahdi Mahrizi, *Fiqh Pazhuhi* (Tehran: Sazman-i Chap va-Intisharat, n.d.), 2/34.
[79] Fayd, *Vizhegiha-yi Ijtihad va-Fiqh-e Puya*, 40–41. Mahrizi, *Fiqh Pazhuhi*, 2/34.

need to distinguish them from non-Muslims. Since the situation had changed in ʿAli's time, Muslims were free to choose whether to dye their hair or not.[80]

Throughout their history, Shiʿi jurists were fully aware of the need to amend their laws based on the circumstances of the times. Muhammad b. ʿAli al-Saduq (d. 991 also known as Ibn Babawayh) was one the first scholars to emphasize the need for change when necessary. Referring to the practice of a distinctive method of wearing a turban in his time, he says that the Prophet stated, "the difference between Muslims and Pagans is *al-talahhi*."[81] Al-Saduq then states, "this was [done] at the beginning in the early period of Islam."[82] For him, this form of donning a turban was only necessary when Muslims had to be distinguished and differentiated from non-Muslims.

In delineating why the practice of *tahannuk* was disregarded in his time, Fayd al-Kashani (d. 1680) a seventeenth-century scholar in the Safavid era, claims that social preferences and normative praxis had dictated that the practice of *tahannuk* be discarded. Al-Kashani explains that Muslims had practiced it in the past in order to differentiate themselves from those non-Muslims who wore turbans without letting the ends hang loose.[83] Since such a distinction was no longer necessary in his time the *tahannuk* was no longer to be observed. Thus, traditions that insist on observing the *tahannuk*, although correct, were now inapposite. Al-Kashani further adds that the practice of *tahannuk* had been discarded because it had now become *libas shuhra*, that is, those who observed it were derided and ridiculed by the laity. This is forbidden in Islam. Hence, the *tahannuk* was no longer practiced.[84]

The principle that laws can (and at times must) change based on *zaman wa makan* has been enunciated by many scholars throughout Shiʿi history. ʿAllama al-Hilli (d. 1325) states that certain rulings are not to be applied at all times, rather, "it is possible that a law is beneficial for a group of people at a specific time so it becomes mandatory, while the same law can be harmful for another group of people at another time, so it becomes prohibited."[85] It is possibly due to this

[80] Muhammad b. al-Hasan al-Hurr al-ʿAmili, *Wasa'il al-Shiʿa ila Tahsil Masaʿil al-Shariʿa* (Beirut: Dar Ihya' al-Turath al-ʿArabi, 1967), 2/87.

[81] This refers to the practice of passing a piece of the turban under the chin to cover the neck, a practice that is also referred to as *tahannuk*.

[82] Muhammad b. Ali al-Saduq, *Man La Yahduruh al-Faqih* (Qum, Jamiʿa al-Mudarrisin, 1983), 1/266.

[83] The practice is called *iqtiʿat*.

[84] Fayd al-Kashani, *Kitab al-Wafi*, 26 vols. (Isfahan: Kitabkhane Imam Amir al-Mu'minin Ali, 1985), 20/746. Liyakat Takim, "Black or White? The Turbanization of Shiʿi Islam," *The Muslim World* 108, no. 3 (2018): 548–63. On the question of *libas shuhra* being *haram*, see Muhammad Rida Muzaffar, *Usul al-Fiqh* (Beirut: Dar al-Taʿaruf, 1983), 1/199.

[85] Hasan b. Yusuf al-Hilli (ʿAllama), *Kashf al-Murad fi Tajrid al-Iʿtiqad* (Tehran: Dar al-Kutub al-Islamiyya, 1388), 173. Mavani, *Religious Authority and Political Thought*, 223. On Sunni references to the concepts of time and place, see ʿAli Ahmad al-Nadwi, *al-Qawa'id al-Fiqhiyya: Mafhumuha, Nasha'tuha, Tatawwuruha, Dirasat Mu'allafatiha, Adillatuha, Muhimmatuha, Tatbiqatuha* (Damascus: Dar al-Qalam, 1994), 27, 65, 158.

factor that ʿAllama al-Hilli cites divergent and at times conflicting *fatawa* in various books on the same issues.[86]

In demonstrating how Islamic laws are pliant and subject to alteration, Shams al-Din asks jurists to contextualize and modify laws based on time and space. Acts of worship (*ʿibadat*) do not require contextualization since such laws do not need alteration. Social laws (*muʿamalat*), on the other hand, are subject to change as circumstances dictate. For example, traditions that encourage the tasting of salt before starting a meal must not be taken at face value, but rather, are applicable to places that experience warmer climates where people tend to perspire more and need salt to replenish energy. Generalizing this law to places where the weather is cold is improper and can even damage a person's health.[87]

In recent times, in a letter sent to the scholars in the seminary in Qum, Ayatullah Khumayni stated that laws have to change in response to changes in political and economic circumstances.[88] He also emphasized that a *mujtahid* must be fully aware of the sociopolitical and other conditions of his time. Chess, for example was prohibited by the Imams because it was used as a device for gambling. Along with other jurists, Khumayni ruled that if, under current social conditions, it was played only to stimulate the intellect, chess should no longer be considered forbidden.[89]

In his discussion of the ownership of mines, Khumayni objects to the mainstream view that a person can possess whatever he excavates from a mine he discovers from his piece of land. Although he acknowledges the reliability of the *hadith*, Khumayni argues against the practice based on the principle of *zaman wa makan*. He states that in the past, extraction from a mine was subject to certain preconditions: it was legislated for a time when a person could only extract what he needed from a mine. In today's world, with the availability of modern machinery and technology, a person can extract far more than his basic requirements. Since the subject (*mawduʿ*) in the discussion has changed, Khumayni rules that a person cannot claim sole propriety to whatever he extracts from the land he owns.[90]

Khumayni goes beyond calling for revisions in laws. He appeals for the introduction of new legal prescriptions to deal with fresh issues. In recommending

[86] Jaʿfar Subhani, *Tadhkira al-Aʿyan* (Qum: Muʾassasa al-Imam al-Sadiq, 2010), 1/265–66. ʿAllama al-Hilli's *Mukhtalaf* cites a wide range of views espoused by Shiʿi scholars up to his time. See ibid., 1/255–56.

[87] Mohammad al-Mahdi Shams al-Din, *Al-Ijtihad wa'l-Tajdid fi al-Fiqh al-Islami* (Beirut: al-Muʾassasa al-Duwaliyya, 1999), 90–91. See also Sayyid Hossein al-Qazwini, "The Influence of Time and Place on Ijtihad," Third Shiʿi Studies Conference, The Islamic College, 2017, unpublished paper.

[88] Fayd, *Vizhegiha-yi Ijtihad*, 38.

[89] Jaʿfar al-Subhani, *Masadir al-Fiqh al-Islami wa-Manabiʿuhu* (Qum: Muʾassasa al-Imam al-Sadiq, 2007), 429–30.

[90] Rizq, *Maʿalim al-Tajdid al-Fiqhi*, 145–48 [transcribed notes of lectures delivered by Kamal Haydari].

the revision of laws or creating new ones, he identifies areas like ownership and its boundaries, land distribution, public wealth, cash and foreign currency, blood money, and religious punishments. He also calls for the revision of previous laws or the derivation of new ones on current topics such as the protection of the environment and nature, birth control, transgender surgery, issues related to surface and underground mines, international laws and their compatibility with Islamic law, performing obligatory rituals in the air or during space travels while moving in the opposite direction to the earth's movement or in the same direction. Khumayni further states that these topics represent only a small portion of the thousands of issues that people continuously encounter. Some of these have been discussed by the *fuqaha'* but no pragmatic solutions have been suggested yet.[91]

The principle of *zaman wa makan* is also discussed and expounded by Ayatullah Husayn 'Ali al-Muntaziri (d. 2009) who was, at one time, designated as Khumayni's successor. In his *Dirasat fi al-Makasib al-Muharrama*, he challenges several laws regarding the permissibility of buying and selling certain impurities. For example, al-Muntaziri quotes al-Mufid, Tusi, al-Muhaqqiq al-Hilli (d. 1277), and 'Allama al-Hilli, all of whom had opined that since blood is impure and has no commercial value, it cannot be sold. He also quotes 'Allama al-Hilli as stating that the sale of blood is impermissible due to the consensus of Shi'i jurists and because blood has no benefit. Al-Muntaziri casts doubts on the consensus and states that in the past, the sale of blood was prohibited because its usage was restricted to drinking purposes. Qur'anic verses and *ahadith* that forbid blood relate to this issue.[92] Since blood can now be used to save lives, its sale is no longer to be prohibited. Al-Muntaziri also questions the prohibition on selling dogs. He states that traditions that forbid selling them and even encourage killing dogs refer to wild and untamed dogs that endanger human lives. However, if a dog is tamed and trained then there is no reason to harm it or to prohibit its sale. For al-Muntaziri, since the subject matter has changed, dogs are no longer to be considered dangerous. Hence, the ruling on them should be revised.[93]

In addressing the ruling that prohibits women from inheriting land from their husbands, Kamal Haydari states that the law was, in all probability, formulated when the Muslim society was structured along strictly tribal and familial lines. Allowing a woman from one tribe or family to inherit land that was owned for generations by a different tribe or family could engender major social and economic upheavals and complicate the division of territories that prevailed in the

[91] Rizq, *Ma'alim al-Tajdid al-Fiqhi*, 177–78.

[92] Husayn 'Ali al-Muntaziri, *Dirasat fi al-Makasib al-Muharrama* (Qum: Nashr Tafakkur, 1994), 1/276.

[93] Ibid., 1/413. For examples of the role of time and space in changing juridical rulings see al-Subhani, *Masadir al-Fiqh*, 415–17. For examples of how the *'ulama'* have responded to changes in circumstances see ibid., 426 ff.

past. Since such concerns are no longer relevant, Kamal Haydari states that both the husband and wife should be able to inherit land from each other.[94]

Similarly, in his seminal work on legal rulings on women, the contemporary Iranian scholar Mahdi Mahrizi cites many examples of recent jurists revising their *fatawa* in response to different or new circumstances.[95] Many of these changes concern issues such as granting mothers greater custodial rights, determining the age of puberty for girls, allowing women to occupy the highest judicial positions, and empowering a wife to initiate divorce proceedings if she finds that living with her spouse to be difficult or detrimental to her well-being.[96]

The examples of rulings cited here are the product of the deliberations and revisions by the juristic interpretive communities based on new circumstances or a re-evaluation of the inferences of other jurists. The alterations, as mentioned, are due to variations in *zaman* and *makan*. To circumvent the accusation of altering Divine laws or those edicts reported from the Imams, Shiʿi jurists emphasize that such revisions to previous edicts can be attributed to changes in the subject matter (*mawduʿ*) rather than altering the rulings stated in the revealed texts. They emphasize this point so as not to be accused of challenging or contravening the famous Prophetic pronouncement that what is lawful and unlawful (*halal* and *haram*) will remain so until the Day of Judgment.[97]

Reformist Discourse among Seminarians

Besides the principle of *zaman wa makan*, jurists from within the traditional seminaries have also challenged and revised earlier rulings issued by their compatriots or predecessors based on their personal research and findings. In the process, they have issued highly controversial edicts. Interestingly, such revisions are not a new phenomenon, they can be traced to the early period of Shiʿi intellectual history. For example, Ahmad b. Muhammad (Muqaddas) Ardabili (d. 1585) allowed women to become judges. This was an anomaly at his time. Among his other controversial rulings was that the ritual ablution (*wudu'*) can be performed by using rose water rather than pure water. He had also ruled

[94] Sayyid Kamal Haydari, *Taʿammulat Intiqadi dar bareye Mabani-yi fiqh-i Mashhur*, https://youtu.be/OhrJd8vZ8kk, posted September 9, 2019.

[95] Mahrizi, *Masʾala al-Marʾa*, 131–32, 269–70.

[96] Ibid., 270. See also ibid., 105–106; on Bujnurdi's variant rulings, ibid., 108–109; on the reforms advocated by Fadlallah, ibid., 117–18. For examples of changes based on time and place, al-Husayni, *al-Ijtihad waʾl-Hayat*, 139–41.

[97] Interestingly, in one of his advanced *(kharij)* classes, Kamal Haydari was receptive to the idea that even if the subject remains unchanged, the laws can still be altered. The fact that this was mentioned in his classes but not in a printed format suggests he may not have wanted his views to be circulated to a wider range of scholars. This was mentioned to me by my research assistant, Hasan Doagoo.

that the People of the Book are intrinsically pure, a view that was also considered an aberration in his time.[98]

Revisions in juridical prescriptions can also be illustrated concerning the question of intergender interaction. Sayyid ʻAli al-ʻAla' al-Sabzawari (d. 1993), the author of a thirty-volume book called *Muhadhdhab al-Ahkam fi Bayan al-Halal wa'l-Haram* quotes Fadil al-Miqdad (d.1422) as stating that there was a consensus among Shiʻi jurists that it was not permissible for a man to look at the face of an unrelated (*ghayr-mahram*) woman.[99] Later on, Zayn al-Din al-ʻAmili (known as Shahid al-Thani, d. 1558) stated that jurists held three divergent opinions on looking at a *ghayr-mahram* woman without lustful desire: some allowed it but also considered it to be abominable (*makruh*), others prohibited it and a third group of scholars said that while the first glance was abominable the second was forbidden.[100]

The controversy on intergender interaction goes beyond looking at the face of an unrelated woman. It also covers communicating with or listening to the voice of a *ghayr mahram*. Classical Shiʻi jurists considered it forbidden to talk to or hear the voice of an unrelated women unless it was essential. Ahmad al-Naraqi (d. 1829) says that this is the most well-known (*mashhur*) *fatwa* among the jurists.[101] Fayd al-Kashani forbids uttering more than five words to a non-*mahram*[102] based on a *hadith* reported from Jaʻfar al-Sadiq.[103]

However, contemporary jurists have proffered a different opinion on the issue. The Iranian jurist Sayyid Taqi Tabataba'i al-Qummi (d. 2016) states that it is permissible to hear the voice of a non-*mahram* woman as long as no lust is involved. This has been agreed on by the current juristic interpretive community.[104] In contrast to the views expressed by the classical scholars, the criterion for considering whether a conversation with or a glance at an unrelated woman is permissible or not is no longer the question of necessity. Rather, it is whether there is any lust involved between the parties. This transition in criterion is significant. Among the classical jurists, any kind of conversation or interaction with the opposite gender was forbidden unless it was essential. Realizing the requirements and needs of the time, most contemporary jurists have permitted all forms of intergender interaction as long as there is no lust involved. However, jurists like

[98] Muhammad Ibrahim Jannati, *Tatawwur Ijtihad dar Hawze-ye Istinbat*, 2 vols. (Tehran: Mu'assasa Intisharat-i Amir Kabir, 2009), 2/279. Mahrizi, *Fiqh Pazhuhi*, 2/32–34.

[99] Sayyid ʻAbd al-Aʻla al-Musawi al-Sabzawari, *Muhadhdhab al-ahkam fi Bayan al-Halal wa'l-haram* (Najaf: Matbaʻa al-Adab, 1982), 5/232 http://lib.eshia.ir/10443/5/232.

[100] Al-Shahid al-Thani, *Masalik al-Afham ila Tanqih shara'i al-Islam* (Qum: Mu'assasa al-Maʻarif al-Islamiyya, 1992), 7:47, http://lib.eshia.ir/10151/7/47.

[101] Ahmad al-Naraqi, *Mustanad al-Shiʻa* (Beirut: Mu'assasa Al al-Bayt li Ihya' al-Turath, 2008), 16:66, http://lib.eshia.ir/10153/16/66.

[102] Al-Kashani, *Mafatih al-Shara'i* (Tehran: Madrese-ye Al-e Shahid Motahhari, 2017), 2:22, http://lib.eshia.ir/86886/2/22.

[103] al-Hurr al-ʻAmili, *Wasa'il al-Shiʻa* (Qum: Mu'assasa Al al-Bayt li Ihya' al-Turath, 1995), 20:212. http://lib.eshia.ir/11025/20/212.

[104] Al-Qummi, *Mabani Minhaj al-Salihin* (Qum: Qalam al-Sharq, 2005), 9:581. http://lib.eshia.ir/71843/9/581.

al-Khu'i and al-Sistani have cautioned that a person should not look at the face or hands of an unrelated woman even without lustful intent.[105]

The aforementioned Fayd al-Kashani also issued a number of rulings that opposed the *fatawa* of the majority of jurists. For example, he allowed singing in public, considered the People of the Book (*ahl al-kitab*) to be pure (*tahir*), maintained that offering Friday prayers instead of the midday prayers is obligatory on every individual, and that no *khums* is payable on savings accumulated from earnings and on agriculture during the occultation of the Imam,[106] a view that was voiced earlier by Muqaddas Ardabili.[107] In another highly controversial verdict, he stated that to beautify the human voice by singing is not *haram*.[108]

Most jurists have ruled that an apostate should be killed. In 2005 Ayatollah al-Muntaziri issued a *fatwa* in which he differentiated between changing a religion and the act of apostasy. In his ruling, al-Muntaziri maintains that a person has the right to change religion without being penalized, since this is one of his/her intrinsic rights. He further states that changing a religion after intellectual research without exhibiting hostility or enmity toward the truth (which he identifies with Islam) should not result in earthly punishment. For al-Muntaziri, changing one's religion based on rational proofs and provided the change does not precipitate chaos or encourage others to change their religion does not amount to a charge of apostasy.[109] Al-Muntaziri also maintains that the *hudud* (legal punishments), whatever form they may take, should not contravene what is considered reasonable by the public or violate the dignity of the perpetrator of the crime. Although al-Muntaziri does not say so explicitly, this probably means that punitive measures such as public lashing and stoning should be replaced by more dignified forms of punishments.[110]

Similarly, al-Khu'i refutes the ruling that a woman cannot leave her house without the husband's consent. He states that the tradition from which the ruling is derived is actually restricted to a particular context and cannot be applied universally.[111] Bujnurdi has challenged the traditional view that the testimony of

[105] https://www.al-islam.org/islamic-laws-ayatullah-abul-qasim-al-khui-sayyid-abu-al-qasim-al-khoei, #2442, 325; https://www.al-islam.org/islamic-laws-sayyid-ali-hussaini-sistani, #2442, 334.

[106] Fayd, *Vizhegiha-yi Ijtihad*, 381.

[107] Ibid., 493.

[108] See Habiballah Ahmadi, "Puya-ye Fiqh Islam," in *Ijtihad va-Zaman va-Makan*, 1/67 fn. 20. Both Muhaqqiq al-Sabzawari and Fayd al-Kashani maintained that the correct time of *maghrib* prayer starts when the sun sets. Fayd, *Vizhegiha-yi Ijtihad*, 426–27. This view is echoed by Fadlallah. Fadlallah, *Nazariyya fi al-Manhaj*, 64. For examples of how Ibn Idris differs with other jurists, see Jaʿfar al-Subhani, *Taʾrikh al-Fiqh al-Islami wa-Adwaruhu* (Beirut: Dar al-Adwa', 1999), 307–308 ff. Books were composed on the differences between the Shiʿis themselves. Ibid., 336–37.

[109] http://en.kadivar.com/2014/07/23/an-introduction-to-apostasy-blasphemy-religious-freedom-in-islam/ (accessed June 22, 2020).

[110] Hunter, *Reformist Voices of Islam*, 62.

[111] Mahrizi, *Masʾala al-Marʾa*, 164. Al-Sistani, on the other hand, states that it is prohibited for a woman to leave her house without the permission of her husband, even if she does not violate his rights by doing so. He further adds in the same *fatwa* that she should submit herself to his sexual

two women is equivalent to that of one man. He argues that, on the contrary, the Qur'anic verse (2:282) on this topic is restricted to a particular socioeconomic context that involved witnessing business transactions, and that in present times, since most women are literate and well educated, the testimony of a woman should be equal to that of a man.[112]

In his discussion of usury, Muhammad Baqir al-Sadr maintains that Islam prohibits usury (*riba*) only when the interest rate is exorbitant. According to him, verse 3:130 ("O you who have believed, do not consume usury, doubled and multiplied, but fear Allah that you may be successful") does not prohibit the charging of interest (*riba*) when lending money as long as it does not double and redouble, an act that would make the transaction exploitative. As long as it does not amount to the exploitation of a human being, giving or taking interest is permissible according to al-Sadr.[113] Kamal Haydari also questions whether the prohibition on *riba* is applicable when a community suffers from inflation. If the interest charged on a loan, for instance, is equal to or less than the rate of inflation, is it still prohibited to engage in interest? Without explicitly stating so, Haydari suggests that the prohibition on *riba* was legislated for specific economic purposes and may not be extended to all times.[114]

Fadlallah's publications from the 1990s onward speak in detail about the issue of political authority and representation, and especially about the participation of women in the public realm. In his *Dunya al-Mar'a* (The Woman's World) he states, "it is not prohibited for a woman to become a *marja'* in questions of jurisprudence if she possesses the required acumen, skills, and moral probity."[115] The only requirement for being a religious authority should be based on reason (*'aql*), and according to Fadlallah's later writings, reason does not discriminate between men and women. Fadlallah also maintains that the traditional requirement that a *marja'* must be male is "due to the patriarchal society of the past and because of inherited social customs."[116]

The Iranian reformer Ahmad Qabil, who was trained in the seminary in Qum, cites the views of various prominent Shi'i jurists like Muhammad Hasan al-Najafi (d. 1849), the author of *Jawahir al-Kalam*, and 'Allama al-Majlisi regarding the *hijab.* They did not believe that it was obligatory for a woman to cover her hair.[117]

desires. https://www.al-islam.org/islamic-laws-sayyid-ali-hussaini-sistani, #2421, 332. See the tradition on this: http://lib.eshia.ir/11025/20/212.

[112] Hunter, *Reformist Voices of Islam*, 65.

[113] Fayd, *Vizhegiha-yi Ijtihad*, 167.

[114] Khalil Rizq, *Ma'alim al-Tajdid al-Fiqhi: Mu'alijatu Ishkaliyya al-Thabit wa'l-Mutaghayyir fi al-Fiqh al-Islami* [transcribed notes of lectures by Kamal Haydari] (Qum: Dar Faraqad Publication, 2009), 149–57.

[115] Muhammad Hussein Fadlallah, *Dunya al-Mar'a* (Beirut: Dar al-Malak, 2003), 124–25.

[116] Muhammad Hussein Fadlallah, *Alf Su'al wa-Jawab* (Beirut: Dar al-Malak, 2004), 28.

[117] Ahmad Qabil, *Ahkam Banuvan dar Ahkam-i Shari'at-i Muhammadi* (Tehran: Shari'at Aqlani, 1977), 55–56, 66–67.

In fact, they stated that the edict on the covering of the hair is based on precaution rather than a clear requirement. Qabil argues that only the body of a Muslim woman must be covered, and that covering other parts of the body like the hair and neck are recommended but not required. His *fatwa* is significant because, as a trained seminarian, he issued a ruling based on traditional jurisprudential sources and principles. Based on his research, he concludes that there was no scholarly agreement that mandated the covering of the hair in public.[118]

Another reformist and somewhat controversial jurist is Ayatullah Saneʿi (b. 1937). He is one of the few Shiʿi jurists who has argued that women can lead men in all forms of prayers, including those held on Fridays. In his commentary on Ayatullah Khumayni's treatise on jurisprudence, Saneʿi contends that traditions which enumerate the conditions for leading Friday prayers are general in nature; they do not specify the gender of the prayer leader. He cites a tradition from an Imam (without specifying his identity) stating, "Do not pray behind one whose trustworthiness in religion is not established." Since women are considered trustworthy, Saneʿi argues that such traditions do not restrict the leadership of prayers to men. He further claims that a tradition in which the Prophet allowed Umm Warqa to lead her family in prayers at home, even if men were present, is reported in Shiʿi books too. This proves, for him, that the Prophet did not object to a woman leading men in prayers. Saneʿi also states that the arguments of those who prohibit women from leading prayers can be refuted. These arguments were discussed in great detail in his weekly lectures that were attended by many prominent jurists in 2001.[119]

Like Fadlallah, Saneʿi allows a woman to be *marjaʿ*, a position that has traditionally been restricted to men. He also issued a *fatwa* stating that a woman can be a president of a country, and that a girl does not need the permission of her father to marry as long as she is able to manage her own financial and social affairs.[120] In another controversial ruling, like Bujnurdi, he states that the testimony of men and women is equal. Most scholars have ruled that based on verse 2:262 in the Qur'an the testimony of two women is equivalent to that of one man. In fact, Saneʿi states that some traditions maintain that the testimony of one woman is acceptable.[121] In his analysis of the contents of the verse on female testimony (2:282), Saneʿi maintains that the verse does not address the issue of

[118] Lloyd Ridgeon, "Ahmad Qabil, a Reason to Believe and the New Religious Thinking in Iran," *Middle Eastern Studies* 56, no. 1 (2020): 10.

[119] Ayatullah Shaykh Yusuf Saneʿi, *al-Taʿliqa ʿala Tahrir al-Wasila* (Tehran: Mu'assasa al-ʿUruj, 2010), 1/269 fn. 2. Among the Sunni jurists, Muhammad Jarir al-Tabari (d. 923) also believed that a woman can lead men in prayers and serve as judges in all cases.

[120] Mahrizi, *Masʾala al-Marʾa*, 95–97. Both Ayatullah Ibrahim Jannati (b. 1933) and Fadlallah have given opinions along similar lines. Ibid., 98–103; 116–18.

[121] Fakhr al-Din Saneʿi, *Shahada al-Marʾa fiʾl-Islam: Qiraʾa Fiqhiyya* (Qum: Manshurat Fiqh al-Thaqalayn, 2007), 43, 54–55.

female testimony. Rather, it is concerned with protecting the rights of all parties in a contract drawn for the repayment of a debt. Thus, this verse does not apply to women's testimony in all instances.[122]

The examples cited thus far are important in demonstrating that, throughout the ages, Shi'i jurists have differed with each other on fundamental legal issues. What is striking in the discourse among the seminarians is the lack of appeal to ethical precepts or rational considerations in revising previous edicts. Unlike scholars such as Abdulaziz Sachedina, Abu'l-Qasim Fanaei, Kadivar, and Shabistari, in rejecting the opinions of previous or contemporary scholars, the seminarians do not appeal to ethical precepts or claim that the juristic pronouncements violate the Qur'anic principles of justice and fairness. Rather, in vindicating their juristic opinions, the seminarians focus more on the authenticity of traditions, the application of certain principles such as *zaman wa makan*, and the contradiction with other traditions, or they appeal to other principles outlined in Islamic legal theory.

The diversity of legal rulings on many issues is a clear indication of the central role played by human agency and reasoning in the conceptualization and interpretation of laws. The disparate and at times conflicting *fatawa* issued by prominent jurists also suggest that rather than rethinking and revising Islamic legal theory or suggesting a comprehensive reform program, they merely differ with other jurists on particular points of law. At most, their measures or revisions highlight distinctive interpretations or views. There is no discussion of reexamining or revising the current foundational parameters or epistemological basis of *usul al-fiqh*. As we shall see in chapter 5, the *ijtihad* that reformers advocate goes beyond modifying certain contentious *fatawa* or resorting to secondary principles such as necessity and *la darar wa-la dirar* (no harm or harassment).

The preceding discussion also highlights the fact that the normativity and singularity of Shi'i jurisprudence was challenged by Shi'i scholars themselves, who held a wide variety of views on a particular subject. Through their differences, they proved that Shi'i law was open to interpretation and revisions throughout its history. The scholars also differed among themselves regarding the mechanisms and extent of change.

Reform and Hermeneutics

Since an Islamic reformation necessitates the understanding and reinterpretation of textual sources, it is essential to discuss the concept of hermeneutics and its effects on a reading of sacred texts. The term "hermeneutics" refers to the

[122] Bauer, *Gender Hierarchy in the Qur'an*, 86.

"identification of principles and methods that are essential to the discernment and interpretation of the meaning of texts."[123] While the term dates back only to the seventeenth century, theories of textual interpretation actually date back to antiquity.[124] In recent times, hermeneutics has become even more important, especially as it involves not only a study and understanding of texts but also an ongoing process of deciphering hidden and abstruse meanings in a text.

Within the remit of an Islamic reformation, hermeneutics is important as, due to it, historical events and the readings of texts can become meaningful and be subject to changes at different times in history. To be sure, besides deciphering the ambiguous meanings of a text, hermeneutics also deals with the nature of a text, authorial intent, and how its comprehension can be shaped by the presuppositions and beliefs of those interpreting the text. This raises important questions concerning the role of the interpreter and his/her culture and society in any understanding of the text. Modern understandings of ancient religious texts like the Bible or the Qur'an necessitate a synthesis of the outlook of the interpreter with the worldview as represented by the text, thereby creating the meaning of the text anew.[125]

Theories regarding hermeneutics have been advanced by many scholars especially by the German theologian and philosopher Friedrich Schleiermacher (d. 1834), who was a towering and pioneering figure in the discipline of hermeneutics. He maintains that interpretation is pivotal in shaping the understanding of a text, but this does not reflect the reality that is independent of the subject. For him, there is no clear or objective meaning in a text that is available and accessible to everyone. Rather, a proper understanding of a text requires comprehension of the cultural and historical context of the author and his/her subjectivity and proclivities. Through hermeneutics, the interpreter is to relive the consciousness of the author and discover his/her intentions.[126]

Schleiermacher further argues that every "interpretation is the result of the relationship between the text and its interpreter and reflects the uniqueness of this relationship."[127] Thus, readings of the same text cannot be similar if they are undertaken by two different interpreters. Because of the potential it has for generating alternative readings of a text, the interpretive enterprise can produce new and at times very diverse understandings of the same text. Many scholars

[123] Dahlen, *Islamic Law*, 6, fn. 5.

[124] Farid Esack, *Qur'an, Liberation and Pluralism: An Islamic Perspective of Interreligious Solidarity against Oppression* (Oxford: Oneworld, 1997), 50.

[125] Van Harvey, "Hermeneutics," in Mircia Eliade ed., *The Encyclopedia of Religion* (New York: Macmillan , 1987), 6/280.

[126] Ibid., 6/281.

[127] Navid Kermani, "From Revelation to Interpretation: Nasr Hamid Abu Zayd and the Literary Study of the Qur'an," in Suha Taji-Farouki, ed., *Modern Muslim Intellectuals and the Qur'an* (London: Oxford University Press, 2004), 181.

were critical of Schleiermacher's theory. Wilhelm Dilthey (d. 1911) believed that Schleiermacher's theory ignores the role of various exogenous social and cultural factors that may sway and influence an interpretation. Dilthey further states that the theory does not consider the author's evolution and subsequent changes in his/her thoughts.[128]

In his *Truth* and *Method*, Hans-Georg Gadamer (d. 2002) strongly disagrees with the theories of both Schleiermacher and Dilthey. A scholar in the philosophical hermeneutical tradition, Gadamer maintains that an author's intentions are irrelevant and do not determine the meaning that a text produces. Hence, a researcher is not bound to or limited by it. Gadamer asserts, "Not just occasionally but always, the meaning of a text goes beyond its author. That is why understanding is not merely a reproductive but always a productive activity as well."[129] For him, it is the reader who is central and provides meaning to the text, whereas the author plays a minimal role. Due to this, the meaning of a text is often contested and negotiated and almost ineluctably evolves with time.[130]

Drawing on the Martin Heidegger's (d. 1976) analysis of *Dasein* (the human way to be), Gadamer argues that to understand how humans comprehend new experiences it is essential to consider their "familiar and common understanding" of what has already been experienced. Thus construed, there is no possibility of there being no presuppositions when an exegete interprets a text. The meaning derived by any exegete is thereby not independent of his personal experiences and prejudices and is actually embedded in his/her contextual subjectivities. Stated differently, readers are often influenced and affected by their social and cultural milieu, which precipitates a "horizon" of understanding. Due to this, no interpretation of a text is bereft of prejudice. Every text or object is interpreted from some subjective standpoint in a tradition that constitutes the horizon within which anything becomes intelligible. The horizon is modified as it encounters different objects, but there is no finality or complete objectivity in interpretation.[131]

Thus, a new understanding of a text occurs within the context of one's "preunderstandings." The "preunderstandings" in turn make possible one's understanding of anything new.[132] It is possible to surmise from this that, because of the presuppositions and horizon of understanding of a reader, s/he can sometimes read into rather than from the texts. Gadamer's theory of hermeneutics also confirms that there is no objective or neutral stance in reading texts hence

[128] Harvey, "Hermeneutics," 6/282.
[129] Victoria Harrison, "Hermeneutics, Religious Language and the Qur'an," *Islam and Christian-Muslim Relations* 21, no. 3 (2010): 209.
[130] See Abou el-Fadl, *Speaking in God's Name*, 122.
[131] Harvey, "Hermeneutics," 6/284.
[132] Harrison, "Hermeneutics, Religious Language and the Qur'an," 210.

there is a need to rehabilitate the concept of prejudice when interpreting texts. It can be argued that, due to the concept of different horizons of understanding and the preconceptions that a reader brings to the text, an interpreter can actually produce and generate a preconceived meaning rather than extract it from a text. Another major flaw in Gadamer's argument is that the preconceptions of an interpreter can engender a meaning from a text that the original author may not have intended or even conceived.

Since every interpreter brings his or her own precommitments and presuppositions to the text, the hermeneutics by a contemporary scholar will most likely vary considerably from that of a reader in the future. The meaning that is generated from the text will also differ between a reader and his/her peers. Therefore, the interpretation of a text can never be definitive or final. Neither can the meaning derived from a text be construed as normative or sacred. Gadamer's theory of textual hermeneutics accentuates the role of human agency in religion and the possibility of continuous change and evolution in understanding religious texts.

Based on Gadamer's theory, if understanding a text is premised on a reader's preunderstanding, then there can be no objective or neutral assessment of a treatise. His theory of hermeneutics and the idea of heterogeneous interpretations of a singular text also raises questions regarding the authority of a supposedly "orthodox" or official meaning of the Qur'an. It would be equally erroneous to claim an interpretation to be inviolable and universally applicable at all times. It should be borne in mind that the multiplicity of interpretations and the theory of an interpreter's preconceptions do not compromise or cast doubts on the sanctity of the text itself. It is the scripture rather than its interpretation that is sacred.

Like any other literal work, the Islamic canonical sources, the Qur'an and *sunna* also require interpretation. An interpreter's social environment and presuppositions will invariably shape how the scripture is understood by different readers and may reflect the basis used to decipher and interpret the text. In their articulation of the law, Muslim jurists interpret the Qur'an and the *hadith* corpus as well as statements of those who have formed the Islamic legal tradition, a process which has crystallized into normative texts. Since there is no ecclesiastical authority to prioritize one interpretation over another in Islam, it is improper to privilege past interpretations over present ones. For Muslim reformers, invoking hermeneutical theories in their analysis means that legal precepts and interpretations issued by scholars over the centuries can be challenged and revised based on the needs of contemporary times. It also means the acceptance of variegated interpretations of their sacred texts.

The Hermeneutics of Mojtahed Shabistari

A detailed discussion on hermeneutics and the impact it has had on Islamic studies is beyond the purview of this study. However, I do wish to highlight its significance to an Islamic reformation. To understand the role that religious texts can play in the reformation process it is essential to examine how they are read and interpreted in light of modern theories of hermeneutics. In his *Hermenutik, ketab va-sonnat* (Hermeneutics, the Book, and the *Sunna*), Mojtahed Shabistari focuses on scriptural exegesis and its relationship with the preunderstandings of the interpreter. He maintains that every text has a hidden reality that can only be revealed in the process of interpretation. It is only through hermeneutics that an interpreter can discern the possible intent of the author. The original intention of the author, in conjunction with the mode of textual communication, becomes important for Shabistari's hermeneutics because a text can only be properly understood by encountering the author.[133] Since the true intent of the author is disclosed only by interpretation, there is a need for a continuous engagement with the text so as to discern its proper and accurate meaning.

Influenced by Gadamer's theory of philosophical hermeneutics, Shabistari also claims that the prejudgments and presuppositions of an interpreter are an important prelude to an understanding of a text. The presuppositions of the interpreter can limit, expand, or shape how s/he formulates and poses questions and engages with the text. The interpreter's horizon of understanding and presuppositions, are, in turn, influenced by her/his consciousness and perception of surroundings.[134] Moreover, the interpreter's milieu, custom, and culture determine how s/he approaches the text. It is because of such factors that an interpretation of a text by a scholar living in the classical period of Islam will differ, sometimes significantly, from how the same text is viewed in contemporary times.

At the same time, the personal or theological views and predilections of a scholar will also shape and mold his/her interpretation. If, for example, a scholar believes in an ethical God who cannot command or condone an immoral deed then the scholar's faith-based presumptions will likely affect his/her interpretive activities and legal determinations. The scholar will therefore underscore and accentuate those verses in the Qur'an and traditions that resonate with her/his preconceived views. This will significantly shape the genres of exegetical analysis and juridical rulings issued. Similarly, if s/he believes that poverty is predetermined, then the scholar will conclude that the masses do not have a right to revolt against a repressive political system. Moreover, a text may be expressed

[133] Dahlen, *Islamic Law*, 176.
[134] Mojtahid Shabistari, *Hermenutik, Ketab va-Sonnat* (Tehran: Tarh-i Naw, 2002), 135.

in a certain format, but a jurist or exegete can steer it toward a specific determination. Because of this, texts can reflect the times, culture, and proclivities of erstwhile jurists or exegetes rather than of those who passively read the same manuals later on.

Shabistari's conceptualization of Islamic hermeneutics and the role of the jurists' preconceptions and epistemological horizons in the inference of laws suggests that the main cause of the disagreement among the *fuqaha'* is grounded in their notions and presumptions governing the texts. Due to this factor, the jurists' preferences and worldviews almost inevitably influence their hermeneutics and ultimately their legal adjudications. In order to avoid the possibility of arbitrary interpretations and statements, Shabistari insists that an interpreter's presuppositions and readings have to be analyzed, vindicated, and defended carefully. Through this entire process, questions like what motivated the author to write the text and how these can be deployed in our times will become clearer.[135]

Since every reader has his/her own presuppositions and predilections and there can be many divergent readings of the Qur'an and the *hadith* literature, there can be no final or immutable understanding of the sacred sources. The concept of a plurality of readings means that the interpretive process can never be closed nor can any exegete lock or fix a text into a specific and final determination. More significantly, no juristic interpretive community can lay claim to an exclusivist rendition of a text, nor can the possibility of re-engaging and reinterpreting the text be ruled out.[136]

Shabistari concludes that "no individual reading of the holy text can ever claim a full understanding because human consciousness and knowledge are continuously in the process of evolution."[137] Equally, there can be no official or normative interpretation of Islam that can speak on behalf of all Muslims. For Shabistari, the notion of "the only possible interpretation" fundamentally contradicts the idea of the plurality of preunderstandings, which shape the exegetes' varied approaches to scripture.[138] Proponents of an "official reading" approach the texts with the various preconceptions, prejudices, and conclusions they wish to extract from them and then impose their deductions on the community of believers.

The preceding discussion indicates that Islamic jurisprudence is a sum of cumulative rulings by different interpretive authorities who have contributed to

[135] Mojtahid Shabistari, *Naqdi bar Qira'at'i Rasmi az Din* (Tehran: Tarh-i Naw, 2000), 373, 366–67. Shireen Hunter, "Islamic Reformist Discourse in Iran: Proponents and Prospects," in Hunter, ed., *Reformist Voices of Islam*, 68–69.

[136] See Abou el-Fadl, *Speaking in God's Name*, 92, 132.

[137] Ghobadzadeh, *Religious Secularity*, 69.

[138] Eskandar Sadeghi-Boroujerdi, "Disenchanting Political Theology in Post-Revolutionary Iran: Reform, Religious Intellectualism and the Death of Utopia" (DPhil thesis, Oxford University, 2013), 236.

this discipline in the past and in the present. These rulings will inevitably comprise major scholarly differences and even contradictions. Hence, like any other discipline, there can never be a normative reading of *fiqh* that is beyond critique or refinement.

Besides arguing for a plurality of interpretations, Shabistari also stresses that textual hermeneutics goes through various stages or phases. An understanding of a text can, with the passage of time, become more enriching and lead to a better understanding of the same text. At each stage of this "hermeneutical cycle" (*dor-e hermenutik*), the interpreter begins with a different preunderstanding of the text and gradually progresses from one cycle of understanding to another.[139] The phrase "hermeneutical cycle" suggests an incremental and gradual comprehension of a text. The cycle starts with an understanding of parts of the text to a subsequent comprehension of the whole. Later, a fresh version of some parts of a text is deduced, followed by a new understanding. The process of interpretation can, in theory, be endless.[140] Hence, it is not possible to speak of an interpretation that is perfect, complete, or eternally valid. Similarly, no one can claim exclusive rights to the interpretive process and impose his/her understanding of religious scriptures on others. Shabistari's understanding of textual hermeneutics and interpretive cycles also suggests that a reader's precommitments and suppositions will change with time. This will result in changes in his/her understanding of the same text. Thus, it is always possible for new renditions to emerge as an interpreter's horizon of understanding expands. The concept of a hermeneutical cycle is essential due to perpetual changes in an interpreter's personal and social realities. In other words, there is a need to return to and reinterpret a text in response to new experiences or the emergence of new ideas in a reader's mind. Furthermore, every new engagement with the text provokes new questions and results in fresh deductions.

Through hermeneutics, an exegete is able to engage various situations from his/her own vantage point. Thus, a contemporary researcher approaches the texts based on his/her current preconceptions and searches for answers to issues that were not raised during the times of the Prophet or the Imams.[141] Shabistari's hermeneutics suggests that only when researchers continuously reinterpret texts from their peculiar vantage points can religion remain relevant and vibrant and speak to the lives of the people.

An important conclusion from Shabistari's theory of hermeneutics is the democratization of the interpretive process. His major contribution to Islamic reformation lies in his view that textual hermeneutics almost ineluctably result in

[139] Shabistari, *Hermenutik, Ketab va-Sonnat*, 20.
[140] Harrison, "Hermeneutics, Religious Language," 209.
[141] Shabistari, *Hermenutik, Ketab va-Sonnat*, 23.

exegetical pluralism and that one can never claim to have fully understood any text, religious or otherwise. In the process, he challenges the self-proclaimed status of the *'ulama'* as the sole custodians and interpreters of the sacred texts of Islam. Shabistari also challenges the authority of the consensus (*ijmaʿ*) of the *'ulama'*, since their agreement can be challenged and revoked by a fresh understanding of the texts. Shabistari's revisionist theory of textual interpretation also means that Muslim reformers can argue for diverse readings or revisions of the sacred texts, while, at the same time, acknowledging the validity of earlier readings during the authors' times. This ecumenical, revisionist outlook can make the classical texts more viable and relevant to contemporary times.

As noted before, the hermeneutical cycle is an ongoing enterprise that entails a continuous interpretation of texts. As sociocultural circumstances change, juristic interpretive endeavors need to respond continuously to those changes. In this way, Islamic jurisprudence becomes more pragmatic than dogmatic. The hermeneutical cycle also injects vibrancy and pluralism in Islamic law. In addition, it repudiates the contention of those jurists who monopolize the interpretive enterprise and impose their understanding of religious texts on others. As mentioned, there can be no reading of texts that is immutable and/or valid for all times. Nor can anyone be compelled to accept and adhere to a particular interpretation of religious texts.

The heterogeneity and diversity that the hermeneutical cycle, multiple readings, and continuous revision of texts can instill in a system can be discerned from the question of the extent of the authority of jurists. The prominent nineteenth-century Shiʿi jurist Muhammad al-Hasan al-Najafi had claimed that Shiʿi jurists possessed the comprehensive authority (*al-wilaya al-ʿamma al-mutlaqa*) that the Imams wielded because "if the *wilaya* was not all-encompassing, a great number of issues related to Shiʿis would have remained unattended to."[142] Likewise, his contemporary Mulla Ahmad al-Naraqi (d. 1829) argues forcefully that the *faqih* is the best creature of God after the Prophet and Imams and that his authority was akin to that of the Prophet and Imams.

Al-Naraqi's work exemplifies a hermeneutical activity that challenges the prevalent concept of juristic authority by revisiting and rereading earlier sources. In the process, based on his preconceived views regarding the nature of the authority of a *faqih*, he extends the authority of the *'ulama'* to well beyond what previous scholars had envisaged. In the same century, and reading the same texts, Najafi's student, Murtada al-Ansari, claimed that juristic authority is restricted to merely issuing legal edicts and arbitrating between litigants. He poignantly

[142] Muhammad Hasan al-Najafi, *Jawahir al-Kalam*, ed. Abbas Ghouchani, 43 vols. (Beirut: Dar Ihya' al-Turath al- 'Arabi, 1983), 21/393–94. See also Seyfeddin Kara and Mohammad Saeed Bahmanpour, "The Legal Authority of the Jurist and Its Scope in Modern Iran," *Journal of the Contemporary Study of Islam* 1, no. 1 (2020): 10.

and sarcastically remarks, "it would be easier to prove pigs fly than to prove all-encompassing authority (*al-wilaya al-ʿamma*) for the jurist."[143] Statements and conclusions such as these indicate that, based on the concept of the hermeneutical cycle and the presuppositions of different scholars, the same religious texts read by different scholars will yield drastically divergent conclusions. In recent times, the concept of the comprehensive authority of jurists (*wilaya al-faqih*) as promulgated by Ayatullah Khumayni in Iran has polarized the community as Shiʿi jurists have differed regarding the extent of a *faqih*'s authority.

Soroush and Reformation

One of the most controversial and yet important contemporary Muslim thinkers is Abdolkarim Soroush. Like other reformers, he maintains that there is a need for a substantial re-examination and revision of the Islamic legal tradition. He also elaborates and expands on the ramifications of the multitudinous readings and interpretation of religious texts. Although Soroush does not delve into hermeneutical theories and principles to the extent that Shabistari does, their arguments are broadly similar.

Initially, Soroush differentiates between religion and the human understanding of it. The latter, he maintains, is transient and historical. It changes and expands as the human understanding of religion develops along with other fields of learning. As such, no understanding of religion or interpretation of the revealed sources is sacred or absolute. Since the understanding of religion evolves with time, the conclusions of previous scholars can be challenged and even discarded with the passage of time. Muslims are therefore not bound to abide by the hermeneutics or statements made by erstwhile scholars and must continuously review and reinterpret texts based on the demands of their own times. This is because textual interpretation is an enterprise that is humanly constructed and conditioned by the milieu in which the interpreter lives.[144]

Soroush also argues that Muslims have not sufficiently differentiated between the mutable forms of Islam and its revealed essence. The latter reflect the foundational principles and essentials of religion that cannot be altered. The former, on the other hand, indicate the accidentals of religion and are subject to change. Since they have not drawn this distinction, Muslims have disregarded features such as diversity and polarization as the natural consequences of reading revealed texts. Reformation, for Soroush, means to revisit previous readings of

[143] Kara and Bahmanpour, "The Legal Authority of the Jurist," 11.

[144] Forough Jahanbakhsh, *Islam, Democracy and Religious Modernism in Iran (1953–2000): From Bazargan to Soroush* (Leiden: Brill, 2001), 148–49.

texts and simultaneously acknowledge the multivalent interpretations of their sacred scriptures. This is an ongoing enterprise that will continue for as long as Muslims revisit and interpret their literature.

Soroush's goal in distinguishing between religion, which is eternal and immutable, and religious knowledge, which is contingent, is to revive the understanding of Islam and to reconcile the religion with the demands of modernity.[145] He further maintains that the understanding and interpretation of religious knowledge occur in a given context and are the denouement of individuals who understand the world differently. In the process these individuals use their own specific presuppositions and methods. More specifically, the understanding of religion is subject to expansion and contraction due to the various genres of hermeneutics involved in it.[146] He also maintains that the fluctuation in religious knowledge is because the study of religion is interwoven with other disciplines of learning. As interpretations and conclusions in other disciplines change, they invariably impact and influence the knowledge and understanding in the religious sciences.[147]

According to Soroush, human knowledge is malleable and mutable. It is also conjectural, because, whereas the last religion has been revealed to mankind, the final religious interpretation has not.[148] Like Shabistari, he argues that with time, new and fresher understandings of religion can arise. As has been discussed, statements such as these directly challenge the authority of a major principle of law enshrined in Islamic legal theory, that is, the *ijmaʿ* of the scholars. Whereas Islamic legal theory insists that the agreement of scholars is one of the sources of Islamic law, Soroush maintains that as human understanding of religion expands, the interpretations and consensus of erstwhile scholars can be refined and even refuted.[149]

Since human beings are fallible and their knowledge of religion is subject to change, no religious authority can enforce a singular version or prefer one understanding of religion or religious texts over another. Consequently, a person who lives by his/her own religious experiences can be judged solely by God, not by another fallible being.[150] Equally, since an individual's episteme can impinge on the understanding of religious scriptures, there can be no singular or institutionalized interpretation of religious texts. There is no reason why

[145] Hunter, "Islamic Reformist Discourse in Iran," 80.
[146] Jahanbakhsh, *Islam, Democracy and Religious Modernism in Iran*, 148–49.
[147] I discuss his theory of contraction and expansion in chapter 5.
[148] Heydar Shadi, *The Philosophy of Religion in Post-Revolutionary Iran: Epistemological Turn in Islamic Reform Discourse* (New York: Routledge, 2019), 23.
[149] For a refutation of Soroush's theory of expansion and contraction, see ʿAbd al-Jabbar al-Rifaʿi, *al-Ijtihad al-Kalami: Manahij wa-Ruy'a Mutanawwiʿa fi al-Kalam al-Jadid* (Beirut: Dar al-Hadi, 2002), 271–72.
[150] Abdolkarim Soroush, *Qabz wa-bast-i te'orik-e shari'at: Nazariyyah-ye takamul-e ma'rifat-e dini* (Tehran: Mu'assasa-ye Farhangi-ye Sirat, 1996), 106–107.

a particular generation of exegetes should lay claims to an exclusive understanding or interpretation of the sacred texts. After all, the commentators in the medieval period were not bound to the commentary of the previous generation of scholars.

An important consequence of Soroush's insistence on the contingent nature of religious knowledge is his refutation of an "official interpretation of religion" (*qeraʾat-e rasmi az din*) by the state and/or the *'ulama'*. The latter subsist on their monopolization of religious knowledge and its imposition on the laity. An official or normative interpretation of religion can give rise to closing the gates of religious thought. Equally, the monopolization of the reading of religious texts by imposing one's interpretation on others cannot be accepted because, like other groups jurists are susceptible to their own prejudices and precommitments. As he states, no *faqih* interprets texts with a blank mind (*zehn-e khali*).[151] Remarks such as these resonate strongly with Shabistari's thesis that there is no complete or final interpretation of a text. It also challenges the concept of an official "normative" version of Islam and its sources.

Soroush's view of the contingency of human knowledge means that many rulings in Islamic law are not applicable eternally. These include laws such as amputating a hand for theft or stoning for adultery. Such a subjective and relativistic reading of sacred sources will inevitably precipitate multivariant understanding of texts that determine the religious practices in the community. This leads Soroush to assert the concept of multivalent readings of Islam and to also contend that there are multiple paths to the truth. Since diverse readings of the sacred sources are inevitable, there is therefore more than one singular path for attaining salvation. Such a posture will invariably precipitate diversity rather than uniformity in communal beliefs and practices.[152]

The concepts of Islamic hermeneutics, multivariate readings and interpretations of texts, the hermeneutical cycle, and the assertion that there can be no final or normative understanding of texts are important elements in the reformation process. For many jurists, the theory of textual hermeneutics that I have adumbrated is problematic because there is no authoritative figure or body to sanction or censure interpretations. In theory, hermeneutics can lead to a "free for all" understanding of religious texts. Such an approach can even compromise the sanctity of a text, since a reader can interpret a text according to his/her proclivities and horizons of understanding. It also raises questions regarding the validity of a particular reading of a text. This is the price that a religious tradition has to pay for the absence of a clerical or religious authority that can safeguard the sanctity and normativity of a text.

[151] Ibid., 487.
[152] Hunter, "Islamic Reformist Discourse in Iran," 78–79.

Conclusion

Juristic interpretive communities often construct and define a normative and authoritative hermeneutic of a text. Once it is specified, the authority and legacy that accompanies a text is transmitted to and imposed on the next generation of readers. It is also seen as embodying the normative and official position of a school. With time, texts can create a restrictive and well-defined position on an issue. Frequently, the contents of the texts are not as significant as the circumstances under which they are interpreted.[153]

The use of modern hermeneutics as a critical theoretical tool by Shiʿi reformists such as Soroush and Shabistari has challenged the traditional view of a normative and singular reading of sacred Islamic texts. The hermeneutical approach is important because of its insistence that the meaning of a text depends on diverse textual and contextual factors. Equally important, the multiplicity of interpretations does not compromise the sanctity of the original text. On the contrary, a text needs continuous interpretation if it is to remain relevant to and valid for the community to which it speaks.

Hermeneutics is also important since it helps explain and resolve differences and diversity within the scholarly community. At the same time, it grants flexibility and generates tolerance. The concepts of diversity and textual hermeneutics also bear testimony to the forbearance of the Lawgiver, who allows His subjects the freedom of interpretation and action. Muslim reformers need to maintain the sanctity of the Qur'an, on the one hand, and yet question and refine those views articulated by classical and medieval exegetes which do not comport with contemporary realities on the other.

[153] Stanley Kurtz, "Text and Context," in Joshua Cohen and Ian Lague, eds., *The Place of Tolerance in Islam* (Boston: Beacon Press, 2002), 51.

2

Usul al-Fiqh and *Ijtihad* in Shi'ism

A discourse on Islamic reformation requires a detailed and nuanced discussion of *ijtihad*. This is because the latter is an essential interpretive tool that jurists use in the derivation of legal injunctions. A discussion on *ijtihad* is also important because jurists invoke the principles anchored in Islamic legal theory (*usul al-fiqh*) in their exegetical analysis as to what constitutes the intention of the Lawgiver. This chapter explores the origins and subsequent development of both *ijtihad* and *usul al-fiqh* in Shi'ism and then explains the principles that jurists employ in extrapolating legal prescriptions. It also examines the multitudinous tools that a jurist has recourse to before enunciating a ruling on a particular subject.

Muhammad Baqir al-Sadr defines *usul al-fiqh* as "a study of the general principles [established] for the inference of a juridical ruling" (*al-'ilm bi-l'anasir al-mushtarika fi 'amaliyya istinbat al-hukm al-shari'*).[1] This discipline posits general principles through which a jurist can decipher or deduce laws from the normative sources.[2] Besides propounding principles for extrapolating laws from the revelatory sources, *usul al-fiqh* also furnishes the methodology and devices a jurist needs to infer laws on issues that are not explicitly mentioned in these sources.[3]

It should be also noted that whereas *usul al-fiqh* postulates general principles for the derivation of the law, substantive law (*fiqh*) applies those principles to

[1] Muhammad Baqir al-Sadr, *Durus fi 'Ilm al-Usul* (Beirut: Dar al-Kitab al-Lubnani, 1978), 1/38–39.

[2] The view that actual law is logically derived from principles established in Islamic legal theory has been contested by many scholars. Scholars have argued that the law actually unfolds in the midst of the needs of the community. Mohammed Fadel, for example, maintains that, in many cases, the actual impact of *usul al-fiqh* on the working out of the law was quite minimal. Sherman Jackson calls the dictum that Islamic legal theory is the exclusive determinant of the content of Islamic law a fiction. See Mohammed Fadel, "'*Istihsan* is Nine-Tenths of the Law': The Puzzling Relationship of *Usul* to *Furu'* in the Maliki *Madhhab*," in Bernard Weiss, ed., *Studies in Islamic Legal Theory* (Leiden: Brill, 2002), 161–76; Sherman Jackson, "Fiction and Formalism: Toward a Functional Analysis of *Usul al-Fiqh*," in Weiss, ed., *Studies in Islamic*. Behnam Sadeghi also argues that laws are the starting point, not the end result for Hanafi jurists. See Behnam Sadeghi, *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition* (New York: Cambridge University Press, 2015), xii.

[3] Norman Calder has aptly termed it a methodology whereby the *fuqaha*' related revelation to prescription. Norman Calder, "The Structure of Authority in Imami Shi'i Jurisprudence," PhD thesis (London: School of Oriental and African Studies, 1979), 173. Various other definitions are given for this discipline, See for example Muzaffar's definition in Muzaffar, *Usul al-Fiqh*, 1/9; Ja'far b. al-Hasan al-Hilli (Muhaqqiq), *Ma'arij al-Usul* (Qum: Sayyid al-Shuhada', 1983), 47. For a definition of *usul al-fiqh*, see also Mahdi 'Ali Pour, who mentions several definitions of *'ilm al-usul*. Mahdi 'Ali Pour, *al-Madkhal Ila Ta'rikh 'Ilm al-Usul* (Qum: Markaz al-Mustafa, 2011), 54–55. See Tusi's definition in Muhammad b. al-Hasan Tusi, *'Udda al-Usul*, 2 vols. (Qum: Sitare, 1995), 1/7.

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particular cases. Stated differently, *usul al-fiqh* sets forth guiding principles for the interpretation of revelation and its translation into prescription. Manuals on *usul al-fiqh* contain chapters discussing various subjects like linguistic signification (*dalalat al-alfaz*), commands (*awamir*), and interdictions (*nawahi*). Other sections in the texts of legal theory comprise discussions on injunctions that are general (*ʿamm*) or restricted (*khass*) in their application and those which are qualified (*muqayyad*) or unqualified (*mutlaq*) in their signification.[4] *Usul al-fiqh* also seeks to determine issues like how a word that appears in a text will be construed and the possible meaning/s it will connote.

Various genres of principles animate a jurist in engaging the legal issues that confront him. For example, when faced with conflicting traditions on a particular topic, a jurist must attempt to harmonize the contents of the traditions before examining their *isnad* (chain of transmission). The jurist would first invoke the Usuli principle of *al-jamʿ al-ʿurfi* to construe a commandment stated in a tradition as referring to preference rather than to a requirement to perform an act. Thus, for example, the normal denotation of a command when used in a sentence is that of incumbency. However, when a tradition that explicitly commands an act to be performed is countered with another tradition that states its opposite, a *mujtahid* can construe the directive to imply a strong preference for performing the act so as to reconcile the contents of the two opposing traditions.[5]

The same principle applies to interpreting verses in the Qur'an. Some imperatives cited in the Qur'an are seen as indicating an obligation to perform an act (e.g., 2:43) whereas others (24:33) designate a mere preference. Verse 5:2, "When you have left the sacred territory, then go hunting," is interpreted by jurists to mean that hunting outside the Kaʿba is an indifferent (*mubah*) act. Thus, depending on the context, scholars of Islamic legal theory have argued that the imperative form in a *hadith* may indicate an obligation, recommendation, or indifference.[6] It is because of such variances and disparate interpretations that some traditions command the performance of an act and yet other traditions indicate that the same act does not have to be undertaken.[7]

Another principle that is outlined and scrutinized extensively in *usul al-fiqh* is the probativity (*hujjiyya*) of a single narrator (*khabar al-wahid*). Most juridical rulings (*ahkam*) are derived from traditions reported from the Prophet and Imams. Since most *ahadith* (traditions) are narrated by isolated reports (*khabar al-wahid*) and there can be many contradictory reports on an issue, *usul al-fiqh*

[4] Calder, "The Structure of Authority in Imami Shiʿi Jurisprudence," 175.

[5] For examples of how this principle is used in the case of offering shortened prayers, see Liyakat Takim, "Offering Complete or Shortened Prayers? The Traveler's *Salat* at the Holy Places," *The Muslim World* 96, no. 3 (2006): 401–22.

[6] See for further details, see Wael Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1999), 48–49.

[7] Fayd, *Vizhegiha-yi Ijtihad*, 411.

poses questions such as, How does a *faqih* decide which tradition to accept in issuing a *fatwa*? Is he permitted to accept a *hadith* that has been transmitted by a single narrator? What do the contents in the traditions actually connote?

Another principle employed in this field is that of the "primacy of the apparent meaning." This is also called the probativity (*hujjiyya*) of the prima facie (*zuhur*) understanding of common usage. Basically, this principle considers whether a jurist can be confident that the apparent meaning that a word conveys is binding (*hujjiyya zuhur al-lafz*) or not. Does a word that is used in a *hadith* signify its apparent meaning? The principle of *hujjiyya zuhur al-lafz* states that unless indicated otherwise, the apparent connotation of a word is to be construed as the intended meaning and is therefore binding. In the absence of any contextual indicators, the first meaning that occurs in a person's mind when s/he hears it is assumed to be the closest to the linguistic or literal indication of the expression.

In assessing the intended meaning of a word or phrase, Muslim legists also assume that authors of a text are cognizant of the original meanings of words, the linguistic conventions of their language, and how words that are uttered or transmitted will be understood by the populace for which the message is intended. Jurists also assume that unless there is evidence to suggest otherwise, a speaker usually intends the normal or literal sense of the words s/he uses. For example, an indicator (*qarina*) may indicate that the speaker is using a specific word in a nonliteral sense. Under such circumstances, a listener would be justified in interpreting that word in a different manner.[8]

In demonstrating some of the principles delineated in *usul al-fiqh* and how they can be deployed to extract a *hukm* (sing. of *ahkam*) Muhammad Baqir al-Sadr quotes the *fatawa* given on three separate issues. These pertain to whether immersing oneself in water invalidates a fast, whether it is obligatory to pay the *khums* tax for one who inherits property from his father, and whether a prayer is invalidated by a person laughing out loudly while s/he is praying. In considering whether a fast is invalidated by submerging one's head in water al-Sadr states that a jurist would initially consult a *hadith* transmitted by Yaʿqub b. Shuʿayb, a companion of Jaʿfar al-Sadiq. The tradition states that a fast is invalidated by immersing the head in water. Before delivering a definitive verdict on this, a *faqih* would have to ensure that all the narrators appearing in the transmission of the tradition have been authenticated and deemed credible in the biographical works (*Kutub al-Rijal*). Biographical profiles (*tarajim*) would testify to their moral probity and reliability in transmitting traditions.

[8] Muhammad Baqir al-Sadr, *Lessons from Islamic Jurisprudence*, trans. Roy Mottahedeh (Oxford: Oneworld, 2005), 92–95. Also *Maʿalim al-Jadida li'l-Usul* (Beirut: Dar al-Maʿarif, 1989), 15–16. For an illustration as to how the interpretive process works, see Weiss, *The Spirit of Islamic Law*, 101.

Usul al-fiqh would also provide proofs to vindicate the acceptance of isolated traditions (*khabar al-wahid*) as having been approved by the Lawgiver. Moreover, *usul al-fiqh* would also clarify that the apparent meaning conveyed by the tradition, "one who fasts cannot submerge himself in water" is clear to the listener and authoritatively binding. The principles embedded in *usul al-fiqh* would further state that the denotation (*mafhum*) of the word *La* (a term used to indicate proscription) alludes to an interdiction from performing an act rather than preferred aversion (*kiraha*). Having sifted through and applied all the principles and proofs cited in the Usuli sources, the jurist will conclude that it is prohibited to submerge one's head in water when fasting.[9]

Usul al-Fiqh and Nontextual Sources

Islamic jurisprudence is much more than a series of ritual acts. It is a combination of a moral code of conduct that covers a wide array of activities ranging from the economic, political, cultural, religious, to the personal and social.[10] A necessary part of any legal system, including Islamic law, is the formulation of laws that respond to novel circumstances and changing societal needs. It is necessary, therefore, to explore the concepts and nuanced discourse that undergird Islamic legal theory so as to comprehend the tools and methodologies that Muslim jurists use in discovering moral-legal injunctions. To be sure, jurists have to link the principles enunciated in *usul al-fiqh* to real-time issues so as to deduce correct and binding edicts.

Shiʿi *usul al-fiqh* manuals are divided into two sections. The first segment expounds the methods of rendering juristic judgments from the authoritative sources of law, namely, the Qur'an, *sunna*, consensus (*ijma'*), and reason (*'aql*). Every part of *usul al-fiqh* is further subdivided into subsections. The domain of semantic discussions, for example, explores the possible connotations of a commandment (*amr*) and prohibition (*nahy*) of words that appear in the texts. As explained before, Usulis discuss, for example, whether a command in a text conveys an obligation, recommendation, or mere permission to perform an act, and whether an interdiction indicates that an act must not be performed or whether it refers to mere disapproval (*makruh*) of the act.[11]

This section also investigates and expounds the wide array of terms that appear in legal texts. Words are divided into various categories ranging from

[9] Baqir al-Sadr, *Durus fi 'ilm al-usul*, 1/38–40. Baqir al-Sadr, *Lessons*, 37–38.

[10] Zackery Heern, *The Emergence of Modern Shiʿism: Islamic Reform in Iraq and Iran* (London: Oneworld, 2015), 44.

[11] For details of these, see Hossein Modarressi, *An Introduction to Shiʿi Law: A Bibliographical Study* (London: Ithaca Press, 1984), 10.

perspicuous and unclear (*zahir* and *mubham*), ambiguous and explicit (*mujmal* and *mubayyan*), general and restricted (*ʿamm* and *khass*), to absolute and restricted (*mutlaq* and *muqayyad*).[12] The second segment of *usul al-fiqh* expounds the interpretive rational devices that a jurist can use when the revealed sources are either ambivalent or reticent on an issue. This section focuses on the premises and the scope of four general procedural principles (*al-usul al-ʿamaliyya*): the principles of exemption (*baraʾa*), continuity (*istishab*), precaution (*ihtiyat*), and choice (*takhyir*). As will be explained later in this chapter, these four principles have assumed great importance in modern Shiʿi juristic discourse. Especially since the time of Murtada al-Ansari (d. 1864), considerable scholarly effort has been expended on elaborating the methods and modes of their application.

A central question for any assessment of *ijtihad* concerns the nontextual sources that a *mujtahid* has at his disposal. More specifically, in conjunction with the Qur'an and *hadith*, on what sources should new prescriptions be based? Can a jurist use rational constructs outside the revealed texts? This question is one of the main distinguishing features between the Sunni and Shiʿi legal schools. Sunni jurists concur that consensus (*ijmaʿ*) and analogy (*qiyas*) are legitimate sources to be used in addition to the Qur'an and *hadith*. They also accept principles like *istihsan* (juristic preference based on what is most appropriate under the circumstances), *maslaha* (a ruling that is conducive to the public welfare), and other tools in the derivation of legal injunctions. Scholars of the Usuli school of thought (which has been the dominant school in Twelver Shiʿism since the eighteenth century), on the other hand, reject *qiyas* as a source from which the law can be derived. Instead, they maintain that consensus (*ijmaʿ*) and reason (*ʿaql*) constitute the third and fourth sources, respectively.

Besides the two sections mentioned, Usuli texts also contain a chapter on the contrariety between the textual sources and methods for resolving the contradictions between them. Most treatises also insert a discussion of the qualifications and stipulations of a jurist who issues legal verdicts as a result of his intellectual endeavors (*ijtihad*) and the conditions required of a jurist whose legal decisions are binding and must be followed by the masses.[13]

Ijtihad during the Times of the Imams

Having examined the definition, contents, and some of the principles that undergird *usul al-fiqh*, I now explore its genesis and subsequent development in Shiʿi intellectual history. Since *usul al-fiqh* and *ijtihad* are deeply interlaced, an

[12] Ibid.
[13] Ibid., 10–11.

analysis of the history and evolution of Shiʿi legal theory requires an examination of the various forces that led to the development of *ijtihad* and the interpretive tradition in Shiʿism.

After the Prophet Muhammad passed away, the need to deploy rational tools in deriving legal norms was sensed by the majority of the Muslims. This was because the Prophet's death had signaled the termination of authoritative guidance in the form of textual sources (the Qur'an and Prophetic practices). Henceforth, Muslims could only approximate God's will by devising and applying various tools like *qiyas*, *ijtihad*, *ra'y* (personal reasoning), and *istihsan* when a particular solution to a legal problem could not be extracted from the revelatory sources.

The Shiʿis, on the other hand, rejected *ijtihad* as a methodological tool during the physical presence of the Imams (up to 874 CE), since their presence obviated the need to resort to independent reasoning. For the Shiʿis, reasoning is not able to arrive at conclusions that are based on certitude because it is considered to be faulty and fallible. Statements and acts of the Imams are considered to be as binding as those of the Prophet himself, and hence as part of the *sunna*. This was because the Imams are considered to be infallible interpreters and expositors of the Divine message. Significantly, due to their aversion to personal reasoning, terms like *ijtihad* and *mujtahid* were not used by the Imams. The Imams were neither called *mujtahids* nor did they use the appellation to refer to any of their companions.[14]

It should be remembered that, during this period, the term *ijtihad* was often used to refer to the personal judgment (*ra'y*) of a scholar. Due to this factor, *ijtihad* was perceived pejoratively by the Shiʿis. They repudiated *ijtihad*, as it could only lead to an opinion that was based on probability rather than certitude. This may explain why tenth-century Shiʿi scholars like the Nawbakhtis and ʿAbd al-Rahman al-Zubayri composed treatises condemning the use of *ijtihad*.[15]

Despite the denunciation of *ijtihad* and *ra'y* among Shiʿi circles, a number of the close associates of the Imams like Muhammad b. Muslim (d. 767) and Hisham b. al-Hakam (d. 807) applied personal reasoning and their understanding of the Imams' teachings when preaching to the Shiʿi community. On many occasions, the Imams reproached and even cursed these disciples for deviating from their teachings.[16] The usage of independent reasoning by the Imams' associates can be further adduced from reports that some of them issued juridical opinions based

[14] Liyakat Takim, "A Brief History of *Ijtihad* in Twelver Shiʿism," in Mohsen Eslami, ed., *Shia Tradition and Iran: Contemporary Global Perspectives* (New York: Global Scholarly Publications 2013), 82.

[15] Ahmad b. ʿAli al-Najashi, *Kitab al-Rijal* (Qum: Maktaba al-Dawari, 1976), 152–53; Modarressi, *An Introduction*, 30.

[16] Takim, *The Heirs of the Prophet*, 94–106. Also Muhammad b. ʿUmar Kashshi, *Ikhtiyar Ma'rifa al-Rijal*, ed. al-Mustafawi (Mashhad: Danishgahi Mashhad, 1969).

on their personal interpretation of the Imams' teachings. The following anecdote exemplifies this:

Muʿidh b. Muslim said:

> Al-Imam al-Sadiq said to me, "I understand that when you are in the mosque you issue *fatawa*." I said, "Yes, I do that." I then said to him, "I would like to ask you something before I depart: When I sit in the mosque, someone often asks me something. If I am aware that he is against you and [yet] acts based on your edicts, I cite a legal opinion that is in accordance with his school. However, if I realize that he is among your companions, I issue a ruling based on your school. But if I am not sure which group he belongs to I give him various *fatawa* and insert your edict among them." The Imam responded, "Continue along the same lines because this accords with my method."[17]

Shiʿi scholars of the Buyid period (945–1055) freely admitted that some disciples of the Imams had resorted to independent reasoning and *qiyas* in arriving at legal decisions. Al-Sharif al-Murtada says companions of the Imams like Yunus b. ʿAbd al-Rahman (d. 823) and Fadl b. Shadhan (d. 873–4) had issued judgments based on *qiyas*.[18] The prominent disciple of the tenth and eleventh Imams Fadl b. Shadhan, had allegedly depended on *ra'y* in arriving at decisions on matters relating to divorce and inheritance.[19] He is also accused of deploying *qiyas* in resolving legal issues, a point that is highlighted by the famous jurist al-Saduq.[20]

Many guidelines regarding the proper procedures for deriving laws from the revealed sources were prescribed by the Imams themselves. In fact, traditions state that the Imams instructed their disciples on how to derive laws based on the procedures and principles they taught them. For example, Shiʿi sources claim that the Imams Jaʿfar al-Sadiq and ʿAli al-Rida (d. 818) said, "It is our duty to set forth and explain the major principles (*usul*) to you, and it is up to you to deduce the rulings [from them]."[21] Several traditions indicate that the Imams had also taught some of their prominent companions certain Usuli principles. According to a tradition reported from Zurara b. Aʿyan:

[17] Al-Hurr al-ʿAmili, *Wasa'il al-Shi'a*, vol. 18, hadith # 37.

[18] Cited in Muhammad al-Mahdi Bahr al-ʿUlum, *al-Fawa'id al-Rijaliyya* (Najaf: 1965), 3/215 (quoting from an unpublished text of al-Murtada's *Risala*).

[19] Bahr al-ʿUlum, *Fawa'id*, 3/215–19. Modarressi, *Introduction*, 30.

[20] Al-Saduq, *Man La Yahduruhu'l-Faqih* (Qum: Imam al-Mahdi, 1983), 4/197. See Takim, *The Heirs of the Prophet*, chapter 3, for a more extensive discussion on this.

[21] Muhammad b. Ahmad b. Idris, *Mustatrafat al-Sara'ir* (Qum: Madrasa al-Imam al-Mahdi, 1987), 575. See a similar tradition from the eighth Imam ʿAli al-Rida cited in al-Hurr al-ʿAmili, *Wasa'il al-Shi'a*, 27/42.

> I said to Abu Jaʿfar (al-Baqir), "May I be sacrificed for you, when two conflicting *hadith* are transmitted which one of them should we accept?" He replied, "Accept that which is accepted by your companions and reject the unfamiliar tradition." I [then] said, "What shall we do if both of them are well-known (*mashhur*)?" He said, "[in that case] accept that which appears more upright (*aʿdal*) and trustworthy (*awthaq*)." I then said, "What do we do if both are upright and trustworthy?" The Imam said, "See which of them agrees with the opinions of the *ʿamma* (i.e., Sunnis). Abandon that view and take the [one that] contradicts what the *ʿamma* accept, for the truth lies in what is opposed to their view." I said, "At times we are confronted with two traditions that agree with the *ʿamma* or both oppose their views; what should we do in such cases?" The Imam said, "Choose that *hadith* which is closer to caution (*ihtiyat*) and disregard the other one." I said, "What shall we do if both traditions accord with [the principle of] caution or if both oppose it?" He then responded, "In that case, choose any one of them and abandon the other one."[22]

Whether factual or contrived, the tradition demonstrates that some principles of legal theory were expounded by the Imams and that these were often invoked by their disciples to arrive at legal decisions. Other traditions indicate that the Imams—especially Jaʿfar al-Sadiq—were questioned about the principles and rules (*qawaʾid*) for deducing and formulating laws. In response, the Imams adumbrated some of the principles behind the laws. The principle of *baraʾa* (exemption of duty—to be examined later), for example, is reported in many traditions from the Imams.[23]

In addition, the Imams reportedly provided instructions on how to formulate laws when there are no guidelines outlined in the revealed sources. Such instructions were used by subsequent jurists in the development of *usul al-fiqh*. Shiʿi scholars also cite as evidence some tracts that were reportedly composed by their disciples. In particular, they claim that Hisham b. al-Hakam, a disciple of the sixth and seventh Imams, had composed a book on linguistics and that the aforementioned Yunus b. ʿAbd al-Rahman had reportedly written a short treatise on *usul al-fiqh*.[24] Further illustrations of debates on *usul al-fiqh* among the Shiʿis during this period are demonstrated

[22] Muhammad b. ʿAli (Ibn Abi Jumhur), *ʿAwali al-laʾali al-ʿAziziyah fi al-Ahadith al-Diniyya*, 4 vols. (Beirut: Matbaʿa Sayyid al-Shuhada, 1983), 4/133.

[23] ʿAli al-Fadil al-Najafi, *ʿIlm al-Usul: Taʾrikhan wa-Tattawuran* (Qum: Matbaʿa Maktab al-Iʿlam al-Islami, 1997), 35–37. Explicating this principle, al-Sadiq is reported to have stated that everything is permitted unless you are certain that it has been prohibited. al-Najafi, *ʿIlm al-Usul*, 38. For a discussion of other principles ibid., 39.

[24] Al-Hasan al-Sadr, *Taʾsis al-Shiʿa* (Tehran: Manshurat al-Aʿlami, n.d.), 310–11; also Adnan Farhan, *Haraka al-Ijtihad ʿInd al-Shiʿa al-Imamiyya* (Beirut: Dar al-Hadi, 2004), 238–42.

by a report that Darim b. Qabisa, a companion of al-Rida, had reportedly compiled a book on the abrogating (*nasikh*) and abrogated (*mansukh*) verses of the Qur'an.[25]

Even if these claims are accepted, there is no evidence to indicate that systematic or well-defined principles of *usul al-fiqh* were formulated or articulated by the companions of the Imams. While traditions definitely state that the Imams had taught their disciples some principles that were applied by later scholars of *usul al-fiqh*, there is no proof to indicate that a full-fledged or properly articulated system of this discipline had been worked out during their times. Since the disciples of the Imams questioned them on issues pertaining to jurisprudence, the Imams explicated some principles which they could use in deducing legal opinions. The Imams, for example, are reported to have taught the disciples how to resolve conflicting traditions or what conclusions to reach in the absence of any revelatory proof.

A close review of Shiʿi biographical and juridical texts indicates that treatises regarding topics discussed in *usul al-fiqh* manuals were composed soon after the short *ghayba* period (874–940) began. Ibn al-Nadim (d. 990) recorded two treatises written by Abu Sahl al-Nawbakhti (d. 924) which suggests that the topic of *usul al-fiqh* was already addressed, if not practiced, by the Shiʿis of that era. The first treatise was a refutation of Muhammad b. Idris al-Shafiʿi's (d. 820) *Risala*. The second work discusses the general or specific principles in *usul al-fiqh*.[26]

Abu Sahl's nephew, the famous heresiographer, Hasan b. Musa al-Nawbakhti (d. 912–921), is also reported to have written two treatises on the specific and general rules and the validity of using isolated traditions.[27] According to Ibn al-Nadim, Abu Sahl also wrote on other Usuli principles like the invalidity of *qiyas*, and a refutation of the *ijtihad* of Ibn Rawandi.[28] According to Devin Stewart, Shiʿi texts on *usul al-fiqh* may have been composed in the early Buyid period, although they are no longer extant. More specifically, he believes that ʿAli b. al-Husayn b. ʿAli al-Masʿudi (d. 956), the famous historian, may have written a tract on the subject.[29]

[25] ʿAli Pour, *al-Madkhal Ila Ta'rikh*, 85.

[26] Muhammad b. Ishaq ibn al-Nadim, *Kitab al-Fihrist*, trans. Bayard Dodge. 2 vols. (New York: Columbia University Press, 1970), 1/440.

[27] Najashi, *Kitab al-Rijal*, 24. Abu'l-Qasim al-Khu'i, *Muʿjam Rijal al-Hadith*, 23 vols. (Beirut: Dar al-Zahra, 1983), 5/142. Ahmad Kazemi Moussavi, *Religious Authority in Shiʿite Islam: From the Office of Mufti to the Institution of Marjaʿ* (Kuala Lumpur: ISTAC, 1996), 76–77.

[28] Al-Najafi, *ʿIlm al-Usul*, 73.

[29] Devin J. Stewart, *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System* (Salt Lake City: University of Utah Press, 1998), 137–39.

Ijtihad during the Major Occultation of the Twelfth Imam

During the minor occultation, Shiʿi scholars continued the trend of citing traditions in expounding legal precepts. This was, in all probability, because of the presence of many texts that included the four hundred *usul* works (*al-usul al-arbaʿu mi'a*) that had been compiled by the Imams' associates.[30] At this time, the process of extrapolation of legal prescriptions was not imbibed with the complex and obfuscating principles of Islamic legal theory. This was because Shiʿi scholars like Muhammad b. Yaʿqub al-Kulayni (d. 941) and al-Saduq were engaged primarily in amassing and recording traditions from the Imams.

The penchant for collecting and recording traditions and issuing legal decrees based on *hadith* reports was a salient trait of the scholars in Qum like al-Saduq, a feature that continued until the tenth century. To further vindicate their practice, the scholars cited traditions from the Imams that denounced Sunni interpretive tools like those of analogical deduction (*qiyas*) and independent reasoning (*ijtihad*). The negative stance toward Sunni legal practices was premised on the view that *ijtihad* was a deductive process based on personal conjecture[31] and therefore had no legal basis in the *shariʿa*. Due to this, the term *ijtihad* was used in a disparaging way by the Shiʿis until the thirteenth century. The denunciation of *ijtihad* during this period also indicates that Shiʿi jurists wanted to construct a legal edifice that was devoid of any doubt or uncertainty.

With the passage of time, Shiʿi *fuqaha'* sensed the need to respond to newer issues and novel circumstances that emerged during the post-*ghayba* period. They also realized that, in their deliberations, they had to go beyond the narrow confines of citing and extrapolating laws from the Imams' traditions. The first Shiʿi jurist who is reported to have used *ijtihad*, albeit in a rudimentary form, was Abu Muhammad al-Hasan b. 'Aqil al-Hadhdha', also known as Ibn Abi 'Aqil (fl. 9th CE). His book titled *al-Mutamassik bi habl-i Al al-Rasul* is mentioned by the Shiʿi biographer al-Najashi (d. 1058–9) as one of the most acclaimed texts on the subject. In this work, Ibn Abi 'Aqil considers and critiques some of the principles employed in rendering juridical proclamations. Although Ibn Abi 'Aqil's work is no longer extant, Ayatullah Ibrahim Jannati (b. 1933), a contemporary Iranian Shiʿi scholar, stresses that Ibn Abi 'Aqil mentions some of the hermeneutical strategies of *usul al-fiqh* that were developed and elaborated on by subsequent jurists.[32] Prior to Ibn Abi 'Aqil's time, Shiʿi jurisprudence took the form of narrating and interpreting traditions. There was little, if any, rational element

[30] An *asl* is a notebook that comprises traditions heard directly from the Imams. See Takim, *The Heirs*, 122; Takim, "A Brief History of *Ijtihad* in Twelver Shiʿism," 84–85.

[31] The term "conjecture" is used to refer to a conclusion reached by surmising or one that is based on probability.

[32] Jannati, *Tatawwur Ijtihad dar Hawze-ye*, 1/227.

involved, especially as very few derivative principles had been formed by this period.[33]

Another important Shiʿi scholar was Muhammad b. Ahmad al-Katib al-Iskafi (d. 991), also known as Ibn Junayd. He elaborated and expounded the principles of *ijtihad* in several works on jurisprudence. The most significant of these are *Tahdhib al-Shiʿa li-Ahkam al-Shariʿa* and *al-Mukhtasar al-Ahmadi li al-fiqh al-e Muhammadi*. He also composed a treatise on *usul al-fiqh* titled *Kitab al-Ifham li-Usul al-Ahkam*. Scholars who read this work, like Abu Jaʿfar b. Maʿd al-Musawi, remark that they had not seen a more articulate or well-researched juridical tract than Ibn Junayd's work.[34]

Due to their predilection for speculative analysis and rational arguments, both Ibn Abi ʿAqil and Ibn Junayd were pioneers in Shiʿi deductive law. Although they resorted to reasoning in inferring legal precepts, their approach was quite different. Generally speaking, Ibn Abi ʿAqil depended mainly on the Qur'an and *mutawatir* (widely transmitted) *hadith*. This is because he did not accept isolated traditions as reliable sources for legal practices. Ibn Junayd's approach was quite different in that he was more inclined to deploy reason (*ʿaql*) and to explore the rationale behind the precepts of the *ahkam*. He disagreed with Ibn ʿAqil in that he considered *khabar al-wahid* (isolated tradition) to be a legitimate source of law.[35] Both Ibn Abi ʿAqil and Ibn Junayd were excoriated and marginalized by the Buyid scholars, al-Mufid, al-Murtada, and Tusi.

Although Ibn Abi ʿAqil's works were appreciated by many, his juridical opinions were not circulated or quoted until the time of the scholars of Hilla in the thirteenth and fourteenth centuries.[36] Ibn Junayd, on the other hand, was widely condemned by Shiʿi scholars for employing *qiyas* and *ijtihad* in his legal opinions. For example, al-Mufid criticizes him for his dependence on *qiyas* and *raʾy*,[37] and al-Murtada attacks Ibn al-Junayd for his reliance on rare traditions (*akhbar shadhdha*), speculations, and the usage of *ijtihad* and personal opinion.[38] Such stratagems had introduced elements of uncertainty and speculation in Shiʿi jurisprudence. It has to be remembered that these were precisely the charges that the Shiʿis had leveled at the Sunnis.

It was the scholars of Hilla, starting with Ibn Idris al-Hilli (d. 1202), who quoted and lauded the works of both Ibn ʿAqil and Ibn Junayd. In fact, both

[33] Ibid., 1/228.

[34] https://www.al-islam.org/al-tawhid/general-al-tawhid/ijtihad-its-meaning-sources-beginnings-and-practice-ray-muhammad-ibrah-4.

[35] Takim, "A Brief History of *Ijtihad* in Twelver Shiʿism," 85.

[36] Ali Rizek, "Scholars of Hilla and the Early Imami Legal Tradition: Ibn Abi ʿAqil and Ibn al-Junayd, 'The Two Ancient Scholars,'" in Sebastian Günther, ed., *Knowledge and Education in Classical Islam: Religious Learning between Continuity and Change*, 2 vols. (Leiden: Brill, 2020), 799–800.

[37] Al-Mufid, *al-Masaʾil al-Sarawiyya* (Qum: n.p. 1992), 58–59.

[38] Rizek, "Scholars of Hilla and the Early Imami Legal Tradition," 801–804.

Muhaqqiq and ʿAllama al-Hilli copiously quote and refer to them in their works. The disparaging remarks of the Buyid scholars were replaced by more laudatory and positive comments by the jurists of Hilla.[39] It is possible that one of the reasons for this change in attitude was that this period witnessed an epistemological transition whereby the scholars of Hilla had to accept some form of speculation and conjecture rather than insisting on complete certitude in the derivation of religious ordinances. By accepting *ijtihad* and *qiyas* as legitimate principles in *usul al-fiqh* Ibn al-Junayd had relinquished a key strategy in Shiʿi polemics against the Sunnis, namely basing their jurisprudence on certitude rather than conjecture. Paradoxically and perhaps unintentionally, Ibn Junayd's methodology brought Shiʿi jurisprudence closer to its Sunni counterparts.

Later scholars claimed that Ibn Junayd had regretted his use of *qiyas* and abnegated it. Others tried to reinterpret and recast his methodological approach. The contemporary jurist Ayatullah al-Sistani for example, maintains that accusations of deploying *qiyas* leveled against Ibn Junayd and other Shiʿi scholars are misplaced because the term *qiyas* was used in a different and wider connotation at that time. *Qiyas*, according to al-Sistani, was also used to denote consistency with the spirit of the text (*al-muwafaqa al-ruhiyya*) rather than referring to analogy, as is popularly assumed.[40]

Shiʿi *Usul al-Fiqh* Works in the Buyid Era

The earliest extant Shiʿi works on *usul al-fiqh* can be traced to the Buyid period. More specifically, the three most important scholars during this period, Shaykh al-Mufid, al-Sharif al-Murtada, and Shaykh Tusi all composed works in this field. Al-Mufid's work on the subject titled *Tadhkira fi Usul al-Fiqh* provides a critique and further elaboration on the *usul* methodology that had been established by both Ibn Abi ʿAqil and Ibn al-Junayd. His extant *usul* work is an abridgment of his original work by al-Karajiki (d. 1057), the author of *Kanz al-Fawa'id*. Al-Karajaki states that he has reproduced only the salient features of al-Mufid's book.[41] A perusal of the abridged text in *Kanz al-Fawa'id* indicates that al-Mufid accepts isolated traditions (*khabar al-wahid*) only if they are accompanied with indicators. In addition, he rejects *qiyas* and *ijtihad* because they were founded on *ra'y*.[42] Al-Mufid's legal methodology can also be discerned from his major work

[39] Of the two, Ibn Abi ʿAqil was more praised and appreciated. Ibn Junayd's views were quoted especially by ʿAllama, but there were few positive evaluations concerning him. Ibid., 809. al-Subhani, *Ta'rikh al-Fiqh al-Islami*, 238–9.

[40] See his arguments in ʿAli al-Husayni al-Sistani, *al-Rafid fi 'ilm al-Usul* (Qum: Mahr, 1993), 11.

[41] For the contents of al-Mufid's *usul* work, see ʿAli Pour, *al-Madkhal Ila Ta'rikh*, 98.

[42] Ibid., 99.

on Shiʿi jurisprudence, *al-Muqnia*. Here, he adopts a middle ground between traditionalists, whom he denounces as being parochial, and the rationalists for their dependence on *qiyas* and *ijtihad*.

Al-Sharif al-Murtada wrote numerous texts on *usul al-fiqh*, the most famous being *al-Dhariʿa ila Usul al-Shariʿa*. In assessing the significance of al-Murtada's text, it should be noted that during his time, *usul al-fiqh* was not considered an independent discipline. *Usul al-fiqh* discourse was often included in the same works as *ʿilm al-fiqh* or *kalam* (theology). Topics such as the attributes of God or evidence to prove the belief in the hereafter with isolated traditions were deliberated along the same vein as the principles of the deduction of juridical prescriptions. The evolution in and elucidation of the principles of *usul al-fiqh* took place gradually as Shiʿi *fiqh* expanded.

Although neither Tusi nor his book are directly mentioned in *al-Dhariʿa*, al-Murtada condemns Tusi's work on *usul* because it included topics that were quite irrelevant to *usul al-fiqh*. More specifically, al-Murtada is critical of Tusi's insertion of the definition of necessary and acquired knowledge, how speculation can produce certitude, the question of causality, the status of the Qur'an and prophetic *hadith* as scripture, and other subjects included in Tusi's introduction to his work.[43]

In his criticism of *ʿUdda al-Usul*, al-Murtada states,

> I am aware of someone who has written on *usul al-fiqh* and its principles. However, he has exceeded its parameters. Although he was correct in presenting its principles and forms, he has gone beyond [the subject of] *usul al-fiqh* and its methods and boundaries.[44]

Rather than restricting themselves to narrating traditions, Shiʿi jurists gradually sensed the need to develop new principles of deriving laws from the *hadith* literature. This need was augmented by the fact that traditions from the Imams to resolve new issues were either unavailable or irrelevant.

Tusi's *ʿUdda al-Usul*

Tusi's seminal work on *usul al-fiqh*, titled *ʿUdda al-Usul*, expands on the works of previous scholars like al-Mufid, whose tract is both shorter and less detailed. In the introduction to *ʿUdda*, Tusi indicates that some of al-Mufid's statements

[43] ʿAli b. al-Husayn al-Murtada, *al-Dhariʿa ila Usul al-Shariʿa* (Tehran: Daneshghah Tehran, 1983), 2nd ed., 2 vols., 1/1–4.
[44] Ibid.

needed to be rectified and that al-Murtada had yet to compose a comprehensive work on *usul al-fiqh*, although he had taught the subject for some time.[45]

He writes in the preamble to *al-ʿUdda*:

> You (may Allah grant you strength) have requested me to write a concise book on *usul al-fiqh* that covers the [main] chapters based on our [legal] school and principles. Those who have [previously] written on this question have done so based on their foundations (*usul*). None of our companions has authored [a treatise] on the topic except Shaykh Abu Abdullah [al-Mufid] in *al-Mukhtasar*.[46]

In all probability, al-Murtada's *al-Dhariʿa* was not completed when Tusi composed his work, since the latter does not refer to it. However, Tusi quotes passages from *al-Dhariʿa*, at times, almost verbatim.[47] His chapter on *qiyas*, for example, is appropriated almost entirely from al-Murtada's work. It appears that Tusi quotes from al-Murtada's lectures on the subject or he may have seen portions of the manuscript, since *al-Dhariʿa* was made available only after Tusi's *ʿUdda* had been completed.

Apart from mentioning the normal subjects in *usul al-fiqh* discourse, Tusi also propounds and explicates a wide array of exegetical and hermeneutical principles required for a proper understanding of revelation, thus demonstrating that traditions alone were insufficient to comprehend and determine God's law. He articulates and expounds six major principles necessary for the understanding and interpretation of revelation: These were *haqiqa* (literal) and *majaz* (metaphor), *mutlaq* (unconditional) and *muqayyad* (conditional), *mujmal* (ambivalent) and *mubayyan* (clear), *awamir* (commandments) and *nawahi* (prohibitions), *umum* (general) and *khusus* (specific), *nasikh* (abrogator) and *mansukh* (abrogated).

Tusi was advocating for the use of rational constructs in interpreting traditions and, in the process, choosing a middle line between the traditionalist and rationalist approach in which both Usuli principles and traditions are incorporated. The principles that Tusi clarified were adopted and elaborated on by subsequent scholars. His *al-Mabsut* also indicates that most studies on the topic had not engaged inferential *fiqh* (*al-fiqh al-istidlali*) in his time and were restricted to extrapolating laws from textual sources.

In complete contrast to his teachers, Tusi argues in the *ʿUdda* for the validity of isolated traditions (*khabar al-wahid*) and contends that these genres of traditions

[45] Stewart, *Islamic Legal Orthodoxy,* 135.
[46] Tusi, *ʿUdda*, 1/3–4.
[47] ʿAli Pour, *al-Madkhal Ila Ta'rikh*, 109. For a list of the topics covered in the *ʿUdda*, ibid., 109.

had been accepted and practiced by previous generation of scholars. He further maintains that the Lawgiver had allowed it, whereas al-Murtada had denied it.[48] Apart from his work on Usul, Tusi also composed other works in the legal field. One of his most important work on jurisprudence is *al-Nihaya*, a book that expounds juridical cases based on Usuli principles. Among all the Shiʿi juridical texts, it was *al-Nihaya* that was used as a standard legal work in the seminaries for a long time. In this work, Tusi uses *ijtihad*, albeit in a rudimentary form, to deduce verdicts from traditions. Tusi also composed *al-Mabsut*, a voluminous work on jurisprudence in which he systematically derived laws based on Usuli principles. His methodology in this work was diametrically opposed to those scholars who had confined their works to direct citation of traditions.[49]

Ijtihad in the Buyid Period

As previously mentioned, up to the thirteenth century, *ijtihad* was equated with analogy and personal reasoning by the Shiʿis. Anti-Sunni diatribe by Shiʿi scholars of the time can be discerned by the slogans they deployed, namely, condemnation of *ijtihad*, *istihsan*, *qiyas*, *zann*, and *khabar al-wahid*. Sunni usage of these devices became tools that Shiʿis could and did exploit in their disputations with their adversaries. They were part of the continuing invective that claimed Shiʿi law was devoid of the conjectures, speculation, and diversity that had plagued much of Sunni jurisprudence. During this period, Shiʿi scholars categorically denounced the deployment of *ijtihad*.[50] The Shiʿi stance on *ijtihad* is typified by al-Murtada, who states in his refutation of a Muʿtazili scholar,

> As to *ijtihad* the evidence demonstrates that what you (ʿAbd al-Jabbar) call *ijtihad* is based on false premises. One of these is that *ijtihad* in law is, according to you, a [method of] ascertaining an opinion based on probability (*ghalaba al-zann*) where there are no explicit indicators. However, conjecture (*zann*) is not acceptable in the *shariʿa*. It is improper that the legal status of something should be grounded on conjecture.[51]

Evidently, al-Murtada sees *ijtihad* as a method of establishing *shariʿa* precepts bereft of textual evidence. *Qiyas*, he contends, is a form of *ijtihad*.[52] This

[48] For a summary of other views of Tusi in ʿ*Udda*, see ʿAli Pour, *al-Madkhal Ila Taʾrikh*, 110–11.

[49] Muhammad b. al-Hasan Tusi, *al-Mabsut*, 8 vols. (Tehran: al-Matbaʿa al-Haydariyya, 1967), 1/2. Moussavi, *Religious Authority*, 83.

[50] On Mufid's rejection of *ijtihad*, see Muhammad b. Muhammad al-Mufid, *Awaʾil al-Maqalat fi al-Madhahib waʾl-Mukhtarat* (Qum: Maktaba Dawari, n.d.), 154.

[51] Al-Sharif al-Murtada, *al-Shafiʿ fiʾl-Imama* (Tehran: Muʾassasa al-Sadiq, 1989), 1/169.

[52] Al-Murtada, *al-Dhariʿa ila Usul al-Shiʿa*, 2/792.

observation is further borne out from a statement in his *al-Intisar*. Referring to Ibn al-Junayd's methodology, al-Murtada states, "It is premised on personal views and reasoning that Ibn al-Junayd depended upon on this issue, this is clearly erroneous." Similarly, when discussing the wiping (*mash*) on both feet when performing the ablution, al-Murtada says, "We do not consider *ijtihad* to be correct and do not support it."[53]

Tusi's stance on *ijtihad* bears a striking resemblance to that of al-Murtada. In his *'Udda*, he includes a chapter on *ijtihad*, which he refutes as a form of personal reasoning. He adds, "This discussion [of *ijtihad*] is not necessary because, as we have discussed before, *qiyas* and *ijtihad* are not permissible in the *shari'a*."[54] Tusi's remarks clearly indicate that *ijtihad* was not accepted by the Shiʿi scholars of his time.

Ironically, Tusi employed some of the principles of *ijtihad* to establish legal precepts. In his seminal work, *al-Mabsut*, Tusi complains that Shiʿi interlocutors mock and deride them, claiming that, due to the methods they employ, Shiʿis are not equipped to extract the *furuʿ* (derivatives) from the *usul* (foundations), and that their scope of juristic inference is restricted to the texts (*nusus*) related by their narrators. Apparently, Sunnis had also accused Shiʿis of a literal application of traditions without employing any form of reasoning. The interlocutors further taunted the Shiʿis, stating that their repudiation of *qiyas* and *ijtihad* rendered them incapable of resolving many legal challenges because their rules and principles of deduction were strictly circumscribed.

Tusi refutes these accusations, asserting that they arise due to the adversaries' ignorance of the Shiʿi legal system. He further states, "had they checked our narrations and jurisprudence, they would have realized that most of the issues they mention are presented in our traditions which are transmitted from the Imams, whose statements, insofar as their authoritativeness is concerned, [is based on] following the Prophet."[55]

Tusi asserts that his method of deducing legal precepts was premised on Usuli reasoning. He acknowledges that his approach differed considerably from those employed by other Shiʿi scholars who had restricted their judgments based on the citation and interpretation of traditions. One of the reasons for composing *al-Mabsut* was to refute Sunni accusations. Tusi also admits that a major impediment to the composition of this work was that it was not usual for Shiʿis to engage in *ijtihad*. Nor was it normal for them to deduce particular laws from universal ones. Prior to Tusi's time, the scope of Shiʿi *fiqh* works was restricted to the review and extrapolation of laws from traditions and texts.

[53] Baqir al-Sadr, *Lessons*, 50.
[54] Tusi, *'Udda*, 2/733.
[55] Tusi, *al-Mabsut*, 1/2.

Tusi also responds to Sunni accusations by denying that the paucity of *furuʿ* laws in Shiʿi *fiqh* works was intrinsic. Rather, the Shiʿi legal corpus could be interpreted exegetically to provide as many, if not more injunctions than the Sunnis had done. In essence, Tusi projects the Sunni legal corpus as predicated on conjecture and doubtful tools such as *raʾy*, *qiyas*, and *ijtihad*. Shiʿi substantive law, on the other hand, was predicated on the *ahadith* from the Imams and interpretive constructs that had produced legal declarations based on certitude rather than conjecture.

Ironically, since Tusi considered isolated traditions to be valid, there is a transition in his epistemology from certitude to probability. His stance on *khabar al-wahid* also meant that many cases that were not dealt with by previous scholars were now open to consideration, since he was able to accept many more traditions that may have been otherwise denied. Tusi was also able to liberate the study of substantive law from its traditional confinements. Prior to his time, jurists depended mainly on traditions and the derivation of principles from them. He was the first Shiʿi jurist to engage in the process of juridical inference (*al-fiqh al-istidlali*) by examining and elucidating its principles.[56] More significantly, his work is indicative of the expansion of Shiʿi jurisprudence and its legal system, for he utilized the methodological and epistemological frameworks that had been proposed by earlier scholars such as Ibn Abi ʿAqil and Ibn al-Junayd.

Tusi's epistemological transition enabled him to argue for a legal edifice that would incorporate an element of speculation in the form of isolated traditions. In many ways he was the precursor to the acceptance of *ijtihad* by the scholars of Hilla. The post-Tusi era marks a time of intellectual stagnation especially as no scholar could challenge or ameliorate his works. For this reason, Shiʿi scholars often describe this period as the time of *taqlid* (imitation), which actually means the acceptance of Tusi's legal edicts and methodology. Most scholars during this period accepted his legal determinations without challenging them.

The Rehabilitation of *Ijtihad* in Shiʿi Jurisprudence

The coming of the Seljuq dynasty after the overthrow of the Buyids in 1055 was a major setback for the Shiʿis, who were persecuted by the new rulers. Due to increased riots and anti-Shiʿi hostilities, the Shiʿi center of learning moved from Baghdad to Najaf under Tusi. Later, under increased persecution and pressure, it moved to Aleppo in 1145 and subsequently to Hilla, where it remained for a long time. It was the jurists of Hilla who made significant contributions to shaping the future of Shiʿi jurisprudence.

[56] Farhan, *Haraka al-Ijtihad*, 266–67.

The post-Tusi period of stagnation ended with Muhammad b. Ahmad b. Idris, an erudite jurist who infused new life into Shiʿi jurisprudence. In this work, he complains of the stultifying intellectual environment in his time and that the Shiʿi populace were quite indifferent in their commitment to the "*shariʿa* of Muhammad and the laws of Islam." Ibn Idris further complains of pervasive ignorance in the community and the scholars' neglect of the needs of the time.[57]

Ibn Idris was clearly reacting to the rigidity and ossification of Shiʿi *fiqh* in his time. His criticisms were directed primarily at Tusi, whose opinions he attacked assiduously and vociferously in his *al-Sara'ir*. A comparison between Ibn Idris's *al-Sara'ir* and Tusi's *al-Mabsut* also indicates that the former examines and explores aspects of Shiʿi law in far greater detail than Tusi does. The arguments and proofs that Ibn Idris presents are more nuanced and meticulous and include points on which the two scholars differ substantially. An issue that is summarily covered in one line in *al-Mabsut* is sometimes covered much more extensively in Ibn Idris' *al-Sara'ir*. For example, on the question of whether contaminated water becomes pure if it is contained in a cistern that is one *kurr* (377 kilograms full) Tusi concludes that the water remains impure. He justifies his verdict in just one sentence. Ibn Idris, on the other hand, discusses the case in much greater depth and concludes that the water should be considered pure. He states, "On this question alone we have written about ten pages in which we extended our limits, and have explicitly proved our verdict thereon, elucidating various points, and giving proofs and testimonies from the verses of the Qur'an and the authentic traditions."[58]

Ibn Idris's scholarly credentials were tacitly enhanced as he challenged and refuted Tusi's opinions on almost every topic. In fact, in his *al-Sara'ir* he debates and attacks Tusi's arguments in almost every page. He was, at times, very critical of Tusi, especially regarding his acceptance of isolated traditions.[59] Through his invectives against Tusi, he was able to break free from the rigidity that had stifled Shiʿi jurisprudence, injecting, in the process, a sense of vibrancy and dynamism in Shiʿi legal thought. Ibn Idris was also the first scholar to assert that reason (*ʿaql*) should be an independent source of law.[60] Prior to his time, al-Mufid had mentioned that although *ʿaql* was a tool to understand the probativity (*hujjiyya*) of the Qur'an, it was not to be considered an independent source of law.[61]

[57] Baqir al-Sadr, *al-Maʿalim*, 74.
[58] Ibid., 77–78. See also ibid. for other examples of the differences between the two.
[59] On comparisons between *al-Sara'ir* and *al-Mabsut*, see Jannati, *Tatawwur Ijtihad*, 1/290–91.
[60] Muhammad b. Mansur Ahmad Ibn Idris, *Kitab al-Sara'ir* (Qum: Mu'assasa Nashr al-Islami, 1989), 1/2. Farhan, *Haraka al-Ijtihad*, 284–85. On other examples of Ibn Idris's excellent scholarship and refutation of Tusi and other scholars, see Baqir al-Sadr, *al-Maʿalim*, 77 ff. See also cases where Ibn Idris is critical of and disagrees with Tusi in al-Subhani, *Taʾrikh al-Fiqh al-Islami*, 283, 306.
[61] Muzaffar, *Usul al-Fiqh*, 2/102.

The thirteenth and fourteenth centuries marked a period of great intellectual ferment for the Shi'i scholars. They continued the trend of deriving laws beyond the confinement of traditional texts. The vexing problem of deploying rational tools to extract new juristic prescriptions was finally resolved by the scholars of Hilla in the thirteenth and fourteenth centuries. They had to accept that they could not be certain that their rulings fully reflected the Divine legislation on most cases that confronted them. To resolve the conundrum, Ja'far b. al-Hasan (Muhaqqiq) al-Hilli (d.1277), a prominent Shi'i jurist of the time, proposed the adoption of *ijtihad* as a hermeneutical construct in the extrapolation of legal precepts. It is important to comprehend Muhaqqiq's definition and understanding of *ijtihad*. In his work on *usul al-fiqh* titled *Ma'arij al-Usul*, he states,

> According to how jurists commonly use the term, *ijtihad* refers to expending one's efforts to extrapolate legal rulings. Based on this [meaning], the act of deducing laws from the legal sources is a kind of *ijtihad* because the rulings are based on theoretical constructs which, in most cases, cannot be derived from the apparent [meaning] of the sources regardless of whether that is based on analogy or anything else. According to this, analogy is one of the types of *ijtihad*. If it is said—based on this [understanding]—that the Imamiyya must be among the people of *ijtihad*, we say that is [certainly] the case.[62]

Given the traditional Shi'i aversion to *ijtihad* and the need to accommodate it within the confines of Shi'i legal epistemology, Muhaqqiq had to redefine *ijtihad*. For him, *ijtihad* was a process of inferring rulings by methods that had been approbated by the Lawgiver.[63] With the exception of analogy, Shi'is could now be counted as among those practising *ijtihad*. For Muhaqqiq, the *shari'a* was not composed of neatly defined normative laws or perspicuous injunctions that could be easily accessed. On the contrary, there were discrepancies and uncertainties within it. Muhaqqiq therefore redefined *ijtihad* as a method of deducing an injunction that approximated the truth based on a format that was accredited by the *Shari'* (Lawgiver). By this definition, *ijtihad* became a process of deciphering the law, rather than its source.

The acceptance of *ijtihad* was a major breakthrough in Shi'i legal history. To justify his usage of *ijtihad*, Muhaqqiq distinguished between probable knowledge (*zann*) and unrestricted or random reasoning. He defined *ijtihad* as a form of valid conjecture. In other words, in contrast to Sunni devices like *ra'y* and *qiyas*, Muhaqqiq's definition of *ijtihad* generated knowledge that was based on probability.[64] It was only the special form of *zann* that was allowed.[65] In all

[62] Muhaqqiq al-Hilli, *Ma'arij*, 179.
[63] Ibid., 179. On the early Shi'i denunciation of the term *ijtihad*, Farhan, *Haraka al-Ijtihad*, 43–46.
[64] Muhaqqiq al-Hilli, *Ma'arij*, 180–81.
[65] Ibid., 221.

probability, Muhaqqiq drew this distinction because he sensed the need to derive the law beyond the narrow confines of citing from textual sources. Henceforth, Shiʿi scholars accepted reasoning that was based on the revelatory sources (called *al-ijtihad al-sharʿi*) as opposed to the more speculative reasoning based on the intellect (*al-ijtihad al-ʿaqli*). The latter form of reasoning was considered inductive whereas *al-ijtihad al-sharʿi* was seen as deductive reasoning from the sacred texts.

By advocating and approving the use of *ijtihad*, Muhaqqiq was sacrificing the cardinal principle of certitude and acknowledging the presence of speculation in the Shiʿi legal system. He was the first Shiʿi jurist to redefine and embrace *ijtihad*. Subsequently, other scholars also transitioned from insisting on attaining certitude in legal norms to the acceptance of probable truth. By promoting *ijtihad*, Muhaqqiq also posited the notion of a class of scholars capable of discovering the law through rational means especially when they had to deal with issues for which no solution had been provided in the revealed sources. His methodology on *ijtihad* was outlined in an important *usul* work called *Maʿarij al-Usul*. Although quite brief, it is highly regarded in Shiʿi circles.

It was ʿAllama Yusuf b. Mutahhar al-Hilli (d. 1325), his nephew, who introduced newer intellectual principles into Shiʿi *fiqh*. Proclaiming *ijtihad* to be a central principle in Shiʿi legal theory, ʿAllama cites a chapter on *ijtihad* and positions it as an important legal construct in all his major *usul* works (*Mabadi' al-Wusul*, *Tahdhib al-Wusul*, and *Nihayat al-Wusul*). In his discourse on *ijtihad*, ʿAllama acknowledges at the outset that, in the absence of the Imam, most of the law was in a state of uncertainty. For him, neither the Prophet nor the Imams had resorted to *ijtihad*, since they had access to knowledge that produced certitude, either in the form of Divine inspiration or what was transmitted from the Prophet. In addition, since they were infallible, the Imams could neither err nor depend on probability, traits that are intrinsic to *ijtihad*.[66] In the absence of the Imam, jurists had to resort to *ijtihad* in an effort to derive new laws or interpret old ones. In the process, ʿAllama empowered scholars to deduce legal values based on conjecture.

For ʿAllama, knowledge of the law was of two types. Necessary knowledge (*daruri*) was related to things that could be known through reason or revelation. These included acts like prayers, fasting, and that which must be performed before an incumbent act (e.g., ablution before prayers). This genre of knowledge was provided with definitive indicators. The other type of knowledge, bereft of indicators, pertained to *sharʿi* values and was the prerogative of the *fuqaha*'. In the absence of *daruri* knowledge, jurists had no alternative but to resort to *ijtihad* to arrive at an opinion on a *sharʿi hukm*.[67] Through this bifurcation of

[66] ʿAllama al-Hilli, *Mabadi' al-Wusul ila ʿilm al-Usul* (Najaf: Matba`a al-Adab, 1970), 240–41.
[67] Calder, *The Structure of Authority*, 233–34.

knowledge, ʿAllama acknowledged and endorsed an element of doubt inherent in Shiʿi law. By positing *ʿilm* as presumptive knowledge predicated on the texts, ʿAllama also infused the Shiʿi legal system with the flexibility and dynamism that was to characterize subsequent manuals of *usul al-fiqh*.

ʿAllama's writings reveal a clear epistemic transition from certainty to acceptable conjecture. Concomitant to the view that the law was in a state of uncertainty was the need to provide authoritative guidance to the ordinary believer. ʿAllama therefore asserted that the laity must follow the juristic proclamations of a *mujtahid*. Like Muhaqqiq, he divided the Shiʿi community between those who knew and those who did not. Although the determinations of a *mujtahid* were based on conjecture, the actions of the Shiʿis had to accord with the pronouncements of a jurist. One who did not follow the *mujtahid* was proclaimed to be a sinner.[68] ʿAllama actually stated that *taqlid* was permissible rather than mandatory.[69] Later Usuli scholars insisted that *taqlid* was obligatory. This rationalist outlook was subsequently espoused and promoted by the *ʿulama'* of Jabal ʿAmil.

ʿAllama's contention that most of the legal system was conjectural can be substantiated by the fact that most traditions were in the form of isolated reports from the Imams. Earlier, Tusi had claimed that permission to accept *khabar al-wahid* had, in fact, been granted by the Lawgiver. This, he claimed, was the consensus of the true sect.[70] Basing his arguments on Qur'anic verses, traditions from the Imams, and the consensus of the community, ʿAllama also argued vehemently for the use of *khabar al-wahid*. This was further evidence that doubt was now accepted as an integral component in Shiʿi law. Subsequently, ʿAllama also posited new ways and terms to categorize and evaluate traditions. By separating *qiyas* and *ra'y* from *ijtihad*, the scholars of Hilla were finally able to accommodate *ijtihad* in Shiʿism, even though this meant incorporating Sunni methodology into Shiʿi legal theory.

The preceding discussion on the history of Shiʿi legal theory indicates that from the tenth to the sixteenth century, it evolved from an initial desire to preserve certitude to a gradual acknowledgment that the actual law cannot be fully understood or known. The principles and epistemologies of *usul al-fiqh* developed considerably during the times of Muhaqqiq and ʿAllama, and the methodologies they used were, with the exception of the Akhbaris, largely embraced by subsequent Shiʿi jurists.

[68] Ibid., 235.

[69] al-Hilli, ʿAllama, *Mabadi' al-Wusul*, 246–48; also *Ma'arij*, 197–99, where Muhaqqiq states that *taqlid* is permissible.

[70] Norman Calder, "Doubt and Prerogative: The Emergence of an Imami Shiʿi Theory of *Ijtihad*," in Paul Luft and Colin Turner, eds., *Shiʿism: Critical Concepts in Islamic Studies*, 4 vols. (New York: Routledge, 2008), 3/180.

It was through the efforts of both Muhaqqiq and ʿAllama that *ijtihad* as a hermeneutical construct and the concomitant element of *zann* were accepted and validated in Shiʿi legal theory. With time, even more scholars subscribed to the view that *ijtihad* based on *zann* was acceptable. It was embraced with an epistemological distinction between certainty and probability. From now on, *ijtihad* no longer connoted *ra'y* and *qiyas*. Rather, it denoted the academic process of determining *shariʿa* ordinances. With this change, *ijtihad* became an important element in Shiʿi jurisprudence.

After the time of ʿAllama, Shams al-Din Muhammad b. Makki al-ʿAmili (d. 1384), also known as al-Shahid al-Awwal (the First Martyr), was the first Shiʿi scholar to compose a tract on *qawa'id al-fiqh*. These were maxims that comprised legal rules which jurists could use in the derivation of laws. The *qawa'id* also express legal declarations in concise terms. This is in contrast to the detailed methodological procedures cited in *usul al-fiqh*. These maxims can be easily memorized and are applicable to a wide array of cases. They are especially helpful when deriving injunctions for new cases and provide guidelines and standards for validating current edicts.[71]

Generally speaking, the *qawa'id* do not contain citations of particular verses from the Qur'an or statements from the *sunna*. Rather, they are extracted from the revelatory sources. Thus, for example, the principle of no harm (*la darar*) is derived from verse (22:78). In most instances, the *qawa'id* depict the overall aims and objectives rather than the details of the *shariʿa*.[72] Gradually, Shiʿi scholars accepted *ijtihad* and expanded its domain so that the legal principles or maxims that animate and guide a jurist were incorporated in the normative juristic corpus.

The preceding discussion on the history of *usul al-fiqh* and *ijtihad* demonstrates that, historically, the principles embedded in *usul al-fiqh* developed after the science of *fiqh*.[73] During the times of the Imams, there was more discussion of substantive law than of the process of its derivation. In other words, when well-accepted legal positions needed legitimation and valorization, *usul al-fiqh* regulated and restricted as much as it generated or determined the law. By imposing constraints and formulating principles for deriving the law, *usul al-fiqh* dictated the parameters within which the law could operate. At the same time, it

[71] Felicitas Opwis, *Maslaha and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century* (Leiden: Brill, 2010), 139.

[72] Luqman Zakariyah, *Legal Maxims in Islamic Criminal Law: Theory and Applications* (Leiden: Brill, 2015), 17. For a list of Shiʿi *Qawa'id* works, see Farhan, *Haraka al-Ijtihad*, 303. For an illustration of how *Qawa'id* principles were used in issuing the tobacco *fatwa* by Mirza Shirazi, see Mostafa Mohaghegh Damad, *Tahavvolat-i Ijtihad-i Shiʿi, Maktabuha Hawzeha va raveshha: Ijtihad bar Mehvar-i Adalat va Keramat-i Bashari* (Tehran: Shahid Beheshti University tahavvol, 2011), 2/22–23.

[73] The question of whether *usul al-fiqh* was subsequent to *fiqh* and whether interpretation tends to vindicate rather than determine the law is treated by many scholars. al-Husayni, *Al-Ijtihad wa'l-Hayat*, 13.

also laid the theoretical grounds for the derivation of future legal judgments.[74] Since earlier jurists had rejected *qiyas*, *ra'y*, and *istihsan*, Shiʿi jurists were careful not to include arbitrary elements that the Sunnis had accepted under their legal theory. However, as we shall see, this was not completely possible.

Sunni Concepts in Shiʿi *Usul al-Fiqh*

As Shiʿi legal thought developed in a predominantly Sunni milieu, Sunni ideas and concepts began to penetrate into and influence Shiʿi jurisprudence creating, in the process, some discrepancies in it. For example, in his two works on jurisprudence, Tusi cites some Sunni sources and then adds his own judgments based on the principles posited by Shiʿi jurists or those derived from Shiʿi traditions.[75]

ʿAllama's extensive study of Sunni *usul* also led him to be influenced by their legal thinking and to incorporate some of their interpretive tools in his methodology. The definition of *ijtihad* that he cites is appropriated from Sunni sources.[76] To be sure, both Muhaqqiq and ʿAllama borrowed elements from the Sunni legal system in their writings. Al-Ghazali's (d. 1111) conceptions of conjectures had influenced both of them in their formulation of the principles of *ijtihad*. It is highly likely that they also appropriated some legal views from Fakhr al-Din Razi (d. 1210).[77]

As he was influenced by Sunni *usul*, ʿAllama included their thoughts and views in his discourse. Drawing on the Sunni division of the types of *hadith*, he was the first Shiʿi scholar to classify *ahadith* based on their reliability.[78] It is probably for this reason that the founder of the Akhbari movement, Mullah Muhammad Amin Astarabadi (to be discussed in what follows) claimed that ʿAllama's *Tahdhib al-Wusul* is an abridgment of the *Mukhtasar* of Ibn Hajib, which itself is an abridgment of other Sunni *usul* works.[79] As a matter of fact, the Akhbaris blamed ʿAllama for borrowing and inserting Sunni concepts and methodologies in Shiʿi *usul al-fiqh*.

Accusations of being influenced by Sunni methodology can be further corroborated from the juristic division between a *mujtahid* and the laypeople. This

[74] Muhammad Baqir al-Sadr acknowledges that as a discipline, *usul al-fiqh* emerged subsequent to the practice of *fiqh*. However, he indicates that this could not have happened without engaging the theoretical constructs and presuppositions of *usul al-fiqh*. Ali-Reza Bhojani, *Moral Rationalism and Shariʿa: Independent Rationality in Modern Shiʿi Usul al-Fiqh* (New York: Routledge, 2015), 13.

[75] Modarressi, *An Introduction*, 44–45. Also Baqir al-Sadr, *al-Maʿalim*, 73ff., where the author acknowledges Sunni influence on Shiʿi legal theory.

[76] ʿAli-Pour, *al-Madkhal Ila Ta'rikh*, 154–55. Takim, "A Brief History of *Ijtihad* in Twelver Shiʿism," 89–90.

[77] Moussavi, *Religious Authority*, 170.

[78] Bahr al-ʿUlum, *Fawa'id*, 2/260.

[79] Stewart, *Islamic Legal Orthodoxy*, 191.

concept was enunciated by al-Shafiʿi, who used it to express the division between *ʿilm al-ʿamma* and *ʿilm al-khassa*. According to him, the later type of knowledge was the prerogative of the jurists and was the sphere wherein there could be no certainty. ʿAllama made no secret of appropriating of Sunni models and concepts in his works.[80]

Despite some differences, the legal theories of Sunnis and Shiʿis came to be quite similar. The methodology of reconciling law and revelation that had evolved in Sunni circles since the time of al-Shafiʿi in the ninth century was also applied to issues that Shiʿis encountered in the tenth century. They had only to adopt and refine from a well-established pool of exegetical techniques and terminologies to determine the intention of the Lawgiver.[81] Shiʿi scholars also learned from the Sunni experience of *usul*. In order to prove the preponderance of their school, the Shiʿis tried to avoid the pitfalls generated by *qiyas*, *raʾy*, and *istihsan*. Eventually, they were forced to abandon a crucial point in their anti-Sunni polemic: the insistence on certitude (*qatʿ*). They did this by accepting some form of *zann* which, they claimed, had been ratified by the Lawgiver.

Akhbarism and *Ijtihad*

Shiʿi rationalist concepts and the deployment of exegetical tools in *usul al-fiqh* were critiqued and rejected by the Akhbaris in the seventeenth century. The main advocate of the Akhbari movement was Muhammad Amin Astarabadi (d. 1626). He was highly critical of Usuli epistemology, which, he contended, was premised on Sunni legal theory and had adulterated the Shiʿi legal system. In contrast to the prevalent legal theory, he postulated an alternative methodology that he claimed was predicated on certainty and was couched primarily on *hadith* reports.

Astarabadi's major thesis was that the truth (*al-haqq*) was based solely on the *ahadith* of the Imams. Their traditions generate certitude that people depend on in their daily transactions. Anyone with a proper understanding of Arabic and a basic comprehension of the Imams' statements could understand their teachings obviating thereby the need for *mujtahids*. Many Akhbaris even claimed that the correct understanding of the Qur'an is dependent on the *ahadith* since, in itself, the Qur'an is not a source of legal precepts. The Akhbari scholar al-Hurr al-ʿAmili (d. 1688) claimed that there are more than two hundred traditions that prohibit the inference of laws from the Qur'an. Thus, the scripture could only be

[80] Calder, *The Structure of Authority*, 233.
[81] Calder, "Doubt and Prerogative," 3/179.

comprehended through traditions.[82] However, a later Akhbari scholar, Yusuf al-Bahrani (d. 1772) presents a more moderate and nuanced view, stating that many Akhbaris believe that legal ordinances can, in fact, be derived from the Qur'an directly.[83]

Akhbari hermeneutical presuppositions and horizons of understanding were premised on their assessment that certitude was to be derived solely from the four main Shiʿi books of law. For them, these works exhibited the most authentic statements from the Imams (*qatʿ al-sudur*). Consequently, most of the law could be derived from them. There was little, if any, scope for personal reasoning in the law.

A close reading of Astarabadi's *al-Fawa'id al-Madaniyya* indicates that he believed that, in legal matters, reason could only be used to seek the correct traditions to resolve an issue. In itself, *ʿaql* was not a source of law. He was highly critical of the Usuli reliance on reason, which had made them accept *zann* and arrive at conclusions on topics that contravened statements from the Imams. Astarabadi declared unequivocally that the application of *zann* is baseless, because the Qur'an had itself declared, "We have not neglected anything in the Book (6:38)." Only what is in the text is cognitively acceptable.

Astarabadi's invective against the Usulis was centered on the loss of certitude in their methodology. He claimed that as *ijtihad* produced *zann*, the Usuli methodology was inherently defective and had led to the assertion of conflicting legal edicts. The Akhbaris, on the other hand, believed in the validity of all traditions transmitted from the Imams. This meant that there was no need for specialized jurists to derive laws beyond the parameters of traditions.[84] More than anything else, Akhbari opposition to the Usulis was epistemological. For them, the jurist had no special authoritative position in the Shiʿi legal system. Hence, they rejected another key principle in Usuli thinking, that of following the edicts of a *mujtahid* (*taqlid*). Akhbari views on *ijtihad* and *taqlid* can be gauged from a chapter in Hurr al-ʿAmili's *Wasa'il al-Shiʿa*. He devotes an entire chapter that contains thirty-four traditions prohibiting *taqlid*. The chapter is titled, "The chapter on the impermissibility of following the views of one who gives judgment based on his [personal] opinions or on what is not based on traditions from them [the Imams].[85]

[82] Rahim Nobahar, "The Role of the Qur'an in Legal Reasoning (Ijtihad): a Shiʿi Perspective, in Ali-Reza Bhojani, Laurens de Rooij, and Michael Bohlander, eds., *Visions of Shariʿa: Contemporary Discussions in Shiʿi Legal Theory* (Leiden: Brill, 2020), 73–74. See also Moussavi, *Religious Authority*, 93.

[83] Yusuf al-Bahrani, *al-Hada'iq al-Nadira* (Qum: Mu'assasa al-Nashr al-Islami, 1985), 1/27, 1/31. Moussavi, *Religious Authority*, 93.

[84] Astarabadi, *al-Fawa'id al-Madaniyya* (Qum: Mu'assasa al-Nashr al-Islami, 2003), 75, 98.

[85] Al-Hurr al-ʿAmili, *Wasa'il al-Shiʿa*, 27/124.

It should be noted that conflicts and acrimony between Shiʿi rationalists and traditionalists was not a new phenomenon. Even some of the closest companions of the Imams disputed and disagreed among themselves regarding the functional role of *ʿaql* in legislation, the jurisdiction of the intellectual faculties, and the authority of traditions in the derivation of juridical injunctions.[86] By their repudiation of Usulism and its methodology, the Akhbaris were rejecting Sunni methodology and its conception of authority. Other Akhbari scholars like Muhsin Fayd al-Kashani and Hurr al-ʿAmili also rebuked the Usulis for appropriating Sunni devices like the concepts of *ijmaʿ* and *istishab* and its corollaries.[87]

Astarabadi's tirade against the Usulis was not entirely misplaced. The existence of conflicting Shiʿi traditions and polarized *fatawa* in Shiʿi jurisprudence was previously admitted by Tusi, who states, "I have found them [the Righteous Sect] differing in the legal injunctions (*ahkam*). One of them issues a *fatwa*, which his contemporary does not. These differences exist in all chapters of jurisprudence from those concerning the laws on ritual purity (*al-tahara*) to the chapter on indemnity (*al-diya*) and on the questions of worship."[88] Tusi was complaining about the differences (*al-ikhtilaf*) in the religious practices of the righteous sect, which he identified as the Shiʿis. According to Tusi, the disagreements among the Shiʿi scholars were greater than the differences between Abu Hanifa, Shafiʿi, and Malik.[89] For Astarabadi, such disparities were the denouement of deviation from the Imams' traditions and the appropriation of Sunni tools of independent reasoning.

Astarabadi was also concerned at the extent of Sunni influence on Shiʿi jurisprudence. He assiduously complains that the Usulis had borrowed extensively from the Sunnis. This had led them to deviate from the truth. He went even further in rebuffing the concept of imitation (*taqlid*) of a *mujtahid* and the Usuli polarization between the *mujtahids* and the layperson. He labeled this dichotomy as yet another Sunni innovation that had penetrated the Shiʿi ranks. Astarabadi jettisoned the position of and reliance on *mujtahids* by insisting that the ordinary believer is obliged to follow the Prophet and Imams only.[90] By doing this, they would be abnegating probability (*zann*) and reasserting certitude. By insisting on the need to rely solely on the traditions of the Imams, Astarabadi was positing a monolithic Shiʿi worldview governed by a law that was premised on the sacred sources exclusively. His proposed legal methodology, which Robert Gleave terms "scripturalist," was to be developed further by subsequent Akhbari scholars.

[86] Takim, *The Heirs*, 94–103.
[87] Stewart, *Islamic Legal Orthodoxy*, 190.
[88] Tusi, *ʿUdda*, 1/136. Liyakat Takim, "Revivalism or Reformation: The Reinterpretation of Islamic Law in Modern Times," *American Journal of Islamic Social Sciences* 25, no. 3 (2008): 66.
[89] Tusi, *ʿUdda*, 1/138.
[90] Astarabadi, *al-Fawa'id al-Madaniyya*, 18.

It is to be noted that even within Akhbari circles, juristic heterogeneity was quite prevalent. Differences arose within their ranks regarding Qur'anic hermeneutics and the interpretation of Qur'anic verses independently of traditions and the divergent ways of comprehending the scripture. Contrary to what one would expect, Akhbaris were not simple literalists; rather, they demonstrated much intellectual ingenuity and sophistication in the construction and defense of a coherent legal structure. Far from being a monolithic school, intraschool diversity and legal pluralism characterized the Akhbaris from the beginning of the movement. For example, Fayd al-Kashani disagreed with Astarabadi's rejection of the principle of *bara'a* (exemption of assessment of duty when the sources are silent on an issue). Fayd agreed with the Usuli position on the subject and stated that traditions from the Imams demonstrated that unless stated otherwise, all things are to be considered permissible.[91]

Yusuf al-Bahrani provides another example of an Akhbari jurist who did not comply with the strict Akhbari methodology. In composing his magnum opus on Shiʿi jurisprudence, (*al-Hada'iq al-Nadira*), he deployed *ijtihad* and various hermeneutical stratagems in the interpretation of the Qur'an and traditions. Although he rebuffed some Usuli tools like *ijmaʿ* and *ʿaql*, al-Bahrani also applied *ijtihad* in inferring judgments in substantive law. This is evinced in his compendium, where al-Bahrani acknowledges *ijtihad* as a potent methodological tool in the derivation and application of the law. To some degree, his monumental work had compromised with Usulism, making the task of his interlocutor, Wahid al-Bihbahani (discussed in the next section), much easier.

The diffusion and popularization of Akhbari ideology meant that accounts of the lives and traditions of the Imams became ubiquitous and pervasive within the Shiʿi community. In the process, the Imams' status was enhanced considerably in popular imagination, and they became figures of intense personal and devotional attachment. Dissemination of Akhbari ideals also led to the compilation of great *hadith* works by the likes of Hurr al-ʿAmili, Muhsin Fayd al-Kashani, and Muhammad Baqir al-Majlisi.[92]

Wahid al-Bihbahani and the Defeat of the Akhbaris

The Akhbari school's ascendancy lasted until the eighteenth century. Akhbari dominance was challenged and subsequently defeated by Muhammad Baqir Wahid al-Bihbahani (d. 1790–1), who resuscitated and rejuvenated the twin

[91] Muhsin Fayd al-Kashani, *al-Usul al-Asila* (Tehran: Sazman-e Chap-e Danishgah, 1971), 143.

[92] On the main points of contention between the Akhbaris and Usulis, see Robert Gleave, *Scripturalist Islam: The History and Doctrines of the Akhbari Shiʿi School* (Leiden: Brill, 2007), 180–86.

principles of rationalism and *ijtihad*. In his *Risala al-Ijtihad wa'l-Akhbar*, al-Bihbahani contends that during the Imam's absence, a *mujtahid* can only attain knowledge by resorting to conjecture.

In contrast to the Akhbaris, al-Bihbahani posited a different epistemological basis. He claimed that, despite the absence of the Imam, the gates of knowledge can be accessed through evidence gained from the Qur'an, *hadith*, and reason. Although he admitted that certainty is not attainable most of the time, al-Bihbahani maintained that it is possible to use indicators (*qara'in*) that can approximate the Lawgiver's intent.[93] In essence, it is the acceptance of a special form of *zann* (*al-zann al-khass*) that distinguishes the Usulis from Akhbaris.

It is to be remembered that ever since the time of Muhaqqiq, Shiʿi jurists had accepted the existence of *zann* in matters of law, that is, a jurist could not be sure that his findings reflected the correct law on any issue. Al-Bihbahani went further, arguing cogently on the difficulties of ascertaining the actual *hukm* (*al-hukm al-waqiʿi*). Shiʿis were not obliged to follow the actual laws; rather, they were required to follow only what was apparent to them even if that apparent knowledge was predicated on *zann*. This is because access to revelation and certain knowledge is not possible while the twelfth Imam is in occultation. Due to this, the jurist has to assume that probable rather than certain knowledge will suffice. Al-Bihbahani further asserted that only *zann* that is based on indicators is valid, even if the ruling does not accord with the actual law. As Robert Gleave states, al-Bihbahani argued, "the *mujtahid*'s task is not to discover the truth, but to consider all the sources which have probative force . . . in an attempt to find the most probable ruling."[94]

Al-Bihbahani also reasserted the Usuli view that reason and revelation are compatible. The Lawgiver would not require human beings to do something that contravened reason. He cited several rational arguments and quoted Qur'anic verses and traditions to justify his thesis that God would not punish a person without first making His intent and injunctions clear.[95] Due to al-Bihbahani's efforts, there was more debate on concepts like *qubh ʿiqab bila bayan* (that it is abominable to punish without warning), *ʿilm ijmali* (general knowledge) and its ramifications, and greater and more in-depth conversations on principles like *istishab* and *bara'a*. In many ways, this period marks the birth of contemporary *usul al-fiqh*, since newer issues and subjects were now being discussed and contemplated. Al-Bihbahani also devoted a major section of his work on *al-usul al-ʿamaliyya* (procedural principles) concentrating on areas of probabilities and doubts in *sharʿi* ordinances.[96] It is not an exaggeration to state that the breadth

[93] Wahid al-Bihbahani, *al-Fawa'id al-Ha'iriyya* (Qum: Majmaʿ al-Fikri al-Islami, 1995), 142.
[94] Robert Gleave, *Inevitable Doubt: Two Theories of Shiʿi Jurisprudence* (Leiden: Brill, 2000), 75.
[95] Al-Subhani, *Ta'rikh al-Fiqh al-Islami*, 422.
[96] ʿAli-Pour, *al-Madkhal Ila Ta'rikh*, 241. I discuss these principles later in this chapter.

and depth of al-Bihbahani's discourse on Shi'i *usul al-fiqh* were both extensive and unprecedented. It was due to him that the authority of reason was reasserted in Shi'i law and the Akhbaris were eventually defeated.

Like his Usuli predecessors, al-Bihbahani also insisted that every believer is obligated to follow and emulate a *mujtahid*'s *zann*. His argument that the ordinary believer must imitate a *mujtahid*'s decrees is anchored in both rational and scriptural proofs. The Usuli triumph in the nineteenth century augmented juristic status and authority in the community. At the same time, it positioned *ijtihad* as the pivotal point on which the institution of *marja'iyya* was later constructed.

In the process, al-Bihbahani reaffirmed the role of reason in Islamic law and rehabilitated *usul al-fiqh*. With him, Usulism became the sole method of deriving legal ordinances and the cornerstone of Shi'i legal theory, especially as many Akhbari students embraced his mode of thinking. Through al-Bihbahani's efforts, Usuli teachings were disseminated rapidly in Shi'i intellectual circles and especially in the seminaries of the shrine city of Najaf, where he taught. The proximity to the holy city was one of the main reasons for the movement's continuity through succeeding generations of teachers and students.

It should be noted that the acrimonious relations between the Usulis and Akhbaris extended beyond epistemic and academic considerations. Such was the hostility between the two factions that according to al-Bihbahani, Akhbaris were to be considered unbelievers (*kuffar*). During his time, a person could even be executed for being an Akhbari.[97] The hostility was reciprocated by the Akhbaris. Many of them would only hold Usuli books with a handkerchief, believing them to be impure.[98]

Usulism and the Contribution of Murtada Ansari

Wahid al-Bihbahani's assertions on *usul al-fiqh* were further refined and developed by Murtada al-Ansari (d. 1864). As I discuss in this section, he redefined legal terms that had been established by his predecessors and, in the process, empowered jurists to produce new laws on almost any legal question. So important has his contribution been that Shi'i scholars have composed more than eighty commentaries on Ansari's main Usuli work, *Fara'id al-Usul*.[99] In this work,

[97] Heern, *The Emergence of Modern Shi'ism*, 82.

[98] Juan Cole, *Sacred Spaces and Holy War: The Politics, Culture and History of Shi'ite Islam* (London: I.B. Tauris Publishers, 2002), 71–72.

[99] Murtada Ansari, *Fara'id al-Usul* (Beirut: Mu'assasa al-'Alami, 1991). One hundred forty-four *mujtahids* have written commentaries on this book and other titles written by Ansari. See Meir Litvak, *Shi'i Scholars of Nineteenth Century Iraq: The 'Ulama' of Najaf and Karbala* (Cambridge: Cambridge University Press, 1997), 73, and Abdul-Hadi Hairi, "Ansari," *Encyclopedia of Islam*, 2nd ed. (Leiden: University of Utah, 2013).

Ansari initially draws an epistemological distinction between certainty and doubt. He devotes the first section to a discourse on *qatʿ* (certainty), denoting a position of certitude whereby a jurist can extrapolate a ruling and be confident that it expresses the Divine intent since the statements on the topic in the sacred sources are explicit and perspicuous. It is in the second section of Ansari's work that his major contribution lies. In the absence of an explicit textual decree Ansari states that a jurist must initially search for an indicator (*dalil*) to premise his judgment on. Since texts do not clearly pronounce a ruling, a jurist cannot be sure that the text signifies the Divine will. Hence, the ruling cannot be said to be based on complete certainty.

In such cases a jurist has to issue a legal ruling based on a valid conjecture. For Ansari, since the texts might contain a *qarina* that indicates the law, a jurist can issue a ruling with confidence that his judgment approximates the law. By applying various exegetical and interpretive tools, a jurist can assess what constitutes the intention of the Legislator with a high degree of probability. In this case, rational principles are invoked to issue a binding legal norm.

Since the concepts of *qatʿ* and *zann muʿtabar* had been discussed and dealt with by previous scholars, Ansari concentrated on the third category of his epistemological stratification, namely, doubt (*shakk*). When confronted with a situation where the answer is tenuous, how can a jurist issue a legal ruling when the textual sources are silent? It is here that his major contribution lies. Ansari's epistemic scheme promoted the use of *ijtihad* and hermeneutical principles by positing numerous conceivable scenarios and hypothetical situations. His exploration of various possible cases of doubt greatly empowered the jurists to rule on instances in which uncertainty prevailed. Before his time, many jurists refused to rule on such cases because of their strict adherence to the epistemological states of certainty or probability. Ansari's deep analysis and meticulous explorations in the realm of doubt provided jurists with a wider range of interpretive tools to extend the sphere of law to areas where there was even a remote possibility of finding a ruling.

Within the realm of *shakk*, Ansari instituted new juristic parameters by expounding the usage of four major procedural principles (*al-usul al-ʿamaliyya*). These were *istishab* (presuming the previous status of a thing did not change), *baraʾa* (exemption from performing a duty), *ihtiyat* (precaution), and *takhyir* (choice). By setting forth new principles and speculating on various hypothetical scenarios in his discourse on *al-usul al-ʿamaliyya*, Ansari vastly expanded the sphere of Shiʿi law. Henceforth, juridical discourse focused not only on the derivation of laws from textual sources but also on the application of procedural principles that accommodate doubt and allow a jurist to explore various possibilities when confronted with an issue that had no textual basis or historical precedence. Stated differently, jurists were now empowered to rule on possible,

not just on probable spheres of actions. In many ways, it is correct to state that contemporary *usul al-fiqh* was reborn with him. Ansari's students were able to transmit and disseminate his teachings to various parts of the world. His contribution to Shiʿi legal theory has been immense, and his nuanced and often technical deliberations and configurations of legal judgments under incredulous circumstances have surpassed all previous treatments of the topic.

Like al-Bihbahani before him, Ansari also promoted *taqlid* as an institution that all lay Shiʿis must adhere to. This had major ramifications for subsequent jurists who imposed *taqlid* as a fundamental and required principle in Usulism and, in the process, enhanced juristic authority. Thus, for example, in his important text titled *al-ʿUrwa al-Wuthqa*, Muhammad Kazim al-Yazdi (d. 1919) devoted the opening chapter to the question of *taqlid* and *ijtihad*. In this chapter he unequivocally declared that the acts of worship of a believer that were not based on the *fatawa* of a *mujtahid* were null and void. He was the first scholar to consider a layperson's acts invalid if they did not accord with the edicts of a *mujtahid*. He was also the first jurist to insert a separate chapter on *taqlid* at the beginning of his juridical treatise.[100]

The Epistemic State of Certitude (*Qatʿ*) and *al-Usul al-ʿAmaliyya* in Shiʿi Legal Theory

Having examined the history and development of *ijtihad* and *usul al-fiqh*, this chapter now discusses the process through which a *mujtahid* can determine and declare rulings from the rational sources. As I mentioned earlier, Shiʿi jurists in the thirteenth century had to admit that the law is often based on probability rather than certitude and that it could possibly but not necessarily reflect the Divine will. Usulis contrived to develop a series of stratagems to deal with cases where they could not extrapolate prescriptions directly from the textual sources. The purpose of developing this methodology was also to furnish jurists with exegetical tools that would help them extrapolate injunctions when confronted with sociopolitical exigencies during the occultation of the Imam.

In establishing the correct ruling on a particular question on Islamic law, a jurist would use various textual and nontextual sources. The textual sources include the Qur'an and *hadith* reports, since, for the Shiʿis, they all reflect God's will. These are also called *al-dalil al-muhriz* (fortified proofs) or nonrational indicators. If a *faqih* finds a response to his quest in any of these sources, then he does not need to resort to *ʿaql* in deriving a ruling. If, on the other hand, he fails to

[100] Muhammad Kazim Yazdi, *al-ʿUrwa wa'l-Wuthqa* (Tehran: Dar al-Kutub al-Islamiyya, n.d.), 3.

find a precedent or solution on a juridical problem in the fortified proofs, he then turns to certain interpretive tools.

When assessing the role of reason and the deployment of *al-usul al-ʿamaliyya*, it is essential to understand how jurists determine laws for which they do and do not have certainty. As I have discussed previously, the view that Shiʿi law could be predicated on probability had been accepted since the times of Muhaqqiq and ʿAllama in the thirteenth and fourteenth centuries. It had been further reinforced by al-Bihbahani in the eighteenth century in his refutation of the Akhbari thesis.

Based on the epistemic scheme that he promoted, Ansari divides legal decisions according to their levels of certainty. This is an explicit acknowledgment that not all ordinances reflect the will of the Lawgiver and that many of these are based on conjecture. It is also an admission that knowledge of the law can be classified based on the degree of certitude and probability. Ansari states that a person who is bound to follow God's decrees (*mukallaf*) is confronted with three kinds of determinations: those based on *qatʿ*, *zann*, or *shakk*. *Qatʿ* defines an epistemic position where a jurist attains knowledge or complete certainty. There can be no doubt in it, since *ʿilm qatʿi* (knowledge based on certitude) can be derived only from revelation. In fact, the epistemic status of *qatʿ* is so elevated that a person must accept an edict based on *qatʿ*. It is because of this that it has the quality of *hujjiyya* (probative force) and is authoritative. In such cases, there is no need to employ reason.[101]

Ansari also states that a jurist cannot ignore or contravene a ruling based on certainty since it reveals God's exact intent.[102] An example of this is the consumption of pork. Since consuming the flesh of swine is explicitly prohibited in the Qur'an (2:173, 5:3), a legal ruling on this is to be considered normative without resorting to rational or other exegetical tools. Pork is prohibited because of a Qur'anic injunction which, for the jurist, produces *qatʿ* as to the Lawgiver's adjudication on the subject.

According to al-Sadr, no one, not even God, can dispense with the element of probative proof from certainty. He cannot say, for example, that if you are sure that there is no obligation to perform an act, you are not excused from performing it. Excuse or nonobligation cannot be removed from *qatʿ*, just as a person who is certain that an act is permissible, but not required, cannot be punished for not performing it. Similarly, if a person is certain that a drink placed in front of him or her is not wine and s/he consumes it, then God cannot punish her/him for that. This is because certitude contains probative force.[103]

[101] For a definition of and discussion on *qatʿ*, see Muhammad al-Salihi, *Tariq al-Ijtihad*, *al-Marhala al-Ula* (Qum: Mashhur, 1966), 43–47, 55. On the Akhbari view of *qatʿ*, see ʿAli-Pour, *al-Madkhal Ila Taʾrikh*, 190.

[102] Ansari, *Fara'id*, 31.

[103] Baqir al-Sadr, *Lessons*, 59.

Absolute certainty can be attained only when a commandment or interdiction is explicitly stated in a revelatory source. These include laws cited in the Qur'an or in *mutawatir* traditions, for they explicitly demonstrate the intent of the Lawgiver.[104] Unfortunately for the Shi'is, the door to this type of knowledge has been closed due to the absence of the Imam. However, since the Qur'an does not provide details of the injunctions and the *mutawatir* traditions are very few in number, jurists have been compelled to depend on isolated traditions, the consensus of scholars, and reason as alternative sources of legislation.

In the absence of *qat'*, Ansari then engages the perplexing question of determining rulings based on valid conjecture (*al-zann al-mu'tabar*), that is, cases where reason is employed to create binding legal norms. The third and last part of his work, which represents Ansari's main contribution, deals with cases of doubt (*shakk*), where neither guidance in the revelatory sources nor any indication of the probability of the correct answer exists. Such detailed analysis of the epistemic states of certitude, probability, and doubt represented a new phase in Shi'i legal discourse. It is not an exaggeration to state that no scholar before Ansari had expounded the topic in such great depth.[105]

Conjectural Proofs (*Zann*)

Usulis freely admit that, in most cases, a *mujtahid* cannot arrive at a solution to a legal problem from the revelatory sources based on *qat'*. An edict then has to be based on *zann*, which suggests that a decision reached by a *faqih* may be incorrect. Despite the possibility that a legal injunction based on *zann* maybe wrong, it is preferable to doubt (*shakk*), since *zann* is of higher epistemic value. *Zann* covers a wide range of states ranging from speculation to high probability. In reality, more legal precepts fall within the realm of *zann* than *qat'*. This means that a believer cannot be absolutely sure that s/he is fulfilling her/his religious duty.

It was the scholars of Hilla who first constructed the juristic theory of *zann*. 'Allama, for example, freely admitted that reliance on *zann* was unavoidable given the fact that access to the source of certitude was not possible during the *ghayba* of the Imam. For him, a jurist had to resort to *ijtihad*, since that was the only method available to approximate the Divine intent. Since most of the *shari'a* rulings were based on probability rather than certitude, it was *zann* rather than *qat'* that was central to Usuli discussions on epistemic states.[106]

[104] Ansari, *Fara'id*, 30–31.

[105] For an in-depth discussion on *qat'* and al-Sadr's view on this, see 'Abd al-Jabbar al-Rifa'i, ed., *Qadaya Islamiyya: Fikr al-Imam al-Shahid Muhammad Baqir al-Sadr* (Qum: n.p., 1996), 198–202.

[106] 'Allama al-Hilli, *Mabadi' al-Wusul* 240–41.

Many of the more subtle points on *zann* were developed by subsequent scholars, particularly by Wahid al-Bihbahani. He states that although a *mujtahid* may not be able to ascertain the actual ruling on a particular subject, it is only his *zann* that is valid, since the *mujtahid* is aware of the indicators. Al-Bihbahani further claims that a ruling exists for every case, even if a *mujtahid* may not be able to ascertain it. By expending his efforts to arrive at the correct decision, a *mujtahid* has discharged his responsibility. A layperson has to then discharge his/her legal duty by imitating (*taqlid*) the *mujtahid*.[107] Usuli scholars also contended that the *zann* of a *mujtahid* absolves a person from his/her legal obligations. They also claimed that *zann* has probative force and that this had been approbated by the Lawgiver. This was called the probative force of *zann* (*hujjiyya al-zann*).

Henceforth, it was accepted that legal obligations can be deduced based on *zann*. Adoption of this principle was inevitable, given the prolonged absence of the Imam. Since epistemologically *zann* is lower than *qatʿ*, a jurist is required to look for a *qarina* on which a ruling can be founded. This is because a ruling based on *zann* is valid only with an indicator. An essential component in Usuli discussion on the topic is that of *amara*. This refers to an indicator that has been approbated by the Lawgiver. For Shiʿi jurists, *amara* and *al-usul al-ʿamaliyya* cannot in themselves create new rules. Rather, they are deemed to be valid only because the Lawgiver has approbated them.[108] Furthermore, *amara* and *al-usul al-ʿamaliyya* do not represent the actual ruling, since it is possible that the ruling may not accurately reflect the God's will. According to Akhund Khurasani (d. 1911), a twentieth-century Usuli scholar, "there is strong evidence to suggest that the Lawgiver has allowed us to follow the indicators, because, due to His refrain from hardship, He has wished for an easing of the path to true rules so that they could be available to the people."[109]

Zann and *Khabar al-Wahid*

Since it is impossible to arrive at rulings based on *qatʿ* in most cases, Shiʿi scholars had to accept *zann* gradually, but unwillingly, within their epistemic horizons. Although *zann* is not authoritative in itself and has not been approved in Shiʿi law, there are instances when specific types of *zann* have been permitted by the Lawgiver. Since this epistemic state is deemed to have been approbated by

[107] Gleave, *Inevitable Doubt*, 134–35.

[108] For the different types of *amara*, see al-Mirza ʿAli al-Mishkini, *Istilahat al-Usul wa-Muʿzam Abhathiha* (Qum: Matbaʿa al-Hadi, 2007), 69–70.

[109] Cited in Amirhassan Boozari, *Shiʿi Jurisprudence and Constitution: Revolution in Iran* (New York: Palgrave Macmillan, 2011), 133.

the Lawgiver it is considered a validated source of speculative *zann*. It is often accompanied by an *amara*.

A good example of this is isolated traditions. In Usuli terminology, an isolated tradition (*khabar al-wahid*) is also called an *amara*. This refers to a type of *zann* that has been elevated to the level of *hujja* by the Lawgiver (*al-zann al-muʿtabar*) and is sufficient to provide a basis for deducing legal edicts. As such, it is dissimilar to the normal *zann*, which is not binding. Most Shiʿi legal judgments arise from traditions transmitted by narrators (mainly in the form of *khabar al-wahid*), since the other sources—Qur'an, *ijmaʿ*, and *ʿaql*—provide few proofs from which a jurist can arrive at a *sharʿi* ruling.

It is to be noted that in itself, *khabar al-wahid* does not generate *qatʿ*, because even a reliable (*thiqa*) reporter could make a mistake in his transmission or could misunderstand an Imam's statements. The problem for a *faqih* in dealing with *khabar al-wahid*, therefore, is that he cannot be certain that such a report carried by a transmitter expresses the true intent of the Lawgiver. Scholars conjured up terminological stratagems that vindicated the acceptance of *khabar al-wahid*. Given the fact that most *shariʿa* declarations are expressed by traditions and that these generate only *zann*, it was essential for the Usulis to demonstrate that the Lawgiver had approved the dependence on *khabar al-wahid* and had even defended its usage. *Usul al-fiqh* provided the terminological devices to raise the *zann* of *khabar al-wahid* to that of the *hujjiyya* of *amara* (that proofs provided by an *amara* are binding).

From the very beginning, Shiʿi jurists were ambivalent regarding the acceptance of *khabar al-wahid* as correctly expressing the intent of the Lawgiver. This is evident in the writings of their early scholars. Thus, al-Mufid, for example, admitted, "I say that no knowledge or action can be taken based on isolated traditions. And no one can attain certitude in matters concerning religion on the strength of *khabar al-wahid*, unless there is an indicator which demonstrates the trustworthiness of its narrator."[110]

For *khabar al-wahid* to be considered authoritative and binding, al-Mufid says it has to be supported by an indicator. He designates reason as one of the criteria for evaluating the content of *hadith*. He writes, "When we find a tradition that conflicts with the judgment of reason, we dismiss it since reason has ruled of its falsity."[111] For al-Mufid, a *qarina* (indicator) such as reason could elevate a *hadith* to the status of *qatʿ*.

Shiʿi scholars were fully aware of the threat that *khabar al-wahid* posed to their insistence on basing *sharʿi* decrees on certitude. Al-Murtada, for example, rejected *khabar al-wahid* as not binding since it did not provide *qatʿ*, and the

[110] Al-Mufid, *Awa'il al-Maqalat*, 100.
[111] Al-Mufid, *Tashih al-Iʿtiqad* (Qum: Maktaba Dawari, n.d.), 247.

traditions reported by the narrators were often contradictory.[112] Legal decisions in the *shariʿa*, states al-Murtada, must be based on certainty. Conjecture, on the other hand, does not eradicate doubt. He further claimed that there was a consensus among all generations of Shiʿi scholars regarding the prohibition of relying on noncorroborated single traditions in deducing the law.[113]

Tusi also agreed that *khabar al-wahid* did not generate certainty. Otherwise, he stated, no differences would exist among the people over its acceptance nor doubts expressed on its correctness. Furthermore, he stated that there is nothing in the rational proofs that make it incumbent to accept *khabar al-wahid* (*laysa fi'1-ʿaql ma yadullu ʿala wujub dhalik*).[114] He further asserted that there is nothing in *samʿ* (revelation) either that necessitates the acceptance of *khabar al-wahid*.[115]

However, Tusi differed from al-Murtada in that he accepted those singular traditions that were transmitted by Shiʿis only (*min tariq ashabina al-qa'ilin bi'l-Imama*).[116] He argued forcefully for the acceptance of *khabar al-wahid*. Despite al-Murtada's objections, Tusi claimed a Shiʿi consensus on the practice of accepting these genres of traditions which, he states, the Shiʿis have recorded in their compilations (*tasanif*) and *usul* works. If a reporter is trustworthy (*thiqa*), Tusi continues, Shiʿis do not discard his traditions, this being their habit and disposition from the time of the Prophet. For him, the Lawgiver had granted permission for the acceptance of only those traditions reported by members of the righteous sect.

He insisted that the only isolated traditions that were acceptable were those which reflected the utterances of the infallible ones. Moreover, he defended himself against those who accused his predecessors of rejecting *khabar al-wahid*. He claimed that when they spoke of traditions not being reliable, jurists like al-Mufid and al-Murtada referred to those traditions that were reported by non-Shiʿis.[117] The *ijmaʿ* that Tusi claimed had existed among the Shiʿis on *khabar al-wahid*, became, in the terminology of later Usulis, *al-sira al-mutasharriʿa* since this was a practice which had, according to him, existed from the Prophet's time.[118]

By adopting this stance, Tusi was raising the importance of the *hadith* corpus as part of the authenticated *sunna*. Tusi, it appears, was aware of the consequences of rejecting *khabar al-wahid*. It must be remembered that he was the author of two of the major Shiʿi *fiqh* works. Most of his verdicts in these works were based

[112] Wilferd Madelung, "Authority in Twelver Shiʿism in the Absence of the Imam," in George Makdisi et al., eds., *La nation d'autorité au Moyen Age* (Byzance: Occidental Paris, 1982), 168.
[113] Al-Murtada, *al-Dhariʿa*, 2/529–30. On the *qara'in* according to Tusi, see *ʿUdda*, 1/143–44.
[114] Tusi, *ʿUdda*, 1/106.
[115] Ibid., 1/108.
[116] Ibid., 1/126.
[117] Ibid., 1/128.
[118] *al-Sira al-mutasharriʿa* refers to acts that are observed by those who abide by the *shariʿa* even if these practices are not mentioned in the revelatory sources. A good example is that of keeping a beard.

on isolated reports. *Khabar al-wahid* had to be reinstated, at least for the sake of preserving the juridical corpus. The alternative was to depend on *mutawatir* traditions and those *hadith* supported by *qara'in*—these were few and far in between. As the Afghani jurist Asaf Muhsini (d. 2020) admits:

> The consideration of the invalidity (*adam al-hujjiyya*) of *khabar al-wahid* would lead to the nullification of most of our jurisprudence (*fiqh*).[119]

It is to be remembered that at the time when al-Murtada and Tusi were writing, *ijtihad* was not admitted as a source of law, as it was equated with *qiyas*. *Ijtihad* suggests the abdication of certainty, a possibility that was denied by both Tusi and al-Murtada. Since movement from *'ilm* to *zann* was inadmissible, only movement in the opposite direction was possible. This was done by raising *khabar al-wahid* to the level of an approbated and accepted *zann*. With the restrictions imposed on the sources at their disposal, Shi'i jurists had to enlarge the pool from which they could exegetically derive their laws. This was done by reinstating and validating *khabar al-wahid*. Tusi fully affirmed the acceptability of isolated traditions even though it did not generate certainty of the law.

The question of certitude against conjecture was a polemical weapon which the Shi'is could use against the Sunnis. To safeguard their contention that their juridical sources were based on *qat'* or an approbated *zann*, *khabar al-wahid* had to be admitted as a special type of acceptable *zann* (*al-zann al-mu'tabar*). The Shi'is could thus fulfill the needs in the *fiqh* manuals on the one hand and not compromise on the question of certitude on the other. In this way, they could maintain the preponderance of the Shi'i legal system over its Sunni counterpart.

Apart from reinstating *khabar al-wahid*, it was necessary for the Usulis to demonstrate that the Lawgiver had approbated its usage in the legal field. Various proofs were advanced by the Usulis to vindicate their claim that *khabar al-wahid* was an accredited *zann*. These ranged from inferences from Qur'anic verses (especially 49:6) to deducing proofs from the *sira* of the *'uqala'* (the practices or of people of sound mind).[120] Later on, 'Allama also claimed that *khabar al-wahid* was *hujja*, basing his arguments on Qur'anic verses as well as on *ijma'*. The arguments he advanced were more compelling and nuanced than those stated by Tusi or Muhaqqiq.[121]

[119] Asaf Muhsini, *Buhuth fi 'Ilm al-Rijal* (Qum: 1983), 107.

[120] Liyakat Takim, "The *Rijal* of the Shi'i Imams as Depicted in Imami Biographical Literature" (PhD diss., London: School of Oriental and African Studies, 1990), 281–83.

[121] In his *Nihaya*, 'Allama has a detailed discussion on the authority of *khabar al-wahid*. He presents fifteen arguments to support his claim. *Nihaya al-Wusul ila 'Ilm al-'Usul* (Qum: Mu'assasa al-Imam al-Sadiq, 2004), 3/370–414.

The most potent weapon the Usulis could produce to demonstrate that *khabar al-wahid* was an approbated *zann* was that of the practice of the people of sound mind. Al-Sadr argues that if the Imams' *sira* was contrary to the accepted norm of accepting isolated traditions, many questions would have been posed to them. The Imams in turn would have responded to these question at least some of which would have reached us.[122] Their silence in the face of all rational beings' acceptance of *khabar al-wahid* is taken to be an accredited *sira* and hence *hujja*. Thus, what was a mere *zann* (that *khabar al-wahid* was a form of conjecture) was raised to an accepted probability by the Usulis.

Given the fact that an isolated tradition does not produce certitude that reflects the will of the Divine, Usulis had to address the problem of justifying their excessive dependence on *khabar al-wahid*. This they did by extracting various quotations from the revealed proofs that could be cited as possible justification for the validity of *khabar al-wahid* (like verse 49:6 from the Qur'an). Above all, they introduced terminological devices that could make the *zann* of *khabar al-wahid* binding.

Usulis further foresaw a clash between Qur'anic verses against relying on *zann* on the one hand and the acceptance of *khabar al-wahid* on the other. The solution was found in making *khabar al-wahid* an exception to the anti-*zann* rule. The best proof that the Usulis could offer was *sira al-ʿuqala*'. Through this and other exegetical stratagems, they raised *khabar al-wahid* to the level of an approbated *zann*. Despite the lower epistemic value of *zann*, Usulis claimed that the Lawgiver had consented to the use of some types *zann*. They were thus able to valorize and declare legal precepts based on *zann* as *hujja*, even though these precepts had not reached the level of certainty.

Another example of the use of an *amara* in endorsing a juristic ruling is that of the Friday prayers (*salat al-jumʿa*). Many jurists had prohibited the convening of the Friday prayer during the absence of the Imam as no explicit permission from him had been granted. Shahid I (d. 1384), on the other hand, argued, "Jurists have the permission of the Imam available in the *sahih* (authentic) tradition of Zurara in which al-Sadiq had reportedly urged his associates to participate in the *jumʿa* prayers. "The permission," says Shahid I, "of al-Sadiq to Zurara is similar to the permission of the Imam of the age (*sahib al-ʿasr*) to the jurists who have undertaken greater responsibilities than that of convening the *jumʿa* during the occultation."[123]

[122] Baqir al-Sadr, *Durus*, 2/197.

[123] Abdulaziz Sachedina, *The Just Ruler in Shiʿite Islam: The Comprehensive Authority of the Jurist in Imamite Jurisprudence* (New York: Oxford University Press, 1988), 189. Also, Zayn al-Din al-ʿAmili, *Dhikra al-Shiʿa fi Ahkam al-Shariʿa* (Litho, 1855); Liyakat Takim, "From Partial to Complete: Juristic Authority in Twelver Shiʿism," *Journal of South Asian and Middle Eastern Studies* 43, no. 4 (2020): 17.

Doubt (*Shakk*) as an Epistemic State

When a *mujtahid* is not able to base his edicts on either *qatʿ* or *zann*, then he has to establish them on doubt (*shakk*). The main difference between *zann* and *shakk* is that in the case of the former, a *mujtahid* might locate an indicator that would substantiate his ruling. Doubt, on the other hand, is the outcome of a lack of any indication in the textual sources.[124] It is because of this that works on *usul al-fiqh* normally contain a separate chapter on doubt and the various forms that it can take.

Ansari's major contribution in this field was the improvisation of a methodology for jurists to deploy when they were confronted with a case in which they could not attain certainty or conjecture. Depending on the kind of doubt that arises, Usuli jurists, especially starting with Ansari, developed various techniques that were expressed in *al-usul al-ʿamaliyya* (procedural principles) so as to arrive at a ruling that approximated but did not reflect the exact Divine injunction on an issue. It is to be noted that, due to the doubt inherent in the procedural principles they are to be used only as a last resort.[125]

In the absence of any proofs from the textual sources, Ansari articulated four procedural principles in cases of doubt. When a jurist is confronted with a question on whether it is obligatory to perform an act or not and if there is no clear response in the revelatory sources, he must first search for a precedent. If he finds one, then the principle of continuance (*istishab*) will apply. If there is no precedent, the jurist should apply the principle of exemption (*baraʾa*). This principle, which means that an agent is absolved from any legal responsibility, is predicated on the view that if God had wanted an act to be performed, He would have enunciated it very clearly in one of the revelatory sources. If, on the other hand, a precedence is located in the sources, then the ruling should remain the same.[126]

However, if the doubt is secondary, that is, it does not refer to the general principles but only to a specific detail or case, and if there is a known obligation, but several options exist, then all of these options must be followed according to the principle of caution (*ihtiyat*). If it is not possible to pursue all the options, then the principle of choice (*takhyir*) applies, and one option should be chosen.

A jurist may encounter various categories of doubt. Doubt can arise as to whether a particular act is incumbent or not, *al-shakk fi taklif*. For example, a person may know that praying is obligatory but may not be sure if, on Fridays,

[124] Zackery Mirza Heern, "Thou Shalt Emulate the Most Knowledgeable Living Cleric: Redefinition of Islamic Law and Authority in Usuli Shiʿism," *Journal of Shiʿa Islamic Studies* 7, no. 3 (2014): 330.

[125] The classical *usul* works like those of Tusi and al-Murtada do not have a separate section or discussion on the principles of *al-usul al-ʿamaliyya*. Such topics are much later additions in Usuli discourse.

[126] Zackery Heern, "*Shiʿi Law and Leadership: The Influence of Mortaza Ansari* (Latvia: LAP Lambert Academic Publishing, 2010), 26.

the noon prayers or Friday prayers are mandatory to offer. Then a doubt may arise, not regarding the ruling but regarding the subject. For example, an agent may be aware that alcohol is prohibited but is unsure as to whether the glass in front of him/her contains alcohol or not. Another kind of doubt is called *al-shakk al-ijmali*, that is, a person may know that there is alcohol in one of the glasses in front of her/him but is unsure which one contains it.[127] These indicate the various cases and forms of doubts that a person may be confronted with. A jurist has to deduce a ruling based on the procedural principles, and then issue an injunction accordingly. In the following section, I briefly adumbrate the four procedural principles and discuss how they are used to arrive at a judicial ruling.

Istishab (the Presumption of Continuity)

The term *istishab* refers to instances where a prior set of cases continue to the present with no alteration in the situation or condition. This principle connects a later set of circumstances with an earlier one and asserts that the rules applicable to certain conditions will remain valid and enforced as long as the conditions have not changed. Stated differently, the status of a ruling will remain the same until the conditions surrounding the original case are altered.[128]

Although the principle of *istishab* was discussed by earlier Usulis, Ansari expanded it considerably and even introduced new procedures in it.[129] For example, something that was initially ritually pure (*tahir*) does not become impure on the basis of doubt engendered by a lapse of time. In case of such a doubt, *istishab* stipulates that a person should ignore the doubt and observe the previously held certainty. The presumption of continuity thus allows a person to presume that the object retains its original state of purity.

As a principle for extrapolating a ruling, *istishab* was not as important to earlier jurists as it became to later ones. It was either not accepted or accentuated by earlier jurists. For example, al-Murtada did not accept *istishab* as *hujja*.[130] In comparison to subsequent works on the same topic, Tusi has a very small section on *istishab*. He quotes the views of the Hanafis, Shafiʿis, al-Murtada, and al-Mufid on the issue. Tusi also quotes traditions on the *hujjiyya* of *istishab*. More significantly, he does not cite any of the subdivisions and arguments on *istishab*

[127] A discussion on Ansari's division of the types of doubts and possible solutions is beyond the purview of this study.

[128] See al-Subhani, *Ta'rikh al-Fiqh al-Islami*, 434–35 for divisions of *istishab.* Heern, "Thou Shalt Emulate," 331.

[129] Al-Subhani, *Tadhkira al-Aʿyan*, 1/378–79.

[130] Al-Subhani, *Ta'rikh al-Fiqh al-Islami*, 265.

that are cited in subsequent texts.[131] Even medieval scholars like Muhaqqiq al-Hilli and ʿAllama al-Hilli have very brief expositions of *istishab*.[132]

Proofs for *Istishab*

Shiʿi jurists have sought validation for the procedural principles from traditions transmitted from the Imams. In his vindication of *istishab*, al-Bihbahani cites several traditions to prove that the Imams issued rulings based on *istishab* and had taught them to their disciples. Jaʿfar al-Sadiq reportedly told his eminent disciple, Zurara b. Aʿyan, "Certainty cannot be invalidated by doubt."[133] In another tradition, Zurara narrates from al-Sadiq that he asked the Imam, "If a person who is in a state of *wudu'* (ablution) sleeps for a few seconds is the *wudu'* invalidated?' The Imam replied, "While the eye might close, the heart and ear remain aware. Only when the eye, ear and heart are asleep is the *wudu'* broken." Al-Sadiq is also reported to have stated, "Unless a person is certain s/he fell asleep, s/he may presume the continuity of the previous *wudu'*. Do not challenge certainty with doubt, because a certitude can only be replaced when it is challenged by another certitude."[134]

The principle of *istishab* can also be determined by reason. It is logical to assume that a prior state in an object will remain in the same condition until one is certain that it has changed to another state. Because reason determines this, the Lawgiver cannot override this ruling, since there is a correlation between what reason dictates and the determination of the Lawgiver (called *qa'ida al-mulazama*). Reason also dictates that it is correct to assume that what was pure before continues to be in the same state of purity unless we know otherwise. The principle of *istishab* can also be affirmed by *sira al-ʿuqala'*, that is, the practice of people of sound mind, who confirm that a thing will remain in its previous state unless something occurs to transform its prior condition.

Usulis explored various possibilities of the applicability and inapplicability of this principle. Jurists encounter various genres of doubts that can be analyzed in the context of *istishab*. One of these is the example of "doubt of original capability" whereby an original state necessarily ends at a specific time. Is *istishab* applicable in this scenario? A person who is fasting may doubt whether the day has ended (i.e., whether the sun has set). Unless a person is residing at the poles

[131] Tusi, *ʿUdda*, 2/757–58.

[132] Muhaqqiq al-Hilli, *Maʿarij*, 207–209. For ʿAllama *istishab* is *hujja*, because he states, "the *ijma'* of the jurists dictates that a *hukm* which is accepted cannot be revoked by a doubt on its continuity." ʿAllama al-Hilli, *Mabadi' al-Wusul*, 250–51.

[133] On Zurara's question to al-Sadiq on *istishab* and *wudu'*, see Zuhayr al-Aʿraji, "*Falsafa al-Zaman wa'l-Makan fi al-Adilla al-Shar'iyya wa'l-Usul al-ʿAmaliyya*," in *Ijtihad va-Zaman va-Makan*, 1/218.

[134] Al-ʿAmili, *Wasa'il*, 1/245. See also traditions on *istishab* in al-Najafi, *ʿIlm al-Usul*, 40–41.

in the summer, by its very nature daytime ends, since it is impossible for it to continue endlessly. In this case, a doubt about whether daytime continues is not created by the possibility of it being affected by an external factor. Rather, it is produced because, by its very nature, daytime will end, and it will become night. In this instance, the principle of continuity (daytime and the need to continue fasting) is not applicable as long as a person is confident that the sun has set.[135]

Norman Calder cites a rather odd example of how *istishab* can produce unexpected legal results. Prior to a sexual act a hermaphrodite, like everyone else, is considered to be in a state of ritual purity. If he engages in a sexual act with an organ that could not be ascertained to be his actual sexual organ, and "since only one organ could be the real organ (for it was not finally allowed that the ambiguous hermaphrodite was both male and female, only that a disambiguating factor had not been discovered), there was always only doubt as to whether a real sexual act had taken place. Since doubt does not overcome a prior certainty, the hermaphrodite remains in a state of purity unless in the case where both his organs are simultaneously brought into play."[136] Hence, even if he has engaged in sexual intercourse, as long as it is not ascertained that his sexual organ has been used, the hermaphrodite can be considered to be in a state of purity.

The Principle of Exemption from Liability (*Bara'a*)

The principle of *bara'a* applies to cases where the texts do not articulate or proclaim any commandment or interdiction of an act. Since there is no explicit ruling on the performance of or abstinence from an act, a person is free to choose between performing or refraining from it. The principle of exemption also states that when a person is not certain if an item is impure or not, it is to be considered pure. The rationale behind the principle of *bara'a* is that if the Lawgiver had wanted a ruling to be binding, He would have explicitly pronounced it in one of the sources. Thus, based on this principle, a person cannot assume something to be obligatory or prohibited unless s/he has proof to do so.

The concept was discussed from the time of the Buyid scholars onward. Al-Murtada argued, based on reason, that when there is no legal ruling stated, an act is permissible, whereas both al-Mufid and Tusi argued for suspending a decision (*tawaqquf*) pending a revelatory injunction.[137] Although the concept was discussed briefly before him, the term *bara'a* was first used by al-Muhaqqiq

[135] Baqir al-Sadr, *Lessons*, 135. There are various other subdivisions of this principle, which are beyond the scope of this study.

[136] Norman Calder, *Islamic Jurisprudence in the Classical Era*, ed. Colin Imber (New York: Cambridge University Press, 2010), 98.

[137] See al-Murtada, *al-Dhari'a ila Usul al-Shi'a*, 2/808–809; Tusi, *'Udda*, 2/742.

al-Hilli when discussing the principles of abrogation (*naskh*) and isolated traditions.[138] The term was clearly gaining currency during this period. ʿAllama sensed the importance that the principle was to acquire because he states that a *mujtahid* must be well acquainted with the principle of *bara'a*.[139]

The principle of *bara'a* is based on Qur'anic injunctions against holding human beings responsible for duties that have not been proclaimed.[140] It is also derived from Qur'anic verse 17:15 "We do not punish those to whom We have not sent a Messenger." The verse is construed to mean that God will not punish a person for performing or refraining from an act unless He issues an injunction on it. A corollary to the principle of *bara'a* is that a person is not required to observe caution (*ihtiyat*) on an issue when s/he is not sure of a ruling on it. The sixth Imam al-Jaʿfar Sadiq is reported to have said that "everything is *halal* unless it is specifically mentioned to be *haram*."[141]

The principle of exemption can also be affirmed based on *ʿaql*. This is because reason judges that it is wrong for God to punish someone if s/he fails to perform an act for which no ruling has been stipulated. Hence, any act which has not been explicitly forbidden by the Lawgiver can be assumed to be lawful. Based on this premise, the term applied to this source of law is rational absolution, or "the principle that it is evil to punish without a clear declaration" (*qubh iqab bila bayan*). This means that as long as God does not clearly pronounce the law, then it would be wrong for Him to expect obedience.[142]

Reason further dictates that if there is no textual pronouncement on a topic, it can be assumed that the Lawgiver has not issued a ruling on it. The absence of any legislation on the subject continues (*istishab*) until evidence to the contrary is found. Hence, the act can be assumed to be lawful in the eyes of the Lawgiver. Al-Bihbahani goes further, arguing that reason, revelation, and consensus all prove that there is no legally binding command from a just Lawgiver unless there is indubitable proof (textual or otherwise) to support the existence of such a command. Actions for which there are no indicators (*adilla*) are outside the Lawgiver's sphere of interest and hence are permissible.[143]

Usulis argue that the practices of people of sound mind further justifies this principle. Based on the principle that "it is evil to punish for performing an act

[138] Robert Gleave, "Value Ontology and the Assumption of Non-Assessment in Postclassical Shiʿi Legal Theory," in Peter Adamson, ed., *Philosophy and Jurisprudence in the Islamic World* (Boston: Walter de Gruyter, 2019), 174.

[139] ʿAllama al-Hilli, *Mabadi' al-Wusul*, 242.

[140] Qur'an, 4:165, 20:134, 17:15.

[141] Sayyid Fadhel Hosseini Milani, *Thirty Principles of Islamic Jurisprudence* (London: Islam in English Press, 2011), 25. On the types of *bara'a* and differences between jurists on this principle, see al-Mishkini, *Istilahat al-Usul*, 48–49.

[142] See al-Salihi, *Tariq al-Ijtihad*, 160. For other traditions on this, see al-Najafi, *ʿIlm al-Usul*, 37–38.

[143] Amirhassan Boozari, *Shiʿi Jurisprudence*, 20–21. On the distinction between *al-bara'a al-shar'iyya* and *al-ʿaqliyya*. See also Boozari, *Shiʿi Jurisprudence*, 20.

without clarifying that it should be avoided" rational persons judge that it is morally wrong to punish someone for the performance or omission of an act without informing him/her.[144] Some Usulis even argued that *bara'a* is also applicable where the texts are unclear or nebulous regarding an act. The principle can also be invoked when there are contradictory verdicts or statements on an issue.[145]

The principle of *bara'a* also suggests that unless it has been specifically validated by the Lawgiver, conjecture is not considered to be *hujja*. This is because reason rules that if God had wanted an act to be undertaken, He would have proclaimed it in a very clear manner, not based on speculation. It is because of this that Shiʿis refuted certain principles that Sunnis accept. These include principles such as *maslaha*, *qiyas*, *ʿurf*, and *istihsan*. For the Shiʿis, they cannot be sure that the obligations derived from invoking these principles reflect or even approximate the will of the Lawgiver.

Since Shiʿi jurists had rejected *qiyas* and *istihsan*, there were, for them, greater spheres of law for which there were no injunctions. This also means that a wider range of acts could fall under the purview of *bara'a*. The principle of *bara'a* has become a very potent tool for Usuli jurists and provided them with greater flexibility to permit the performance of acts. This is because the lack of a proclamation from the Lawgiver means there is no obligation to either perform or avoid an act. Even though this principle is based on *zann*, Usulis argue the principle could operate in all spheres of law. The principle of *bara'a* is also connected to *istishab*. This is because *bara'a* establishes that in the absence of an injunction, there is no moral duty on an agent. *Istishab* perpetuates the *bara'a* principle by ruling that in the absence of an injunction, a ruling of no assessment cannot be changed unless there is another clear injunction from the Lawgiver to indicate otherwise.

The ramifications of the principle of *bara'a* can be seen in the case of smoking and many other doubtful acts. Since there is no revelatory proof to prohibit smoking, the principle of *bara'a* dictates that smoking should be permitted.[146] The Akhbaris refuted the principle of *bara'a*, arguing that where no textual proof was available and no injunction mentioned regarding an act, an agent should refrain from undertaking it. Thus, due to their disparate epistemological outlook, they prohibited the same act that the Usulis had permitted (smoking) based on the principle of precaution. Due to the presence of reports supporting *bara'a*, some Akhbaris like al-Bahrani argued in favor of it.[147] In more recent times,

[144] Baqir al-Sadr, *Durus*, 1/174.

[145] Gleave, *Scripturalist Islam*, 285.

[146] For further divisions of this principle, see al-Mishkini, *Istilahat al-Usul*, 46–49. For the principle of *bara'a*, see Muhammad Mahdi al-Naraqi, *Anis al-Mujtahidin* (Qum: Matbaʿa Muʾassasa Bustan-e Kitab, 2010), 386–87; for cases where Akhbaris accepted *bara'a*, see Gleave, *Scripturalist Islam*, 204, 285–89.

[147] Gleave, *Scripturalist Islam*, 288–89. For Usuli arguments for *bara'a*, see Gleave, *Inevitable Doubt*, 123–25. On traditions from the Imams regarding *bara'a*, see al-Najafi, *ʿIlm al-Usul*, 37–38; on *istishab*, see ibid., 40–41.

after examining the very sensitive topic of transgender surgery in great depth, Ayatullah Khumayni issued a *fatwa* permitting the procedure based on the principle of *bara'a*.[148]

In contrast, Muhammad Baqir al-Sadr, offers a very different perspective. He claims that human beings are duty-bound to obey God on all issues, whether they are stated in the texts or not. By doing this, they will have fulfilled their obligations toward the Creator. Furthermore, it could be argued that the lack of clarity regarding religious obligations may be due to our lack of understanding rather than God's failure to communicate them. Al-Sadr therefore rules that when a person is unsure of his/her obligations on an issue, s/he must exercise caution by performing all possible duties that would ensure the obligation is fulfilled.[149] His ruling directly contradicts the views proffered by many Usuli scholars who accept the *bara'a* principle when no directive has been issued by the Lawgiver.

The Principle of *Ihtiyat* (Precaution)

Ansari also hypothesized cases when doubts arise concerning details of a particular *hukm*. For example, when a person knows that an obligatory act can be fulfilled in numerous ways but is not sure as to in which form they should be performed, Ansari rules that all possible venues must be explored. By doing so, one can be confident that the religious obligation has been undertaken. This would create considerable difficulties for a believer, since it would entail the performance of multiple acts for a single ritual. If it is impossible to perform all the options, the agent should choose (*takhyir*) between them. In this case, a *faqih* would decide which option closely approximates the actual ruling.[150]

Due to their strict epistemological framework, the Akhbaris favored and applied *ihtiyat* more rigidly than the Usulis did. As previously mentioned, the latter preferred principles like *bara'a* and *istishab* and invoked *ihtiyat* only when there was no clear indicator for a ruling to be issued or when the texts were ambivalent. Usuli reluctance to apply the principle of *ihtiyat* can be illustrated from rulings issued by medieval scholars like Muhaqqiq al-Hilli. He states that it is recommended but not necessary to observe the principle of *ihtiyat*.[151] Thus, for example, a question is posed concerning the washing of a bowl if a dog licks it.

[148] Mahdi 'Ali Pour, "Islamic *Shari'a* law, Neotraditionalist Muslim Scholars and Transgender Sex-Reassignment Surgery: A Case Study of Ayatollah Khomeini's and Sheikh al-Tantawi's Fatwas," *International Journal of Transgenderism* 18, no. 1 (2017): 99.

[149] Baqir al-Sadr, *al-Ma'alim*, 186.

[150] Also Litvak's discussion on Ansari's procedural principles, *Shi'i Scholars*, 72.

[151] Gleave, *Inevitable Doubt*, 105. For conflicting opinions on the validity of *ihtiyat*, ibid., 106.

In contrast to other jurists who ruled based on *ihtiyat*, Muhaqqiq states only one washing of the bowl is necessary.[152] Rather than opting for precaution, Muhaqqiq invokes the *bara'a* principle, since this is the minimum requirement. *Ihtiyat*, on the other hand, would dictate that the same bowl be washed seven times. Performing multiple acts for one ruling would be cumbersome and would, in effect, mean that a person has to repeat the same act several times so as to be certain that the minimum legal requirement has been fulfilled.[153]

Many traditions from the Imams support the principle of *ihtiyat* and the need to exercise it in cases of doubt. For al-Bihbahani, as for most Usulis, *ihtiyat* is to be observed only when a person is confused or uncertain of his/her obligation. As they were more text- than reason-centered, the Akhbaris stressed the principle of caution, especially as they were against the application of the more rationally based *bara'a* principle. For them, exercising the principle of *bara'a* meant the actual obligation remained unfilled. By accentuating the maximalist view of *ihtiyat*, the Akhbaris ensured that the Lawgiver's will has been fulfilled even at the cost of performing multiple acts of worship.

In the juridical corpus, *fatawa* based on *ihtiyat* indicate that a *mujtahid* is not sure of the actual ruling and that there is not enough proof to indicate even the probable ruling on an issue. For some scholars, resorting to the principle of *ihtiyat* may also be an indication of a *mujtahid*'s piety. In some cases, even though a *mujtahid* has arrived at a definitive ruling on an issue, he may opt for *ihtiyat* if he finds that the common verdict (*mashhur*) issued by other jurists contradicts his view.[154] However, the application of this principle can be extremely cumbersome and exacting for an ordinary believer. The rulings of precaution in matters of worship are much fewer than those pertaining to interpersonal transactions. At the same time, the difficulties of being cautious in matters of worship are much less exacting than observing *ihtiyat* in social transactions. For example, repeating a prayer four times when one is not sure of the direction of the *qibla* is not as difficult as having to pay religious dues again.

Precaution also grants a person the license to seek the legal opinion of another *mujtahid* on a particular matter. By issuing a ruling based on precaution, a *mujtahid* shifts the burden of responsibility to another jurist who is more confident or bold to issue a definitive ruling on the same subject. Shams al-Din remarks that a jurist needs to be forthright and courageous to reach a clear determination rather than opting for precaution. He asks jurists to reduce the number of edicts they issue based on precaution especially when it comes to social transactions, since these can be very difficult to apply in practice.[155]

[152] Muhaqqiq al-Hilli, *Maʿarij*, 216–17.
[153] For conflicting opinions on the validity of *ihtiyat*, see Gleave, *Inevitable Doubt*, 106.
[154] See a discussion on this in chapter 5 of the present study.
[155] Al-Rifaʿi, *Maqasid al-Shariʿa*, 42.

It is also correct to state that *ihtiyat* functions in opposition to the principle of no harm or harassment. Whereas *la darar wa-la dirar* affirms the principle of no harm or difficulty in religion, *ihtiyat* does the opposite. For example, if a person is not sure whether s/he is required to offer the *qasr* (shortened) or full prayers at a particular place, the principle of *ihtiyat* demands that s/he should offer both. Similarly, if a person is not sure of the direction of prayers, *ihtiyat* requires that s/he prays four times, one prayer in each direction. The principle also contravenes the Qur'anic verse stating that God wishes ease, not difficulties, for the believers (2:185).

It should be noted that the copious usage of *ihtiyat* in juridical treatises is a relatively new phenomenon, as it is present more among later than earlier scholars. Especially in the last century, *fatawa* based on *ihtiyat* have proliferated. One reason is that, according to Shams al-Din, jurists examine issues through personal rather than societal lens. In doing so, they do not realize the social impact of their *fatawa* based on *ihtiyat*.[156] Shams al-Din's observation can be substantiated by a comparison between earlier juridical texts and contemporary ones. A comparison of Tusi's *al-Nihaya* and al-Khu'i's *Minhaj al-Salihin*, for example, indicates a much greater penchant for issuing judgments based on *ihtiyat* in the latter text.

The preceding discussion indicates that the horizons of understanding of a jurist and the hermeneutics deployed will greatly determine the kind of injunctions he issues. The more flexible the outlook of a scholar, the more variant and accommodating his rulings are likely to be. The rulings of a jurist who accepts and employs *bara'a* in his adjudication for example, are more likely to be malleable than those of a jurist who strictly enforces *ihtiyat* in his decision-making process. This is because *bara'a* allows the issuance of a wider range of juristic rulings than *ihtiyat* does. Generally speaking, it is correct to state that the more flexible the hermeneutical principles employed, the more-wide ranging the outcome of the juridical process, that is, the rulings of jurists will be more diverse. This is because different outcomes can be shown to be consistent with the sources. In such cases hermeneutical principles do not determine the law; rather, they justify it. This is because any outcome of the law can be harmonized with the text.[157] Along the same lines, as I discuss in chapter 4, a jurist who incorporates rational and ethical considerations in his decision-making process is likely to deduce injunctions very different from those produced by one who rules by textual sources only.

[156] Al-Rifa'i, *Maqasid al-Shari'a*, 42–43. For the types of *ihtiyat*, see al-Salihi, *Tariq al-Ijtihad*, 163–67. Also, al-Naraqi, *Anis*, 315, 389–91.

[157] On this Behnam Sadeghi, *The Logic of Law Making in Islam*, 6–7.

Takhyir (the Principle of Option)

The principle of *takhyir* is often invoked when there is a clash between two texts or traditions that cannot be reconciled. It is also applied if a jurist is confronted with a doubt between an obligatory and forbidden act and is not able to reconcile the divergent proofs that he is confronted with. The application of the principle of *takhyir* can be demonstrated in Tusi's attempts at resolving contradictory traditions. Tusi says a jurist must first compare them with the Qur'an. The tradition that agrees with the Qur'an is to be accepted at the expense of its counterpart. If both traditions agree with the Qur'an, Tusi tries to harmonize them by interpreting their contents and engaging in various forms of interpretive exercises. At times, he claims that a particular *rawi* (transmitter) is a Sunni (*ʿammi*) and therefore the tradition should be discarded. He also states that the *hadith* which opposes the Sunni ruling on the same issue is to be preferred to that which agrees with their ruling.[158] On other occasions, he maintains that the *ijmaʿ* of the community is contrary to the purport of the traditions or that a tradition must have been uttered because of *taqiyya* (dissimulation). When confronted with contradictory traditions, Tusi also examines and demonstrates a tradition's unreliability due to weak links in the chain of *hadith* transmitters.[159] He states that it is essential to act on a tradition that is related by the most upright (*aʿdal*) *rawi*. The *ʿadala* of a *rawi* meant, for Tusi, that he should be a believer in the truth (*muʿtaqidan bi1-haqq*), have insight [in his religion], be reliable and not known for lying. If the reporters are equal in their moral rectitude, Tusi states that a reporter who narrates more traditions is to be preferred to one who reports fewer *ahadith*. In the final analysis, when all options have been exhausted, a jurist is free to choose (*takhyir*) between the traditions.[160]

An example of the application of this principle is the choice between performing the Friday or noon prayers. Some jurists have stated that offering the Friday prayers is obligatory, others are not sure if the twelfth Imam had permitted jurists to lead the Friday prayers during the occultation. Many jurists have offered the believing community the option of choosing between offering one of the two prayers, while others have stated that, based on precaution, a person should offer the noon prayers even if he offers the Friday prayers.[161] Traditions

[158] Tusi, *ʿUdda*, 1/147. This criterion is mentioned in the *usul* works because, according to a tradition reported from al-Sadiq, "The people would ask ʿAli questions and then deliberately act contrary to it so as to confuse the masses." al-ʿAmili, *Wasaʾil*, 18/83. Another reason given for this ruling is because Sunni jurisprudence is built on falsehood. Al-Saduq, *ʿIlal al-Sharaʿi* (Najaf: Maktaba al-Haydariyya, 1966), 531.

[159] See, for example, Muhammad b. al-Hasan Tusi, *al-Istibsar Fi Ma Ikhtalafa min al-Akhbar* (Beirut: Dar al-Adwa', 1985), 1/48.

[160] Ibid., 1/4–5.

[161] Al-Mishkini, *Istilahat al-Usul*, 102–103.

narrated from the Imams vindicate the principle of *takhyir*. For example, a person visited the eighth Imam, ʿAli al-Rida, and told him that two reliable narrators reported contradictory traditions. This left him with a dilemma to which the Imam responded, "you are free to choose any one of the two."[162]

Deployment of *al-Usul al-ʿAmaliyya*

As different legal cases arose, Shiʿi jurists had to summon newer strategies to deal with them. Usuli discourse was extended to include not only the revelatory sources of law, but also *al-usul al-ʿamaliyya*. The principles set forth in *al-usul al-ʿamaliyya* help a jurist determine a ruling even when the evidence for a particular act is circumstantial or equivocal. For example, based on the principle of *istishab*, Ansari rules that a jurist does not have the *wilaya al-tasarruf*, that is the authority to dispose of the goods of others. Since the right to dispose did not exist before, and circumstances have not changed, Ansari rules that, based on the principle of *istishab*, a jurist does not have the right to dispose of property that belongs to others.[163] Similarly, jurists during the Qajar period in Iran used Usuli arguments and the principles embedded in *al-usul al-ʿamaliyya* to derive rulings so as to guide the sociopolitical affairs of the community, especially during the constitutional crisis in Iran in 1905–1906.[164] Justification for constitutionalism was argued by Muhammad Husain Naʿini (d. 1936), who claimed "the constitutional system was in conformity with the Usuli legal tradition by referring to the principle of *muqaddamah-yi wajib* (obligatory prerequisite), that is, that the adoption of constitution is obligatory as a precondition to ensure Muslim welfare and security."[165]

Another application of *al-usul al-ʿamaliyya* can be illustrated in the example of cloning. This subject is, of course, not mentioned in the textual sources. Those who oppose cloning cite verse 4:119, which quotes Satan as stating that he will command people to alter God's creation. Based on this verse, some scholars have argued that cloning is tantamount to changing God's creation and hence should be prohibited. In this case, *al-usul al-ʿamaliyya* rules that since there is no explicit text (*nass qatʿi*) to prohibit cloning, the principle of *bara'a* should apply and jurists should permit cloning.[166] The principle of *asl al-ibaha* (by default everything is permitted unless stated otherwise) can also be invoked.

[162] Ahmad b. ʿAli al-Tabrisi, *al-Ihtijaj*, 2 vols. (Mashhad Murtada, 1981), 357.
[163] Sachedina, *The Just Ruler*, 215.
[164] Ibid., 221.
[165] Dahlen, *Islamic Law*, 104.
[166] Al-Qummi, *Kalimat Sadida*, 55.

Application of the principles elaborated in *al-usul al-ʿamaliyya* demonstrate that much of what is purportedly God's law is actually the product of human intellectual endeavor. Based on the principles established in Shiʿi legal theory, when confronted with an issue for which there is no clear textual evidence, jurists either apply what they perceive to be the law or use the procedural principles outlined earlier in cases when they cannot deduce a clear ruling from the textual sources. It is because of the human element in the interpretation and implementation of the principles established in *usul al-fiqh* that, despite the *shariʿa*'s purported encapsulation of all aspects of human activity, there is no unified or monolithic legal system accepted and acknowledged by all Muslims.

Application of the principles of *al-usul al-ʿamaliyya* also substantiates the Muslim reformers' contention that much of the *shariʿa* is humanly constructed rather than Divinely revealed. Given a different set of circumstances, it can be reconstructed to respond to newer settings. Recourse to and reliance on *al-usul al-ʿamaliyya* also lends credence to the view that, in themselves, the revealed sources cannot respond to the multitudinous challenges confronting the community at different times and places.

Through the application of procedural principles, jurists have produced a sophisticated science of theoretical jurisprudence that demonstrates their interpretive abilities. Significantly, in the typology of the epistemic schemes that scholars have defined, there is no discourse on the moral-ethical underpinnings of their rulings. Neither is there a discussion on the ethical and social ramifications of their judgments on the community of believers. Generally speaking, most *fuqaha*' do not discuss what, if any, recourse a jurist has if the laws he has deduced do not comport with universally recognized moral or ethical principles. Within the juridical literature, there is more emphasis on how to derive rather than the moral worth of the law. I expound on this topic in more details in chapters 4 and 5.

Conclusion

Shiʿi legal theory emerged out of a concern to apply consistency in the process of inferring legal injunctions. The concern for knowledge and certitude, which characterized much of Shiʿi juristic literature in its formative period, was displaced with the passage of time, by a recognition of doubt as an inalienable feature of the law. Shiʿi jurists perceived the need to incorporate and even vindicate elements of doubt inherent in the law. While the transition from certitude to conjecture was a development that took place over centuries, the critical phase of this movement can be located in the lifetime of ʿAllama al-Hilli, who elaborated and definitively developed a Shiʿi theory of *ijtihad*. It was ʿAllama and his uncle,

Muhaqqiq, who conceded that juristic pronouncements were frequently based on pragmatism and conjecture rather than on the revelatory sources.

The scholars of Hilla and the Usuli jurists who followed them redefined and then advocated *ijtihad*, which now connoted the abdication of certainty and the assertion of valid conjecture. They further asserted that *ijtihad* is restricted to spheres where no clear edict can be deduced from the canonical sources. This was an explicit acknowledgment that the law was partially humanly constructed and represented an approximation rather than an accurate reflection of the Divine intent.

In the process, the authority and status of the scholars increased tremendously, since the masses were made to depend on them. Jurists also had to deal with the perplexing problem of how to derive the law when in a state of doubt. While the scholars of Hilla sought ways to justify speculation in matters pertaining to the law, al-Bihbahani asserted that a jurist's prerogative was to determine the most probable rather than the actual ruling. By performing acts based on probability, a person had fulfilled his or her obligations.

Whereas earlier scholars had ruled on areas where there was probability or certainty that their judgments indicated the wishes of the Lawgiver, Ansari constructed and methodically explored the epistemological categories of certainty, speculation, and doubt. He reconstructed the epistemic states of Islamic legal theory by refining and developing procedural principles as normative juristic positions. This empowered jurists to issue rulings on many spheres of law that had hitherto remained beyond their realm, broadening, in the process, the scope of Islamic law.

Ansari divided legal decisions into three categories and distinguished between valid and invalid conjectures. He also instituted systematic rules which allowed jurists to explore areas which had elements of doubt through his articulation of the procedural principles. Ansari's typology of epistemic states empowered jurists to extend their areas of investigation into virtually any legal matter. Whether he intended it or not, Ansari increased the sphere of the jurists' authority to beyond the revealed law. They could now infer the law through various forms of rational exegetical techniques.

3
Islamic Reformation and the Tools of *Ijtihad*

In chapter 2, I traced the development of *ijtihad* and *usul al-fiqh* in Shiʿism and examined some of the methodological tools and strategies that jurists can use when extrapolating legal decrees. Besides the textual sources and procedural principles, jurists can employ other rationally based tools that can be applied to either revise previous juridical proclamations or formulate new ones. In this chapter, I examine the application of some important hermeneutical devices and the important role they can play in an Islamic reformation.

Generally speaking, Shiʿi legists can respond to new situations and challenges by deploying various hermeneutical, exegetical, and juridical devices like time and place, custom (*ʿurf*), enacting laws that enhance the interests of the community (*maslaha*), and by a consideration of the objectives of the law (*maqasid al-shariʿa*). In addition, where necessary, jurists can also invoke secondary principles such as no harm and no harassment (*la darar wa-la dirar*), necessity (*darura*), averting difficulty (*ʿusr*), distress (*haraj*), and hardship (*mashaqqa*) as exceptions to rules that can engender legal modifications. At best, these devices can provide only partial and ephemeral amendments to existing legal injunctions. This is because they are motivated primarily by social exigencies and short-term considerations.

As I will discuss, notions like ethics, reason, justice, the role of local custom in formulating and applying the law, and the praxis of the people of sound mind have, so far, played limited roles in juridical decision-making. Since these tools are construed as predicated on reasoning and hermeneutical strategies rather than on commandments in the textual sources, they are not deemed to be Divinely sanctioned or as accurately reflecting the Divine intent. Hence, in most instances, they have not been deployed in juridical decision-making.

Maqasid al-Shariʿa and Shiʿi Legal Theory

One of the tools that reformers can use in the reformation process is that of *maqasid al-shariʿa* (goals or objectives of the law). According to the

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proponents of this principle, it is necessary to look beyond the laws expressed in the revelatory sources to understand the purposes and objectives of their enactment. Moreover, rather than the literal reading of a text, the principle of *maqasid al-shari'a* seeks to uncover universal axioms that are connected to the higher objectives of the law. Proponents of the *maqasid* further contend that there are certain moral and ethical trajectories that fulfill the purpose and goals of the laws that God has instituted. These precepts can provide proper guidance and direction to a jurist in his legal reasoning so that he issues those injunctions that best approximate and fulfill the ultimate objectives of the law.

Maqasid al-shari'a is important in the reformation process as it stipulates that the specifics of *shari'a* declarations may change in order to attain the overall values like those of justice, equality, and dignity of all human beings. Based on this presumption, jurists can revise erstwhile proclamations or formulate new ones whenever these objectives are not met or accomplished. It is important to underscore that the *maqasid* principle injects a high degree of flexibility and versatility to the interpretation of the texts.

There was little discussion on the objectives of the law in the early period of Islam. The *maqasid* was, in fact, a later interpretive endeavor. Although its roots can be traced to the times of al-Juwayni (d. 1085) and al-Ghazali (d. 1111), the major principles of *maqasid al-shari'a* were fully elaborated and explicated by Abu Ishaq al-Shatibi (d. 1388).[1] Briefly stated, al-Shatibi argued that legal injunctions can be inferred from five "necessary" principles (the protection of life, religion, progeny, property, and intellect). Since the *shari'a* was instituted for the welfare of humanity the *fuqaha'* can issue those edicts that fulfill these purposes and revise those proclamations that oppose them.[2] Historically, the *maqasid* offered Muslim jurists the possibility to reinterpret and reapply traditional *shari'a* ordinances especially when the boundaries of the Muslim world expanded and Muslims sought religious guidance to the various socioeconomic and religious challenges they encountered. In the process, the *fuqaha'* were able to refine and revise the verdicts of earlier scholars.

[1] Muhammad Khalid Masud has delineated the roots of *maqasid al-shari'a* prior to al-Shatibi's time; see M. K. Masud, *Islamic Legal Philosophy: A Study of Abu Ishaq al-Shatibi's Life and Thought* (Delhi: International Islamic Publishers, 1989), 149–69.

[2] Ibrahim ibn Musa al-Shatibi, *al-Muwafaqat fi Usul al-Shari'a* (Cairo: Dar al-Fikr al-'Arabi), 2/6. Since the details of al-Shatibi's concept of *maqasid* have been covered by others, I do not discuss them here. See, for example, Hallaq, *A History of Islamic Legal Theories*, 168ff; Yasir S. Ibrahim, "An Examination of the Modern Discourse on *Maqasid al-Shari'a*," *Journal of the Middle East and Africa* 5, no. 1 (2014): 44.

Maqasid in Shiʿi Legal Theory

In the Shiʿi context, the issue of *maqasid al-shariʿa* has to be comprehended within its particular epistemological construction, that is, whether the intellect is capable of accurately comprehending the overall objectives of the *shariʿa* without assistance from the revelatory sources. The validity of a legal injunction is contingent on the application of certain rules derived from the revelatory sources. These would approximate if not correctly discern the Divine intent and, at the same time, eliminate random or arbitrary speculation that, the Shiʿis claim, has characterized much of Sunni law.

Although laws pertaining to acts of worship are fixed and cannot be altered, it is quite possible to revise legal precepts in the realm of social relationships. This is because a jurist can decipher the rationale or objective behind a given edict by examining a precept's contextual evidence or indicators (*qara'in*).[3] One of the major weaknesses of the current form of *ijtihad* in Shiʿism is the disjuncture of religious decrees with the goals of *shariʿa*. Generally speaking, Shiʿi jurists agree that religious injunctions should be aligned with rather than oppose or be indifferent to the objectives of the law. However, this has not been practiced because jurists believe that it is up to the Lawgiver to synthesize religious decrees with the objectives of the law. They also argue that to discern the *maqasid*, they need to fathom the intent or objectives of the Lawgiver.[4] This line of thinking is a close approximation to Friedrich Schleiermacher's theory on hermeneutics. As explained in chapter 1, he maintains that an interpreter is to relive the consciousness of the author and discover his intention. For Shiʿi jurists, this cannot be accomplished through reason because of its inherent fallibility.

Because of this, traditional Shiʿi *usul* literature is bereft of discussion or analysis on this subject. Another reason for the lack of discourse on *maqasid* is that in the past Shiʿis were a minority group within a predominantly Sunni milieu where they were not required to respond to or decide on practical matters that impinged the Muslim community. Even in modern times, most Shiʿi jurists do not engage in a discussion on the objectives or goals of *shariʿa* injunctions. This is probably because, rather than discussing traditional Usuli topics like the probative value of isolated traditions or the apparent meaning of certain words, how to determine which tradition to prioritize when it conflicts with another tradition, *maqasid* discourse is more concerned with subjective evaluations of whether specific juristic injunctions are consistent with the overall goals of the Lawgiver through rational rather than textual means.

[3] Al-Husayni, *al-Ijtihad wa'l-Hayat*, 44–45; Takim, "Maqasid al-Shariʿa," 114.

[4] See the discussion on this in Abu'l-Qasim Fanaei, *Akhlaq-i Din-Shinasi: Pezhuhashi dar Mabani ma'rifati va-Akhlaq-i Fiqh* (Tehran: Nighae Muʿasir, 2013), 487.

In contrast to *usul al-fiqh*, which tends to be abstract and is predisposed to ad hoc modifications, *maqasid* incorporates teleological causation in its reasoning. The effect has been to connect an injunction to higher teleological considerations, thus rendering the preservation of reason as an essential objective of the law.[5] As I discuss in the next chapter, since it attempts to discover and fulfill the essential purposes of the law, the discourse on *maqasid* is interlaced with ethical values, underlining thereby the symbiosis between legal theory and ethics.

Generally speaking, Sunni jurists agree that legal ordinances must accord with those principles that are conducive to the welfare of a society and prevent corruption. These principles are generally used in their legal system. In contrast, most Shi'i jurists have rejected *maqasid al-shari'a* as an interpretive principle that should be incorporated in their legal system because, they claim, it is has not been endorsed by the revelatory sources. Furthermore, they contend that discerning the objectives of a law is often based on the subjective assessment and predilections of a jurist.

However, in recent times, many Shi'i scholars have sought to review and revise their legal system. More specifically, they have questioned the applicability of the current form of *ijtihad* especially in the realm of social transactions. They also maintain that incorporating concepts such as *maqasid* within the Shi'i legal framework provides them with greater flexibility and versatility in responding to contemporary contingencies and in formulating rulings on topics that are not specifically addressed in the textual sources. In addition, the establishment of an Islamic Republic in Iran in 1979 has meant that Shi'i jurists have had to respond to practical social challenges which they did not encounter in the past.

The renewed interest in *maqasid* and *maslaha* (to be discussed later) can be discerned from the views articulated by scholars like Mahdi Shams al-Din and Sayyid Fadlallah. They complain that the sociopolitical components of *fiqh* have not been highlighted in Shi'i legal discourse. This is due primarily to the fact that historically, because of the persecution and hostility they endured, Shi'is were isolated from day-to-day social issues so much so that their juristic outlook became parochial and was indifferent to the challenges that any society faces. Consequently, Shi'i scholars have not played any significant role in the evolution of political or social jurisprudence. Shi'i juridical discourse has instead been suffused with questions that affect the populace at a personal level such as prayers and fasting.[6]

Currently, there is little discourse on the question of public welfare or the overall objectives of the law in Shi'i legal manuals. On the contrary, *usul al-fiqh* focuses more on the principles and process of deriving injunctions from texts

[5] Hallaq, *Reforming Modernity*, 47–48.
[6] Al-Rifa'i, *Maqasid al-Shari'a*, 17.

than with assessing their concordance with the overall objectives of the *shariʿa*. More significantly, although Shiʿi seminarians immerse themselves in *fiqh* and *usul al-fiqh*, there is little discussion in the seminaries on the sociohistorical circumstances that led previous jurists to reach the conclusions that they did, that is, there is no conversation on the relationship between a text and its context and the impact that the erstwhile juristic declarations had on the lives of the people they addressed. Thus, when issuing new legal proclamations or assessing the applicability of previous ones, the *fuqaha'* need to keep in mind the overall vision of the *shariʿa* and the impact that their edicts will have on serving the needs of the community.

The concern among scholars regarding the lack of application of the *maqasid* principles becomes apparent in a question posed to Fadlallah. He was asked about a person who leaves his wife to work in a different town or city. Islamic law allows him to marry another woman while keeping his first wife as long as he provides for her. Fadlallah argues that jurists should invoke the principle of *nafy al-haraj* (the principle of averting harm) so as to annul the marriage. He also cites the Qur'anic verse 2:185, "Live with them in a socially acceptable manner (*bi'l-maʿruf*)." In such instances, the term *al-maʿruf* should act as a yardstick in guiding jurists in their decisions. Stated differently, Fadlallah accentuates the ultimate objectives and purposes rather than the letter of the law. For him, a marital relationship must be based on fairness and kindness.[7] In such instances, Shiʿi jurists often engage and interpret the sacred texts literally, and rule that, because the husband is not infringing the letter of the law, he cannot be censured, nor can the marriage be dissolved regardless of the difficulties inflicted on the wife.

Juristic methodology on such issues is problematic for Fadlallah because it is based on principles that were propounded in medieval texts. In such instances, he contends that contemporary *ʿurf* (custom) can provide guidelines on what is in the best interests of a community. Increasingly, more jurists have called for the incorporation of *maqasid* principles within the Shiʿi legal framework. Scholars like ʿAli Hubballah (b. 1960)[8] and Muhammad Taqi Mudarrisi have spoken in favor of the inclusion of *maqasid* principles as a mechanism for legislating laws in Shiʿi jurisprudence.[9] Along with other jurists, they are both critical of the traditional methodology inherent in the current form of *fiqh*.

As discussed earlier, Shiʿi legal theory does not explore the goals and purposes of the law; on the contrary, it merely posits the principles of how to derive the law. *Maqasid*, on the other hand, demonstrates the importance of discerning not

[7] Al-Husayni, *al-Ijtihad wa'l-Hayat,* 38–9; al-Rifaʿi, *Maqasid al-Shariʿa*, 58–59. Takim, "Maqasid al-Shariʿa," 118.

[8] Ali Hubullah, *Dirasat fi falsafa usul al-fiqh wa'l-shariʿa wa'l-fiqh* (Beirut: Dar al-Hadi, 2005).

[9] Muhammad Taqi Mudarrisi, *al-Tashriʿ al-Islami: Manahijuhu wa-Maqasiduhu* (Tehran: Intisharat Mudarrisi, 1992).

only the *hukm* but also, more significantly, the *hikma* (sagacity) of the *shari'a*. In other words, it delineates and defines the moral trajectories and boundaries of the *shari'a*. For example, Islamic law states that gambling is forbidden except in the cases of horse racing, camel racing, or archery. Gambling in these fields is permitted as they purportedly prepare the participants physically and mentally for war. Since the form of warfare has now changed, it could be argued that the permission to gamble could now be extended to games that use modern weapons of war based on the same principle. Apparently, Khumayni alluded to this possibility in a letter to one of his students.[10]

Maslaha as an Interpretive Tool

Muslim jurists deploy various interpretive strategies to apply current law to those cases that have not been discussed in the normative sources. Another important interpretive tool discussed in *usul al-fiqh* is that of *maslaha*. The term refers to promoting or enacting those laws that best serve the needs and well-being of the community. Since the purpose of the law is interlaced with catering to the interests of the community, the principle is also called *al-masalih al-mursala*, that is, pursuing those policies and enacting laws that are beneficial to the people in general in the absence of guiding principles in the textual sources. The principle of *masalih al-mursala* is grounded on the view that, in the absence of scriptural validation, it provides a sufficient foundation for inferring legal deductions.

Proponents of *masalih al-mursala* claim that God's law has been instituted to best serve the people's interests. They also contend that the *shari'a* is malleable and flexible in the sense that it is capable of responding to the needs and requirements of the people. In modern times, the principle of public good has become crucial in the derivation of new social laws, especially when the scriptural sources provide little or no guidance and where jurists have had to cope with novel socioeconomic and political challenges.

The claim that God intends what is best for His creatures is contingent on establishing authoritative textual proof. In vindicating the usage of *maslaha*, scholars quote Qur'anic verses and traditions that promote the public good and prevent wrongdoing. For example, in explaining the rules of purity and ablution, the Qur'an states, "It is not God's intention to create any difficulty (*haraj*) for you; [on the contrary] He desires to purify you, so that He may complete His blessings on you" (5:6). The verse indicates that God wishes what is in the interests of the people and does not intend difficulties for His creatures. Many examples in the

[10] Ali Syed, "The Principle of Laws Are Subordinate to Benefits and Harms," in Imami Shi'i Legal Theory (Berkeley: Berkeley Institute for Islamic Studies, 2018): 9.

early period of Islam also vindicate the usage of the principle of *maslaha*. They illustrate that, on several occasions, the Prophet and the caliphs reversed earlier actions or devised new laws due to the changing requirements of the people.[11] For Sunni jurists, *maslaha* has become a salient heuristic device when executing legal modifications.

Like the principle of *maqasid al-shariʿa*, *maslaha* provides great suppleness to a jurist to alter or even rescind a religious declaration, since he is able to address situations where no rationale or guidance is available from a text. *Maslaha* also empowers a *faqih* to suspend a law if it does not fulfill its intended purpose or is deleterious to the community in general. Another source for the principle of *al-masalih al-mursala* is that it is premised on the ability of the intellect to discern what is beneficial and pernicious to a society independently of revelation. A *mujtahid* who believes in *ʿaql* as a potent device in inferring rules is more likely invoke *maslaha* in deciding if a particular circumstance is beneficial or harmful when issuing a ruling. This standpoint resonates with the Shiʿi view of good and evil being objective categories that empower a jurist to apply moral judgments to particular situations independently of revelation.[12]

A crucial point of consideration is that, as the hermeneutical cycle is an ongoing process, it can lead to a continuous revision of laws based on the vicissitudes of time and place. By invoking hermeneutical principles like *maslaha*, jurists can continuously interpret and revise texts and transcend the parameters established in the classical juridical manuals. The cycle of interpretation infuses great adaptability and elasticity in the laws enunciated in Islamic jurisprudence especially as it entails a continuous interpretive process that refines or adjusts previous rulings. Based on such considerations, *maslaha* empowers a jurist to continuously adapt and modify laws based on the fluctuating interests of the community.

Maslaha in Shiʿi Legal Thought

Sunni scholars have exercised greater flexibility in discerning the purpose of an injunction because they do not insist that laws be predicated on proofs that are either cited in or derived from the revelatory texts. For them, a jurist can execute a legal opinion even if it is not strictly based on textual sources. It is because of

[11] Taha Jabir al-Alwani cites a number of examples of the Prophet's companions modifying prescribed laws in the early period of Islam. Taha Jabir al-Alwani, *Towards a Fiqh for Minorities: Some Basic Reflections* (Washington: International Institute of Islamic Thought, 2003), 40, fn. 14.

[12] Abdulaziz Sachedina, *Islamic Biomedical Ethics: Principles and Applications* (Oxford: Oxford University Press, 2009), 52. For a Shiʿi critique of *al-masalih al-mursala*, see Mustafa Ashrafi Shahrudi, "Hamsuy-e fiqh ba tahavvulat va-Niyazha-yi Jami-e," in *Ijtihad va-Zaman va-Makan*, 1/142–43.

this factor that they consider interpretive tools such as analogy (*qiyas*), reasoning (*ra'y*), obstruction of all means to resolve a problem (*sadd al-dhara'i'*), and discerning the public interest (*istihsan*) as valid bases for discerning the law. The insistence on attaining *qat'* when issuing a ruling is not as pronounced in Sunni jurisprudence as it is in its Shi'i counterpart.

In recent times, reform-minded Shi'i scholars in the seminaries like Ayatullahs Sane'i, Kamal Haydari, Mojtahed Shabistari, Mohsen Kadivar, Mohaghegh Damad, Ibrahim Jannati, and Muhammad Jawad Arasta have advocated the inclusion of *maslaha* in the legal system so as to accommodate current exigencies. For them, Qur'anic verses that state that God wishes ease and not difficulty for His creatures specifically demonstrate that Islamic legal ordinances can be modified so as to alleviate difficulties or facilitate ease for the community.

The principle of *maslaha* can, for example, be invoked on the question of permitting prenatal gender selection. Generally speaking, parents have the right to choose the gender of their children based on the principle of *tasallut*. This is predicated on the understanding that people have discretion over themselves (*al-nas musallatun 'ala anfusihim*).[13] However, this principle could be assuaged by the possibility of discrimination or bias in gender selection and that it may adversely impact the overall population of the community in the future. Since many parents in the Muslim world tend to prefer males over females, this could have major ramifications on future generations. Hence, the principle of *maslaha* may dictate that, under certain circumstances, prenatal selection be disallowed. In such cases, it is critical to consider what is in the overall interests of the future generation of Muslims.[14]

In a very controversial move, based on the principle of *maslaha*, Fadlallah permitted women to engage and participate actively in plays and movies. The *fatwa* also includes dancing and other theatrical and stage performances, as long as they do not contravene basic Islamic normative ethics and laws. For Fadlallah, women may engage in such social and artistic activities primarily because of their cultural and social benefits. He further states that a woman is permitted to engage in any vocation and perform in public as long as she does not violate the religiously prescribed ethical norms.[15]

[13] Al-Qummi, *Kalimat Sadida*, 163.

[14] The preference of having boys rather than girls extends to juristic circles too. For example, when engaged in sexual intercourse, a couple are recommended to pray to God that they should have a pious boy. https://www.sistani.org/arabic/book/16/858/.#5.

[15] Joseph Alagha, "G. Banna's and A. Fadlallah's Views on Dancing," *Journal of the Sociology of Islam* no. 2 (2014): 69.

Objections to *al-Masalih al-Mursala* in Shiʿi Legal Thought

Shiʿi scholars have doubted the validity of any legislation that is based on a *mujtahid*'s subjective evaluation of what constitutes the public interest. This is because *al-masalih al-mursala* has, in their understanding, no basis in the textual sources. In addition, when a ruling is founded on the subjective opinions and proclivities of a jurist, it may not even approximate let alone reflect the wishes of the Lawgiver. Shiʿi jurists also argue that discerning the public interest must be based on perspicuous evidence derived from the canonical sources. Only those acts of harm and benefits which are derived directly from the canonical texts can provide surety to a jurist that the conclusion he has arrived at has been approbated by the Lawgiver.[16] Since any *hukm* based the principle of *maslaha* is considered conjectural and could even be capricious, discussions on *al-maqasid* and *maslaha* have either been marginalized or neglected in Shiʿi legal discourse.[17]

In his discussion on the subject, al-Sadr argues that if there is social benefit in an act, God will surely reveal it through an injunction. Although reason can perceive the utility of an act, due to its fallibility and limitations, it may not be able to perceive all the benefits or the possible negative repercussions of an act. Sometimes the *maslaha* of an act may actually be greater than its *mafsada* (harm) and yet reason would judge it to be evil. For example, it may be possible that by killing one person a physician can extract a medicine from his/her body that can cure two or three other people. Yet, despite this possible benefit, *ʿaql* will judge the killing of that person to be evil.[18]

It is because of the objections to *maslaha* that, in the classical and medieval *fiqh* works, neither the *maqasid* nor *maslaha* were discussed at any great length. The works on *usul al-fiqh* by leading Shiʿi scholars like al-Mufid, al-Murtada, Tusi, and Muhaqqiq and ʿAllama al-Hilli have little, if anything, to say about either of these two principles.[19] In most cases, the subjects are addressed either occasionally or casually. Even in contemporary *usul* works that are used as standard textbooks in the Shiʿi seminaries like Ansari's *Fara'id al-Usul* and Muhammad Kazim al-Khurasani's (d. 1911) *Kifaya al-Usul*, there is no discussion of *al-masalih al-mursala*. It could be argued that the paucity of discourse on these principles indicates that Shiʿi legal theory lacks the dynamism or flexibility evident in Sunni legal tracts.

[16] Ayatullah Mohaghegh-Damad, "The Role of Time and Social Welfare in the Modification of Legal Rulings," in Lynda Clarke, ed., *The Shiʿite Heritage* (Binghamton: Global, 2001), 215.

[17] For a Shiʿi understanding of *al-masalih al-mursala*, see al-Subhani, *Masadir al-Fiqh*, 296–297.

[18] Baqir al-Sadr, *Durus*, 3/306–307.

[19] See, for instance, al-Murtada, *al-Dhariʿa*; Tusi, al-'Udda; Muhaqqiq al-Hilli, *Maʿarij*; ʿAllama al-Hilli, *Mabadi' al-Wusul*; Muhaqqiq al-Hilli has a very short section on *maslaha*. *Maʿarij al-Usul*, 221–23.

Shi'i criticisms of *maslaha* should not be construed as its total neglect or rejection. Although *maslaha* is not considered an independent source of legislation, several Shi'i scholars have pointed out that, on several occasions, the Prophet and Imams adjudicated on crucial matters based on what was considered by them to be in the interests of the community. The destruction of the mosque of *Dirar*, which is addressed in the Qur'an (9:107), is an example of a decision based on *maslaha*. Depending on the circumstances and needs of the times, the Prophet is reported to have distributed lands that Muslims conquered in battles in different ways. The division of the land conquered after the battle of Khaybar, for example, was quite different from the distribution of land conquered from a Jewish tribe, the Banu Nadir. Such decisions were reached on an ad hoc basis, depending on the needs and conditions of the Muslim community at the time.[20]

Shi'i jurists have also issued many judgments based on *maslaha*. In his *al-Muqni'a* al-Mufid states that if an adulterer repents, the Imam can either forgive him or deliver the prescribed *hadd* punishment, depending on the *maslaha* of the community.[21] On several occasions, Tusi also issues verdicts based on *maslaha*. For example, in his *al-Mabsut*, Tusi states that the division and usage of conquered land will depend on the benefits that will accrue to the community.[22] According to Muhaqqiq al-Hilli, an Imam can declare that *jihad* should be considered as *wajib 'ayni* (individually incumbent) rather than *wajib kifa'i* (collectively incumbent) based on *maslaha*.[23] 'Allama rules that *maslaha* will determine the kind of *ta'zir* (a crime for which no specific penalty has been stipulated) should be meted out to an offender.[24] Even under such instances, *maslaha* is not considered an independent source of law, rather, it is invoked only under extenuating circumstances. However, contemporary scholars caution that even if *maslaha* is accepted in legal proclamations, it cannot be construed as being independent of the Qur'an or *sunna*.[25] Similarly, the Iranian jurist Ayatullah Ja'far al-Subhani cautions that *maslaha* cannot override a clear textual injunction.[26]

[20] The Iranian scholar Yahya Jahangiri cites several examples of the Imams arriving at important decisions based on *maslaha*. Yahya Jahangiri, *Maslaha dar Fiqh: Mabani, Rahyaftha, Karkardha* (Qum: Intisharat Rasul A'zam, 2014), 138. For other examples of *maslaha* during the Prophet's time see ibid., 142–45.

[21] Mufid, *al-Muqni'a* (Qum: Mu'assasa al-Nashr al-Islami, 1991), 777.

[22] Tusi, *al-Mabsut*, 1/235.

[23] Muhaqqiq al-Hilli, *Shara'i Islam fi Masa'il al-Halal wa'l-Haram*, 4 vols. (Najaf: Matba'a al-Adab), 1/307.

[24] Jahangiri, *Maslaha dar Fiqh*, 153.

[25] See Muhammad Ibrahim Jannati, *Manabi'-i Ijtihad dar didgah-e Madhahib-e Islami* (Tehran: Intisharati Kayhan, 1991), 336.

[26] Al-Subhani, *Masadir al-Fiqh*, 456.

Maslaha and the Iranian Revolution

Since the Iranian revolution, many Shiʿi jurists have acknowledged that *maslaha* can become a potent hermeneutical principle in responding to the various challenges they encountered. The discourse on issuing legal judgments that impact government public policy has emerged recently because Iran has been confronted with the practical realities and challenges that erstwhile Shiʿi jurists did not encounter. More specifically, the formation of the Islamic state has compelled jurists to re-evaluate and reassert the politics of expediency in their legal and political discourse. Ayatullah Khumayni, the supreme leader (*wali al-faqih*) of the Islamic republic, was one of the most vocal proponents for deploying *maslaha* when local contingencies demanded it. Soon after the formation of the Islamic republic he became cognizant of the traditional jurisprudence's limitations and inability to respond to the many challenges that arose as a result of running a modern state. He therefore advocated the principle of *maslaha* as an indispensable component in state legislation.[27] In essence, religious injunctions could be overridden by the necessities of the political order. Khumayni states:

> The government is empowered to unilaterally revoke any *shariʿa* agreements which it has concluded with the people when these agreements are contrary to the interests of the country or Islam. The government can also prevent any devotional [*ʿibad*, from *ʿibadat*] or non-devotional affair if it is opposed to the interests of Islam and for so long as it is so. The government can prevent *hajj*, which is one of the important Divine obligations, on a temporary basis, in cases when it is contrary to the interests of the Islamic country.[28]

Khumayni revived and reasserted the principle of *maslaha* as an essential and effective device in dealing with political exigencies. He also called for the creation of an expediency council whose mandate was to intervene and arbitrate when the Guardian Council objected to laws that had been passed by the parliament in Iran. The new institution was aptly called the Council for the Interest of the Islamic Order (*majlis-e tashkhis-e maslahat-e nezam-e eslami*). It could enforce any legislation that was approved by the parliament (*majlis*) which the Guardian Council rejected as being contrary to the dictates of Islamic law.[29]

[27] Ruhollah Mousavi Khomeini, *Sahife-ye nur* (Tehran: Sazman-e madarek-e farhangi-ye enqelab-e Islami, 1990), 21/98.

[28] Quoted in Chibli Mallat, *The Renewal of Islamic Law* (Cambridge: Cambridge University Press, 1993), 90–92.

[29] Behrooz Ghamari-Tabrizi, *Islam and Dissent in Post-Revolutionary Iran* (London: I.B. Tauris, 2008), 86.

According to Khumayni, the expediency council was empowered to not only overrule or reverse Islamic laws but also suspend them when necessary.[30] Other declarations issued by Khumayni stipulated that rulings issued by the *wali al-faqih* were to be regarded as primary rather than as secondary ordinances. This meant that henceforth, the supreme leader could legislate and enforce laws on all citizens, based on his assessment of the interests and needs of the community. Importantly, this signified a paradigm shift, in that *maslaha* was no longer a precept that could be applied only when required by social or political necessities. On the contrary, it could and should take center-stage.

In many ways Khumayni was redefining the traditional Shi'i legal system. He recognized and asserted the right of the government to issue legally binding norms unilaterally, even if they were contrary to the revelatory sources. In effect, law-making replaced law-finding and was sufficient to legitimize statutory law. The establishment of the council of expediency and the endorsement of *maslaha* was a tacit acknowledgment by Khumayni and his peers of the failure of traditional *ijtihad* to cope with current challenges and its lack of pragmatism in responding to contemporary needs. Moreover, the frequent conflicts and tension between the *majlis* (parliament) and the Guardian Council further demonstrate that the social laws articulated in Shi'i juridical literature could not effectively respond to the challenges that a modern state encounters.

Given the tensions between classical rulings and the practical needs of the Islamic state, only laws legislated by an institution that was patronized by the political entity could address the shortcomings of laws related to public welfare. Henceforth, Muslim legists affiliated to the political state would decide on religious law by accentuating the role of the public good as the paramount concern in legislation even if, at times, these entailed a revision or abnegation of classical rulings.[31]

Traditionally, Shi'i jurists have acknowledged that *maslaha* could be invoked as a secondary ruling (*al-hukm al-thanawi*) under extenuating cases only. In recent times, this concept has been advocated by many jurists in Iran who contend that principles like *maqasid* and *maslaha* can be invoked to address the public good where necessary, even if this means overruling or disregarding legal injunctions that had been pronounced by earlier scholars. For example, if a form of public punishment like stoning or lashing engenders an adverse image of Islam, the government can enforce another mode of punishment so as to counter

[30] Hashemi, *Hoquq-e Asasi-ye Jomhuri-ye Eslami-ye-Iran* (Qum: n.p., 1996), 1:211, 213. Also Sa'id Amir Arjomand, "Authority in Shiism and Constitutional Developments in the Islamic Republic of Iran," in Rainer Brunner and Werner Ende, eds., *The Twelver Shi'a in Modern Times* (Leiden: Brill, 2001), 319; Takim, *Maqasid*, 113.

[31] Mohammad Fadel, "Islamic Law Reform: Between Reinterpretation and Democracy," Coulson Memorial Lecture, presented at the School of Oriental and African Studies, March 19, 2015, 31.

that image. This is based on another principle elucidated in *usul al-fiqh*, that of *taqdim aham ʿala al-muhim* (prioritize the more important over the important).[32] According to this view, the image of Islam is more crucial than the form of a punishment.

Other jurists have argued that based on the requirements of the community, an Islamic government can revise even the primary rulings. It can, for example, fix prices, prevent hoarding, build roads even if that entails destroying people's houses which are located on the path, and so forth.[33] Critics of the jurisprudence of public welfare (as it is sometimes called) claim that the principle can override even Qur'anic pronouncements and legislate almost any law based on a very subjective and personal interpretation of what can be subsumed by the principle of *maslaha.* More significantly, it invests immense powers to the ruling authority, enabling it to enact any law it feels necessary to enhance the public good. These could include measures such as torturing and imprisoning political opponents, curbing freedom of expression, and restricting all forms of political dissent.

Some Shiʿi jurists like Muhammad Jawad Arasta appropriate Sunni paradigms in their arguments. He insists that, besides the traditional sources, new legal precepts should be founded on the objectives of the law and interests of the community. He further claims that the revelatory sources do not state that *al-masalih al-mursala* should be rejected when the need arises. Based on this presumption, it is correct to state that *maslaha* outlines universal ethical objectives, like those of the protection of life, intellect, and dignity. Jurists can issue appropriate declarations based on *maslaha* when the occasion demands.[34]

The jurisprudence of public welfare has been opposed by many scholars in Iran, especially when it conflicts with declarations made in the sacred scriptures. Eminent jurists like Ayatullah Mohammed Reza Gulpaygani (d. 1993) and Mohammed Emami al-Kashani, who used to lead the Friday prayers in Tehran, have opposed the incorporation of principles of *maqasid* and public welfare as they are based on subjective assessments by individual jurists and are predicated on conjecture.

Maslaha is deemed objectionable especially when it violates the edicts of previous scholars. These would include legislations like labor laws and the cancelation of a contract if it was no longer in the state's interests. Jurists were alarmed at the powers conferred to the expediency council especially when faced with a conflict between the interests of the political entity and Islamic injunctions.[35]

[32] Abu'l-Qasim ʿAli Doost, *Fiqh va-Maslahat* (Qum: Sazman-e Intisharat Pezhushghah-e Farhang, 2000), 397.

[33] Al-Subhani, *Masadir al-Fiqh*, 460–64.

[34] Muhammad Jawad Arasta, *Tashkhis Masleha Nizam: Azdidghahe Fiqhi–Huquqi* (Tehran: Intisharat Kanun Andisheh Jawan, 2009), 121–22.

[35] Ghamari-Tabrizi, *Islam and Dissent*, 86–87, 153.

Jurists like Muhammad al-Yazdi saw the application of *maslaha* as "committing acts against the *shari'a* and against the law in response to necessities of the time."[36]

In many instances, expediencies and social considerations have led to revisions in laws. Slavery, child marriages, infant marriages, polygamy, and female genital mutilation (FGM) have all been banned in Iran, as they are considered ethically problematic and against public welfare. Given the fact that these laws challenged the previous rulings and textual sources, it was claimed that new situations (*mawdu'*) demanded the introduction of new laws or that previous laws be revised. By permitting the extension of laws to new areas in the public sphere, *maslaha* has become a potent tool in modifying laws to suit new contingencies and for social reform in contemporary Iran. It has also become a crucial element in social activism and political mobilization.

By invoking the principle of *maslaha*, Shi'i legists in Iran were relinquishing their traditional insistence on ascertaining *al-zann al-mu'tabar* and admitting a greater scope of uncertainty in Shi'i jurisprudence. Such measures inevitably met with strong opposition from more conservative scholars who saw this as political expediency and as compromising *shari'a* ideals. Ironically, even though Sunni theologians tend to restrict the use of reason due to their emphasis on revelation, they have used rationally based principles like *maqasid* and *maslaha* much more extensively than Shi'i jurists have.

Maslaha and Civic Rules

Many examples can be cited of jurists having to issue rulings based on the principle of *maslaha*. For example, can a civilian aircraft carrying Muslim passengers be shot down if the aircraft has been hijacked and is being forced to crash into a Muslim neighborhood? Jurists have stated that under such dire circumstances, the principle of public good dictates that it is permissible to kill Muslims who are being used as human shields in order to save a greater number of Muslims from being harmed.[37]

Many other examples can be cited for the application of *maslaha*. Until recently, the concept of trade unions was not contemplated by Muslim jurists. Working for an employer was subject to an agreement between the two parties exclusively. There was no legislation on minimum wage, the number of hours to work, concern over the safety of workers, nor was there any government

[36] Ibid, 154.

[37] For a discussion on Muslims being used as human shields, see for example, Hasan b. Yusuf ('Allama al-Hilli), *Tabsirat al-Muta'allimin Fi Ahkam al-Din*, ed., Muhammad Hadi Yusufi Gharavi (Tehran: Chapp va Nashr, 1990), 88; al-Najafi, *Jawahir al-Kalam*, 21/70; al-Subhani, *Masadir al-Fiqh*, 297.

oversight. With the advent of labor laws, trade unions, and government intervention, the ability of both parties to agree on a private contract has been curtailed. The reasoning behind the ruling is that if a person independently signs a contract with an employer, s/he could become a burden to society if s/he is disabled and has no statutory benefits. Thus, to uphold the interests of the public, a government can prevent both parties from concluding a private contract. In other words, *maslaha* dictates that a private agreement between the two parties should now be a right of those engaged in the civil service. Such legislations have major social and economic ramifications.[38]

In his *Fiqh wa-Maslaha* the contemporary Iranian jurist ʿAli Doost enumerates many possible applications of the principle of *maslaha*. Among these is the permissibility to lie under extenuating circumstances for a higher good, the permission to work for a tyrannical government due to possible benefits that may accrue to the community, and the obligation to pay *khums* or *zakat* to a jurist due to *maslaha*.[39] The Islamic legal tradition developed tools such as necessity, equity, or public interest which enabled jurists to legislate laws that were more just and fair. These devices were used sparingly and under exceptional circumstances, hence their efficacy was limited. Despite their initial insistence that laws should be centered on what was prescribed in or could be deduced from the texts, Shiʿi jurists have been forced to compromise on their repudiation of *zann* and have had to acknowledge *maslaha* as a practical necessity. Iran provides an important paradigm whereby a secondary precept like *maslaha* has been transformed to a primary principle of law.

Sira al-ʿUqala' and *Maslaha*

Another salient principle that can be used in the reformation process is the notion of *sira al-ʿuqala'*. In *usul al-fiqh*, *sira al-ʿuqala'* is categorized as a proof that is not verbalized (*al-dalil al-sharʿi ghayr al-lafzi*) and is premised on the principle of how rational people behave under a given circumstance. In essence, *sira al-ʿuqala'* connotes what rational people normally perceive as correct and proper, that is, the values that frame a community's notion of what is socially and rationally acceptable in their context. It also defines a community's collective understanding of what constitutes acceptable ethical practices.[40]

[38] Mohaghegh Damad, "The Role of Time and Social Welfare," in Clarke, *Shiʿite Heritage*, 220; Takim, "Maqasid al-Shariʿa," 121.

[39] Doost, *Fiqh va Maslahat*, 409.

[40] On various definitions of *sira*, see Hossein al-Qazwini, *Dirasa Usuliyya hawl al-Sira al-ʿUqala'iyya wa'l-Mutasharʿiyya wa-ba'd Mawarid Istiʿmalihima fi'l-Fiqh wa'l-Usul* (Kerbala: n.p. 2012), 10–11.

No textual or verbal proof is necessary to establish a *sira*, rather, the practice of the people of sound mind (*al-'uqala'*) provides enough evidence for a *mujtahid* to opine that it has been endorsed by the Lawgiver. That being the case, unless there is a specific injunction prohibiting it, a pattern of behavior that is accepted by rational beings, regardless of when they lived, is acknowledged as a source of legislation as it had been approved by the Lawgiver.[41]

It is important to underscore that custom (*'urf*) and *sira* are deeply connected. An approbated practice not only is based on *'urf* but also is dependent on its approval by the people of sound mind. The practice of the people of sound mind describes the demeanor of all persons regardless of their religious or social affiliations. They behave in a specific way because they are rational beings, not because they are associated to a particular group or due to their religious attachments. *Sira al-'uqala'* transcends the Muslim community insofar as it upholds the demeanor and values espoused by people of sound mind as normative. *Sira al-'uqala'* also demonstrates and underlines another crucial principle in legislation, that of ethical judgments. It indicates that people of sound mind act based on what they consider to be ethical and morally correct conduct. I elaborate on this principle in the next chapter.

Based on the principle of *sira al-'uqala'* it can be argued that a pattern of practices that is accepted by rational beings has been approbated by the Lawgiver. It is presumed that there is congruency or concordance between what reason or the people of sound mind determine and what is ordained by the Lawgiver. In other words, Shi'i *fuqaha'* state that *'aql* is in harmony with the Divine intent. To believe otherwise would indicate that the Divine has implanted a device in human cognition that is antithetical to His intent. In fact, *usul al-fiqh* posits God to be the *ra'is al-'uqala'* (the epitome of reason). That being the case, from a purely rational point of view, God cannot mandate anything that contravenes what reason dictates.[42]

Shi'i jurists also quote an axiom (derived from the Imams' traditions) that *kulluma hakama bihi al-'aql hakama bihi al-shar'* (whatever reason rules the Lawgiver will rule likewise). For the jurists, this is further proof of the role that *sira al-'uqala'* can play in legislating rulings that are not stated in the textual sources. In this context, Murtada al-Ansari states, "The truth is that there is a real correlation between rational rule and the rule of the *shari'a*, and our predecessors have strongly supported it. . . . What is meant from the *mulazama* (correlation) is that the Divine rule would be proven by rational rule, and the rational rule is a

[41] Baqir al-Sadr, *Durus*, where he cites the example of depending on the apparent meaning of words, 2/182. See the discussion on this also in Takim, *The Heirs of the Prophet*, 130–35.

[42] Boozari, *Shi'i Jurisprudence*, 30.

proof for the Divine rule."[43] In a sense, a legal determination based on reason is also sanctioned by the Legislator.

An example of how *sira* is used in the legal system is the practice of rational beings' acting on isolated traditions if the person narrating them is dependable. Similarly, rational people accept and act on the apparent meaning of a word (*hujjiyya al-zawahir*) when they hear or read it. Jurists have also invoked the concept of *sira al-ʿuqala'* to justify principles like continuance (*istishab*) and that the possession of a thing is proof of its ownership. *Sira al-ʿuqala'* is clearly an important device in the juridical decision-making process because it provides critical intellectual and hermeneutical tools that can help a jurist in extrapolating new rulings provided these have not been explicitly rejected by the Lawgiver.

Not all *fuqaha'* are agreed on this principle. They have argued against the usage of reason or *sira* in extrapolating laws from the Qur'an and *sunna*. For example, can a jurist who is confronted by a question that is not addressed in the revelatory sources issue a *fatwa* based solely on *sira al-ʿuqala'* and assume that this reflects the Divine will? Can *sira al-ʿuqala'* perform functions that are reserved exclusively for the revelatory sources?[44] Another possible objection to *sira al-ʿuqala'* is that the practices and views of the people of sound mind may change over a period of time and that they may not necessarily reflect the will of the Lawgiver. The claim that *sira al-ʿuqala'* should be seen as a source of legislation raises many other legal issues. How does a jurist decide when diverse modes of practices coexist in a society or across many societies simultaneously? Which one of them reflects the will of the Lawgiver most accurately?

One of the proponents of the use of the *sira al-ʿuqala'* is Ayatullah Saneʿi. When discussing a woman's right to terminate her marriage, he appeals to the principle of *sira al-ʿuqala'*. Saneʿi argues that rational people collectively agree that if a woman does not have the same right as her husband to terminate her marriage unilaterally, a just God will establish a procedure or method that can force her spouse to dissolve the marriage, even if it is against his wishes. This is because, just as the husband can divorce her whenever he wishes to, she should have equal rights to terminate the marriage by returning his dowry.[45]

Ayatullah Khumayni cites another example of how *sira al-ʿuqala'* acts as an important legislative tool. In his discussion on the practice of following the edicts of a jurist (*taqlid*), he states that the only conclusive proof to prove the validity of *taqlid* is the demeanor of the people of sound mind, that is, a *jahil*

[43] Ibid., 31. Liyakat Takim, "Custom as a Legal Principle of Legislation for Shiʿi Law," *Studies in Religion/Sciences Religieuses* 47, no. 4 (2018): 487.

[44] Sayyid Muhammad al-Shahrudi, *Buhuth fi ʿIlm al-Usul*, 7 vols. (n. p.: Muʾassasa al-Fiqh wa Maʿarif Ahl al-Bayt, n.d.), 2/234.

[45] Yusuf al-Saneʿi, *Wujub Talaq al-Khulʿ ʿala al-Rajul* (Qum, n.d.), 33. Also Liyakat Takim, "Privileging the Qur'an: Divorce and the Hermeneutics of Ayatullah Saneʿi," in Alessandro Cancian, ed., *Approaches to the Quran in Contemporary Iran* (New York: Oxford University Press, 2019), 86.

(ignorant) person asking a scholar. Just as those who are sick visit and seek the expert opinion of a medical doctor, Khumayni says that one who is not cognizant of a religious ruling on an issue should refer to an expert in the religious field.[46] Critical hermeneutical tools discussed under procedural principles like those of *istishab* and *bara'a* are also based on *sira al-'uqala'*.

The preceding discussion on *sira al-'uqala'* suggests that this is an important interpretive device in the reformation process, since it empowers a jurist to initiate a wide range of legal reforms. For example, contemporary *sira al-'uqala'* would dictate that the keeping of concubines, practising FGM, and endorsing discriminatory laws against minorities are unethical and should therefore be outlawed in Islamic law.[47] As I discuss in what follows, the custom of the people of sound mind in conjunction with contemporary *'urf* can also have the effect of introducing a wide range of new laws in Islamic jurisprudence.

According to Mohsen Kadivar, a reformist jurist trained in the seminary in Qum, when revising or abrogating a legal ruling sociopolitical conditions of the people should be considered. If the people of sound mind judge an act or ruling to be unjust, it should be nullified because "reasonable" people today view it to be unjust, discriminatory, and abhorrent, although the *sira* of the people in the past may have seen it differently. Thus, according to Kadivar, "civic reasoning and rationality should determine if a religious precept has been issued for every place and time or if it has been a variable precept that is no longer relevant."[48] In essence, Kadivar calls for the collective conscience of the people to be a basis for determining new laws.

The concept of the collective consciousness of the community in the form of *sira al-'uqala'* is a close approximation to the notion of a consensus or an agreement of the community. As we shall see, many of the current social laws of Islam were appropriated from the prevailing norms at the time of revelation. The *ahkam-e imda'i* (endorsed rulings) that Islam accepted reflected the customary laws of the time. These laws valorized the reasoning of the *'uqala'* at the time of the Prophet. It can be argued that contemporary *sira al-'uqala'* is binding on the current community of believers just as *sira al-'uqala'* at the time of the Prophet was binding on Muslims during his lifetime. This offers the possibility that contemporary *sira al-'uqala'* can challenge and undermine traditions that

[46] Subhani Tabrizi, *Tahdhib al-Usul* (Qum: al-Matba'a al-'Ilmiyya, 1962), 3 vols., 3/167. Fayd, *Vizhegiha-yi Ijtihad*, 276.

[47] On the permissibility of FGM, see http://www.al-khoei.us/books/?id=6771%20(1382)—see fatwa no. 1382 (accessed June 24, 2020). Based on a few *hadith*, female circumcision is also recommended by the Sunni schools of law. In contrast to the other schools, the Shafi'is maintain that circumcision is obligatory for both females as well as males. Kecia Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence* (Oxford: Oneworld Publications, 2006), 100–102.

[48] Ghobadzadeh, *Religious Secularity*, 107.

have existed among the believers for centuries. This is because at the time of the Prophet, the rational consideration of the people of sound mind was compatible with rather than antithetical to the *shariʿa*. The laws that Islam appropriated or enacted at the time of revelation were in concordance with the *sira al-ʿuqala'* at that time. The same principle can be applied in present times as long as contemporary *sira* does not violate *shariʿa* norms.

The Principle of "No Harm, No Harassment" *La Darar wa-La Dirar*

Another critical hermeneutical principle in the reformation process is the rule of "no harm, no harassment" (*la darar wa-la dirar*). The principle is premised on the view that the Lawgiver does not wish to inflict any harm or injury on His creatures. It also stipulates that when a particular legal precept is deemed to be pernicious or deleterious to an individual or society, it can be discarded or substituted with one that removes the harm. To be sure, the principle of "no harm, no harassment" is rooted in both revelation and reason. It can be derived from the Qur'an, which states, "He has chosen you and has imposed no difficulties on you in religion" (22:78). Another verse states, "God does not intend to make difficulty for you, but He intends to purify you and complete His favor upon you that you may be grateful" (5:6). The verses unequivocally state that God does not desire to impose difficulties or hardship on His creatures.

The principle of no harm no harassment is also interwoven to Shiʿi theology, which asserts that God's laws are underpinned and governed by the *la darar* principle insofar as He would not legislate a law that is detrimental to His creatures. This is considered as an important argument in vindicating the view that God's rulings are based on benefits and harms to His creatures, even though reason cannot always perceive them. This is also applicable to devotional acts (*ʿibadat*) like prayers and forms of ablutions where the rationale behind certain ritual acts cannot be rationally discerned.

The *la darar* principle is also premised on the view that people of sound mind are capable of recognizing and acknowledging what is detrimental to their well-being independently of revelation. According to Muslim legists, if an individual is unsure whether a particular case is injurious or not, s/he should consult the local *ʿurf*, which would help determine whether the *la darar* principle can be applied in that instance. *Darar* would be what *ʿurf*, in conjunction with the people of sound mind, deem to be harmful.[49]

[49] Fayd, *Vizhegiha-yi Ijtihad*, 77.

Based on this understanding, the *shari'a* validates what custom has determined. In effect, it is custom that determines the enforcement of a ruling. When there is no specific evidence in the textual sources, relying on custom to determine whether a precept is harmful or not can be difficult and subjective, especially as even reasonable people can hold conflicting opinions on the harmful effects of a ruling. A person's social status, culture, and the time in which s/he lives all play major roles in defining harm. Furthermore, people define harm based on their own proclivities and ability to endure difficulties. What one person construes to be wrong or harmful may be considered differently by another person. Although deemed a secondary ruling which is invoked only under special circumstances, the principle overrides primary obligations, which are suspended when they cause harm to an individual or the community. For that reason, in the derivation of a legal precept, the rule of no harm and no harassment is accorded preponderance over primary obligations in the *shari'a*.

The Principle of No Harm from a Shi'i Perspective

Shi'i jurists who invoke the principle of *la darar* in inferring juridical ordinances also cite traditions from the Imams that prohibit engagement in any act that may hurt an individual or the community.[50] However, most jurists have not invoked the *la darar* principle in their judicial proclamations unless they are absolutely certain that a particular act is harmful. When there is a difference of opinion on whether an act is pernicious or not, jurists have normally permitted it. Smoking for example, was allowed by most Shi'i jurists, since they were not certain of its detrimental effects. In the absence of absolute certainty (*qat'*), the principle of *bara'a* (exemption from an obligation) rather than *la darar* is enforced as the legal duty in this instance. Similarly, Shi'i *'ulama'* have permitted certain ritual practices in the month of Muharram like flagellation by using chains (*latmiyya* or *ma'tam*) and swords or knives (*tatbir*), since their deleterious effects have not been proven beyond doubt.

When asked about organ transplantation, Ayatullah al-Khu'i asserts that if a part of the body that is to be transplanted is essential for the donor to lead a normal life, like an eye, hand, nose, or a leg then that organ cannot be transplanted.[51] Similarly, a person cannot donate an organ if it will cause his/her death because it violates the principle of *la darar wa-la dirar*. In addition,

[50] Muhammad al-Baqir al-Majlisi, *Bihar al-Anwar: al-Jami'a Lidurari Akhbar al-A'imma al-Athar*, 110 vols. (Beirut: Dar al-Ihya' al-Turath al-'Arabi, 1983), 2/277.

[51] https://www.al-islam.org/islamic-laws-ayatullah-abul-qasim-al-khui-sayyid-abu-al-qasim-al-khoei, 2894. Al-Sistani also prohibits the donation of vital organs like eyes. *https://www.al-islam.org/printpdf/book/export/html/38634*.

traditions on this subject state that a believer should not do or donate anything that would lead to him/her being humiliated or ridiculed in the public sphere. Therefore, amputation of any part of the body should not lead to public humiliation or belittlement.[52]

Ayatullah Fadlallah invokes the principle of *la darar wa-la dirar* in response to a case discussed earlier, that of a woman whose husband is away for an extended period of time and marries another woman. Most jurists have ruled that she has no recourse to seek a divorce as long as he maintains her financially. The marriage is harmful for the wife since, although she has a husband, she cannot demand or receive sexual satisfaction, nor can she seek freedom from him despite the fact that he is away for an extended period of time and has taken another wife.[53] Fadlallah asks poignantly, "doesn't she have a right to sexual satisfaction?" Is there a greater harm for her than this? He remarks cynically that the *fuqaha'* apply the principal of no harm when confronted with the question of performing ablution in cases of cold weather or possible harm to the body caused by using cold water, yet they do not raise the issue of harm being inflicted when a husband is away for an extended period of time, a situation that creates immense difficulties for the wife.[54]

Saneʿi raises the same issue in his discourse on the same topic. For him, the principle of no harm is grounded on the Qur'anic verse "And strive hard in (the way of) Allah (such) a striving as is due to Him; He has chosen you and has not laid upon you any hardship in religion" (22:78). This means, according to him, that when confronted with great difficulties in the context of a marital relationship, a woman can annul the marriage without seeking permission from her husband as long as she returns the *mahr* that was given to her.[55] Saneʿi's reading of the text is not unique. Based on the principle of *la darar*, ʿAllama al-Hilli had also ruled that a woman who experiences immense difficulties in a marital relationship can annul a marriage without having to resort to a judge (*hakim*) to grant her a divorce.[56]

Saneʿi invokes the same principle in his discourse on the age of puberty for girls. He rejects the view espoused by many *fuqaha'* that girls become religiously responsible at the age of nine. He states that this age is not mentioned in any text prior to Tusi's time.[57] In fact, many scholars, including Tusi himself, maintain

[52] Al-Qummi, *Kalimat Sadida*, 168.

[53] ʿAbdul Hadi al-Hakim, *A Code of Practice for Muslims in the West in Accordance with the Edicts of Ayatullah al-Udhma as-Sayyid Ali al-Husaini as-Seestani*, trans. Sayyid Muhammad Rizvi (London: Imam ʿAli Foundation, 1999), 212.

[54] Al-Rifaʿi, *Maqasid al-Shariʿa*, 58–9.

[55] Ayatullah al-ʿUzma al-Shaykh Yusuf Saneʿi, *Qa'ida 'Adala va-Nafy Zulm*, ed. Hadi Qabel (Qum: Fiqh al-Thaqalayn, 2011), 212–14; 252–53.

[56] Ibid., 212–33.

[57] Ayatullah Yusuf Saneʿi, *Bulugh al-Banat* (Qum: Mu'assasa Farhang-e fiqh al-Thaqalayn, 2003), 28.

that a girl attains puberty (*bulugh*) at the age of ten. Sane'i also states that puberty is not contingent on a girl's age and argues that imposing religious responsibilities at the age of nine creates immense difficulties for a girl and that, under normal circumstances, the age of puberty is reached when a girl experiences her first menstrual cycle, which can even be when she turns thirteen.

Sane'i contends that this is in a girl's best interests since an earlier age imposes great hardship that on her.[58] This observation is particularly germane to those Muslims living in the West, where fasting during the summer months can exceed nineteen or twenty hours. Such views are echoed by many other contemporary jurists.[59] However, although the principle of benefit and harm is accepted by most jurists, they do not invoke it when issuing juridical statements due to the difficulties in determining what is beneficial or harmful. In reality, the precept has little, if any, bearing on the derivation process.

Customary Law as a Source of Legislation

In emphasizing the significance of social norms, the Qur'an often uses the term *al-ma'ruf* (derived from *'urf*). The term connotes what is acknowledged as a good or admirable mode of conduct and is used thirty-eight times in the Qur'an. It is also used in contrast to an act that is reprehensible (*munkar*).[60] *Al-ma'ruf* can also be understood as an ethical category that is the product of human experience and normative understanding of what is morally correct.

Kevin Reinhart has correctly observed that the Qur'an uses the term *al-ma'ruf* without explaining what it connotes, as it assumes that such terms are understood by human intuition without the need for further elucidation.[61] To be sure, the Qur'an extols rather than defines ethical categories and assumes that human beings can distinguish between good and evil because God has instilled that cognitive ability in them. The constant usage of the term *al-ma'ruf* in the scripture without elaborating it corroborates the contention that the human intellect can discover universal ethical norms and values independently of revelation.[62]

[58] Ibid., 35–36.

[59] See, for example, Fadlallah, *Nazara fi al-Manhaj*, 28–29; Mahrizi, *Mas'ala al-Mar'a*, 118; Jannati, *Tatawur Ijtihad dar Hawze-yi*, 1/36; Ayatullah al-Sayyid Muhammad Musawi Bujnurdi, *Majmu'a-ye Maqalat-e Fiqhi, Huquq-i va Ijtima'-i* (Tehran: Intisharat pezhushkadeh Imam Khomeini va inqilab Islami, 2002), Mahrizi, *Mas'ala al-Mar'a*, 107; Muhammad Hadi Ma'rifat, in Mahrizi, *Mas'ala al-Mar'a*, 106; Mulla Fayd al-Kashani as cited in Fayd, *Vizhegiha-yi Ijtihad*, 423–24.

[60] Gerald Hawting, "Tradition and Custom," in Jane D. McAuliffe, ed., *Encyclopedia of the Qur'an* (Leiden: Brill, 2004); Takim, "Custom as a Legal Principle of Legislation," 481–99.

[61] Kevin Reinhart, "What We Know about *Ma'ruf*," *Journal of Islamic Ethics* no. 1 (2017): 60. The Qur'an also uses terms such as *zulm* (injustice), *'adl* (justice), and *salih* (good) without explaining them.

[62] Hamid Mavani, "Structural Ijtihad: A Radical Paradigm Shift in Twelver Shi'i Legal Theory," in David Vishanoff, ed., *Islamic Law and Ethics* (Herndon, VA: IIIT, 2020), 71.

The Qur'an also urges human beings to look for complementary sources of ethical knowledge wherever it may be found even if it is extrinsic to revelation. More specifically, human beings are urged by the Qur'an to engage in ethical reflection based on social norms as well on those addressed in revelation. The social and cultural milieu in which Muslims are located is also seen as a vital source of the external moral knowledge with which the Qur'an expects Muslims to condition themselves.[63]

For example, *al-maʿruf* is frequently used in the Qur'an in discussing the relationship and behavior with women (2:228, 3:19), demonstrating thereby its concern that human demeanor should be established on commonly acknowledged normative ethical precepts like kindness and decency. Similarly, verse 2:180 reads, "Prescribed for you when death approaches [any] one of you if he leaves wealth [is that he should make] a bequest for the parents and near relatives according to what is commonly acceptable (*maʿruf*)." It could be argued that contemporary Muslims should consider the normative ethical axioms of their own social milieu to understand the norms mentioned in the Qur'an. The scriptural appeal to behave according to socially accepted norms shows that moral agency can be extended beyond the cognitive faculty so that the community as a whole becomes an important moral agent.

Al-maʿruf is to be distinguished from the term *ʿurf*. The former is a broader category and refers to what is intuitively known or comprehended upon ethical and communal reflection. *ʿUrf*, on the other hand, includes various social norms, customs, and practices of a community in a particular context. In the absence of a formal, normative or codified law, customary law often forms the backbone of the mode of behavior that regulates a community's activities. As I discuss presently, custom plays a crucial role in textual hermeneutics, and in assessing whether a ruling is applicable or not.[64]

Generally speaking, Shiʿi legists have not considered *ʿurf* to be a source of Islamic legislation. This is because for them, there is nothing cited in the revealed sources to substantiate its legislative function.[65] They argue that both the Qur'an and traditions maintain that the right to legislate belongs exclusively to God. *ʿUrf* is seen merely as a reference point through which laws can be applied, and, because of this, it provides a measure of suppleness to the application of the law. Due to the flexibility it furnishes, custom allows the law to adapt to heterogeneous social and cultural contexts.

[63] Reinhart, "What We Know about *Maʿruf*," 63, 69. Rather surprisingly, Reinhart does not connect *al-maʿruf* with *sira al-ʿuqala'*, which, after all, is an important source of normative social praxis.

[64] There are different types of *ʿurf*. The one that concerns us is what is commonly accepted by all rational beings, that is, *ʿurf al-ʿamma*.

[65] ʿAli Doost, *Fiqh va-Urf* (Tehran: Sazman Intisharat Pezhuhashghah Farhang va Andishey-e Islami, n.d.), 181.

'Urf and the Reformation Process

It would be unreasonable to expect the Qur'an to address and rescind all the social praxis prevalent at the time of its revelation. In fact, when it was revealed, the Qur'an did not introduce a new system of legislation; rather, its verses in this field reflected the prevalent sociopolitical and customary normative praxis it encountered. In many instances, it either rejected, altered, or accepted the prevalent social values. It would be correct to state therefore that Islam did not begin with tabula rasa. Neither did it abolish or modify all prevailing laws and practices.

Pre-Islamic Arabs held many social laws based on local custom, which attained normative status for them. Many of these laws were incorporated by Islam in its legal structure. These included marital laws, rules for social compatibility, laws regulating wars, retaliation, blood money, trade, slavery, and so forth. Medina, whose economy was more agrarian, had specific rules on agriculture, livestock, and farming.[66] Pre-Islamic social and economic mores and conventions were accepted and appropriated by the fledgling Islamic legal system provided they did not directly oppose the ethical guidelines of the revelatory sources.[67]

In the penal code, Islam adopted, among many other laws, the custom of *qasama*. According to this code, fifty inhabitants of a tribe or city have to take an oath that they did not cause the death of a body that is abandoned or found on their territory. By doing this, they free themselves from liability for a person's death.[68] Islam also appropriated many prevalent customs and laws, especially those that pertained to the family. Laws on the granting of dowry (*mahr*) to the bride, the guardianship of daughters (*wilaya al-bint*), the custody of children when a marriage was dissolved, the practice of *mut'a* (marriage for a fixed duration) and many other practices were incorporated in the nascent Islamic legal structure. In the case of permanent marriages, the pre-Islamic Arabs observed two types of marriages—*sadiqa* and *ba'l*.[69] Islam adopted aspects of both forms of marriages. When a couple divorced, Islam adopted the pre-Islamic tribal custom that the custody of the child would revert to the father after s/he had reached a certain age.

Ayatullah Bujnurdi cites the example of the practice of exacting retribution (*qisas*) by the victim's family or that of accepting blood money (*diya*).[70] *Qisas* was

[66] Sayyid Mostafa Mohaghegh Damad, *Protection of Individuals in Times of Armed Conflict under International and Islamic Laws* (New York: Global, 2005), 8.

[67] Khalid al-Mansuri argues that *'urf* has probative value in the legal tradition. See Khalid al-Mansuri, *Dirasa Mawdu'iyya Hawl Nazariyya al-'urf wa-Dawruha fi 'Amaliyya al-Istinbat* (Maktab al-I'lam al-Islami: n.p., 1992), 191–200.

[68] See details in Hallaq, *A History of Islamic Legal Theories*, 12–13.

[69] On the differences between the two types of marriages, see Mahmoud Ayoub, *Islam: Faith and History* (London: Oneworld, 2012), 180.

[70] Bujnurdi, *Majmu'a-ye Maqalat-e Fiqhi,* 1/102. There are many traditions in favor of *'urf* cited from the Imams. See al-Mansuri, *Dirasa*, 128–33.

seen as the most suitable way for resolving issues related to homicide especially, as the killing of a member of a tribe could precipitate a series of wars between two or more tribes. The underlying logic behind the laws of retaliation was to end the cycle of killing and tribal warfare. This was a custom that was approved by Islam. Shiʿi jurists freely admit that the majority of Islam's social and business-related laws are *imdaʾi* (endorsed).[71] The adoption of pre-Islamic norms and values was critical especially in the early period of Islamic history, as it enabled new converts to adapt to and accept Islam and yet preserve some of their prevalent customs, values, and lifestyles.

Many of the pre-Islamic laws that were incorporated into the burgeoning Islamic legal system were appropriate for the needs of the time and are therefore time-bound. Included in this is the Qur'anic adoption of pre-Islamic punishments such as the penalty for robbery and homicide. Other penalties were derived from Roman law or appropriated from the Jewish legal system in order to be accepted by contemporary communities. Similarly, the amputation of body parts or stoning were endorsed rather than divinely instituted punishments.

In the political realm, the assembling of a tribal council to select Abu Bakr as the Prophet's successor was a perpetuation of the pre-Islamic mode of appointing a successor to lead a community. The restriction of the leadership of the community to a person of Qurayshi descent was another manifestation of pre-Islamic political norms. This perpetuated the prevalent custom that only those affiliated to the tribal leader could replace him. The Qur'anic instruction to the Prophet to consult (*shura*) people in his decision-making (3:159) also reflects a pre-Islamic phenomenon whereby the heads of tribes met at *Dar al-Nadwa* in Medina to discuss matters of social importance. The Qur'anic injunction to consult others cannot be construed as a permanent prescription for political theory nor is it a stipulation of the form of governance that Muslims should or should not adopt. Verses such as these indicate the scripture's engagement with societal needs at specific times in history.

It should be remembered that in the first century of Islam, there were no hermeneutical methods or strategies employed by jurists to formulate, interpret, or constrain laws. In the absence of well-defined procedures and stipulations on deriving and instituting laws, the Qur'an expects that its laws and commandments will be comprehended in the light of prevalent and commonly recognized practices and values. There is nothing in the Qur'an to indicate that the customary normative axioms that it endorsed cannot be transformed or modified by future generation of Muslims. Furthermore, those laws that were retained by Islam were considered by the early Muslims as just and reasonable in their

[71] See Bujnurdi, *Majmuʿa-ye Maqalat-e Fiqhi*, 1/95 on *ahkam imdaʾi*, 1/96–97 on examples of references to *ʿurf*, and 1/98 on the usage of an equivalent *mahr* (*mahr mithl*) based on *ʿurf*.

particular sociocultural context. It is probably because of this factor that less than 10 percent of the Qur'an's legal verses precipitated new injunctions or prohibited existing ones.[72] Pre-Islamic laws were either accepted, modified, or abjured if they were seen as undesirable. It is correct to state therefore that in instituting modifications and reforms to existing social mores, the Qur'anic approach was more evolutionary than revolutionary.

Significantly, the acceptance and inclusion of pre-Islamic values and laws in its ethical vision indicates that the Qur'an was responding to the circumstances of the Prophet and the Muslim community at the time of its revelation, and that the scripture is intimately connected to the life of the Prophet in seventh-century Arabian society. Statements and actions by the Prophet and engagement with his followers and enemies based on the social customs of the time are also reflected in the Qur'an. The message of the scripture and its implementation by the Prophet became increasingly entrenched with the normative culture of the Hijaz. This is reflected in the Qur'an's many references to the customary values, practices, and institutions in the Prophet's time.[73] In other words, the sociopolitical conditions at the time of revelation provided the basic framework for the legal and social messages contained in the scripture.

In their hermeneutical and reformative enterprises, Muslim thinkers have to therefore consider the history, culture, and Arab composition of the early Muslim community and how these may or may not apply in contemporary times. It is correct to argue that the process of revelation was continuously engaged with and connected to the requirements of the Muslim community. The revealed discourse addressing the conditions prevalent in the society can be also be seen in the legal and exegetical concepts like those of the abrogation of Qur'anic verses and occasions of their revelation.

Significantly, as I argue later in this chapter, there was nothing sacred or immutable in many of the pre-Islamic customs that Islam appropriated. This becomes evident from the fact that the *'urf* that shaped and molded the sociopolitical and economic rules in the early period of Islam was not limited to the practices of the Muslims. On the contrary, pre-Islamic *'urf* was both sanctioned and Islamized by the burgeoning Muslim community. The inclusion of prevailing social norms in Islamic law demonstrates that it is important to examine the symbiosis between Islam and the social environment in which it functions. Normative social and cultural praxis that were prevalent at the Prophet's time are assumed to have been approved by him unless they have been explicitly proscribed. It is thus correct to

[72] Yousef Eshkevari claims that 99 percent of Islamic rulings were endorsed. Ziba Mir-Hosseini and Richard Tapper, *Islam and Democracy in Iran: Eshkevari and The Quest for Reform* (London: I.B. Tauris, 2006), 167.

[73] See, for example, verse 7:199. Qur'anic references to female infanticide, slavery, and laws on retaliation further corroborate the point being made.

state that, provided they were not antithetical to the moral vision of the Qur'an, existing customary practices and rules were endorsed and appropriated by the nascent religion. During this process, even pagan *'urf* was Islamized.[74] Thus, in the initial stages, the Islamic legal tradition was framed by the existing normative culture. It was the latter that set the parameters for the former. Stated differently, initially, Islamic law was framed not so much by new divinely revealed legislation as by modifying or approving existing ones. Evidently, the early Muslims were content to retain their prevailing social structures and norms. For them, what was pre-Islamic was certainly not considered to be un-Islamic.[75]

In his discourse on how customary law shape Islamic jurisprudence, the Hanafi jurist Muhammad Amin b. 'Abidin (d. 1836) states that much of what was established by the jurist Abu Hanifa (d. 767) was due to the *'urf* in his era but that they have changed with time. He cites the example of the custom of the permissibility of charging for teaching the Qur'an.[76] In his *al-Muwatta'* Malik b. Anas states that acceptance of women's testimony at childbirth without male corroboration was based on local *'urf*. Similarly, Malik invokes the local custom in Medina (which he calls the *sunna*) in rejecting the testimony of women in cases of divorce or the *hudud* penalties.[77] These examples indicate how the law was often interpreted to accommodate local custom and the flexibility available within the Islamic juristic tradition. Ibn 'Abidin also states that much of the corpus of the law in the past was based on local social norms and praxis and had they lived in another era or under different circumstances, the jurists would have issued different rulings.[78] Ibn 'Abidin's statement demonstrates not only the role of custom in molding and shaping the law but also the variations in custom that play a major role in how the law is shaped and framed.

As Sherman Jackson has argued, Islamic law has never been solely the result of hermeneutics of the sacred texts. On the contrary, Islamic law was not formed by appropriating scriptural precepts or those from traditions and asserting them into the religiolegal institutions. Rather, it was often formed by endorsing and sanctioning prevailing customary laws and practices that were neither determined nor inscribed by the sacred sources. In other words, Islamic law was not always the product of textual hermeneutics or rational derivation. A study of the Islamic legal history demonstrates that, apart from the *'ibadat* (devotional acts), for an act to be considered "Islamic," "it did not have to originate from or be

[74] See examples of *'urf* that were endorsed by the Prophet in Shabana, *Custom in Islamic Law and Legal Theory*, 54–57.

[75] Takim, "Custom as a Legal Principle," 484.

[76] Amjad M. Mohammed, *Muslims in Non-Muslim Lands* (Cambridge: Islamic Texts Society, 2013), 106–107.

[77] Malik b. Anas, *al-Muwatta'*, 5th ed. (Morocco, Dar al-Afaq al-Jadida, 1999), 634–35.

[78] Qasim Zaman, *The 'Ulama' in Contemporary Islam*, 19.

inspired by the revelatory texts. It merely had to show that it was not in violation of the scripture."[79]

The preceding discussion suggests that the Islamic legal tradition is composed of textual references, hermeneutics, rational constructs, collective opinions of jurists throughout the centuries, and local customary practices and norms. The inclusion of *'urf* and juristic reasoning means that anything that is foreign to Islam is not necessarily antithetical to it. An example of such innovative enterprises by the early Muslim community is that of the institution of the caliphate, which, in fact, has no scriptural reference or basis. Similarly, domes, minarets, niches, and the crescent are not mentioned in the Islamic texts but were later Islamized since they did not contravene Islamic values. In many instances Islamic law validated what was derived or inherited from other traditions. It is precisely because of the lack of understanding of this framework that Muslims today see the crescent, *ijazas*,[80] minarets, niches, and domes as Islamic but do not regard democracy or a republican form of government as having any foundation in Islam.

The function of the *fuqaha'* was not only to extract rulings from the sacred sources but also to ensure that what was discovered or created outside the text fell within the ambit of their parameters. Islamizing a juridical ordinance was as important for a *faqih* as deducing one from the texts. Based on this consideration, Islam is capable of Islamizing a practice or institution in various parts of the world today including Western institutions like democracy, a parliamentary system of government, or constitutionalism. It can also embrace many aspects of Western culture.

The discourse on *'urf* demonstrates that many Islamic laws are expressions of existent indigenous social values and norms and that Islamic history and the sociopolitical experience of Muslims played crucial roles in creating the substance of Islamic law. It is because of this factor that Islamic law has never been monolithic or uniform in the Muslim world. On the question of organ donation, for example, whereas scholars in Egypt have argued against the practice, the *'ulama'* in Iran and Saudi Arabia have spoken in favor of it. Similarly, on the question of abortion, there are major disagreements between scholars as to when ensoulment occurs, and up to what time is abortion permitted.[81] Muslim scholars have also disagreed among themselves regarding the permissibility of human cloning and whether a young girl needs the permission of her guardian to marry.

[79] Sherman Jackson, "Liberal/Progressive, Modern, and Modernized Islam: Muslim Americans and the American State," in A. Kamrava, ed., *Innovation in Islam: Traditions and Contributions* (Berkeley: University of California Press, 2011), 178–79.

[80] Literally meaning "permission," there are various kinds of *ijazas*. They range from permission to transmit a tradition to exercising *ijtihad* and collecting religious dues on behalf of a Shi'i *marja'*.

[81] Hasan Shanawani and Mohammad Hassan Khalil, "Reporting on "Islamic Bioethics," in the Medical Literature: Where Are the Experts?" in Jonathan Brockopp and Thomas Eich, eds., *Muslim Medical Ethics: From Theory to Practice* (Columbia: University of South Carolina Press, 2008), 222.

The view that Islamic laws lend themselves to a multiplicity of interpretations can be evinced on the question of observing ritual acts in the polar regions. Shiʿi jurists have posited a wide array of opinions on offering of prayers and fasting there. Fadlallah and al-Sistani maintain that when praying or fasting in areas where there is continuous daylight or where the sun does not rise, a person should follow the timings of the nearest city that experiences night and day,[82] whereas al-Khu'i states that s/he should migrate to where s/he is able to pray and fast based on the rising and setting of the sun. If that is not possible, a believer is to apportion the prayer timings over the course of the day."[83] Another jurist, Fadil Lankarani (d. 2007), recommends that a person follow his/her homeland timings.[84] Juristic variations such as these indicate that the precepts that Islam incorporates in its legal system are not immutable and that they can be modified based on various considerations.

The fact that many social norms can be traced to pre-Islamic Arabian culture and normative praxis suggests that had Islam emerged in a different milieu or circumstances the social laws of Islam would indubitably have been different. There was nothing Divine or sacred in the customary traditions that Islam endorsed. These customary laws could and probably should be modified under different customary and social normative practices. Since large sections of Islamic law are humanly constructed they can be reconstructed or refined so as to accommodate the needs of diverse societies based on their own customs. So, for example, the payment of dowry (*mahr* or *sadaq*) is a requirement that Islam appropriated from pre-Islamic Arabia. The idea that it can be paid in instalments or can be totally forgiven is a later juristic innovation.

Although the legal doctrine did not recognize *ʿurf* as an independent source of law it never rejected it outright either. Rather, *ʿurf* was incorporated within the legal ambit since it was *ʿurf* that could determine how the law was to be interpreted and applied in a particular instance. The discussion on *ʿurf* underscores the role of communal practices in framing the law and that *ʿurf* is often linked more to societal practices than to abstract juristic laws. Custom provides the parameters within which the law is constructed and deployed. Due to the pivotal role that custom plays in jurisprudence many jurists insist that one of the conditions stipulated for a *mujtahid* is that he must be fully cognizant of local *ʿurf*.[85] It is essential that a *mujtahid* be mindful of customary practices so that he can render a

[82] Al-Sayyid Husayn al-Husayni, *Ahkam al-Mughtaribin* (Tehran: Markaz al-Tibaʿa wa'l-Nashr-lil-Majmaʿ al-ʿAlami li-ahl al-Bayt, 1999), 98. Linda Darwish, "Texts of Tensions, Spaces of Empowerment: Migrant Muslims and the Limits of Shiʿite Legal Discourse" (PhD diss., Concordia University, 2009), 227. Also, Liyakat Takim, "Reinterpretation or Reformation: Shiʿi Law in the West," *Journal of Shiʿa Islamic Studies* 3, no. 2 (2010): 141–65.

[83] Liyakat Takim, "The *Marjaʿiyya* and the Juristic Challenges of the Diaspora," *Australian Journal of Islamic Studies (AJIS)* 2, no. 3 (2017): 40–54.

[84] Darwish, "Texts of Tensions," 227.

[85] Mohammed, *Muslims in Non-Muslim Lands*, 109, quoting Ibn Abidin Sharh *ʿUqud Rasm al-Mufti*, 39; al-Subhani, *Masadir*, 466. Ibrahim al-Jannati also insists that a *mujtahid* must be aware

legal opinion that is most suitable for that community. This factor led the Iranian jurist Mirza Qummi (d. 1815) to argue that the more a jurist knows the customs of the community the more erudite he is.[86]

The discussion on pre-Islamic laws and their role in sanctioning the practices of the early Muslim community indicates that at the time of its inception, a law may originate from a particular custom or worldview. Since it incorporated pre-Islamic practices, legal continuity in the early period of Islam would make it much easier for newcomers to the faith to adapt to and accept it. With time the genesis and reason for a law's prescription may fall into oblivion. The law is retained simply because it works and continues to function well for the community. The law may later be impugned if it is no longer able to serve the needs of the community or if the moral consciousness of the community has changed so much that the law is considered unconscionable or unjust to a particular segment of the population.

Since there were no well-established principles or guidelines of defining or deducing laws in the seventh and early eighth centuries, it is correct to state that when it was instituted, *usul al-fiqh* actually explained rather than generated the laws that Islam had endorsed. In other words, legal injunctions were accepted and enforced before their rationale and methods of inferring them came to be discussed and justified in the Usuli manuals. It was left to *usul al-fiqh* to explain how the laws came into existence in the first place and to elucidate the legal process of deciphering them in the future.

Customary Law as an Evaluative Measure

In many instances, jurists deploy various hermeneutical tools including *'urf*, when modifying or revising the *ahkam* with changing social conditions. However, since it is deemed to be conjectural its function has been confined to that of deciding the applicability of an injunction in a particular social setting. The important role that *'urf* plays has yet to be formally recognized or discussed by Shi'i jurists'[87] Although *'urf* is not considered to be an independent source for legislating laws, jurists acknowledge that it is absolutely indispensable in its application within a community and that *'urf* plays a definitive role in identifying the objects of legal determinations.[88] Based on the view that the law is

of the customs and practices of the society that he lives in. 'Abd al-Hadi al-Fadli, *al-Taqlid wa'l-ijtihad: Dirasatu'l-Fiqhiyya li-Dhahirat* (Beirut: Markaz al-Ghadir, 2007), 270.

[86] Sane'i, *Qa'ida*, 228.

[87] Mahrizi, *Fiqh Pazhuhi*, 2/297. Ansari, however, is an exception to this in that he discusses the role of *'urf* in more than thirty places. See ibid., 2/296–97.

[88] Doost, *Fiqh va-Maslahat*, 181, 190.

partially constructed on socioeconomic considerations, a ruling can be revised or replaced by a more suitable one if required by societal needs.

Despite the fact that custom is not acknowledged as a source of law, Shiʿi juridical manuals are replete with examples of how custom plays a vital role in establishing a yardstick for the permissibility or interdiction of an act. When a jurist rules that music that is played at "vain and amusement gatherings" is prohibited, local custom is invoked to determine whether a particular type of music falls within that category or not. To be sure, the criterion for discerning what genre of gathering is for "vain and amusement purposes" is very subjective and difficult to determine. Hence it is open to interpretation.[89] Custom also plays a significant role in determining marital compatibility (*kafa'a*) between couples of diverse social and economic backgrounds, when to start offering the shortened (*qasr*) prayer, whether a person who is on life support can be presumed dead, how much *mahr* should a husband pay if it is not stipulated at the time of marriage, and so on.

Juristic works cite various scenarios of how custom can determine the applicability of a ruling. At the same time, they demonstrate how *'urf* is a pivotal point around which the law operates.[90] Although *'urf* cannot define the moral worth of an act it does identify socially acceptable or unacceptable acts. A good illustration of this is whether a husband can demand to engage in anal intercourse. In dealing with this issue, jurists have to determine if the concept of *tamkin* (giving pleasure) means that a woman has to consent to any sexual position her husband wishes or not. Ayatullah Muhsin al-Hakim (d. 1970) claims that based on the customary usage of the term, *tamkin* does not refer to the entire body and that a wife's refusal to have anal sex does not constitute *nushuz* (insubordination) on her part. In the absence of definitive proof in the textual sources, he states that there is no evidence to suggest that a man has a right to demand pleasure from any part of her body that he desires. On the contrary, al-Hakim states that she is only required to provide what is normally understood by *'urf* to constitute sexual relations. In the case under consideration, it does not include anal intercourse.[91]

Custom can also help determine how a husband should maintain his wife. If her family was affluent with a good standard of living before marriage, the husband must maintain his wife based on her social status and the standard of living that she enjoyed before the marriage.[92] Similarly, custom can also decide

[89] Al-Husayni, *Ahkam al-Mughtaribin*, 444.

[90] For other references of *'urf* in juridical treatises, see al-Mansuri, *Dirasa Mawduʿiyya*, 88–89. For examples of when the application of a legal edict depends on *'urf*, see Bujnurdi, *Majmuʿa-ye Maqalat-e Fiqhi,* 1/93–99.

[91] Ayatullah Muhsin al-Hakim, *Mustamsik al-ʿUrwa al-Wuthqa* (Qum: Dar al-Tafsir, 1995), 2/808. Takim, "Custom as a Legal Principle," 485.

[92] Al-Shahid al-Thani, *al-Rawda al-Bahiyya fi Sharh al-Lumʿa al-Dimashqiyya*, 10 vols., ed. Muhammad Kalantar (Qum: Kitabfurushi-ye Davari, 1989), 5/471.

whether a husband has spent enough time with a wife in a polygamous marriage. When he spends a night with one of his wives, the husband cannot leave her premises unless it is absolutely necessary. If he has to leave her house, then he is required to compensate the duration of his absence unless the period that he left was so short that *'urf* would not consider it to be time away from home.[93] In this instance, it is *'urf* that will determine if the time he spent away from the house is to be considered excessive or not. Along similar lines, the medieval jurist Hamza b. 'Ali b. Zuhra (d. 1189) states that in comprehending what a word may possibly connote, a *faqih* should examine the customary usage of a word in determining how it is to be interpreted. If that is not possible, then he should look at the lexical meaning of the word.[94]

Custom can also mold or shape the law especially when the law is silent regarding an issue. For example, when a house is to be sold it is the local *'urf* that determines what is to be considered as an essential part of the home. Are items like chandeliers, paintings attached to the walls, fridges, microwaves, and furniture considered appurtenances of the house or not? If they are then these must be included when the property is sold. When performing the pilgrimage, it is *'urf* that decides whether stoning the devil (*ramy*) and walking between the mountains of *Safa* and *Marwa* (*sa'y*) in Mecca from the upper floors can be considered as fulfillment of the *hajj* rituals or not.[95]

Can a man who undergoes transgender surgery exercise authority over a minor? According to Khumayni, she no longer is considered to be a guardian, because a guardian has to be male. However, if a woman changes her gender and becomes a man, she still does not become a guardian for the child because, despite the change of gender, she cannot be considered to be a father to her children. This is because the father is the one who has deposited semen into the uterus of the mother of the children. Since the mother gave birth to the children, she cannot be considered to be the father despite the change in gender. This observation is premised on what custom decides as to who is the father or mother of the children.[96]

Customary practices can, at times, also influence a *fatwa* issued by a jurist. According to Murtaza Mutahhari, the covering of the face for a woman was not prescribed during the time of the Prophet. In all probability, this was a social practice introduced later on by Iranians, a residue of Sassanian culture. Yet some jurists have issued injunctions stating that, based on the principle of *ihtiyat*

[93] Taymaz Tabrizi, "Saving the Shi'i Community in Marriage: Sex, Gender and Soteriology in the Anthropology of Imami Law" (PhD Thesis: McMaster University, 2016), 109.

[94] 'Ali b. Zuhra al-Husayni al-Halabi, *Ghunyat al-Nuzu' ila 'ilmay al-usul wa'l-Furu'* (Mashhad: Mu'assasa al-Imam al-Razavi, n.d.), 523.

[95] Ahmadi, "Puya-yi Fiqh-i Islam," 1/67.

[96] Al-Qummi, *Kalimat Sadida*, 115.

(precaution), a woman should cover her entire face in public. This is a good example of how a customary phenomenon can, with the passage of time, become a religious one.[97]

Another example of custom framing the law is the practice of tying a turban under the chin or *tahannuk*. Contrary to current practices, Shiʿi law manuals state that it is highly recommended that the *tahannuk* be observed whenever a person wears a turban. According to ʿAllama Hilli, "The *tahannuk* is recommended to observe based on the statements of Imam Jaʿfar al-Sadiq. He said, 'Whoever wears the turban and does not put the *tahannuk* an ailment has struck him for which there is no cure. Thus, he should blame nobody but himself."[98] Based on *hadith* reports, ʿAllama states unequivocally that the turban should be tied under the chin at all times, regardless of whether one is praying or not."[99] ʿAllama's opinion on the *tahannuk* is shared by many scholars like Shahid I and Baha' al-Din Muhammad b. Husayn al-ʿAmili (also known as Shaykh Baha'i; d. 1621). The latter emphatically states that "the *tahannuk* is recommended for anyone who wears the turban—whether he is praying or not. There is nothing in the traditions to suggest that it is recommended only during prayers."[100] Scholars like Jaʿfar Kashif al-Ghita' (d. 1812) reinforce the observance of the *tahannuk* at all times. He quotes Shaykh al-Saduq (d. 991) as saying: "I have heard our teachers say that it is not permitted for anyone who wears a turban to pray unless he observes the *tahannuk*."[101]

Despite the copious traditions that extol the merits of observing the *tahannuk* and the severe consequences of disregarding it, contemporary scholars do not observe it. Whereas medieval scholars stressed the need to observe the *tahannuk*, subsequent scholars did the opposite by de-emphasizing the significance of the practice. In explaining the discrepancy, Fayd al-Kashani maintains that customary practices in his time dictated that the *tahannuk* be discarded. This is because it attracted negative attention and was a form of dressing that was scorned and disparaged (*libas shuhra*), something which is prohibited. Due to this, al-Kashani states that it is no longer essential to observe it.[102] It is *ʿurf* that determines what constitutes *libas shuhra* and whether a particular form of dressing should be observed. With the passage of time, a mode of dressing that the Imams emphasized was abnegated by the very scholars who claimed to be their deputies and promoted their practices. This is further illustration of how

[97] Mahrizi, *Masʾala al-Marʾa*, 285.
[98] ʿAllama al-Hilli, *Tadhkira al-Fuqaha*', 2/451.
[99] ʿAllama al-Hilli, *Muntaha al-Matlab fi Tahqiq al-Madhhab* (Mashhad: Majmaʿ al-Buhuth al-Islamiyya, 1992), 4/251.
[100] Al-ʾAmili, *al-Habl al-Matin* (Qum: Manshurat Maktab al-Basirat, 1999), 187.
[101] Jaʿfar Kashif al-Ghita', *Kashf al-Ghita'* (Isfahan: Intisharat al-Mahdawi, 1999), 1/202.
[102] al-Kashani, *Kitab al-Wafi*, 20/746.

customary laws had drastically impinged on the method of wearing the turban within Shi'i circles.[103]

Other examples are even more insightful on how Islamic law was either impugned or replaced by local *'urf*. While Islamic law insisted that slaves be manumitted after a period of time after conversion, the precise period of manumission varied according to local custom and was even dependent on race. Blacks, for example, were liberated seven years after conversion in the Balkans and Anatolia, whereas white slaves were freed after nine years, since they were more resistant to the cold weather and were more expensive. In the Turkic world, slaves were freed after six years, whereas Chinese military slaves were freed after twelve years in East Turkistan. Thus, the law was contingent on local custom.[104] At times, custom took precedence and overruled Islamic law. The castration of slaves, for example, is against the *shari'a* injunctions and yet, based on customary practice, it was widely performed in different parts of the Muslim world.[105]

Ayatullah Sane'i is one of the few jurists who has paid great attention to the role of custom in issuing legal judgments. In discussing the importance of justice in the decision-making process, he states that the collective rationality or the *'urf* must be the basis for defining justice.[106] He goes further than most jurists, arguing that if custom deems an act to be unjust and reason rules otherwise, the former should prevail and be prioritized over reason.[107] Sane'i applies the same rule when custom and *hadith* clash. When traditions clash with the Qur'an, he believes that custom should be an important criterion in evaluating its applicability. If custom acknowledges that a particular ruling is unfair, a *mujtahid* should ignore a *hadith* that opposes it, since it is against the Qur'an and what people of sound mind consider to be just.[108] Sane'i emphasizes that the Imams have asserted quite categorically that traditions that contradict the Qur'an should be abandoned.[109]

The discussion on how *'urf* can shape and decide on the applicability of Islamic rulings demonstrates that, in the past, given the fact that most of Islamic law was endorsed, *fiqh* was often formulated and modified around the dictates of custom rather than the other way around. Despite this, jurists have refused to

[103] Takim, "Black or White?" 548–9.

[104] William Gervase Clarence-Smith, *Islam and the Abolition of Slavery* (New York: Oxford University Press, 2006), 67.

[105] Ibid., 82.

[106] Masoumeh Rad Goudarzi and Alireza Najafinejad, "Necessity of Reinterpretation of Sharia in the Thoughts of a Grand Ayatollah: Saanei's Response to the Challenge of Human Rights," *Muslim World: Journal of Human Rights* (2019): 12, 15.

[107] Sane'i, *Qa'ida*, 173, 177.

[108] Ibid., 182.

[109] Goudarzi and Najafinejad, "Necessity of Reinterpretation of Sharia," 16. For an example of how *'urf* determines the extent of a *wasi*'s authority, see Sane'i, *Qa'ida*, 169–70; on other examples of how *'urf* determines the application of rulings, ibid., 171–2ff.

acknowledge the role of *ʿurf* as a source for legislation; rather, they have considered it merely as an elaborator and evaluative measure of the applicability of the law.[110]

The Imposition of Seventh-Century *ʿUrf* in Contemporary Times

The Qur'an mentions that every nation has been given different laws and paths (5.48). Evidently, it legislated or endorsed laws and practices based on a society's distinct character and needs. Significantly, the Qur'an did not impose the normative praxis of one society on another. Equally important, there is no evidence to suggest that the Qur'an considered that the customary norms it encountered and approbated should be considered immutable or immune from change. On the contrary, the Qur'anic revision or annulment of some pre-Islamic practices like infanticide or the waiting period (*ʿidda*) for a widow and its instituting the principle of *naskh* (abrogation) indicates that the Qur'an intended to counter the deleterious consequences of some local practices. At the same time, its endorsement of many pre-Islamic laws demonstrates its approval of local custom.

Classical jurists worked within the framework of their milieu where local *ʿurf* and inherited laws were interwoven and defined the jurists' boundaries of interpretation. However, the imposition of seventh and eighth-century Arabian customary laws in present times means that current needs, moral values, contemporary *sira al-ʿuqala'* and *ʿurf* are often overlooked in favor of laws expressed fourteen centuries earlier. Instead of basing their rulings on the Qur'anic notion of *al-maʿruf*, jurists tend to enunciate and replicate laws based on the *fiqh* they have inherited. In their hermeneutical enterprises, contemporary jurists' horizon is animated by their presupposition that pre-Islamic customary norms and laws that were approved by the Qur'an and the Prophet are eternally binding and immutable. Consequently, cultural norms that considered women to be intellectually deficient and required constant male supervision are enforced on contemporary Muslim diasporic communities where, paradoxically, women are often more educated than men.

For example, many contemporary jurists insist that a woman cannot leave her house without her husband's permission and that she should submit to his sexual desires as and when he wishes.[111] In effect, jurists universalized verses and traditions that were specific to sociocultural circumstances in seventh-century

[110] On the vast number of subjects that can be covered by *ʿurf*, see al-Mansuri, *Dirasa Mawduʿiyya*, 62–64; 87–89 ff.

[111] https://www.al-islam.org/islamic-laws-sayyid-ali-hussaini-sistani, #2421, 332.

Arabian tribal culture and asserted them on contemporary Muslims. In the process, they argued for the legal preponderance of men over women.

Jurists who abide by and impose pronouncements issued by their predecessors in the classical period need to bear in mind that they are, in effect, using Islamic texts to validate eighth-century *'urf* and that they are perpetuating and promulgating the views and pronouncements on women and other minorities based on pre-Islamic Arabian culture. Universalizing and imposing pre-Islamic social norms in contemporary times is akin to immortalizing and sanctifying them. Hence, even though the Qur'anic and *hadith* pronouncements on women were addressing issues in that era, they are deemed to be infinite and eternal by many Muslims. These laws often give men preference over women and cite biological differences as the reason for their preponderance. The laws are held to be universal even though they were actually socially and culturally specific. In the process, pre-Islamic *'urf* is both Islamized and sacralized.[112]

It is important to underscore that there is no Prophetic *hadith* or Qur'anic verse that obliges Muslims to abide by or follow the pre-Islamic customary norms that were approved in the classical period of Islamic history. On the contrary, as we have seen, in the past Muslim jurists innovated various strategic devices like *maslaha*, *istihsan*, *qiyas*, *ra'y* etc. to infer and even create laws when they found the existing laws unacceptable or that they could not be applied. Due to this factor, Islamic law was never monolithic and was often contingent on where a person lived and which school of law s/he followed.[113] The diverse views espoused by Muslim jurists demonstrate that pluralism and diversity in legal practices were prominent features in the early period of Islam. It also demonstrates that Islamic law is malleable and subject to interpretation.

Within the interpretive juristic community today, there is little or no discourse on the rationale or justification for extending *imda'i* rulings eternally. It is taken for granted that, unless stated to the contrary, a legal prescription is immutable and perduring even if it was endorsed rather than instituted. Muslim reformers need to engage the juridical literature and question the justification for extending culturally generated rulings to other times and places.

A Clash of Cultures

As noted, *'urf* is embedded in the norms and values of a society, which Abu'l-Qasim Fanaei, a contemporary Iranian scholar, terms "the conventional lawgiver

[112] I cite examples of such laws in chapter 1.

[113] For examples of changes in legal pronouncements due to new circumstances in the early period of Islam, see al-Alwani, *Towards a Fiqh for Minorities*, 40, fn. 14. See also Takim, "Custom as a Legal Principle," 491.

(*shariʿat-i ʿurfi*). It is not predicated on the will of the Divine Lawgiver (*shariʿat-i qudsi*), rather, it is based on the customary laws and outlook of the people of the time. Even though contemporary conventional laws are important in the lives of and impact local Muslim communities, most jurists are of the opinion that contemporary *ʿurf* has no probative value unless it resonates with the customary laws ubiquitous in the early period of Islam. Scholars also argue that the validity of conventional laws is contingent on the approval from the Lawgiver or the infallible guides (the Prophet and/or Imams) through an explicit proclamation. Due to this factor, many scholars do not accept modern business practices like insurances, accepting or paying interest, dealing in stocks, shares, and bonds, laws on copyrights[114] or that the Islamic penal code can be applied based solely on DNA results.[115]

Sacred scriptures are often shaped and influenced by local culture at the time of revelation. The social and cultural normative praxis from which the revelation emerged had a major influence in shaping the contents and worldview of the Qur'an. According to Abu Zayd, "the Qur'an was a cultural production, in the sense that pre-Islamic culture and concepts are re-articulated via the specific language structure. Hence, the Qur'an cannot be read in isolation, rather, it has to be seen within the context of pre-Islamic practices, norms and culture."[116]

As the Prophet's teachings were intertwined with the culture of his time, it is necessary to comprehend not only his teachings but also the cultural milieu in which they were transmitted. Therefore, a modern jurist is confronted with the formidable challenge of distinguishing between Divine revelation and the culture in which that revelation was couched. This is necessary because the pre-Islamic customary laws and values prevalent at the beginning of Islam are crucial to any understanding of Qur'anic and Prophetic legislations. If the cultural and social norms at the time of revelation are not understood and differentiated from the revelation itself then a jurist cannot properly contextualize the Qur'anic verses and traditions of the Prophet. The exegete or reformer must also bear in mind that a different social or cultural background would have generated a divergent rendition of the sacred texts. In other words, the language, culture, and social practices of the first generation of Muslims are peripheral parts of the religion, they are not essential to it. To be sure, the earlier jurists were guided not only by religious texts but also by their own proclivities and sociocultural

[114] Al-Sistani states that it is preferable but not obligatory to abide by copyright laws. https://www.al-islam.org/contemporary-legal-rulings-shii-law-ayatullah-ali-al-sistani/b-muamalat#copyright. Fadlallah, on the other hand, insists that copyright laws must be observed. Muhammad Husayn Fadlallah, *Fiqh al-Hayat* (Beirut: Mu'assasa al-'Arif li'l-Matbu'at, 1998), 102.

[115] Imam 'Ali Foundation, *Current Legal Issues According to the Edicts of Ayatullah al-Sayyid 'Ali al-Seestani* (London: Imam 'Ali Foundation, 1997), 48.

[116] Nasr Abu Zayd, *Reformation of Islamic Thought: A Critical Historical Analysis* (Amsterdam: Amsterdam University Press, 2006), 141.

backgrounds. Viewed from this perspective, Islamic jurisprudence is an edifice that is continually evolving and adapting to newer circumstances.

A modern jurist has to also translate the religious texts culturally so as to comprehend the essence of the principles inveterated in the Divine proclamation.[117] Cultural translation means to compare and contrast the earlier culture with the present one and then to separate the essence of the Qur'anic revelation from the sociocultural milieu of the early generation of Muslims. The jurist would then have to link revelation with his own cultural framework rather than the culture at the time of revelation. Contemporary culture would be predicated on the custom and reasoning of the people of sound mind. Thus construed, the *ijtihad* of the *fuqaha*' transcends the extraction of decrees to resolve emerging issues from religious texts. Engaging *ijtihad* today entails the bifurcation of laws and values from the cultural accretions in the early period of Islam. It also means that since the law is inveterated in and responds to cultural exigencies, some of the laws that were instituted in a distinct cultural context will have to be revised when they interact with a different culture. Scholars like Fanaei, Shabistari, and Soroush have argued that cultural translation should take priority over the extrapolation of juridical injunctions from the revelatory sources.[118]

It is equally important that a jurist avoid transposing the values and customs associated with one culture on another. More specifically, in issuing a *fatwa* that is to be applied in modern times, a jurist must trace the provenance of a *hukm* to determine whether it is divinely instituted (*ta'sisi*) or *imda'i* (endorsed). If it is the latter, and if there is a clash between previous and present-day rulings, then in reality the conflict is not between Islamic law and present-day custom as much as a clash between two customs, that is, pre-Islamic or early Islamic *'urf* with contemporary *'urf*. Just as pre-Islamic *'urf* was endorsed, the local *'urf* that Muslims encounter today can be accepted and endorsed on the same basis.

The prevalence and endorsement of a custom at the incipience of Islam is not a valid justification for preferring or asserting it over modern *'urf*. This is because in such instances, as we have seen, the Legislator endorses local *'urf* not because it is sacred or has a religious or moral value but because it does not violate its ethical precepts and is socially acceptable to the people of sound mind at that time. In other words, as far as legal prescription is concerned, it is the local rather than previous *'urf* that should be affirmed. The only time contemporary *'urf* cannot override a previous injunction is if the latter is *ta'sisi*, that is, a law that Islam had instituted. Even in such circumstances, only fixed rather than mutable laws must be prioritized over contemporary *'urf*.

[117] See the discussion on this in Fanaei, *Akhlaq-i Din-Shinasi*, 429.
[118] Ibid., 432. See chapters 1 and 5 for the views of Soroush on this.

According to Fanaei, local *ʿurf* and conventional laws are valid and binding unless they are proscribed by the Lawgiver. Based on this proposition, he claims that Islam approves the manifestation and expression of modern customary values unless their invalidity is proven through clear proclamations. Thus, accepting conventional *shariʿa* (*shariʿat-i ʿurfi*) and following its precepts do not need to be vindicated; on the contrary, arguments against using the conventional *shariʿa* and its norms have to be justified. When there is tension between contemporary and previous *ʿurf*, one cannot prioritize the latter unless there is clear proof that the Divine Lawgiver has required that this be done.[119]

A good example of this is the penal system in Islam. The purpose of punishment is to reform an offender's behavior and establish justice. The values that the punitive laws are supposed to protect are immutable whereas the form of punishment can be modified. The fact that the punishments imposed are severe reflects the importance of a precept assigned by the Divine. Therefore, the punitive measures legislated for adultery or theft reflect the importance that the *shariʿa* assigns to ethical values such as chastity and honesty. Stated differently, the value of a punitive measure lies in the ethical and moral behavior it intends to uphold rather than in the form of punishment.[120] In fact, the forms of punishment are often based on local *ʿurf* and acceptable punitive practices. To be sure, there is nothing sacred about lashing, stoning, or amputating a hand. Thus, the form of punishment is not sacred, whereas the values associated with a particular mode of behavior are. Furthermore, the purpose of the Lawgiver for issuing or sanctioning certain punitive laws in the early period of Islam was to establish justice and to combat crime. Any method that helps the judicial system reach these goals is acceptable. Thus, although the purpose of punishment remains the same, the form of punishment is subject to change based on the social conventions of the time.

According to Bujnurdi, when Ayatullah Khumayni was told that stoning (*rajm*) as a punitive measure was often used to ridicule Islam and extirpate its image as the religion was depicted as barbaric and savage, Khumayni replied that the courts should be instructed to resort to other punitive measures like the death penalty. Khumayni had also stated that a convict should initially be asked to repent so that he/she could be exonerated.[121] For him, it was more important to protect and preserve the image and integrity of Islam than to insist on a particular form of punishment.

[119] Ibid., 480.
[120] Khaled Abou El Fadl, "Qur'anic Ethics and Islamic Law," *Journal of Islamic Ethics* 1 (2017): 15.
[121] Based on an email I received in 2001. See also Takim, "Maqasid al-Shariʿa," 104.

Diasporic *'Urf* as a Source of Legal Prescription

Crucially, local *'urf* does not have to resonate with or originate from the customs of Islamic countries. After all, when they conquered different lands after the demise of the Prophet, the early Muslims borrowed from and incorporated local *'urf* in their legal system rather than perpetuating the *'urf* of the Hijaz. The covering of the face for women is just one example of this. The Hanafi law that a virgin girl could marry without seeking the consent of her guardian is another example of how local *'urf* could override the *'urf* in the Hijaz. At times, *'urf* even replaced the law. The exegete Mahmud b. 'Umar al-Zamakhshari (d. 1144) opposes the ruling of his own school (Hanafi) by stating that women should perform the housework even if the sources state they do not have to.[122] Since the custom in his time supported gender hierarchy and a woman performing the housework was the norm, it overrode the prescriptive interpretation of the Hanafi school.[123]

Contemporary Muslims are not obliged to replicate laws that were premised on eighth-century *'urf*. Just as rulings in the past were often based on the practices of local custom, local diasporic practices can act as a foundation for contemporary legal prescriptions. Thus, local customary practices that are acceptable to the people of sound mind can be employed in either formulating or revising laws in the diaspora.

Reasserting universally accepted moral values, applying the practices of the people of sound mind and using local customs would result in changes in many rulings, especially, but not exclusively, for Muslims in the diaspora. The interpretation of law in the diasporic context must be grounded in accepted social norms because, as I have argued, law and custom are intertwined. This interpretive activity entails expanding current laws to new conditions and circumstances that are absent in the scripture. Unfortunately, instead of predicating current rulings on the Qur'anic principles of justice and equality and *sira al-'uqala'*, rulings are often extracted from erstwhile texts and scholarly opinions.

It would be erroneous to presume that classical jurists could arrive at rulings that would serve the needs and interests of future Muslims at all times and places. To be sure, the inherited *fiqh* is not an always adequate point of reference for new *fatawa*. Neither is the consensus of the older generation of scholars a valid basis for inferring new rulings. Rather than asserting aspects of Islamic jurisprudence based on rulings stipulated in earlier texts or on a country that claims to abide by the *shari'a*, diasporic customary law can be recognized as a valid source of prescription and tool for integration in the diasporic milieu especially where

[122] Abu al-Qasim Mahmud b. 'Umar al-Zamakhshari, *Al-Kashshaf 'an Haqa'iq al-Tanzil*, 4 vols. (Beirut: Dar al-Kutub al-'Arabi, 1987), 1/272.
[123] Bauer, *Gender Hierarchy in the Qur'an*, 163–64.

Islamic law allows recourse to local custom. Unless there is an explicit legal interdiction, diasporic laws can be used for self-empowerment and to gain access to the highest political and civic engagement. Viewed from this perspective, since custom is interlaced with the law, it becomes an important component in the process of an Islamic reformation.

The Qur'anic directive to command or enjoin *ʿurf* (7:199) suggests that it not only ratifies local but also possibly future *ʿurf*. Nowhere does the Qur'an restrict the notion of *ʿurf* to seventh-century Arabia. Nor does it insist that all future legal injunctions must be based on seventh-century *ʿurf*. It is crucial at this juncture to comprehend the concept of *al-maʿruf*. As noted, the term refers to the most acceptable practices at a point in time, something which the *ʿuqala'* can access and retrieve. In essence, *al-maʿruf* refers to the collective practices of a community or societal reasoning based on commonly acknowledged values. However, an accepted custom or law can be revoked by a more acceptable practice at another time. Thus, *al-maʿruf* cannot be sanctified or frozen to a particular era. It can change based on the commonly accepted values of the time. Importantly, *al-maʿruf* does not have to be anchored to a particular place. Commonly accepted practices in the West can inform the *ʿurf* for Muslims living in the Western diaspora. As I have discussed, even pagan *ʿurf* was endorsed by the Qur'an.

In revising their rulings or devising new ones, legal hermeneutics must be grounded on Islamic values rather than the rulings pronounced by erstwhile jurists. Such a reading of the sacred texts means that custom can frame and mold particular juristic rulings rather than merely identify and specify their application. A rendition of the texts based on local *ʿurf* will also result in the revision of many juridical rulings. Legal pronouncements on child marriages, women leading men in prayers, women's inheritance, permitting them to travel without the consent of their husbands or guardians, women's ability to give unilateral divorce, their ability to share guardianship (*wilaya*) of their children, intergender interaction including the shaking of hands,[124] and those elements of the Islamic penal code that are deemed abhorrent by the *ʿuqala'* can be revisited and altered.

Contemporary jurists also need to address topics such as the sale of shares and bonds, artificial insemination with donor sperm (AID), genetic engineering, IVF (In Vitro Fertilization), whether a Muslim builder or contractor can build a place of worship for non-Muslims in the West,[125] serving in Western judiciaries, acting in or directing movies made in the diaspora, and Muslim doctors having to terminate a patient's life when s/he is in a vegetative state. Laws regulating such

[124] The Iranian jurist Mohsin Saʿidzadeh believes that men and women can shake hands. Mir-Hosseini, *Islam and Gender*, 267.

[125] Ayatullah Sistani says it is not permissible to do so because this is tantamount to promoting false religions, al-Hakim, *A Code of Practice for Muslims in the West*, 150.

topics need to be either formulated or revised based on the principles enunciated previously.

Recourse to local *'urf* can also challenge and revise traditional *fiqh* rulings. For example, in the past, statutes and idols were objects of devotion and religious offerings. Hence they were prohibited. However, in modern times, in most cases, they are used for aesthetic purposes only. Therefore, Ayatullah Ja'far al-Subhani states that the proscription on displaying statues and works of art should be changed. Based on the principles of *'urf* and *sira al-'uqala'* diasporic customary law can be the basis for further legislation.[126]

The present discussion has attempted to demonstrate that local custom which is validated by *sira al-'uqala'* can serve as an important interpretive device to extrapolate new laws that are more appropriate for diasporic Muslims especially as it empowers the *fuqaha'* to derive and formulate new laws. When adopting and accepting a particular social norm, the provenance of the practice is not important. What is essential is that it does not violate the moral-ethical framework of the scripture. In this interpretive process, jurists need to keep in mind that they cannot limit God and His laws to seventh-century Arabia, and that an eternal God speaks eternally. Whereas revelation is believed to be from God, the sociopolitical context of that revelation is culturally specific. Therefore, reformation of the legal system means there is a need to go beyond the literal understanding and historical exegesis of the Qur'an to an examination of and deciphering the moral élan of the Qur'an.

Reformist Tools: *Mintaq al-Faragh*

Another important strategy in the reformation process is that of *mintaq al-faragh* (lacunae or discretionary area). This domain constitutes a sphere where no legal/moral value of prohibition (*haram*) or mandatory (*wajib*) has been prescribed by Islamic law, that is, it falls under the category of permissible (*mubah*) acts that is inclusive of recommended (*mustahabb*) and reprehensible or discouraged (*makruh*) ones. A ruler or jurist has the discretion to mandate certain acts or forbid them based on the interests of the community and to address any injustice or imbalance present in a society. Conceptually, the notion of lacunae indicates that there is a need for an expansion rather than the replacement of certain parts of the *shari'a* to respond to the needs of contemporary society. Therefore, it enables a jurist to revise erstwhile edicts and/or enact new ones based on the vicissitudes of time and space.

[126] Al-Subhani, *Masadir al-Fiqh*, 442.

A proponent of this notion was Muhammad Baqir al-Sadr. He maintains that not all laws issued by the Prophet were enforced in his capacity as a ruler of the community or that of a revelatory figure. They cannot therefore be considered as a permanent or an essential part of the prescribed laws of Islam.[127] For instance, al-Sadr cites a tradition from Jaʿfar al-Sadiq concerning the Prophet's resolution to a dispute among the inhabitants of Medina. The local community had debated over the possession of water for watering palm trees. The Prophet stated that no one should prevent others from taking surplus water from him/her.[128] Al-Sadr argues that preventing others from taking surplus water that a person owns is permissible under Islamic law. However, the Prophet had issued a judgment based on his role as the leader of the community, not as a revelatory figure. He was responding to the social needs at the time.[129] Theoretically, such a bifurcation of Prophetic roles empowers a *mujtahid* to discard a particular Prophetic practice or statement if it was not part of the revealed law. This is because the injunctions connected to the latter are contingent on sociopolitical and economic circumstances."[130]

Since the *shariʿa* does not encroach on every field of human activity there are many instances that fall within the scope of *mintaq al-faragh*. There is nothing to prohibit the performance of acts that are not mentioned in the scripture and are therefore categorized as *mubah*. The *shariʿa* has nothing to say about whether the Qur'an was created or not. Similarly, it is silent on military strategies, patent and copyright laws, government monetary and economic policies, and so forth. It is equally reticent on the forms of governance that a nation can accept. Hence, any form of government is acceptable as long as it fulfills the goal of establishing a just sociopolitical order. Furthermore, the *shariʿa* has no laws on trade unions, minimum wage, or deoxyribonucleic acid (DNA). It is in the sphere of *mintaq al-faragh* that many of these topics can be engaged.[131] In the diaspora, *mintaq al-faragh* can empower jurists to rule on serving in Western armies, art, cinema, drama, sculpture, and aesthetics.

Jurists can play an important role in pronouncing rulings in this field. Especially in the socioeconomic fields, al-Sadr states that Islam has granted a government the flexibility to improvise new regulations in response to special economic circumstances. The ruler of an Islamic state can initiate any legislation

[127] Baqir al-Sadr, *Iqtisaduna* (Tehran: World Organization for Islamic Services, 1982), 2/2/186.

[128] This *hadith* and others similar to it can be found in al-Hurr al-ʿAmili, *Wasaʾil al-Shiʿa*, 17/24.

[129] Kamal Haydari mentions five other traditions that al-Sadr uses to solidify his argument. Rizq, *Maʿalim al-Tajdid al-Fiqhi*, 139–41.

[130] Murtada Mutahhari, *Islam va-Muqtadayat-i Zaman* (Tehran: Sadra, 2006), 1/91, http://lib.eshia.ir/50001/1/91.

[131] Takim, "Custom as a Legal Principle of Legislation," 490. Many jurists are of the opinion that since the *shariʿa* purportedly covers every dimension of human needs there is no vacuum or need for *mintaq al-faragh*. Mahrizi, *Fiqh Pazhuhi*, 1/29. There is also a dispute as to the boundaries of this field, namely, how much and where a *faqih* can legislate.

that he deems appropriate for the needs of the people and to maximize the application of resources. The government can also choose to implement a wide array of economic and monetary policies ranging from a complete control of the economy to privatizing it so as to maximize its socioeconomic goals. Al-Sadr cites the example of ʿAli b. Abi Talib, who asked Malik al-Ashtar (d. 658) to prevent exploitation by regulating the prices of certain commodities when they were in short supply.[132]

For al-Sadr, the jurisdiction of the *wali al-amr* (the supreme political authority) is restricted to changes to nonobligatory acts only. He invokes the Qur'anic verse "O you who believe! Obey Allah, and obey the Messenger, and those charged with authority among you" (4:59) to justify his argument that the *wali al-amr* has absolute authority in the realm of *mintaq al-faragh*. Al-Sadr explains that in the past, people were allowed to occupy as much land as they wanted so as to cultivate and develop it. Since the instruments available at that time were very basic and a person could not work on more than a certain amount of land at a time, the rule accorded with social justice. In modern times, with the technology available, a person can own hundreds of acres of land and cultivate them simultaneously, an act that may no longer be considered just. Under such circumstances, the *wali al-amr* can enforce restrictions on how much land a person can own and cultivate.[133]

The *wali al-amr*'s jurisdiction can also encompass subjects like severing diplomatic ties with a particular country, limiting individual freedom like restrictions on the construction of buildings, roads, agriculture, and so forth, as well as matters related to people lives like organ donation. During the occultation of the twelfth Imam, most jurists have restricted the authority that a jurist can wield to matters regarding *al-umur al-hisbiyya*. This field confines the powers of a jurist to performing certain duties like promoting what is good and forbidding evil deeds, administering endowments (*awqaf*), supervising the property of minors and the disabled, and administering punishments where necessary. The principle of *mintaq al-faragh* extends the authority to a *faqih* to much broader fields.[134]

Advocates of the principle of *mintaq al-faragh* claim that it can only be applied to instances where there is no definitive ruling legislated. Theoretically, it can also be extended to formulating new laws based on the principle of *al-maʿruf*. As discussed, *al-maʿruf* refers to the collective practices of a community and can change with time. It is possible to extend *mintaq al-faragh* to incorporate cases where different customs demand fresh laws or the alteration of older rulings. It

[132] Baqir al-Sadr, *Iqtisaduna*, 2/2/186; Mavani, *Religious Authority and Political Thought in Twelver Shiʿism*, 151.
[133] Rizq, *Maʿalim al-Tajdid al-Fiqhi*, 126–30.
[134] Ibid. Also Takim, "From Partial to Complete," 26–27.

is in this neutral sphere that laws can also be enacted based on other principles like *maslaha*.

In the realm of discretionary acts *ʿurf*, in conjunction with *sira al-ʿuqala*', can ascertain the admissibility of an act. Viewed from this perspective, *mintaq al-faragh* empowers Muslims to formulate laws wherever they reside. In legislating laws in this sphere, Jaʿfar al-Subhani states that the local *ʿurf* should be consulted.[135] By invoking the concept of *sira al-ʿuqala*' in the domain of *mintaq al-faragh*, jurists can transcend the limited parameters of inherited laws, the *ʿijma* of preceding scholars, and the revelatory sources.

The importance of *mintaq al-faragh* in legislating new rules or modifying old ones can be evinced by a perusal of the *mustahdathat* (new matters or occurrences) literature.[136] It demonstrates that even the new *fatawa* issued from the seminaries in Qum and Najaf are premised on the same principles and follow the same methodology as the older ones. Important questions confronting Shiʿis, especially those residing in the West, like those of acculturation, assimilation and integration, racism, and Islamophobia have not been addressed.

Contemporary juridical manuals are replete with rules on the treatment of slaves, the number of nights that a man has to spend with each wife in a polygamous marriage, whether or not to cast a die in determining which wife should accompany him on his travels, the degradation of non-Muslims when they pay the *jizya*, and child marriages. The practices of the people of sound mind determines that laws which treat grown-up women like minors and assign them a guardian or those which discriminate between Muslims and non-Muslims on important issues such as saving the lives of non-Muslims, blood transfusion, and the dissection of a body must be revised.[137] Similarly, laws that stipulate the usage of dice or drawing lots on which slave to free should be abolished.[138]

Mintaq al-faragh affords the space for changing such readings of texts that are not compatible with commonly acknowledged human values. Importantly, jurists face the challenge of synthesizing and applying the universal principles of Islam to their present-day needs. In this enterprise, they can appropriate custom that has been approved by the *ʿuqala*' to deduce new laws or revise previous ones especially when the sacred sources are silent on the issue. Consequently, local customs can shape and regulate Islamic laws even in the diaspora.

[135] Al-Subhani, *Masadir al-Fiqh*, 189.
[136] This genre of text comprises answers to questions asked by the followers of *maraji*ʿ from different parts of the world, especially from the West.
[137] Al-Qummi, *Kalimat Sadida*, 137–38.
[138] Baqir al-Irawani, *Introduction to Jurisprudential Maxims* (London: ICAS, 2017), 91–92.

Conclusion

The legal system formulated by Muslim legists is more concerned with observing proper procedures and the process of inferring legal injunctions than with fulfilling the ethical or moral objectives of the Divine message. In fact, as I discuss in the following two chapters, the moral élan of the message is frequently ignored in favor of well-established legal doctrines and rules of deductions.

This chapter has argued that various hermeneutical and exegetical devices can be used to infuse dynamism in Islamic jurisprudence. These include increasing the scope of reason, utilizing *mintaq al-faragh* and revising rulings based on hermeneutical devices such as time, place, and custom, and the application of *shari'a* laws based on its ultimate objectives. In addition, the ethical tone of the Qur'an has to be reflected in Shi'i jurisprudence.

Calls for a reformation to the Islamic legal tradition are often thwarted by the traditionalists' insistence on adhering to previous juridical interpretations and methodologies that often circumvent the Qur'an's egalitarian and ecumenical message. Consequently, Muslims need to come to terms with the reality that while the Qur'an is, for them, Divinely revealed, the legal thrust of its message is frequently directed at a specific social and historical context. They also need to realize that normative texts cannot be treated as timeless and immutable. The fact that classical jurists often disputed among themselves on what constituted the Divine will and upheld divergent laws is further proof of the contention that Islamic law comprises of elements which are humanly constructed and subject to adjustment. In the reformation process, Muslim reformers will also have to engage their traditional sources so as to construct a juristic edifice that will incorporate universal values like the equality and intrinsic dignity of all human beings, freedom of conscience, respect for the rights of non-Muslim minorities, gender equality, and ecology.

4

Reason and Ethics and an Islamic Reformation

Preceding chapters having examined the role of custom and *sira al-ʿuqala'* in Islamic jurisprudence and discussed some of the other hermeneutical devices that jurists can apply, this chapter explores the role of reason and ethical precepts in deriving *shariʿa* ordinances independently of the scriptural sources. It argues that legal determinations based on rational and ethical considerations can empower a *mujtahid* to legislate on topics that are congruent with the views of the people of sound mind. In principle, when necessary, such proclamations can even override laws that are derived from the textual sources.

At the outset, it should be understood that the Shiʿi understanding of the role of reason in Islamic jurisprudence is quite distinct from the Sunni view. Generally speaking, Sunnis follow the Ashʿari school, which rejects the view that reason is an autonomous source of juridical or ethical knowledge. They also refute the moral ontological view that acts have values in themselves. The ultimate source for determining the moral worth of an act is grounded in revelation rather than in human intuition. Hence, without Divine guidance, there can be no knowledge of reward and punishment and therefore no assessment of acts. Based on this understanding, an act is evil not because reason construes it to be so but because God proclaims it to be so. According to Kevin Reinhart, for the Ashʿaris, "prior to Revelation, the world remains amoral and the assessment of human acts cannot be done in the absence of Revelation."[1]

In contrast, the Shiʿis upheld the rationalist thesis concerning the primacy of reason in ethical epistemology. Most Shiʿi theologians affirm the autonomy of the human intellect and that good and evil are ontological attributes that can be discerned by all rational human beings. The belief in the objective assessment of acts is premised on the view that there is an inherent quality in an act that accounts for its goodness or detestability. Thus, actions are good or evil due to essential properties inherently existing in the acts whether the Lawgiver pronounces them as such or not. Furthermore, the moral ontological assessments of actions—their praiseworthiness or blameworthiness—means that reason has

[1] A. Kevin Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought* (Albany: SUNY Press, 1995), 7.

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an inherent capacity to recognize these properties independently of revelation. Thus, all rational beings can access universal ethical values regardless of their exposure to the revealed sources or Divine guidance. As noted in the last chapter, access to moral knowledge outside of the revealed sources is stipulated by the Qur'an itself.

To be sure, the discussion on good and evil in Usuli discourse is considerably more nuanced and detailed. Muzaffar, for example, divides his discussion on *husn* and *qubh* (good and evil) into three levels. The first application of the concept of *husn* and *qubh* refers to the perfection or imperfection of the self. This usage describes voluntary acts or objects of verbs. Acts like learning and teaching are good as they can lead to the perfection of the self. *Husn* and *qubh* are also used to describe objects of verbs such as ignorance is evil as it leads to the soul's imperfection. Similarly, traits like bravery, kindness, forbearance, and justice are good for human beings to cultivate as they lead to the perfection of the soul. Second, good and evil can also be used in a utilitarian sense, that is, what pleases or displeases the soul. Certain natural and beautiful scenes can be pleasing to the soul. Similarly, acts like eating when one is hungry or drinking when one is thirsty have utilitarian value. For Muzaffar, the soul enjoys them as it finds pleasure in them. In this sense good and evil are categories that are connected to pleasure and pain that accompanies certain acts. The Ash'aris and Mu'tazilis are agreed on these two categorizations of good and evil.

The third usage of good and evil for Muzaffar is the application of moral judgments to acts that are considered to be either praiseworthy or blameworthy. For him, it is only this kind of usage that refers to the moral value of acts and deserves praise and blame which would lead to reward or punishment. Significantly, the people of sound mind determine the goodness and evil in an act and ascribe praise and blame accordingly. Thus, the performance of a good act is considered befitting by rational beings. And the *'uqala'* also opine that a *qabih* act should be avoided. It is the third sense of the moral categorization of acts that will concern us in this chapter. It is also in this sense that the Ash'aris differed with the Mu'tazilis.[2]

Furthermore, assuming there is an association between the determination of reason and that of the Lawgiver, when reason determines an act to be morally evil or wrong, does this necessarily mean that it is prohibited in the *shari'a*? Stated differently, is a moral categorization of an act a sufficient basis for forming a juridical opinion on it? For most Usulis, an evil act is forbidden in itself and the performance of such an act will lead to punishment.[3]

[2] See Bhojani, *Moral Rationalism and Shari'a*, 84–88; Muzaffar, *Usul al-Fiqh*, 188–91.

[3] Usulis like al-Bihbahani maintained that reason not only produces moral knowledge but also leads to legal knowledge. Gleave, *Inevitable Doubt*, 187, 215.

The Shiʿi contention that the moral worth of an act can be known objectively highlights the role of reason in perceiving moral values and, at the same time, at least in theory, enables a *mujtahid* to infer new rulings based on moral and rational considerations, especially when a question has not been addressed in the textual sources. *ʿAql* also enables a jurist to revise previous legal edicts by invoking the methodological tools and devices examined in chapter 3. By emphasizing the rational character of *fiqh*, reason becomes a cogent hermeneutical tool in the interpretation of Islamic jurisprudence, and an important component in the reformation of Islamic law.[4]

The capacity of reason to determine basic ethical values provides the basis for much of the rationalist thought in Shiʿi legal discourse. For example, reason determines that obedience to the Divine is mandatory for human beings to fulfill God's rights. Thus, human beings obey God and submit to Him as reason tells them to do so, not because of God's commandment. Otherwise, as Muhammad Baqir al-Sadr poignantly asks, "why do we obey the order of the Lawgiver to us to obey the order of the Lawgiver?"[5]

Just as reason dictates that human beings should obey God, it also, in the absence of any textual evidence, informs them whether a person is exempt from performing an act that has not been prescribed or whether s/he has to exercise prudence. Similarly, jurists invoke reason in matters that pertain to doubt. Does God have the right to demand obedience and punish a person for not performing a doubtful injunction? Does reason demand that the Legislator inform an agent of his/her legal duties before holding him/her responsible for not performing them? These are some of the important issues that Usuli scholars have had to deal with.

The Akhbaris rejected the role of reason in matters pertaining to ritual practices and legal deductions claiming that *ʿaql* does not have the probative force in these fields. They further asserted that *ʿaql* is not an autonomous source of law, nor is there any symbiosis or correlation between the judgments of reason and revelation. For the Akhbaris, no legal or moral judgment is valid unless it is couched on revelation. They further stated that if a subject is not addressed in the revelatory sources a person should either abstain from performing it or exercise prudence.

Usuli jurists maintain that God's laws have a moral underpinning and that His legislation is intertwined to His ethics in the sense that the two cannot contradict each other. Thus, when He legislates an injunction, a just and ethical God will not violate ethical imperatives or His creatures' rights. Laws reflect the values

[4] Although the term *ʿaql* can be translated as "intellect" or "intuition," I believe translating it as "reason" is closer to the meaning of *ʿaql*, since it refers to a sense of understanding, a human faculty, and a system of knowledge.

[5] Baqir al-Sadr, *Lessons*, 120.

espoused by the Lawgiver; if the Lawgiver is just, His laws cannot possibly oppose His justice because a just Deity will not ordain something that would be antithetical to His nature. Stated differently, if reason acknowledges certain acts to be obligatory before revelation they must be mandatory after revelation too. For Shi'i jurists, Divinely instituted laws cannot violate the ethical axioms that God has imprinted in the human conscience. Equally, He will not ask human beings to disregard or oppose the rational faculties that He has endowed to them.

The fact that Shi'is believe in the autonomy of the human intellect and its ability to independently recognize the moral good means that judgments of moral rationalism are consistent with Divine precepts. By moral rationalism I mean judgments of morality that are predicated on the ability of reason to infer values independently of revelation. In other words, reason is an autonomous source of ethical knowledge that can comprehend *husn* and *qubh* on its own. Because of the correlation (*mulazama*), an assessment of moral rationalism is also seen as a Divine judgment. In other words, due to the affinity between what reason concludes and what God ordains, when the rational mind discerns the goodness or evilness of an act, God would not contradict its validity by ordaining an opposing rule.[6] This is because a just and benevolent Deity cannot diametrically oppose or violate a moral command that He has inveterated in the human conscience.

As noted in chapter 3, not only is God among the rational beings but also He is the head of all rational beings. This is because He is the creator of rationality.[7] Due to this, He will adjudicate in accordance with their judgment. Furthermore, since God is the most rational of all beings, He will not institute a law that is in conflict with the reasoning of the people of sound mind. Due to this correlation, laudable values that can be known through reason without confirmation from the transmitted sources are considered praiseworthy by the Divine too. This correlation is mitigated by the proviso stipulated by some jurists that judgments of moral rationalism must be agreed on by people of sound mind and that they must be predicated on certitude (*qat'*) for them to be considered a valid source of legislation.[8]

As al-Sharif al-Murtada says:

> When revelation is invoked for the claim of prohibition of a prohibited act, our knowledge acquired by reason will (also) prohibit it. Similarly, when revelation dismisses [the claim of] prohibition, our knowledge will find it obligatory.

[6] Muzaffar, *Usul al-Fiqh*, 1/206–207. Also Boozari, *Shi'i Jurisprudence*, 30.

[7] On the *mulazama* between judgments of moral rationalism and Divine judgments, see Muzaffar, *Usul al-Fiqh*, 2/106. On the view that the Lawgiver is the head of the *'uqala'*, ibid., 1/206, 140, 231.

[8] Bhojani, *Moral Rationalism and Shari'a*, 105.

> Then, if something is disclosed by our reason and not by the revelation, it is what would be discovered from revelation, though explored by our reason and what we know of revelation. Thus, there is no conflict between rational finding and our acquired knowledge from the Divine revelation. There is no circumstance in which the proven [rational] principles would establish opposition to or rejection of revelation. And the discovery of (the rule revealed in) revelation on the details of the matters is not possible but by discovering the [social] customs and experiences and what has been reported about them.[9]

Based on this, in theory at least, reason can override textual proofs especially when the latter is in conflict with the former. Thus, when texts are silent on an issue reason can, along with other hermeneutical devices, assist a jurist in inferring difficult juridical decisions like the permissibility of donating vital organs, determining when life has ceased, the permissibility of assisted reproductive technologies (ARTs), in vitro fertilization, transgender surgery, and so forth.

The usage of *ʿaql* as an efficacious hermeneutical device was recognized by early scholars like al-Mufid, al-Murtada, and Tusi. For them, *ʿaql* was as an important device to understand and interpret revelation, and to apply what was discovered in the normative sources to concrete cases. Despite its inherent fallibility, reason could play a vital role in the discovery and implementation of legal norms. Although he does not see reason as a source of law, al-Mufid states that a tradition supported by reason, consensus, or custom is acceptable, otherwise, without such indicators, it is not. In fact, he saw *ʿaql* as an important evaluator of the validity of a *hadith* and a guide to the procedures of deducing the law.[10] Al-Murtada concurred with al-Mufid by granting primacy to reason in assessing the validity of traditions. He states that where there is no *sharīʿ* ruling on an issue, *ʿaql* can be used to derive one even though he, like al-Mufid, does not consider it an autonomous source of *sharīʿa* prescriptions.[11]

Tusi also emphasizes the potency of *ʿaql* in jurisprudence although like al-Mufid and al-Murtada before him, he does not see it as a source of law. In his *ʿUdda*, Tusi distinguishes between what is known by reason from that which can be recognized by revelation. In the process, he accentuates the role of *ʿaql* in Shiʿi theology.[12] Rather than being an independent source of law, reason was assigned a more restricted role of interpretation and application of Usuli principles in the derivation of law.

[9] Boozari, *Shiʿi Jurisprudence*, 15.

[10] Muhammad b. Muhammad al-Mufid, *Awaʾil al-Maqalat fi al-Madhahib waʾl-Mukhtarat* (Qum: Maktaba Dawari, n.d.), 51.

Also, Martin McDermott, *The Theology of Shaikh al-Mufid* (Beirut: distribution, Librairie orientale, 1978), 298–99, 310.

[11] Bhojani, *Moral Rationalism and Shariʿa*, 28.

[12] Tusi, ʿ*Udda*, 2/759–63. A discussion on Tusi's view on the role of ʿ*aql* in Shiʿi theology is beyond the purview of this study.

The overall rationalist outlook of these Buyid scholars was continued by subsequent Shi'i scholars. The positive evaluation of *'aql* and its role in the legal system was enhanced considerably by Ibn Idris al-Hilli. For him, reason was more than an interpretive tool. It could also independently discern *shari'a* precepts and be used to derive fresh laws as circumstances dictate. By examining the circumstances surrounding the issuance of a ruling, reason can discover the rationale behind a particular law and possibly modify it.[13] After Ibn Idris, most Shi'i jurists have considered *'aql* as the fourth source of law.

Recent Shi'i reformers like Mohsen Kadivar and Ahmad Qabil also emphasize that there is a need for a reinterpretation of the *shari'a* based on rational and moral grounds. This is because judgments based on reason, even if we cannot be sure that they accurately reflect the will of the Divine, can override the apparent (*zahir*) proofs that are derived from *hadith* reports which themselves do not provide certitude that they reflect God's will.[14] In other words, when two conjectures collide, the one based on reason should be given precedence.

Unlike scholars like Kadivar, Soroush, and Shabistari, Ahmad Qabil does not argue for a complete revamping of the foundations of *usul al-fiqh*. He believes that the traditional sources and methodology can cater for the needs of modern times. To be efficacious, the sources must be revisited, reread, and where necessary reinterpreted so that they should not oppose the collective or customary reason (*'aql-e 'urfi*) of the time. Qabil insists that legal injunctions must accord with reason because it is the primary criterion for measuring the probity of a ruling.[15]

Qabil argues vehemently that rulings that are contrary to *aql-e 'urfi* be abandoned. Even if they are stated in the Qur'an, such rulings can be reinterpreted. He claims that his views have been voiced by earlier scholars like al-Mufid, al-Murtada, and Tusi, who clearly stated, "if any Qur'anic verse [text] comes in contradiction with *adelleh 'uqoul* (rational arguments), it should be interpreted according to rational *adelleh*."[16] Qabil further argues that traditions that contradict human rational sense should also be abandoned.

As discussed in chapter 2, the methodological tools that are at a jurist's disposal are humanly derived. In most cases, juristic edicts on legal cases are based on conjecture rather than certitude. Such deductions merely approximate rather than accurately reveal the will of the Lawgiver. Thus, statements in the *hadith* literature that explicitly contravene commonly acknowledged values like freedom

[13] Ibn Idris, *Kitab al-Sara'ir*, 4. For a discussion on the implications of Ibn Idris's ruling, Fayd, *Vizhegiha-yi Ijtihad*, 295.

[14] Ulrich von Schwerin, *The Dissident Mullah: Ayatollah Montazeri and the Struggle for Reform in Revolutionary Iran* (New York: I.B. Tauris, 2015), 214–15.

[15] Forough Jahanbakhsh, "Rational Shari'ah: Ahmad Qabel's Reformist Approach," *Religions* 12, no. 6 (2020): 8–9.

[16] Ibid., 10.

of conscience, the dignity and moral worth of all human beings or those that advocate the keeping of concubines and subjugation of women can be challenged if reason dictates it. In reality, the role of reason to mediate between the scripture and modern-day reality has been strictly circumscribed. In many instances, when there is a clash between values derived by reason and those stated in the sacred sources, the latter have been invoked in juristic pronouncements.

The possibility to deduce laws predicated on *ʿaql* without recourse to revelation can be illustrated in Saneʿi's ruling on a woman's right to initiate divorce proceedings. According to him, reason rules that it is wrong and unjust for a husband to be able to divorce his wife by giving her the *mahr* (dowry) even if she does not want the divorce (*talaq*) but that she cannot do the same to him. *ʿAql* also rules that it is oppression (*zulm*) to deny the right of *talaq* to the wife. This is because reason does not construe gender to be a basis for denying a woman her rights. To prove this, Saneʿi acknowledges that there may be traditions which stipulate the contrary to what reason determines. He argues that a single tradition which repudiates what *ʿaql* has ruled is not authoritatively binding. This is because the Lawgiver, who has given us the capacity to rationalize and think, is obliged to interject when *ʿaql* has arrived at an erroneous conclusion.

If the Lawgiver wanted to repudiate what *ʿaql* rules or what is ingrained in the human conscience on this issue, then it would have been necessary for Him to do so with clear textual proofs, not with conjectural and isolated reports. In other words, it is obligatory on the Lawgiver to pronounce, in clear and unequivocal terms, that what reason has ruled on the topic is either evil or wrong. The invalidation of what *ʿaql* has perceived cannot be established in any *riwaya* (narration) that has been reported nor is there any textual proof on this. Saneʿi unequivocally states that what reason determines in this case, namely, that both parties should have the same grounds for divorce is valid and must be upheld.[17]

The use of reason in judicial deliberations has also been advanced by the Iranian jurist Hujjat al-Islam Saeid Edalatnezhad (b. 1962), who distinguishes between reason-centered and tradition-centered *ijtihad*. In cases of conflict between reason and texts, he advocates the primacy of reason over texts. The reason-centered *ijtihad* places *ʿaql* rather than the sacred texts at the center of intellectual activities. This does not necessitate or require the abnegation of religious texts. On the contrary, it means using reason as one of the sources of interpretation and, if there is a contradiction, prioritizing reason over previous or textual proclamations.

By emphasizing the rational character of *fiqh*, reason becomes a powerful hermeneutical device in the interpretation of Islamic sources, and an important component in the reformation of Islamic law. Edalatnezhad complains that

[17] Takim, "Privileging the Qur'an," 90.

Shi'i seminaries have become factories of *ijtihad* in which a new *ijtihad* is modeled on and resembles a previous one, albeit with some minor adjustments and modifications.[18] By reinstating reason as a source of law, it can be an important hermeneutical tool in inferring new rulings especially in the domain of *mintaq al-faragh*, where no ruling is stated by the Lawgiver. In this domain, reason, in conjunction with other tools such as *sira al-'uqala'* and custom, can be utilized to issue fresh legal proclamations.

For Shi'i jurists, reason is broader than revelation, especially when revelation is silent on a matter. Whereas revelation is culturally specific and may be time-bound, reason is eternal and timeless. It is reason, based on the custom of the people of sound mind, that can help revise and devise laws in contemporary times. In composing or revising laws, Muslim legists need to bear in mind that frequently, there is a dichotomy between the rationally derived universal values and the scripturally based contextually defined pronouncements. They need to prioritize the former over the latter especially if it is agreed on by the people of sound mind.

Despite the Shi'i insistence on the primacy of reason over revelation the former has played limited if any independent role in the formulation of juridical rulings. This has been admitted by modern scholars such as Muhammad Baqir al-Sadr, 'Ali Rida Fayd, Mohsen Kadivar, and Yousef Eshkevari, who complain that, despite the juristic emphasis on the importance of reason, it is barely used as a source from which legal injunctions can be derived.[19] Al-Sadr claims that in reality, *'aql* is a putative rather than an actual source of law. Most legal ordinances have been extracted primarily from the revealed sources even though they can also be discovered by reason.[20] He further states that it is possible to deduce a full course on demonstrative jurisprudence without applying reason. Al-Sadr maintains that this is because reason is fallible and cannot fathom the inner secrets of what is detrimental or beneficial to human beings.[21]

He further admits that in deriving *shari'a* rulings, he has not employed reason without recourse to the textual sources even once.[22] In reality, the role of reason as an independent source of Shi'i legislation is strictly circumscribed. Proponents of the current form of *ijtihad* argue that in itself, reason can be arbitrary and often reflects the desires or penchant of a jurist. They further claim that the Divine will is not accessible by reason since the latter cannot infer the

[18] Mehran Kamrava, "Iranian Shi'ism at the Gates of Historic Change," in Mehran Kamrava, ed., *Innovation in Islam: Traditions and Contributions* (Berkeley: University of California Press, 2011), 75.
[19] Baqir al-Sadr, *Durus*, 2/203; also Fayd, *Vizhegiha-yi Ijtihad*, 80–81.
[20] Hossein Modarressi, "Rationalism & Traditionalism in Shi'i Jurisprudence: A Preliminary Survey," *Studia Islamica* (1984): 142, fn. 4.
[21] Mohsen Kadivar, "Human Rights and Intellectual Islam," in Kari Vogt, Lena Larsen, and Christian Moe, eds., *New Directions in Islamic Thought: Exploring Reform and Muslim Tradition* (New York: Tauris, 2009), 50.
[22] Baqir al-Sadr, *al-Fatawa al-Wadiha* (Beirut: Dar Ta'aruf, 1983), 98.

purposes or benefits of legal ordinances.[23] Due to this factor, *ʿaql* cannot provide surety that the correct solution has been determined on a particular jurisprudential question. Furthermore, they argue that if reason can decipher a ruling without the aid of revelation, then there would be no need for the Lawgiver or the Prophets.[24]

To be sure, *ʿaql* is as inconsequential in juridical decision-making in Shiʿism as it is in Sunnism. Reason is not deemed to be capable of independently deciphering the law; rather, its role is restricted to ascertaining that the means by which legal injunctions are derived and interpreted are correct. In other words, rather than being a source of law, reason is used as a device for interpreting the revelatory sources and for applying a ruling to concrete cases.

The Role of Ethics in Juridical Inferences

The discussion on reason and its capacity to determine laws independently of revelation raises the question of the role of ethics in legal deliberations. Even though the Qur'an talks more about ethics than law, ethical principles that could undergird or influence a particular religious ruling are barely analyzed or discussed in Usuli discourse. To be sure, legal systems frequently disregard rational and moral deliberations in favor of recognized rules and procedures of deductions. Whereas law is concerned with order, stability, and proper adherence to the principles of deduction, morality is connected with values like justice, honesty, loyalty, and egalitarianism. Generally speaking, the *fuqaha*' have undermined the ethical-moral vision of the Qur'an in favor of a well-defined textually documented legal process. As we shall see in this chapter, the bifurcation of the two domains can create major conflicts between them.

In order to comprehend the ethical principles that undergird *shariʿ* precepts, it is important to initially define ethics and examine the role it can play in an Islamic reformation. Although ethics and morality are closely related, the terms often overlap and are frequently used interchangeably. There are, however, subtle distinctions between the two that should be understood. Ethics is a discipline that is concerned with the norms and values that govern a person's actions. It deals with questions that pertain to human virtues and prescribes the actions that an individual ought to perform or not undertake. It also furnishes the guidance necessary to a person so as to help him/her distinguish between good and evil and how best to practice the good and avoid evil. Morality, on the other hand,

[23] Muzaffar, *Usul al-Fiqh*, 2/106.

[24] Even the famous Shiʿi gnostic-cum philosopher Mulla Sadra (d. 1641) accuses the '*ulama*' of being devoid of reason and for their pervasive ignorance. Sadr al-Din Muhammad al-Shirazi, *Al-Hikma al-Mutaʿaliya fi al-Asfar al-ʿAqliyya al-Arbaʿa* (Najaf: n.p. 1967), 1/6.

refers to basic good human character, behavior, or conduct and prescribes particular rules that pertain to what is right and wrong. It also posits norms for correct personal demeanor.[25] Thus, whereas morality addresses questions of proper behavior, ethics posits the general standards of good and bad and is concerned with issues such as why certain actions are proper in the first place. Morality can therefore be considered as a subject of ethics; ethics, on the other hand, is the philosophy of morality.[26]

At this juncture, it is appropriate to remind ourselves of the difference between the *shari'a and fiqh*. As discussed in chapter 1, *shari'a* refers to the legal and moral precepts enunciated in the Qur'an and the Prophetic *sunna*. It comprises the normative, sacred, and unchanging truths and reflects the legal and ethical ethos of the Divine will. *Fiqh*, on the other hand, is concerned with extrapolating specific laws and rules from the revelatory sources so as to translate the ethical vision of the sacred sources into legal practice. In other words, *fiqh* laws are particularized instances of the *shari'a*'s ethical norms. Therefore, theoretically, the rulings stated in the legal manuals should be anchored on and reflect the *shari'a*'s ethical values.

Despite their rigorous and sincere efforts, due to the epistemic barriers highlighted in chapters 2 and 3, jurists often do not explore the objectives or ethical norms that underlie Divine legislation. In reality, when it comes to the question of legal adjudication, it is the letter rather than the ethics of the law that is given more prominence.

Shi'i theology acknowledges the ontological nature of ethical attributes and that judgments of morality like doing good is commendable or evil is reprehensible can be discerned by reason of independently of revelation. In other words, ethical knowledge is to be premised not only on the sacred sources but also on ethical axioms extrinsic to the texts. The importance of reason and its ability to empower humans to discern moral values without recourse to scriptural valorization gives rise to the idea that determinations of moral rationalism can also be a source of legal prescription especially when the texts are silent, deemed unethical, or discriminatory on a particular question confronting a jurist.

As we shall see in this and the next chapter, there are many cases of conflict and tension between rulings deduced from scripture and those inferred by moral rationalism. How can such conflicts be resolved? This tension is exacerbated when scripturally inferred verdicts are judged to have violated moral rationalist imperatives as determined by people of sound mind. Surely, a God who has anchored and instilled His will in the human conscience cannot endorse immoral laws or acts or be unjust to His creatures. In such instances of conflicts,

[25] Amyn Sajoo, *Muslim Ethics: Emerging Vistas* (New York: Taurus, 2004), 7.

[26] Raid al-Daghistani, "Ethics in Islam: An Overview of Theological, Philosophical and Mystical Approaches," *Annales Series Historia et Sociologia* 28, no. 1 (2018): 2.

should judgments derived from scriptures be evaluated based on what moral rationalism says? Conversely, must a precept derived by moral rationalism be validated by revelation? What should a jurist do when a ruling derived from a scripture directly conflicts with a judgment apprised by moral rationalism?

In examining the role of ethical deliberation in juristic inferences, it should be first noted that the Qur'an is imbued with an ethos in which law and ethics are indissolubly bound to an extent that even immutable and invariable aspects of personal law like the ritual prayers and fasting, which are classified in the realm of acts of worship (*'ibada*), are connected with ethical imperatives. The Qur'an states, for example, that prayers are supposed to prevent people from engaging in corrupt and prohibited acts (29:45). Fasting has been prescribed so that people may attain moral uprightness (2:183). At the social level, it continuously stresses the importance of observing ethical values like justice, honesty, loyalty, doing good to others, promoting charity, and the need to enjoin social good and prohibit evil and urges people to compete for virtue (5:48). It is thus not an exaggeration to state that the Qur'an communicates more values than laws. In the Qur'anic view, ethics rather than law is more important because the latter manifests the former in concrete cases. To reduce the law to legal imperatives and to delink it from the moral would be to contravene and do injustice to the Qur'anic worldview on interpersonal relations.

The scripture also posits certain moral and ethical precepts that can be used in evaluating the moral value of an act. It assumes that people know, through the Divinely inculcated intuition, that values like justice and honesty are praiseworthy attributes that should be practised. It assiduously implores human beings to perform good deeds (*'amal salihat*) without explaining or describing these acts. It also conjoins *'amal salih* to having faith (*iman*) in God implying that ethical behavior is an exteriorization or outward expression of faith. The Qur'an is thereby distinguished by the primacy it accords to ethical concerns and that, in the Qur'anic understanding, virtue is defined by the possession of ethical attributes and performing good deeds than by merely observing legal rules.

In other words, piety in the Qur'an is connected more with a virtuous inner disposition and attitude of a person than with the mode of performing an act.[27] To be sure, ethics in the Qur'anic view, is deontological. It represents an ethical system whereby human acts are considered correct because of the very nature of the acts. More specifically, a person acts virtuously as that is what s/he ought to do, regardless of the possible outcome of the act.[28] Given the importance that the Qur'an attaches to ethics, what role can it play in the inference of legal rulings?

[27] Reinhart, "What We Know about *Ma'ruf*," 58.
[28] Kevin Reinhart, "Ethics and the Qur'an," in Jane D. McAuliffe, ed., *Encyclopedia of the Qur'an*.

An important component in Shiʿi legal reasoning is Aristotelian deduction, or the syllogism.[29] The syllogism was accepted as an effective mode of legal reasoning so as to ensure that a precept or conclusion was correctly deduced. In this genre of reasoning, if both the minor and the major premises are based on scriptural evidence, then the conclusion is considered to be textually derived. This mode of deduction would furnish a jurist with great confidence that a legal precept based on such reasoning is valid and approximates the Divine intent. Due to this, such syllogisms are considered as *al-dalil al-sharʿi* (scriptural proof). On the other hand, if either the minor or major premise in a syllogism is based on reason, then the conclusion is considered as *al-dalil al-ʿaqli* (rational proof). If both premises in the syllogism are based on reason exclusively, then the conclusion is referred to as a judgment based on independent rationality (*al-mustaqillat al-ʿaqliyya*). However, when a syllogism employs both reason and scriptural indicators then it is referred to as nonindependent rationality (*ghayr al-mustaqillat al-ʿaqliyya*).[30]

The following syllogism is based on independent rationality:

Minor premise: *ʿAql* judges that honesty is praiseworthy.

Major premise: The *Shariʿ* (Lawgiver) judges according to what *ʿaql* does

Conclusion: Honesty is praiseworthy according to the *Shariʿ*

The minor premise is inferred based on a moral judgment that honesty is praiseworthy. An essential component of a moral rationalist syllogism is the assumption of a correlation between the judgment of *ʿaql* and that of the Lawgiver. The major premise in this syllogism, that the *Shariʿ* judges according to what *ʿaql* does, affirms the existence of such a relationship between the judgments of *ʿaql* and *sharʿ*.

The problem arises when either one or both of the premises in a syllogism are disputed or repudiated. For example, Muzaffar says the usage of *al-mustaqillat al-ʿaqliyya* is restricted to very basic moral propositions that reason can perceive independently of revelation and are universally agreed on. Thus, the application of moral rationalism is confined to those assessments that are known with complete certitude. These include issues like the connection between cause and effect, or that the prescription that an act is obligatory necessarily means the interdiction of one that opposes it, or that it is impossible for the Lawgiver to impose an obligation without proclaiming or elucidating it. Such propositions are based on rational considerations that are intuitively known and hence valorized

[29] Hossein Modarressi, *An Introduction to Shiʿi Law: A Bibliographical Study* (London: Ithaca Press, 1984), 3–4, 29.

[30] A discussion of the *ghayr al-mustaqillat al-ʿaqliyya* is beyond the purview of the present discussion. For details of these, see Bhojani, *Moral Rationalism and Shariʿa*, 32–33.

by the Lawgiver. They are acceptable because one can be certain that these rational propositions correlate with the Divine will. Beyond such basic propositions, Muzaffar doubts the correctness of moral rationalist determinations that are used in *al-mustaqillat al-ʿaqliyya* to infer *shariʿa* precepts. He argues that it is quite possible that *ʿaql* cannot perceive some of the inner secrets or wisdom of the injunctions that the Lawgiver ordains.[31] Hence, what *ʿaql* rules on an issue may be quite different from what the *Shariʿ* rules on the same topic.[32]

However, such basic and simple moral propositions whose validity is self-evident, do not furnish sufficient principles or details that can be deployed in determining *shariʿa* precepts. Moreover, any inference from such standard propositions may be deemed to be invalid as it may not fulfill the basic epistemic standard of certitude required in establishing legal precepts. So, for example, in the syllogism:

Minor premise: Injustice is rationally blameworthy

Major premise: Applying the capital punishment to an apostate is an instance of injustice

Conclusion: Therefore, applying capital punishment to an apostate is rationally blameworthy

Here, due to the presence of *hadith* reports that refute the moral proposition, jurists will not accept the major premise, namely, to kill an apostate is an instance of injustice. Although people of sound mind agree with the proposition that justice is praiseworthy and that injustice is blameworthy, the problem arises in affirming that denying someone the right of freedom of conscience is an instance of injustice. Hence, even though *ʿaql* would rule that killing an apostate is an unjust act, the syllogism and its conclusion would not be accepted due to conflicting scriptural reports in this instance. As a matter of fact, most of the conflicts between judgments of moral rationalism and those based on textual sources lie at this juncture.

A major impediment to the validity of moral rationalist inferences is that unlike scripturally derived judgments, the former are considered as based on conjecture rather than certitude. They lack the probative value that is necessary to enforce a ruling. Due to this factor, they do not accurately reflect the will of the Divine. More significantly, in contrast to an isolated report, there is no validation from the Lawgiver to enforce the probative force of rulings deduced by moral rationalism. Stated differently, unlike *khabar al-wahid*, conjectural based

[31] Muzaffar, *Usul al-Fiqh*, 2/106–108; 1/185.
[32] Ibid., 1/209.

inferences of moral rationalism are not considered to be equivalent to *al-zann al-mu'tabar*. In essence, the Usuli stipulation that the authoritativeness of moral rationalist determinations should be premised on certainty or one that has been approbated by the Lawgiver means that despite the possible role for moral rationalism as a source of *shari'a* precepts, the epistemic barriers stultify their actualization and application in substantive law. As I discuss in the next section, the Usuli view that scripturally derived laws can override pronouncements based on moral rationalism can lead to highly problematic and even embarrassing juristic declarations. In the process, judgments that people of sound mind consider iniquitous or unjust are ascribed to God.

Usul al-Fiqh and the Case of Child Marriages

A jurist may sometimes reach a legal conclusion that seemingly violates the collective conscience and moral perception of the people of sound mind. After careful consideration and application of the procedures and rules articulated in the legal theory, he may publish the conclusions he has arrived at even though, due to the iniquitous nature of the contents, the jurist may feel embarrassed at publicizing them. It is in such instances that the *fuqaha*' need to engage in an internal moral dialogue with their conscience and to assess the moral implications of their *fatawa* and the effect they will have on the community of believers.

In this section, I examine two very sensitive topics in Shi'i law, marriage with children and deriving sexual pleasures from them even if they are infants. According to Shi'i jurisprudence, both the father and the grandfather have the authority to unilaterally perform a child's marriage with whomsoever they wish without seeking the consent of the child.[33] If there is a clash of opinion between the two guardians then the decision of the grandfather is given precedence. The only exception to this is if his determination is deemed to be harmful to the girl.[34] In that case, the father's opinion can override that of the grandfather. This is a ruling that is unanimously agreed on by Shi'i jurists and is based on a number of traditions transmitted from the Imams. For example, al-Fadl b. 'Abd al-Malik, an associate of al-Sadiq, asked the Imam, "Can a man marry off his son who is a young child?" Al-Sadiq responded, "That is permissible." Al-Fadl b. 'Abd al-Malik then asked him, "Can the father then perform the divorce?" The Imam replied, "No."[35]

As with many other social prescriptions, child marriages predate Islam and was a practise that was endorsed by the Prophet and the Imams based on the

[33] Al-Najafi, *Jawahir al-Kalam*, 29/216.
[34] Muhammad b. al-Hasan Tusi, *al-Nihaya fi Mujarrad al-Fiqh Wa'l-Fatawa* (Tehran: n.p., 1970), 465.
[35] Kulayni, *al-Kafi*, 5/400.

custom of the time. Generally speaking, Shiʿi jurists have deemed such endorsed laws (*imda'i*) to be admissible and universally applicable. Despite this endorsement, the law on child marriages is problematic for many Shiʿis because a child has no say in choosing her/his spouse. It is further exacerbated by the juristic insistence that a child cannot annul the marriage even after attaining maturity (normally defined as the age of puberty).

Although the *fuqaha'* are agreed on the validity of child marriages, they have disagreed on the conditions related to such marriages. Scholars like Muhaqqiq al-Hilli, ʿAllama al-Hilli, Shahid II, Mulla Ahmad al-Naraqi, Mulla Hadi al-Sabzawari (d. 1873), and others have ruled that the children involved do not have a choice to annul the marriage after maturity because it was correctly performed by their guardians.[36] They cite the Qur'anic verse "O you who believe, fulfill your contracts" (5:1) to vindicate the edict that the marriage is valid and cannot be voided even after puberty. For these jurists, since the verse is absolute and unconditional, it is applicable whenever any form of contract has been agreed on.

Other jurists like Tusi, al-Qadi ibn Barraj (d. 1088), and Ibn Idris al-Hilli have maintained that only the boy has a choice to annul the marriage after attaining maturity.[37] Possibly, this is because he has to pay the *mahr* (dowry) and maintain his wife financially. Since he may not be able to fulfill his financial obligations only he has the right to dissolve the marriage. Tusi's views have been endorsed by a number of other scholars.[38] Jurists like al-Mufid, Tusi, and Ibn Zuhra, and others have also argued that if one of the children dies before maturity then the spouse will inherit from his/her estate upon maturity.[39]

Fuqaha' like Ayatullah al-Khu'i have ruled that once a marriage has been performed it cannot be annulled even after the children attain maturity. Invoking the principle of *la darar*, he states that the only exception is if the marriage is deemed to be pernicious to any of the parties concerned. If any of them suffers any form of injury or if the marriage is deemed to be harmful, then al-Khu'i states that both parties have the option of annulling the marriage upon attaining maturity. This is because the marriage contract would then be classified as *fuduli*. This form of contract is an agreement that is reached and accepted by someone on behalf of another person. The agreement can be either endorsed or revoked by the affected party at a later date. According to al-Khu'i, determination of the injury inflicted on any party would be based on how the people of sound mind would view such a union.[40]

[36] I am grateful to al-Sayyid Hossein al-Qazwini for sharing his unpublished paper with me. *Wilaya al-Ab 'ala Tazwij al-Saghira*. See 19–20.

[37] Tusi, *al-Nihaya*, 464, 467. Ibn Idris, *Mustatrafat al-Sara'ir*, 2/568.

[38] Al-Qazwini, *Wilaya al-Ab*, 19.

[39] Al-Mufid, *Muqni'a*, 511; Ibn Idris, *Mustatrafat al-Sara'ir*, 3/283, Tusi, *al-Nihaya*, 466, Muhaqqiq al-Hilli, *Shara'i al-Islam*, 4/834.

[40] Al-Khu'i, *Minhaj al-Salihin* (Qum: Mehr, n.d.), 2/261.

Scholars like Ayatullah al-Sistani have gone further than stipulating the absence of any harm. He states that the absence of injury is not a sufficient cause for permitting a child marriage. Based on a precautionary ruling, al-Sistani stipulates that for the marriage to be valid it should be considered beneficial (*maslaha*) for the couple involved. As with the ruling on *la darar*, the *'uqala'* would determine whether the marriage is beneficial to the parties concerned.[41] The fact that al-Sistani's verdict is based on precaution rather than on an unequivocal injunction indicates the absence of textual evidence to support his ruling. Thus, in deciding to engage in a marriage with a child, a person is free to follow the edict of another *mujtahid* who does not insist that there has to be *maslaha* for the marriage to be considered valid.

Although child marriages have been unanimously accepted, Shi'i jurists have disagreed on the conditions attached to them. Some scholars have contested the condition that there has to be *maslaha* or the absence of *mafsada* (harm or corruption) for a child marriage to be valid. They claim that traditions from the Imams permitting child marriages are general and unequivocal in nature. Since the *ahadith* do not attach any conditions requiring the need for *maslaha* such stipulations are redundant.[42]

Shi'i jurists also agree that in the marriage, no penetration is permitted until a girl reaches the age of nine. This is based on several *hadith* narratives reported from the Imams. For example, Zurara b. A'yan quotes Muhammad al-Baqir (d. 733–737), the fifth Shi'i Imam, as stating, "A young girl (*al-jariya*) is not to be penetrated until she reaches the age of nine or ten."[43] More significantly, since no age for the validity of a marriage is mentioned in the sources, jurists have ruled that a marriage with an infant, even if she is being breastfed, is valid as long as her guardian consents to it.

Since traditions prohibit only penetration in child marriages, jurists have inferred from this proscription that deriving other forms of sexual pleasures is permitted even with a suckling infant.[44] To be sure, there is no tradition from any Imam which allows the touching of or looking at the private parts of an infant even if a person is married to her. Historically, jurists in the classical period did not issue any ruling regarding sexual activities with infants. They merely prohibited sexual intercourse with a woman under the age of nine.

Rulings that allow sexual enjoyment with children and infants appear at a relatively later period in Shi'i juridical history. One of the earliest jurists to allow such acts was al-Fadil al-Miqdad (d. 1423) in his *al-Tanqih al-Ra'i' li-Mukhtasar*

[41] Al-Sistani, *Minhaj al-Salihin* (Qum: n.p., 1994), 3/25–26.
[42] Al-Qazwini, *al-Wilaya al-Ab*, 14.
[43] Al-Hurr al-'Amili, *Wasa'il al-Shi'a,* 14/70.
[44] Al-Qazwini, *al-Wilaya al-Ab*, 32.

*al-Sharaʿi*ʿ.[45] Muhammad al-Najafi (d. 1850) in his magnum opus *Jawahir al-Kalam* also allows the practice.[46] In the last century Muhammad Kazim al-Yazdi, in his *al-ʿUrwa al-Wuthqa* permitted all genres of sexual acts apart from intercourse in a child marriage. These include various acts like looking at and lustful touching the private parts of an infant, hugging a child, and feeling her thighs.[47] Most scholars after al-Yazdi have followed his ruling. In his commentary on al-Yazdi's text, al-Khu'i states that since there is no proof to prohibit it, any kind of pleasure with a wife or slave girl is allowed.[48] In his *Tahrir al-Wasila*, Khumayni adds, "A man can marry a girl younger than nine years of age, even if the girl is still a baby being breastfed. . . . a man having intercourse with a girl younger than nine years of age has not committed a crime, but only an infraction, if the girl is not permanently damaged. If the girl, however, is permanently damaged, the man must provide for her all her life."[49]

Statements such as these are not unique to Khumayni. In his juridical treatise, al-Sistani says that a man cannot engage in sexual intercourse with a girl until she is nine years old. Apart from that, all forms of other sexual pleasures are allowed.[50] He repeats al-Yazdi's statement that these include looking at and touching the private parts of an infant.[51]

In vindicating this practise, scholars have argued that all forms of sexual activities are allowed in a marital relationship. The only restriction when marrying a child is that the husband is not allowed to engage in sexual intercourse. Jurists

[45] Al-Fadil al-Miqdad, *al-Tanqih al-Ra'i li-Mukhtasar al-Sharaʿi*, 3/26; http://ar.lib.eshia.ir/71524/3/26.

[46] Al-Najafi, *Jawahir al-Kalam*, 29/416. The author says that having sexual intercourse is forbidden but other forms of sexual activities are allowed due to the principle of *al-asl* or *'asalat al-sihha*, that is, unless it is specifically prohibited, an act is permitted.

[47] Al-Yazdi, *al-ʿUrwa al-Wuthqa*, 2/811, http://lib.eshia.ir/10027/5/502.

[48] Al-Khu'i, *Minhaj*, 1/155. al-Hakim, *al-Mustamsik*, 14/80. Also al-Qazwini, *al-Wilaya al-Ab*, 34.

[49] Ruhullah Khomeini, *Tahrir al-Wasila* (Beirut: Dar al-Taʿaruf, 1981), 2/241. See also *Tahrir al-Wasila*, 3/431 (Qum: daftar-e intisharat-e Islami, 2008) (Persian translation). https://wikiislam.net/wiki/Contemporary_Pedophilic_Islamic_Marriages#cite_note-27.

[50] Al-Sistani, *Minhaj*, 3/8–10.

[51] For the rulings of other scholars endorsing this law, see al-Yazdi, *al-ʿUrwa al-Wuthqa*, 2/811. http://lib.eshia.ir/10027/5/502.

Al-Hakim, *Mustamsik*, 14/80, http://lib.eshia.ir/27158/14/80. Al-Hakim implicitly confirms al-Yazdi's *fatwa* by stating: "as Jawahir has stated." Ruhullah Khumayni, *Tahrir al-Wasila*, 2/241, http://lib.eshia.ir/27158/14/80; Shahab al-Din al-Marʿashi al-Najafi, *Minhaj al-Mu'minin* (Qum: al-Marʿashi al-Najafi Library Publications, 1985), 2/241; Abu'l-Qasim al-Khu'i, *Mabani al-ʿUrwa al-Wuthqa—Kitab al-Nikah* (Qum: Manshurat Madrasa Dar al-Ilm, 1988) 1/155; Abu'l-Qasim al-Khu'i, *Mawsuʿa al-Imam al-Khu'i* (Qum: Mu'assasa Ihya' Athar al-Imam al-Khu'i, 1997), 32/126; 'Abd al-A'la al-Sabzawari, *Muhadhdhab al-Ahkam fi Bayan al-Halal wa'l-Haram* (Beirut: Mu'assasa al-Manar, 1992), 24/73, http://lib.eshia.ir/10443/24/73.

Muhammad al-Fadil al-Lankarani, *Tafsil al-Shari'a—Kitab al-Nikah* (Qum: al-Markaz al-Fiqhi li al-A'imma al-Athar, 2000), 24, http://lib.eshia.ir/10605/1/22; Muhammad Sadiq al-Ruhani, *Fiqh al-Sadiq* (Qum: Dar al-Kutub, 1993), 21/88, http://lib.eshia.ir/10113/21/88/; Lutfallah Safi Gulpaygani, *Hidaya al-'Ibad* (Qum: Dar al-Qur'an al-Karim, 1995), 2/396; http://lib.eshia.ir/10113/21/88/; Muhammad Taqi al-Modarressi, *al-Wajiz fi al-Fiqh al-Islami—Ahkam al-Zawaj wa-Fiqh al-Usra* (Qum: Dar Muhibbi al-Husayn, 2005), 147.

further insist that prohibiting a particular form of sexual act requires textual documentation. Since there is no *hadith* constricting the types of sexual enjoyment with a child, all genres of sexual acts are allowed.[52] Jurists like Sayyid Muhammad al-Shirazi and Khumayni even allow anal intercourse.[53]

Proponents of prepubescent sex argue based on their interpretation of the Qur'anic verse "Your women are like tilth for you; so, approach your tilth as you wish; but do perform some good acts beforehand; and fear Allah. And know that you will meet Him and give good tidings to those who believe" (2:223). The verse is general in its signification without imposing any restriction. As there are no conditions attached, scholars interpret it to mean that any form of sexual pleasure is allowed in a marriage. Since a minor is also considered a wife, all kinds of acts, apart from penetration, are permitted. In the absence of any law explicitly prohibiting the practice the principle of *bara'a* is invoked to justify sexual gratification with children. The principle states that when the textual sources are silent on a particular issue, a *faqih* can assume that there is no *hukm* from the Lawgiver and hence an act is permitted. Sexual enjoyment with minors is also based on the Usuli principle of *asl al-ibaha* (that by default everything is permitted unless stated otherwise) and of *itlaq* (general application). Since there are no restrictions or boundaries stipulated, all forms of sexual activities apart from penetration are permitted.

Paradoxically, in deciding whether child marriages are beneficial or injurious to the children, jurists appeal to the principle of *sira al-'uqala'*. Yet in permitting sexual acts with minors, jurists ignore the same *sira al-'uqala'* which they previously invoked. People of sound mind would undoubtedly declare that any form of sexual enjoyment with children and infants is abhorrent and morally wrong. Apparently, this moral determination by the *'uqala'* is deemed to be irrelevant by the jurists in their decision-making process.

The dilemma that opponents of sexual acts with children face is that they are accused of basing their objections on *zann* rather than *qat'*. Consider the following syllogism:

1. People of sound mind consider sexual acts with minors to be immoral
2. Any act that is considered immoral by people of sound mind is prohibited by God
3. Sexual acts with minors are prohibited by God

The problem with this syllogism is that the minor premise includes a moral statement that is both subjective and conjectural. Since *zann* does not have any probative value in legal inferences, both the conclusion and syllogism are considered

[52] Al-Qazwini, *Wilaya al-Ab*, 34–35.
[53] Ibid., 40.

invalid. Although, as al-Sadr asserts, most jurists agree on the *mulazama*, there are others who doubt its efficacy in the major premise since the correlation is not proven for them.[54] Here, al-Sadr is probably referring to Usulis like Muhamad al-Husayn al-Isfahani (d. 1833) who deny the existence of such a correlation.[55]

In assessing the jurists' arguments for child marriages, Sayyid Hossein al-Qazwini, a contemporary Iraqi scholar, while not prohibiting the practice, argues that children should have the right to decide whether they want to annul a marriage or not after maturity especially in view of the fact that they did not have a choice in contracting it in the first place. Denying them that right would be tantamount to committing an act of great injustice to them, something that the Lawgiver prohibits.[56] Al-Qazwini is also critical of applying the Qur'anic verse 2:223 to the scholars' argument. The verse mentions women as being the tilth of men. Lexically, the term "women" does not refer to infants or young girls who are involved in a relationship without their consent. He therefore contends that the verse cannot be used to justify sexual acts with infants or young girls.[57]

Al-Qazwini also argues that the juristic requirement that there should be either benefit for the children or the absence of harm in such a marriage means that the marriage is in fact invalid in the first place. If the marriage is invalid, then the discourse on the forms of sexual acts is both otiose and unnecessary. Additionally, he argues that psychologists have shown that any kind of sexual activity, even if it involves the touching or fondling of private parts, will create enormous psychological trauma for a child throughout her life. It may even make a girl hate men for the rest of her life. Such forms of abuse have proved to be extremely harmful. Based on this consideration, the principle of no harm and no harassment can be used to invalidate the marriage.[58] Al-Qazwini further states that rulings such as these in the juridical manuals create a very negative image of Shiʿism especially in the West and that child marriages are prohibited in most countries today.

Many jurists have found issuing such edicts to be embarrassing and highly problematic especially in an age of social media where their statements are shared globally. Thus, possibly at the recommendation of their followers, *mujtahids* like al-Sistani and Khumayni have excised their edicts on sexual enjoyment with children from later editions of their works. Such statements have also been removed from their websites. In many ways, the omission of such rulings is indicative of the deficiencies in the current form of jurisprudence. Instead of revising a *fatwa* to make it more palatable or applicable in modern times, it is

[54] Baqir al-Sadr, *Durus*, 3/307.
[55] See Baqir al-Sadr, *al-Fusul al-Gharawiyya fi'l-Usul al-Fiqhiyya* (Tehran, n.d. lithograph), 351–61.
[56] Al-Qazwini, *Wilaya al-Ab*, 31.
[57] Ibid., 36.
[58] Ibid., 37.

simply removed. More importantly, the fact that a *fatwa* is removed from a website or book does not mean that it has been rescinded or that it is no longer valid. All it means is that it is removed from public scrutiny. The initial ruling is still valid, and the practice is considered permissible. Only explicit and unequivocal statements by the *maraji'* prohibiting and excoriating such practices would deter their followers from engaging in them.

Other jurists have been more forthcoming in their denunciation and condemnation of the verdict on sexual relations with minors. Al-Sayyid Mustafa al-Khumayni (d. 1977), the son of Ayatullah Khumayni, was one of the earliest to critique his father's ruling.[59] He states that even though no restrictions are mentioned in the traditions, iniquitous acts like deriving sexual pleasures from children cannot be allowed. In prohibiting the practice, Mustafa al-Khumayni invokes the concept of *insiraf*. The term refers to the first meaning of a word that is ensconced in the mind when it is used. In the case under consideration, *insiraf* restricts the usage of a word to a singular and specific meaning.[60] Mustafa al-Khumayni argues that since the Qur'anic verse 2:223 is in the context of sexual relations, when the term "women" is used in the verse the idea of an adult woman rather than a minor comes to mind. Hence, he refutes the views of those jurists who permit sexual pleasure with infants or children. Essentially, he argues that there is no proof to generalize and apply the ruling on deriving sexual pleasures to minors. Others like Ayatullah al-Shubayri al-Zanjani resort to the principle of *la darar* in prohibiting all forms of sexual acts with minors due to the harm and trauma they inflict.[61]

Despite the pressures to conform to the rulings of their peers, a few other *mujtahids* have also spoken out at such practices. For example, Ayatullah Nasir Makarim Shirazi, who is regarded as one of the grand jurists (*maraji'*) in the contemporary Shi'i world, rejects traditions or previous rulings that permit the practice, claiming that it is ethically obnoxious to human reason (*qubh-i 'uqala'i*).[62] For Nasir Makarim Shirazi, moral rationalism, independently of revelation, rules on the impermissibility of the act. Stated differently, for him, *'aql* provides the moral grounds for prohibiting this form of sexual pleasure.[63] Nasir Makarim Shirazi argues that in contemporary times, most people perceive the immorality

[59] Mustafa al-Khumayni, *Mustanad Tahrir al-Wasila* (Tehran: Mu'assasa Tanzim va Nashr-e Athar-e Imam Khomeini, 1997), 2/344, http://lib.eshia.ir/10154/2/344.

[60] Muzaffar, *Usul al-Fiqh*, 1/165.

[61] Musa al-Shubayri al-Zanjani, *Kitab al-Nikah* (Qum: Ray Pardaz, n.d.), 5/499. The book comprises transcribed notes of his Kharij lectures.

[62] Nasir Makarim Shirazi, *Kitab al-Nikah*, 6 vols., ed. Muhammad Rida Hamidi and Masud Makarim (Qum: Intisharat-i Madrasah-yi Imam Ali b. Abi Talib, 2003), 2/135. Fadlallah also rejects the idea of marriage to and playing with the private parts of infants. Fadlallah, *Nazariyya fi al-Manhaj*, 39.

[63] See his commentary in Makarim al-Shirazi, *al-'Urwa al-Wuthqa* (Qum: Madrasa al-Imam 'Ali b. Abi Talib, 2007), 2/772, http://ar.lib.eshia.ir/27542/2/772. Also see Makarim al-Shirazi, *Anwar al-Faqaha*, *Kitab al-Nikah* (Qum: Dar al-Nashr al-Imam 'Ali b. Abi Talib, 2011), 1/39, http://ar.lib.eshia.ir/10282/1/39.

of deriving sexual pleasure from underage children who are married. Therefore, the absolute nature of traditions which speak of the permissibility of deriving all forms of sexual pleasures from a wife cannot be applied to children especially as such acts are deemed obnoxious and unpalatable according to the people of sound mind.

Shirazi is equally vehement in arguing against another practice that he deems to be morally wrong, that of *mutʿa* (temporary) marriages with prostitutes. Although many jurists have allowed this practice, Nasir Makarim Shirazi maintains that this is against the ethical principles of the Qur'an and violates the basic ethical foundations of Shiʿi law.[64] This kind of practice also endangers the future of the Shiʿi community as it precipitates the fusion of fluids (*ikhtilat al-miyah*), which, he states, the *shariʿa* prohibits.[65] *Mutʿa* with prostitutes could also lead to illegitimate children, since it is highly improbable that a *zaniya* (lit., fornicator) will change her unethical demeanor after marriage. This is because she exhibited no concern for *sharʿi* rules before the marriage. Shirazi concludes that traditions that allow this practice must either be reinterpreted or ignored, because, in addition to having weak links in the chain of transmission of the *hadith*, they violate the moral ethos of the Qur'an. Without explicitly stating it, Nasir Makarim Shirazi's objections suggest that practices that are deemed unethical by moral rationalism and the people of sound mind can be proscribed, regardless of what the textual sources state.[66]

Another popular practice among some Shiʿi communities is for a man to marry a young girl so that her mother can be related to him. This would facilitate the man's social interaction with the child's mother without requiring her to observe the *hijab* in his presence.[67] Although this form of marriage does not involve any sexual act with the child, Fadlallah rejects this practice too, finding it to be unethical as it involves marriage with a child.[68]

Although many jurists have allowed sexual gratification with children, the fact remains that such practices are neither normative nor mentioned in the earlier canonical texts. In reality, laws on deriving sexual pleasure with children were inserted in the juridical manuals based on the absence of any interdiction from the Lawgiver rather than based on an explicit approval in the canonical texts. Although not explicitly mentioned in the scripture, the Qur'an's admonishment to abstain from what is morally corrupt (17:32, 29:45) indicates that sexual acts with children run contrary to its moral vision.

[64] Al-Sistani does not encourage the practice saying that based on obligatory precaution, a person should refrain from performing a temporary marriage with a prostitute unless she repents. ʿAbdul Hadi al-Hakim, *A Code of Practice for Muslims in the West in Accordance with the Edicts of Ayatullah al-Udhma as-Sayyid Ali al-Husaini as-Seestani*, trans. Sayyid Muhammad Rizvi (London: Imam ʿAli Foundation, 1999), 216, #428.

[65] Shirazi, *Kitab al-Nikah*, 5/84–89; Tabrizi, "Saving the Shiʿi Community in Marriage," 62–63.

[66] Shirazi, *Kitab al-Nikah*, 5/84–89.

[67] Ruhullah Khumayni, *Tahrir al-Wasila*, 2/262.

[68] Fadlallah, *Nazariyya fi al-Manhaj al-Ijtihadi*, 52–53.

Many other instances can be cited where, instead of taking a clear stand on a topic, jurists simply choose to disregard it. Among these is the question of sexual relationship between a master and a female slave. Al-Sistani disregards this issue entirely, focusing instead on sexual relationships in the two types of marriages, permanent and temporary.[69] Another topic that is omitted in many texts is that of FGM (female genital mutilation). Many classical and medieval texts allowed it, claiming that it is a recommended practise, but al-Sistani does not even mention it.[70]

The preceding discussion indicates that the strict and methodical application of the principles of Islamic legal theory does not necessarily result in a value-laden injunction. Disregarding the role of ethics in legal deliberations has led to the issuance of iniquitous statements by the very scholars who uphold the Islamic ethical and legal tradition. *Fuqaha*' will sometimes infer and assert their legal determinations even if they are deemed abhorrent in social contexts or what is rationally acceptable by people of sound mind. Jurists may feel compelled to publish their inferences of the law while at the same time acknowledging that they are incongruent with universal moral values. Indeed, sometimes a jurist may find it difficult or even embarrassing to state his findings because he disagrees with the values they reflect. At other times, a jurist may simply choose to ignore the topic. The fact that jurists have removed laws regarding sexual enjoyment with minors from their publications and websites indicates that they are fully aware that the masses find such laws to be both immoral and obnoxious. It is also a tacit acknowledgment that such statements are incongruent with universal moral values.

Although they have removed edicts like sexual enjoyment with minors from their books and websites, few jurists have rejected or distanced themselves from them. Jurists follow the dictates of a legal system that operates on specifically regulated principles. These do not always reflect the moral values or character of the jurists who deduced the law or the audience to whom it speaks. In reality, the moral horizon of a jurist may be incongruent with the legal verdicts he issues. In other words, a moral jurist does not necessarily issue a moral *fatwa*. This is the cost jurists have to pay for pedantic and strict adherence to rules of inferring laws and for overlooking the ethical repercussions of their rulings. It is also the denouement of a juristic process that bifurcates the moral and legal spheres of religion. Since they purportedly reflect the will of the Divine, ultimately such verdicts impute immoral values to a moral Deity. The verdict on engaging in sexual activities with minors is also the consequence of a judicial system that

[69] Al-Sistani, *Minhaj*, 3/30.

[70] Al-Najafi, *Jawahir*, 31:262–63, http://www.al-khoei.us/books/?id=6771%20(1382) # 1382. Also Haider Ala Hamoudi, "Strategic Juristic Omission and the Non-Muslim Blood Price: An Examination of Shi'i Fiqh and Practice," in Bhojani, de Rooij, and Bohlander, *Visions of Shari'a*, 129.

attaches more importance to the technical process of inferring laws than to the moral implications of the jurists' edicts.

The Devaluation of Ethics in Islamic Law

Ijtihad, as taught and practiced in the seminaries, is couched primarily on *ahadith* from the Imams that were uttered in a particular context. Besides the Qur'an and traditions, most judicial opinions are premised on the rulings issued by earlier scholars, the consensus of Shi'i jurists, and other principles enunciated in chapter 2. The seminaries also fastidiously examine and critique the *hadith* and biographical literature whether a particular ruling accords with the principles ensconced in Islamic legal theory, and methods to deduce laws if the sources are silent on an issue.

The outcome is an exegetical judgment as to what is believed to constitute the intention of the Legislator. However, there is very little discussion in the seminaries on the history and development of Islamic law, the sociopolitical factors that caused a scholar to issue a particular edict, or the reasoning that led jurists to form their distinctive opinions. These are critical factors in influencing the genres of *fatawa* deduced. In the words of Mahdi Mahrizi, "there is no doubt that the social circumstances in which the jurists live affects their thought."[71] Thus construed, Islamic law evolves continuously based on sociocultural factors.

Furthermore, Usuli discourse is oblivious to the presuppositions of a scholar or to his horizon of understanding in arriving at a particular legal judgment. Neither the texts nor the ensuing legal discussions provide the moral reasoning in judicial decision-making. It is assumed that the traditions that the *fuqaha'* depend on reflect or approximate the will of the Lawgiver regardless of whether they are just, discriminatory, or contravene ethical values as accepted by the *'uqala'*. Furthermore, there is little attempt to align the juristic statements with ethical maxims prescribing justice and morally upright behavior or to issue rulings that accord with the faculty of reason.

Similarly, there is little consideration of the social and ethical implications of the laws that jurists deduce. In fact, most legal works do not contain a separate chapter on ethics or justice, nor is there a discussion on couching legal rulings on the moral-ethical framework of the Qur'an. Although there is much legal categorization of acts into what is required, recommended, or forbidden, the juridical literature is bereft of any moral categorization of human acts. This point is evident in a study of the legal manuals in which the process of the extrapolation of

[71] Bauer, *Gender Hierarchy in the Qur'an*, 86.

rulings is based primarily on the textual sources rather than on the directives of moral rationalism.

Ayatullah Mohaghegh Damad, a prominent Iranian scholar, agrees that Shi'i jurists have paid little or no attention to ethical considerations in their deliberations. Damad complains that, generally speaking, Muslim scholars have distinguished law from Aristotelian ethics. Consequently, they have focused on the law rather than on ethical norms in their inferences. He further states, "A religion that has no Divine law can possibly have ethics, but one that has Divine law, such as Islam and Judaism, would be void of ethics."[72]

It is not an exaggeration to say that contemporary *fiqh* is a vestige of the intellectual endeavors of classical jurists whose moral and juridical presuppositions and horizons differed considerably from those in the modern world. Since interpreters bring their personal presuppositions to a text, the meaning that it reveals will invariably differ. Contemporary reformers of sacred texts are preconditioned by current sociopolitical and cultural surroundings, these create a very different horizon of understanding from that engendered by the presuppositions and precommitments that classical jurists had. Such differences will inevitably result in a multiplicity and even contrariety of the readings of texts.

Rather than reiterating the observations made in the earlier legal corpus, reformers seek a more nuanced approach to Islamic jurisprudence, one that does not depend primarily on rulings cited in the traditional legal texts. They opt to incorporate the rational and moral underpinnings of those texts. The disparate sets of presuppositions between the traditional scholars and reformers will inevitably lead to a clash of horizons and charges of heresy or deviation from normative positions.

As we have seen in the discussion on child marriages and sexual acts with minors, the focus on the legal dimension in juristic literature and the undermining of moral rationalist directives have resulted in the devaluation of human life and dignity. In short, religion has been divorced from ethics. In the process, in the name of religion, immoral and inhumane acts have been validated and sanctified. The view that the estrangement of religion from ethics can have disastrous social consequences can be discerned from many other cases. As we have seen in recent times, members of the Islamic State of Iraq and al-Sham (ISIS) offer prayers and seek God's forgiveness before raping Yazidi slave girls. A suicide bomber invokes God, shouting "Allahu Akbar!" before entering a mosque where he kills himself and innocent worshippers in Pakistan. Citing the name of God and scriptural references, Boko Haram in Nigeria kidnapped 276 Chibok schoolgirls and forcibly made them wear the *hijab* and converted them to Islam.

[72] Mavani, "Structural Ijtihad," 66.

Although juridical methodology necessitates proper reference to the scriptural sources, in the field of bioethics, for example, there is little interest in the morality of biomedical practices. In fact, jurists provide legal rather than ethical justification when considering newly emerging medical cases.[73] Thus instead of evaluating whether human cloning is ethically correct, there has been more discussion on whether it is legally correct, that is, if legal reasoning can justify cloning. When "Dolly" the sheep was cloned in 1997, there was little public consternation in the Muslim world on the ethical consequences of cloning and the effects it may have on future generations. Instead of a discourse on the moral teachings of the normative texts, there was more discussion on the legal reasoning that could justify cloning.[74] Such instances indicate that one of the most formidable challenges confronting Muslims today is to develop a juridical and ethical framework that is committed to upholding the religious-moral values that undergird their normative scriptures. There is also a need to retrieve the core ethical values from the revelatory texts that can offer a new (and more ethical) paradigm of jurisprudence which would address more pertinent moral and ethical issues in our times.

The Basis of the Discriminatory Rulings in Islamic Law

Contemporary Muslim legists are confronted with the challenge of incorporating and applying moral values that guarantee the inalienable rights and dignity of all human beings in their legal system. It is not an exaggeration to state that nowhere is the devaluation of ethics in the legal discourse more pronounced than it is on the rulings on women and non-Muslim minorities. The fact of the matter is that in the juridical manuals composed in the medieval era, the treatment of non-Muslims was patently discriminatory, as they were denied the same privileges that were accorded to Muslims. Non-Muslims were also targeted for unfair treatment. Their houses were to be smaller than those of the Muslims and they were to be belittled or humiliated when paying the *jizya* (poll tax). ʿAbd Allah b. ʿAbbas (d. 687), the famous exegete, says that a *dhimmi* (one who has a pact with Muslims) is to be slapped on the back of his neck when paying the *jizya*.[75]

Many other examples of discrimination can be cited. A Muslim judge can accept the testimony of a Muslim against a non-Muslim but not the opposite case.[76]

[73] Sachedina, *Islamic Biomedical Ethics*, 18.
[74] Ibid., 199.
[75] Nasir al-Din ʿUmar b. Muhammad al-Baydawi, *Anwar al-Tanzil wa Asrar al-Ta'wil* (Beirut: Dar Ihya' al-Turath al-ʿArabi, n.d.), 3/76.
[76] Al-Hurr al-ʿAmili, *Wasa'il al-Shiʿa*, 18/284; *hadith* #1, chapter #38.

Dhimmis were also required to wear distinctive clothing that portrayed their inferior status in Muslim communities. The jurists argued that since they had refused to convert to Islam, non-Muslims deserved the inferior status that was conferred to them under Muslim rule.[77] Such discriminatory ideas and practices are not confined to the past. They are regurgitated even today in different ways in Muslim countries, where a systematic undermining and disregard for the basic rights of people to freedom of worship and expression occur regularly.

Shi'is, for example, have been ostracized and attacked for offering prayers according to the dictates of their school of law or for performing the annual Muharram rituals in countries like Saudi Arabia and Malaysia. In many instances, Shi'is are more free to enact their public rituals in the West than in their home countries. Jews and Christians have experienced many problems in obtaining permission to build places of worship in Muslim countries. A Muslim woman experiences great difficulties in obtaining a divorce if her husband does not agree to it. In addition, even contemporary *fiqh* works insist that she cannot leave the house without the husband's permission even if by doing so, she does not violate any of his rights. In effect, this is virtually a license to imprison her within the confines of the four walls of the house. The wife is also required to submit to the husband's sexual desires at his will.[78] Perhaps more disheartening is the fact that the *'ulama'* are either active or passive participants in curbing the rights of women and minority groups.

To make the *shari'a* more moral and just, scholars need to search for and assert a universal language that acknowledges the dignity and nobility of all human beings regardless of their ethnic, national, or religious affiliations. They also need to question and revise those injunctions in their juridical literature that degrade and discriminate against women, minority groups, and non-Muslims. The foundations of many of the discriminatory pronouncements can be traced to the *hadith* and juridical literature rather than to the Qur'an.

In contrast to legal declarations issued even today, the Qur'an does not distinguish between the life of a Muslim and that of a non-Muslim. Rather, it asserts the inviolability of all human life by stating that saving one life (Muslim or otherwise) is equivalent to saving the whole of humanity (5:32). This sense of dignity and equality of all human beings is missing in juridical literature which, as I have discussed, is distinctly prejudiced. Ayatullah al-Sistani, for example, was asked whether it is obligatory to save a person's life by delivering CPR

[77] For other restrictions and acts of humiliation inflicted on the *dhimmis*, see Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: Johns Hopkins Press, 1955), 197–98. Liyakat Takim, "Peace and War in the Qur'an and Juridical Literature: A Comparative Perspective," *Journal of Sociology and Social Welfare* 28, no. 2 (2011): 144–45.

[78] Ayatullah Sistani, *Islamic Laws*: *English Version of Taudhihul Masae'l* (London: World Federation), 1994, 332, #2421.

(cardiopulmonary resuscitation). For him, the answer is contingent on a person's faith. He states that if the patient is not a Muslim, there is no objection to not giving him life-saving assistance. However, if the patient is a Muslim, all means have to be exhausted to rescue her/his life.[79] Al-Sistani also rules that if the patient is not a Muslim, life-supporting devices can be removed. However, if the patient is a Muslim, then it is not permissible to remove the device even if the patient's relatives ask that this be done.[80]

Other *mujtahids* have stated that organs can be removed from a deceased person if s/he is not a Muslim and the life of a Muslim can be saved. In this event, since the deceased is not a Muslim, no blood money is payable to his/her family.[81] According to al-Sistani, "As far as removing an organ from a deceased (based on his will) for the purpose of transplanting it into a living person is concerned, there is no problem in it as long as (a) the diseased was not a Muslim or someone who is considered a Muslim (b) or the life of a Muslim depended on such transplantation."[82] In other words, organs can be removed from a Muslim body only to save a Muslim life. Some jurists have stated that it is prohibited to dissect a Muslim body, but that it is permissible to do so to a non-Muslim body.[83] The basis of such arguments is that the sanctity (*hurma*) that is accorded to a *dhimmi* is based on his/her contractual agreement and attachment to Islam. When s/he dies, the *hurma* is no longer applicable as there is no further affiliation to Islam.[84]

Paradoxically, scholars derive the ruling on the distinction between saving the life of a Muslim and non-Muslim from Qur'anic verses. Verse 17:33 states, "And do not kill a soul that Allah has forbidden, except for a just cause, and whoever is slain unjustly, We have indeed given to his heir authority, so let him not exceed the limits in slaying; surely he is supported." Similarly, verse 6:151 states, "Do not kill the soul which Allah has forbidden except for the requirements of justice; thus, He has enjoined you with that you may understand." The key term in these verses is *nafs muhtarama* (a sanctified soul), a soul that God has forbidden to kill. In the juridical treatises, such ideas are discussed in the context of warfare in *kitab al-jihad*. Jurists restrict the applicability of *nafs muhtarama* to the life of a believer or one who has

[79] Imam 'Ali Foundation, *Current Legal Issues*, 49.

[80] Ibid. The discriminatory rulings are extended to the economic field too. Although the taking of interest is considered unlawful, according to al-Khu'i, "there is no harm if a Muslim takes interest from an unbeliever who is not under the protection of Islam or from an unbeliever who is under the protection of Islam and taking interest is permissible in his religion," https://www.al-islam.org/islamic-laws-ayatullah-abul-qasim-al-khui-sayyid-abu-al-qasim-al-khoei, #2088.

[81] Hamid Mavani, *A Guide to Islamic Medical Ethics: Based on Authoritative Contemporary Sources*, trans. Hamid Mavani (Montreal: Organization for the Advancement of Islamic Knowledge and Humanitarian Services, 1998), 23.

[82] Al-Hakim, *A Code of Practice*, 194. See also al-Sistani, *Contemporary Legal Rulings*, 50; Imam 'Ali Foundation, *Current Legal Issues*, 100.

[83] Al-Qummi, *Kalimat Sadida*, 137–38; Imam 'Ali Foundation, *Current Legal Issues*, 99.

[84] Al-Qummi, *Kalimat Sadida*, 176–77.

a pact with Muslims. Since non-Muslims do not fall into this category, the juridical works do not consider their lives to be sacred and hence are not valuable as Muslim lives are.

Among the injunctions that desanctify the life of non-Muslims is the edict that a Muslim cannot be killed if he kills a non-Muslim. On the other hand, the reverse is not the case. Traditions from Ja'far al-Sadiq state that a Muslim cannot be killed for killing a non-Muslim unless he becomes habituated to it.[85] Al-Khu'i emphasizes that regardless of whether a Muslim kills an unbeliever or a *dhimmi* the Muslim cannot be killed. The ruling is founded on the assumption that the religion of a non-Muslim is not equivalent to that of a Muslim's religion. The only exception to the rule is if a Muslim makes a habit of killing *dhimmis*. In that case, the guardian of the *dhimmi* has the right to exact revenge by killing the Muslim offender provided he pays the *diya* (blood money) for killing a Muslim.[86] In other words, the *dhimmi*'s heir has not only to endure the death of a loved one, but also to pay for spilling the blood of a Muslim if he chooses to exact revenge. Otherwise, the heir can choose to accept the *diya* of a non-Muslim, which is valued at about one twelfth the life of a Muslim. The value of a non-Muslim's life is 800 dirhams, whereas that of a male Muslim is valued at 10,000 dirhams.[87] By such interpretive strategies, jurists were able to tacitly sacralize Muslim lives while accepting the shedding of a non-Muslim's blood. Interestingly, the *diya* of a *dhimmi* is higher in the Sunni than in the Shi'i school of law. Some Sunni schools fix the *diya* of a *dhimmi* at one-third of the Muslim rate, whereas others at the same rate as the *diya* of a Muslim.[88]

It should be remembered that ideas surrounding the necessity of saving *nafs muhtarama* were conceived in a hostile milieu when there was considerable animosity and even wars between Muslims and non-Muslims. Muslim scholars divided the world into believers and nonbelievers and conferred special privileges on Muslims. In their division of the world into these spheres, jurists restricted the signification of not killing a sacred soul to the life of a believer and a *dhimmi*. One who did not fall in this category (a *harbi*—one who was at war with Muslims) was thereby not protected and his property had no value.

This observation is substantiated by al-Shafi'i's declaration that when confronted with people who claim to belong to the People of the Book but could not substantiate their claim, Muslims could spurn their offer to pay the *jizya* and

[85] Al-Hurr al-'Amili, *Wasa'il al-Shi'a*, 29/107.

[86] Al-Khu'i, *Mabani Takmila Minhaj al-Salihin* (Baghdad: Matba'a Babil, n.d.), 2/61–62.

[87] Ibid., 2/187, 208. See also Liyakat Takim, "You Can Receive but Not Give: The Ethical Dilemma of Organ Donation," ed. E. Gurch and Mahdiya Abdulhussein (forthcoming 2022).

[88] Al-Najafi, *Jawahir al-Kalam*, 43/38. See also Hamoudi, "*Strategic Juristic Omission and the Non-Muslim Blood Price*," 138–39. Ayatullah Khamenei in Iran has argued that the *diya* of a Muslim and non-Muslim should be the same. Ibid., 142.

offer them a choice between surrendering or fighting.[89] Stated differently, the refusal to convert denies a non-Muslim the right to life. He also maintained that nonbelievers could be fought due to their disbelief.[90] Scholars like al-Sarakhsi agreed with al-Shafiʿi, claiming that Islam requires Muslims to fight unbelievers, a duty that will continue until the end of time."[91]

Fadlallah Nuri (d. 1909), a prominent jurist during the constitutionalist movement in Iran, considered such forms of discrimination to be among the essentials of Islam. For him, the notion of equal human dignity regardless of faith was contrary to the *shariʿa*.[92] The preceding discussion demonstrates that a non-Muslim who does not have the status of *dhimmi*, or has not signed a treaty granting him/her amnesty, has no judicial rights in Islamic law. His/her life and property are not sacred and s/he does not enjoy dignity (*al-ʿirdh al-muhtaram*). No revenge can be exacted if the non-Muslim is killed or assaulted, or if his/her property is stolen. This is the price a non-Muslim has to pay for not belonging to any of the protected groups. Only conversion to Islam would accord him/her full rights.[93]

Unlike the juristic bifurcation of the world into the abodes of Islam (*dar al-Islam*) and war (*dar al-harb*), there is no such demarcation in the Qur'an. Neither does the Qur'an require the subjugation of one sphere over the other. The juristic division of the world into the abodes of Islam and war reflects the sociopolitical realities that Muslim legists had to contend with.[94] As I have discussed elsewhere, in their writings that asserted Muslim dominance and authority over non-Muslims, scholars often adduced laws based on the principle of *maslaha*. By resorting to this principle, they were able to legitimize the state's policies that favored the *umma*, even if these violated the core values of the Qur'an. It was in this sphere that the demonization of and fighting against non-Muslims could be vindicated.[95] In the process, the killing of *kuffar* was also validated. Instead of reflecting the Muslim scripture, such rulings are illustrative of the prescriptions devised by Muslims in the classical and medieval periods when they were able to subjugate and belittle non-Muslims. More importantly, the context in which the rulings on differentiating between Muslim and non-Muslim lives was conceived has to be kept in mind in the reformation process.

[89] Abdulaziz Sachedina, *The Islamic Roots of Democratic Pluralism* (Oxford: Oxford University Press, 2001), 49, citing Tabari's *Kitab Ikhtilaf al-Fuqaha'*.

[90] Muhammad al-Idris al-Shafiʿi, *Kitab al-Umm* (Beirut: Dar al-Fikr, 1990), 4/84–85.

[91] Shams al-Din b. Ahmad al-Sarakhsi, *Kitab al-Mabsut* (Cairo: 1906), 2–3. Liyakat Takim, "Holy Peace or Holy War: Tolerance and Co-Existence in the Islamic Juridical Tradition," *Islam and Muslim Societies* 3, no. 2 (2007): 295–307.

[92] Mohsen Kadivar, *Human Rights and Reformist Islam*, trans. Niki Akhavan (Edinburgh: Edinburgh University Press, 2021), 93.

[93] Ibid., 97–98.

[94] Also Takim, "Holy Peace or Holy War," 295–307.

[95] Ibid.

The preceding discussion demonstrates that the discriminatory injunctions in the *fiqh* corpus were premised on three main factors. The first type of laws relate primarily to women. Apart from the laws on inheritance, most laws regarding women bear the remnants of pre-Islamic customary normative praxis which were either endorsed or partially revised by the Prophet and his companions. These can be modified in contemporary times based on the argument that Divine endorsement of such laws does not mean that they were Divinely ordained. Had different laws and customs been present at the time, in all probability, the Qur'an would have approved them too, as long as they were socially acceptable and did not contravene its ethical fabric.

The second genre of discriminatory laws arose primarily because Muslims inherited institutions or customs that they could not eradicate immediately due to the adverse repercussions such an act would have on the community. The Qur'an endorsed slavery, for example, because Muslims were enslaved by non-Muslims. To abolish slavery immediately would have put Muslims at a huge disadvantage since they could not use non-Muslim slaves to ransom Muslim ones. The rules of penal retaliation and restitution probably arose for the same reasons.

The third genre of discriminatory injunctions arose due to the formulation of laws by medieval scholars who enforced certain rulings to demonstrate the dominance of Muslims over non-Muslims and to put the latter at a social and economic disadvantage. A wide range of rulings were put into effect to degrade and belittle the People of the Book.[96] Included in these were rulings that determined Muslim lives to be more valuable than non-Muslim ones. Using the various interpretive strategies discussed, Muslim reformers need to address and revise all the three genres of discriminatory rulings.

In Shi'i juridical literature, the differential treatment of people extends to the treatment of *sayyid*s, the descendants of the Prophet. The ruling on menopause, for example, varies between women who are descendants of the Prophet and those who are not. According to most jurists, a woman who is fifty years old is considered to have reached menopause. Thus, she has to pray and fast even if she experiences her monthly period. However, female descendants of the Prophet (*sayyida*) reach menopause only when they turn sixty. Al-Khu'i and al-Sistani add that as a precautionary measure, a *sayyida* should combine the acts performed by a woman who experiences irregular blood (*istihada*)[97] with abstinence from those acts that a menstruating woman keeps away from. This should be done after she (the *sayyida*) turns fifty until she becomes sixty years old.[98] The

[96] The Qur'an mentions belittling the People of the Book only when they pay the *jizya* (9:29).

[97] Depending on the amount of blood, a woman who experiences irregular blood discharge may have to perform the major washing (*ghusl*) at different times during the day before she can offer her prayers.

[98] Muhammad Hasan Bani Hashimi Khumayni and Ihsan Usuli, eds., *Tawdih al-Masa'il-i Maraji'*, 8th ed., 2 vols. (Qum: Daftar-i Intisharat-i Islami, 1961), 1/252–53. See also Ruhullah Khumayni,

favorable treatment of *sayyid*s is reflected in the laws of *khums* taxes too. *Sayyids* receive half the *khums* dues, whereas non-*sayyids* receive a share of *zakat* and voluntary alms (*sadaqa*) instead.[99]

Increasingly, many Muslim scholars have sensed the need to search beyond their normative texts and procedural principles for an ethical language that transcends humanly constructed sociopolitical and cultural barriers and can address the moral challenges of the time. This would also help Muslims to revise those laws which blatantly discriminate against minorities within their own juridical system. Fundamental human rights like the dignity of all human beings and justice become meaningful only when all human beings receive the same basic rights.

In the past, justice based on rights (*al-ʿadala al-istihqaqiyya*) was seen as the most appropriate approach to social transactions. This method apportioned justice based on people's status, gender, ability, and so forth. Desert-based justice claimed that human beings are equal but that their equality is proportional and hierarchical. In other words, the rights that people enjoy are proportional to certain predetermined categories they fall under. The system permitted and even justified discriminatory practices against certain groups such as women, minorities, and slaves. This was a close approximation to Aristotle's theory of distributive justice.

Paradoxically, even in the Muslim world, religion became the basis for apportioning different rights to human beings. The classical jurists' notion of justice was very different from today's understanding of the concept, which privileges equality and egalitarianism over hierarchies and the inherent superiority of some groups over others. Kadivar argues that the world was not prepared to accept egalitarian justice in the past. Thus, justice was proportional, but this was to be a prelude to a system based on egalitarian justice in which all human beings would be treated equally.[100] Since the dominant discourse on human rights is now based on the concept of egalitarian justice, there is a need for a paradigm shift so that the rights meted out to human beings should not be contingent on a person's gender, religion, ethnic affiliation, or social status.[101]

Tawdih al-Masa'il (Tehran: Mu'assasa Tanzim va Nashr-i 'Athaar-i Imam Khumayni, 1972), 75; Muhammad Fadil Lankarani, *Tawdih al-Masa'il* (Qum: Amir al-'Ilm'Ilm, 2005), 69; Ali Sistani, *Tawdih al-Masa'il* (Qum: Unknown, 1973), 79; al-Khu'i, *Tawdih al-Masa'il* (Qum: Mu'assasa Ihya' Athar al-Imam al-Khu'i, 2001), 74. Also Takim, *The Heirs*, 45.

[99] Al-Khu'i, *Minhaj al-Salihin*,1/371.

[100] Mohsen Kadivar, "Revisiting Women's Rights in Islam: 'Egalitarian Justice' in Lieu of 'Deserts-Based Justice,'" in Ziba Mir-Hosseini, Kari Vogt, Lena Larsen, and Christian Moe, eds., *Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Tradition* (London: Tauris, 2013), 213, 225–27.

[101] Ibid., 217.

As Muslim reformers seek to grant equal rights to women and non-Muslim minorities within their legal system, they must bear in mind that there is nothing Divine or sacred about customs that permit discrimination against certain social groups; or those that advocate slavery, domestic violence, and child marriages; or those laws that ordain that a slave girl should not cover her hair in public. Due to the prevailing social conventions at the time, indigenous norms and practices were endorsed by the Qur'an. With the territorial expansion of the Islamic world after the Prophet's demise, Muslims accepted local *'urf* as long as it could be accommodated within the framework of the pre-Islamic customs they inherited. The pre-Islamic norms that Muslims had adopted incorporated local *'urf* as long as there was no clear conflict between the two. As I discuss in the next chapter, in their reformative discourse, Muslim reformers now seek to replace pre-Islamic norms with the Qur'anic vision of an ethical social order based on the notion of the intrinsic and equal rights of all human beings.

Another reason for the issuance of immoral *fatawa* is the generalization and sacralization of religious laws, many of which are constructed by the interpretive stratagems of scholars. When jurists doubt whether a law is *ta'sisi* (instituted) or *imda'i* (endorsed) they often assume it to be the former. Claiming a rule to be *ta'sisi* and permanent imposes pre-Islamic patriarchal sociocultural norms on a gender-equal modern society. In fact, even the Legislator cannot make a temporary law permanent. This is because certain laws are constrained by time and space and lack the necessary universal principles to make them permanent. More specifically, since ephemeral laws cater to the needs of a community at a particular point in time, they cannot be universalized or eternalized, especially when the circumstances that led to the temporal laws being enacted in the first place change.

Thus, if temporal laws like the guardianship and supervision of women, child marriages, and laws that are prejudicial to a particular segment of a community are immortalized, they may be deemed to be immoral by subsequent generations. Along similar lines, the prevalent method of governance in the tribal community of early Islam was that of the caliphate and monarchy. When it emerged, Islam confirmed the same system without offering a new theory of governance or a political structure for the community. This should not be construed to mean that Islam was opposed to other forms of government like republicanism and democracy or that the caliphate was a sacred institution that could not be replaced by another system of governance.

The discussion on the generalization and universalization of temporal rulings in the Shi'i legal system can be explicated by the Usuli principle of *al-ishtirak fi al-ahkam* (the universality of rulings). The principle states that if a ruling has been applied to a person or a group of people in the past, regardless of its source, it can be universalized and deemed to be applicable to all persons unless declared

otherwise.[102] Stated differently, regardless of the context and circumstances, a *hukm* that may have been directed to a group of people is universalized and considered immutable unless there is explicit proof to the contrary. Such generalization and universalization of rulings that were specific to a particular context are indicative of the problematic shortcomings of *usul al-fiqh*.

Revisionist Theory of Progressive Historicism

Another important tool in the reformist agenda is that of progressive historicism. The concept reduces the effect of particular rulings found in the Islamic revelatory sources especially if what was considered acceptable at a particular period in history is no longer palatable. Based on this notion, a reformer can argue that although a ruling in classical sources is general with no conditions or restrictions placed on it, contemporary Muslims can revise the declaration due to its negative moral ramifications or significance. Prevalent practices and normative axioms in early seventh-century Arabia imposed limitations on achieving justice as it is now conceived by the '*uqala*'. This has led to rendering rulings that may impose unfair or severe difficulties on a particular segment of the community in contemporary times.[103]

Historicism can also vitiate the full impact of those legal Qur'anic verses that are normally construed to be fixed and immutable. This is done by restricting these verses to particular sociohistorical circumstances. Progressive historicism further appeals to principles that differentiate between certain verses. These include the *asbab al-nuzul* (occasions of revelation), *naskh* (abrogation), the *muhkam* and *mutashabih* (univocal and the equivocal), the Meccan and the Medinan categorization of verses, and so forth. These principles have become important hermeneutical tools to situate legal verses in the Qur'an within a particular context. The historicist and revisionist reading of the verses questions the validity of legal norms in current times. The argument also refutes and dissipates any absolutist or generalized modern reading of the text.[104]

In addressing gender inequalities inherent in traditions, Mohamed Fadel argues that "progressive historicism can be used to generate readings of revelation that render rules reinforcing a system of gender subordination obsolete by, for example, limiting their application to the unique circumstances of premodern societies on the ground that they lacked the economic and institutional

[102] Sayyid al-Hasan Musawi, *al-Qawa'id al-Fiqhiyya* (Qum: al-Hadi Publishing, 1998), 7/58.

[103] Mohammed Fadel, "Is Historicism a Viable Strategy for Islamic Law Reform? The Case of "Never Shall a Folk Prosper Who Have Appointed a Woman to Rule Them,"" *Islamic Law and Society* 18 (2011): 135.

[104] Hallaq, *Reforming Modernity*, 124–25.

means to support a system of gender egalitarianism."[105] This approach, which focuses on the revisions of particular laws or practices based on moral grounds, resonates strongly with that adopted by Fazlur Rahman in his thematic work on the Qur'an. Like other reformist programs, the topic remains controversial in many Muslim groups as a hermeneutical construct, probably because of its postulation that the contemporary definition of morally correct acts can vindicate changes to or suspension of some Qur'anic legal stipulations. For many Muslims, this approach connotes an imperfection in God's revelation or that the laws can be changed based on the penchant of a thinker.

Reformers also have to bear in mind that legislation of Islamic regulations should be harmonious with universal moral values as recognized and accepted by the people of sound mind. Moreover, they should remember that certain notions which are currently considered abhorrent or unpalatable were deemed acceptable in the past. For example, the discrimination between men and women asserted by premodern Qur'anic commentators accorded with the value system in that period. Their sociocultural norms and horizons of understanding molded their interpretation of the texts. The Iranian scholar/reformer Yousef Eshkevari (b. 1950) makes the important observation that the Qur'an acknowledged the *'urf* at the time of revelation as its criterion in determining notions of justice but that these concepts were not eternal and were subject to change. Equally significant is the observation that the *'urf* mentioned in the Qur'an and *sunna* was acknowledged by the early Muslims as being just and fair during their times.[106] A ruling that may have appeared ethical or beneficial in the past can actually be detrimental to a particular segment of the community at a later date. As Abderrahmane Taha argues, "this is because a Qur'anic ruling may not realise the same value at a later period of history as it did at the time of revelation." Therefore, it is essential to examine Qur'anic verses in the contemporary context so as to make its directives more pertinent.[107]

A Moral Basis for *Ijtihad*

The discussion on the shortcomings of contemporary *ijtihad* suggests that more than ever, there is a need for reformers to address its rational and moral

[105] Fadel, "Is Historicism a Viable Strategy for Islamic Law Reform?," 135.

[106] Adis Duderija, "The Custom ('*urf*) Based Assumptions Regarding Gender Roles and Norms in the Islamic Tradition: A Critical Examination," *Studies in Religion / Sciences Religieuses* 45, no. 4 (2016): 7.

[107] Ramon Harvey, "Qur'anic Values and Modernity in Contemporary Islamic Ethics: Taha Abderrahmane and Fazlur Rahman in Conversation," in Mohammed Hashas and Mutaz al-Khatib, eds., *Islamic Ethics and the Trusteeship Paradigm: Taha Abderrahmane's Philosophy in Comparative Perspectives* (Leiden: Brill, 2020), 159.

deficiencies. They face the formidable challenge of re-examining and revising the major normative paradigms that guide them in the derivation of laws. A critique of the philosophical, epistemological, and ethical principles of *ijtihad* is in itself a kind of *ijtihad* in the foundations and principles of *usul al-fiqh*. In other words, *ijtihad* itself is in need of another *ijtihad*.

In assessing the efficacy of the current form of *ijtihad*, a jurist is also confronted with the challenge of discerning and identifying the core Qur'anic ethical values and applying them in a given context. To quote Abdurrahman Taha,

> The Qur'anic ethicization of conduct thus operates at both the legal and the moral levels, but it must be clear that the legal always follows and is thus subordinate to the moral. Law, regulations, and rules are therefore only as good as the morality that gives rise to them. This is to be understood as part of the principle (often misunderstood) that ethics and moral instruction in Islam are not optional, to be followed or ignored at will; rather, they are necessities (*darura*) whose violation or neglect comes at the price of infringing upon social organization as well as upon the very value of humanity intrinsic to the human.[108]

As discussed in the previous section, in many instances the current form of *ijtihad* has yielded immoral *fatawa.* To make Islamic jurisprudence more ethical, Muslim scholars will have to incorporate principles like justice, dignity, and judgments of *'aql* in their legal deliberations so that they play more definitive roles in determining how the sources are interpreted and applied. This would require current Shi'i jurists to accept that judgments made by moral rationalism which are not located in the sacred sources can act as independent sources of legislation. The *'urf*, together with the *sira* of *'uqala'*, would be the arbiters in determining whether a particular morally deduced ruling is acceptable or not.

The legal tradition has been the summation of past generations' experiences and the result of their struggle with different theoretical and practical difficulties in various aspects of their lives. Often, legal judgments in these sources were more permeated with existent tribal normative praxis than formulated on ethical or moral considerations. By applying customary laws in their deliberations, jurists undermined the ethical content of sacred sources. Therefore, in many instances, legal judgments based on such laws were opposed to the universal moral values enunciated in the sacred sources.

Ayatullah Kamal Haydari, a controversial and an outspoken reformist *mujtahid* in Qum, has often been critical of the disregard of ethical precepts in *ijtihad*. In his assessment of the current form of *ijtihad* he states that the juridical malaise has arisen as jurists discuss *fiqh* by isolating it from other branches of

[108] See Hallaq, *Reforming Modernity*, 134.

religious knowledge like ethics and *kalam* (theology). He stresses that religion is an integrated system in which diverse fields of learning are intertwined. The consequence of the *fuqaha*'s adoption of a strictly legalistic approach to issues that arise in contemporary societies is that they do not highlight the theological, Qur'anic, and ethical imperatives in their discourses.[109]

He further states that Islam acknowledges values like human rights and the moral worth of all beings. These ethical principles are shared by other religions. Haydari asks poignantly, "can such values which are defined outside of religion help us understand issues like women's rights? A *mujtahid* who accepts values only if they are defined by his own religion denies the validity of other values and sees affirming them as being contrary to Islamic teachings. For instance, psychology and modern sciences may prove that certain acts by husbands can be detrimental to the well-being of their wives. If these actions are not proscribed in the Islamic sources they would be considered permissible even if it is proven that they are harmful by modern science." Unfortunately, he adds, today's strictly *fiqhi* approach to women's rights is predicated on religious texts only, neglecting, in the process, widely accepted human values. This is the denouement of the strictly jurisprudential approach adopted by the jurists in the seminaries.[110]

The need to realign jurisprudence and ethics and address the injustices committed is evident in many areas of Islamic jurisprudence. In Hanafi *fiqh*, for example, a mother appears eleventh in the list of the right of guardians who can determine the contracting of a marriage of a minor. However, when it comes to the question of maintenance, the mother is third in the list after the husband and father.[111] In reality, a mother is more competent and better equipped to manage the affairs of her child than the child's paternal grandfather. She can also determine what is in the best interests of her child better than anyone else.[112]

According to Muhammad al-Hasan al-Najafi, a master is permitted to sell his female slave on the day she gives birth to a child. He adds that, although there is nothing in the revelatory sources that allows separating a mother from her child immediately after the child's birth, it is considered permissible based on the consensus of scholars.[113] Along similar lines, current Shi'i jurisprudence states that a woman who wants to leave her husband because he does not satisfy her sexual needs or because she does not love him has little recourse to divorce as long as he treats her well and provides for her.[114] A husband, on the other hand, can divorce

[109] https://youtu.be/OhrJd8vZ8kk.

[110] YouTube video, 04:13. Posted January 2019. https://youtu.be/hDWs0yYdhMk.

[111] Mohammed Omar Farooq, *Toward Our Reformation: From Legalism to Value-Oriented Islamic Law and Jurisprudence* (Washington: The International Institute of Islamic Thought, 2011), 131.

[112] On this, see Sane'i's views in *Qaymumat-e madar* (Qum: Mu'assasa-ye farhangi-ye fiqh-e thaqalayn, 2005), 21–22.

[113] Mavani, "Structural Ijtihad," 64.

[114] Al-Hakim, *A Code of Practice for Muslims in the West*, 212.

his wife at will. According to Ayatullah al-Sistani, "if a person divorces his wife without informing her, and he continues to maintain her as he did when she was his wife, and after a year informs her that he divorced her a year ago, and can prove it, then he can demand the things which he supplied her during that period if she has not used them, but he cannot demand from her what she has already expended."[115]

Not all scholars acknowledge or accept such views regarding women. The Afghani scholar Ayatullah Ishaq Fayyad (b. 1930), a prominent student of Ayatullah al-Khu'i, has been critical of the misogynist traditions and legal rulings. He considers some traditions that are against women to be inauthentic since some of the narrators in the chains of transmission of *hadith* are not credible. For example, he questions the authenticity of a tradition which claims that the intellect of a woman is deficient. He states:

"This *hadith* is not sound, so it is not correct to ascribe it to the noble Prophet. Furthermore, it cannot be accepted because it is obviously against that which we see and witness in reality, because it is evident that a woman's intellect is no less than that of a man in all different academic arenas where women are present and participate." He also declares that the tradition: " 'The community that is led by a woman will never be prosperous,' which indicates the impermissibility of women occupying positions of authority, as unsound and against common conscience."[116] In reality, what the sacred sources state regarding women's ability to function effectively in society often stand in stark contrast to the contemporary world where women play more dominant social and political roles.

In discussing some of the deficiencies in the current form of *ijtihad* and the legal system, Kamal Haydari is also critical of the inherent male bias in it. Currently, in the seminaries, women's discourse is representational, that is, men discuss and interpret texts regarding women's issues. Haydari calls for women to be able to interpret their readings of the authoritative religious texts. This will assist women to advocate their rights and voice their concerns. In addition, they will not have to depend on men to interpret the texts for them.[117] Haydari is also concerned at the lack of ethical discourse and the injustices done to women in the current form of *ijtihad*. He complains that the mainstream *fiqh* bestows absolute authority on men to divorce their wives whenever they want to and for whatever reason they desire. In contrast, it deprives women of such a right to get divorced from men, no matter how difficult and unbearable the circumstances

[115] Sayyid 'Ali al-Husaini Sistani, *Islamic Laws*: *English Version of Taudhihul Masae'l* (London: 1994), 472, #2553.

[116] Ali Ashraf Fatahi, *The Socio-Political Thought of Ayatullah al-'Uzmah Muhammad Ishaq al-Fayyad*. The original article can be accessed at http://www.tourjan.com/?p=6155 (accessed June 24, 2020).

[117] Sayyid Kamal al-Haydari, http://alhaydari.com/fa/2019/12/9353/ (accessed June 7, 2020).

of their lives are. In many instances, it is the civil rather than Islamic law that enforces restrictions on men and is more just to women. It is not surprising, therefore, that Islam is accused of discriminating against women.[118] In reality, the traditional *ijtihad* does not provide the proper mechanisms to deduce relevant judicial decisions regarding women's issues that have changed drastically in recent times.

As mentioned in chapter 1, any reform has to be Islamic in the sense that the frame of reference has to be Islam and its sources. The reformers that I have quoted whether in the seminaries or otherwise, need to keep in mind that besides the normal procedures for extrapolating laws as explicated in legal theory, their edicts should not contravene normative ethical axioms as understood by people of sound mind. Equally, they should not be contrary to what reason would rule. Rulings should be applicable in contemporary times and not be harmful or harassing a segment of a society. This shift of emphasis has led to bitter struggles and to accusations and refutations.

The focus on the ethical underpinning of a new form of *ijtihad* does not mean that the canonical texts are to be rejected or neglected; rather, they are to be reinterpreted and conjoined to moral imperatives. The Qur'anic admonishment that "God knows, and you do not" (2:216) is an important reminder to Muslims that revelation is a ubiquitous part of the Qur'an's moral and legal trajectory and that Muslims cannot disregard textual injunctions in their judicial deliberations.

The Deficiencies of Contemporary of *Ijtihad* and a Time for Change

The present form of *ijtihad*, which was developed in the middle ages, has not produced a coherent methodology that can effectively respond to the challenges confronting contemporary Muslims. As I discuss in the next chapter, contemporary jurisprudence is confronted with the task of revamping its ethical foundations, methodology, and epistemological assumptions. These are the principles and laws that instruct jurists on ethical and epistemological considerations in their juridical deliberations. They also dictate which sources to use, which transmitter to rely on, what methodology to follow, and so forth.

Despite the Shi'i claim that the doors of *ijtihad* have always been open in their school, the fact of the matter is that the process of deducing rulings is confined to extrapolating them from the sacred texts and the use of procedural and secondary principles. Such an approach means that new contingencies are discussed primarily in light of and deduced from the sacred texts and erstwhile juridical

[118] Haydari, *Ta'ammulat Intiqadi dar bareye Mabani-ye fiqh-i Mashhur*.

contributions that addressed them. This strategy is not tenable in the present-day context, where the *fuqaha*' are confronted with major moral and practical dilemmas from their followers on a regular basis. These require solutions that the textual sources and procedural principles cannot always provide. Even though *ʿaql* is putatively an independent source of law in Shiʿism, it is hardly employed in generating new laws when the other sources fail to produce an effective ruling. As discussed in chapter 2, *ʿaql* is invoked only when texts are silent and even then it is deployed within the parameters of *al-usul al-ʿamaliyya*.

The method of deducing an edict not only should be based on rational and textual sources but also, more importantly, should be pragmatic. Since laws impinge on the lives of people, a *mujtahid* has to consider the social ramifications of his edicts. Without social awareness, his rulings might inflict difficulties and even contradict the objectives of the *shariʿa*. This point is astutely expressed by the twentieth-century Sunni scholar Mohammed al-Ghazali (d. 1996). He states that jurists use texts as shields against reason and rationality. In the process, they use the *shariʿa* to represent irrational or unreasonable propositions.[119] Instead of critically engaging the texts, scholars shift their moral responsibilities to the text. In the process, the moral and rational autonomy of the individual, which are emphasized by the Qur'an, are undermined. Moral engagement, reason, and autonomous human agency are replaced by faithful and strict adherence to the textual sources.

In expounding some of the deficiencies of the current form of *ijtihad*, Kamal Haydari complains that when confronted with questions regarding current forms of business transactions, the *fuqaha*' consider them valid only if they accord with the three traditional categorization of business dealings discussed in earlier jurisprudential texts. Such a response is problematic because jurists do not study the characteristics of modern business or economic transactions. Instead, they rely on the research and studies done by earlier scholars in the field. He states:

> For instance, we see that al-Hasan ibn Yusuf al-Hilli, known as ʿAllama studied the subjects prevalent in his time carefully and did research on the conditions set by *ʿurf* for every transaction, within the framework of general *sharʿi* principles. Then he issued a *fatwa* on whether a transaction is permissible or prohibited. Assume that ʿAllama studied *mudaraba* in its usual form at his time, according to which one side of the contract is the investor, and the other side is the worker. In his time, *ʿurf* required that the investor pay capital in cash—gold or silver—and the worker had to reciprocate with physical labor. Thus, ʿAllama derived the conditions for such contracts based on the *ʿurf* of the intellectuals

[119] Khaled Abou el-Fadl, *Reasoning with God: Reclaiming Shariʿah in the Modern Age* (Lanham, Maryland: Rowman & Littlefield, 2014), 261–62.

> at his time. So, his *fatwas* on the subject were predicated from his *'urf* of the intellectuals in his time.
>
> The question is whether, after eight hundred years since the time of 'Allama, *'urf* remains the same or not. There is no doubt that it has changed as the *'urf* of intellectuals and their lifestyle changes in different times and places. At that time, for instance, no more than three types of business (*tijara*) transactions were known. Today, however, the *'urf* of intellectuals recognizes ten types of business, for example. In his time, 'Allama studied all aspects of the three types of business, which were common then, and then adopted a position on them. But [now] we have ten types of partnership in business (*shirka*) and when we ask a *faqih* about them, he answers: if the type of partnership in question comes under one of those three known categories, it is permissible! The reason behind such a response from a contemporary *faqih* is that he has neglected to do what 'Allama did in his time.[120]

Haydari adds that jurists have not been able to respond to questions on the modern banking system due largely to their unfamiliarity with the subject matter. Similarly, Baqir al-Sadr states that transactions such as leasing, share-cropping, and partnership that were stated in previous juristic works reflect the economic conditions that existed 800 or 1,000 years ago. Since the nature of economic transactions have changed and are more complex now jurists must become fully acquainted with present-day economic transactions so as to deduce appropriate rules from the general principles of Islam.[121]

Another weakness with the current form of *ijtihad* is that there is a distinct cleavage between the moral and legal spheres. At the moral level, Muslims are told to behave ethically in that they cannot cheat or deceive anyone, including non-Muslims. In contrast, the rulings in the juridical field are distinctly different. Ayatullah al-Khu'i, for example, opines that it is permissible for a Muslim to steal from a *kafir*.[122] Murtaza al-Ansari states that it is lawful to backbite or slander Sunnis, since they do not accept the *wilaya* (authority) of the Shi'i Imams.[123] Recently, in a discussion that was posted on YouTube, Kamal Haydari was widely condemned by the seminarians in Qum for publicly stating that most Shi'i scholars believe that, although they are to be treated as Muslims in this world, Sunnis will be judged and considered as nonbelievers in the next. Haydari was not incorrect, since many jurists did (and some still do) hold that view.[124]

[120] Haydari, *Ma'alim al-Tajdid al-Fiqhi*, 83–5.
[121] https://www.al-islam.org/trends-history-quran-sayyid-muhammad-baqir-al-sadr#comment-0.
[122] Al-Khu'i's *fatwa* is cited in al-Husayni, *Ahkam al-Mughtaribin*, 400, fatwa #1221.
[123] Murtada Ansari, *Kitab al-Makasib* (Beirut: Mu'assasa al-Nur li'l-Matbu'at, 1990), 40.
[124] Many Shi'i jurists consider Sunnis as *kafirs* in the hereafter. See for example, al-Khu'i, http://lib.eshia.ir/10155/5/94; http://lib.eshia.ir/10155/1/504; Najafi http://lib.eshia.ir/10088/22/62; Majlisi, http://lib.eshia.ir/71860/8/368.

The unethical and discriminatory tenor of contemporary *ijtihad* is also discernible by a reading of contemporary legal manuals. There is much discussion on topics like sleeping with slave girls, temporary marriages, polygamous and child marriages, and that the testimony of a woman who sights a new moon cannot be accepted. Many scholars have expressed serious reservations at the immoral and irrational nature of past and present juridical precepts. For example, Eshkevari argues that many laws issued by jurists are neither just nor rational.[125] Others have argued that a ruling that contravenes commonly accepted notions of justice is wrong.[126]

In their attempts at revising Shiʿi legal theory, reformers can invoke various interpretive devices like *ʿaql*, *ʿadl*, *ʿurf*, *maqasid*, *maslaha*, and *zaman wa makan*. In addition, they can also resort to secondary precepts such as *la haraj* (no difficulties), *la darar*, and *maslaha* in modifying the law as and when required. In order to be resourceful a jurist has to fathom the historical and ethical trajectories of the sources, that is, he must comprehend the historical circumstances and epistemological parameters in which the specific ethical norms were negotiated. This would entail comprehending the dynamics of the text and the specific contexts it had to engage in.

Among contemporary Shiʿi reformers, Mohsen Kadivar is a *mujtahid* trained in the seminary in Qum and a former student of Ayatullah al-Muntaziri. He is highly critical of the current form of *ijtihad*, claiming that it is inadequate to address present-day needs since its methodology amounts to making minor adjustments in the form of incorporating secondary principles taking into consideration changes in time, place, custom, and the needs of the people. Such juridical tools are subjective and casuistic at best and are often predicated on the predispositions of a scholar. Scholars like Kadivar argue that, "only a new epistemological foundation of *ijtihad* and a modification of Islamic legal thought (which he calls structural *ijtihad*) can effectively respond to modern challenges that are raised in the fields of medicine and bioethics. They can also help revise the laws governing apostasy, human rights, and disproportion gender rights."[127]

Another seminarian, Ahmad Qabil, is also critical of the discriminatory rulings. Rather than seeking hermeneutical and epistemological changes, Qabil's reformist agenda is more entrenched within the juristic culture. He argues that religion cannot prescribe anything that is unethical or contrary to reason. Qabil further claims that just as revelation in the early period of Islam was congenial with social norms and the *sira al-ʿuqala'* of its time, contemporary laws and interpretations of Qur'anic precepts should be based on the same principles.[128]

[125] Ghobadzadeh, *Religious Secularity*, 76.
[126] Masʿud Aghayi, "Ijtihad va Tahavvol," in *Ijtihad va-Zaman va-Makan*, 1/26.
[127] Mavani, *Religious Authority*, 226. Kadivar does not elaborate the methodology or form the new *ijtihad* would take.
[128] Jahanbakhsh, "Rational Shari'ah," 8–9.

Conclusion

The present chapter has argued that for most Shi'i jurists, *'aql* is a possible rather than an actual source of law. This is because the functioning of a reason-centered *ijtihad* is constricted by epistemic parameters that inhibit moral rationalism to pass any judgments beyond scriptural boundaries. Thus, even though a *mujtahid* may acknowledge that a particular ruling is immoral or that it contravenes the judgment of the *'uqala'*, his scripturally derived edict is prioritized over a prescription determined by moral rationalism. Due to this, juristic reasoning often conflicts with moral verdicts.

This chapter has further argued that the suppression of certain embarrassing or problematic *fatawa* is an indication of the failure of traditional *ijtihad* to come to terms with modern moral and social challenges. Instead of revising previous rulings many jurists opt to disregard or omit them from their treatises. The primary reason for the conflict between the legal and ethical dimensions in Islamic jurisprudence is because the underlying principles of *ijtihad* are more text than reason or morally based. The juristic insistence on applying certain legal rather than rational methodologies in textual hermeneutics can corrupt the integrity of a text. Such restrictive interpretive methods can also stultify the dynamism of Islamic law. The juristic contention that all rulings must stem from particular epistemological frameworks further exacerbates the tension. The clash between the legal and the ethical imposes great responsibility on jurists to make judgments based on ethical considerations. The Qur'anic ethical outlook must be viewed as a starting point for the development of an Islamic moral rationalist framework that will eventually challenge and transform juristic prescriptions.[129] This is the theme of the next chapter.

[129] Ali, *Sexual Ethics and Islam*, 150.

5
The Neo-*Ijtihadist* Phenomenon

Highlighting the shortcomings and deficiencies of an existing legal system is not difficult especially for one that has undergone through many revisions since the eighth century. It is much more challenging to come up with some possible avenues for amelioration and remedy. Given the deficiencies of traditional *ijtihad* that I have highlighted, the present chapter evaluates and considers some of the interpretive strategies and epistemological frameworks in the current form of *ijtihad*.

My basic thesis is that the current form of *ijtihad* is too text-centered and needs to be replaced by what I call *neo-ijtihadism* and that, should this occur, the transition could have major ramifications on the genre of rulings pronounced by the juristic interpretive community. The term "neo-*ijtihadism*" refers to a different form of *ijtihad* that postulates diverse methodological and epistemological principles and approaches to juristic inferences. These principles seek to ameliorate some of the weaknesses in the traditional form of Islamic legal theory by going beyond the normative texts and procedural principles outlined in the previous chapters. Neo-*ijtihadism* also incorporates many of the strategies and interpretive methods and tools I have discussed before.

To be sure, neo-*ijtihadism* does not mean a complete break with or the abjuration of the current form of *ijtihad*. Rather, as discussed in this chapter, neo-*ijtihadist* scholars propose different exegetical principles that a new form of *ijtihad* could deploy so as to extrapolate more ethical, rational, and pragmatic genres of juridical injunctions. Many of the scholars that I have mentioned in this study can be termed neo-*ijtihadists*. These include reform-minded scholars such as Soroush, Shabistari, Kadivar, Fanaei, and Qabil. It could also include reformist seminarians like Fadlallah, Damad, Sane'i, Kamal Haydari, Bujnurdi, Jannati, and Shams al-Din.[1]

Since the cycle of interpretation is a continuous process, there is no final or perfect rendition of the sacred sources. Neither is there a single, valid, and immutable hermeneutic of the sacred sources that can be privileged over others. Neo-*ijtihadist* scholars seek to establish new normative principles that guide

[1] Of course this does not mean that these scholars necessarily agree on the form and contents or strategies of neo-*ijtihadist* discourse. There are many differences on their vision of revising *ijtihad* and *usul al-fiqh*.

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the jurisprudential process so as to revise juridical rulings based on the overall objectives of the *shari'a* like justice, equality, freedom, and respect for human dignity.[2] Apart from engaging ritual matters like prayers, fasting and the laws of purity, neo-*ijtihadists* maintain that there is a need to search for a more pragmatic interpretation of Islamic revelation so as to make social interactions more humane and inclusive especially in those sections of the juridical corpus which exhibit prejudice and accentuate the preponderance of Muslims over other religious groups.

Hence, when conceptualizing a new form of *ijtihad*, neo-*ijtihadism* challenges scholars to rethink and revise not only the earlier juridical pronouncements but also the precepts, methodologies, and epistemological assumptions on which the Shi'i legal tradition is founded. The epistemological transition entails understanding the texts in their original sociocultural settings and comprehending the objectives and rationale of the texts so as to apply them to a new context. Determining the authenticity of a tradition is only a part of this process. There is a concurrent need to understand the historical factors that generated a text and to analyze the procedures that led to its particular interpretation.

In other words, there is a need to investigate the totality of the circumstances that led to a text and how its particular interpretation was constructed and defined. It is also important to understand how the early Muslims understood and applied certain traditions or phrases within a text through their own lived experiences and whether the text and its earlier understanding can be applied today. This requires a historical and contextualized reading of the revelatory sources so that new rulings can be generated based on the spirit rather than the letter of the sacred texts. Knowledge of the context and reasons of revelation will also help determine whether a verse or tradition was universal or temporal in its application.[3] Without re-examining the foundational principles, attempts at reformation will result at best in haphazard and unsystematic exposition of juristic rulings that provide temporary relief from difficulties a person may endure.

The dilemma confronting neo-*ijtihadists* is exacerbated by the fact that most '*ulama*' do not contextualize or trace the historical evolution of Islamic law and the sociohistorical forces that shaped the decisions made by the earlier juristic interpretive communities. For example, the Qur'an mentions the payment of the *zakat* eighty-two times, but it does not fix the rate at which it is payable. Based on traditions from the Prophet and Imams it has been fixed at the same rate since the seventh century, namely, 2.5 percent. As is obvious, this rate is exceptionally low to cater for the economic and social demands of contemporary Muslim

[2] Mohsen Kadivar calls this "goal-oriented Islam" (*Islam e-qayat gera*). Hunter, *Islamic Reformist Discourse in Iran*, 292.

[3] Shams al-Din, *Al-Ijtihad wa'l-Tajdid fi al-Fiqh al-Islami*, 13.

societies. The recalcitrance of the *'ulama'* to adjust the rate of *zakat* has forced most Muslim governments to introduce and levy supplementary taxes in order to accommodate the deficits in their budget. In fact, because of the intransigence of the *'ulama'* to adjust the rate of *zakat* and the introduction of government taxes, many Muslims cannot afford or refuse to pay the *zakat* tax. Ultimately, this has increased the level of penury in many communities. It has also forced governments to solicit secular remedies to resolve social issues within Muslim communities.[4]

The fact that calls for reformation of the legal system have come from both Western-trained scholars and those trained in the Shi'i seminaries in Iran and Iraq corroborates the contention being made that the inherited *fiqh* and current form of *ijtihad* do not address the multitudinous challenges that contemporary Muslims encounter. This view is further substantiated by Ayatullah Khumayni's establishment of an expediency council in Iran so as to enforce laws approved by the *majlis* (parliament) which the Guardian Council might dismiss as being contrary to the dictates of Islamic law.

Neo-*Ijtihadism* and the Qur'an

An Islamic reformation entails a re-evaluation of how the sacred sources are interpreted and applied. Historically, it was the jurists and exegetes who were engaged in composing commentaries of the Qur'an. Their methodology took the form of commenting on Qur'anic verses based on transmitted *hadith* reports, a narration of the historical accounts that were recorded in the Prophet's biographical (*sira*) literature, and statements from the occasions of revelation (*asbab al-nuzul*) literature and various other disciplines. They document and explicate the particular sociohistorical circumstances under which the relevant verses of the Qur'an were revealed. These were often accompanied by observations made by previous scholars regarding the verses in question.

In their exegetical enterprises jurists have also subjected Qur'anic verses to numerous interpretive processes employing various methodological techniques enunciated in *usul al-fiqh*. These include reconciling apparent contradictory verses by resorting to the principle of abrogation (*naskh*) or claiming that a particular verse was conditional or general whereas an opposing one was unconditional or specific to a particular occasion. Interpretive Qur'anic principles also

[4] Most Shi'i *fuqaha'* have ruled that *zakat* is *wajib* on nine items only, which do not include commercial transactions or income. This is premised on the overwhelming number of traditions that limit the items to nine. al-Najafi, *Jawahir al-Kalam*, 15/72. However, some jurists like al-Sistani consider paying *zakat* on business merchandise to be *ihtiyat-e wajib* (obligatory based on precaution). See al-Sistani, *Minhaj*, 1/367.

include that of *takhsis* (specification of a verse) and other forms of modifications on the basis of *hadith*, consensus, abrogation, and so forth.[5]

Other commentators took a distinctly theological approach to Qur'anic hermeneutics. They compared and contrasted the theological standpoints held by proponents of various theological and mystical schools and then proffered their own exegesis. This is evident in the proliferation of exegetical works produced by various Mu'tazili, Ash'ari, Sufi, and Shi'i scholars. As in the juridical field, Muslim exegetes have produced a wide array of interpretations of the Qur'an, invalidating thereby the concept of an "official Islamic interpretation" of a verse to which all Muslims are bound.

As neo-*ijtihadists* contemplate the revision of Qur'anic hermeneutics and the traditional exegetical literature, they need to bear in mind that the Qur'an's legal and historical import were conditioned by the specific sociopolitical circumstances prevalent in seventh-century Arabia and that many Qur'anic verses reflect and address the Arab milieu and customs of the time. This does not mean that the Qur'an's message cannot transcend the original context. In fact, any historical text can be read so as to extract its implications for a different setting.[6] Despite the contextuality of its message, the universality of the Quran lies in its ability to address human beings at all times within their own context. More specifically, the universality and integrity of the Qur'an are not compromised by the contextuality of its message. Viewed from this perspective, we should note that had the Prophet lived under different sociohistorical circumstances, the verses in the Qur'an responding to his experiences would indubitably have been different even though the essence and spirit of the Qur'anic message would have remained the same. Thus, as the sociocultural milieu changes, verses that address certain topics may no longer be tenable or applicable.

Additionally, when considering the application of the Qur'anic message in present times, there is a need to distinguish between the scripture and its subsequent exegesis. Neo-*ijtihadists* need to bear in mind that apart from the Qur'an even its exegesis was formulated in a particular sociohistorical context and that, like the jurists, the exegetes were also responding to the customs, values, and needs of their times based on their horizons of understanding. Scholars' views are based on their scholarly context. This includes multiple factors such as their legal and theological schools, preconceptions and horizon of understanding, and sociocultural environment.

Contemporary Muslims are not obligated to accept or endorse classical or medieval exegetical extrapolations. Just as the early Muslims understood the Qur'anic message in light of their sociopolitical world, contemporary Muslims

[5] Liyakat Takim, "Islamic Law and the Neoijtihadist Phenomenon," *Religions* 12, no. 6 (2021).
[6] Abou el-Fadl, *Speaking in God's Name*, 126.

need to do the same. Otherwise, Muslims will have to follow the same Qur'anic prescriptions as the earlier generation of Muslims did. This would entail accepting and endorsing practices such as polygamy (4:3), violence against women (4:34), warfare against non-Muslims (9:5), and estrangement from Jews and Christians (5:51) today. Undoubtedly, many of the laws stipulated in the Qur'an regarding warfare, slavery, and inheritance were responding to the sociopolitical realities at the time of revelation. Hence, the Qur'anic commandments dealing with historical issues are not to be construed as eternal or immutable.

This view contrasts sharply with those who view the Qur'an to be an unchangeable, divinely revealed text that should not be compromised or influenced by historical or temporal forces. As a matter of fact, many traditional jurists prefer the literal as opposed to the contextual approach to interpreting the text. The literalist approach diminishes the relevance of historical context for understanding the meaning of the Qur'an.[7] Such scholars have opted to reproduce a meaning of the scripture that was actually addressing an earlier generation of Muslims.

To be sure, Muslim scholars need to see the Qur'an as both a Divine and historical document. Criticism of the juristic approach to scriptural hermeneutics and its disregard of the contextuality of the Qur'an should not be construed as challenging the authenticity or inviolability of the Qur'an. It is the historicity rather than the sanctity of the Qur'an that is the point of contention here. Such criticisms merely challenge the view held by some scholars that Qur'anic legislations are not subject to reinterpretation or contextualization. In fact, by neglecting to examine the sociopolitical and historical background of the canonical sources, jurists have often made culturally specific laws universal and, at times, universal principles culturally specific.

The need to properly situate and historicize Qur'anic verses is seen in the case of the law on apostasy. Historically, the penalty for apostasy was imposed on those tribes that opposed and fought against Muslim governments.[8] The dissident tribes had not only revoked their allegiance to Islam but were also guilty of political treason by supporting political insurrection or movements against the Muslim polity. In all probability, it was because of this factor that in his letters to the tribes that were rebelling against him Abu Bakr did not cite a single Qur'anic verse vindicating the deployment of capital punishment against his opponents. Nor did he produce any Qur'anic verse to justify the measures that he would implement in the *ridda* (apostasy) wars. This was because the wars that he was about to engage in were more politically than religiously motivated. The situation of the

[7] Abdullah Saeed, *Reading the Qur'an in the Twenty-First Century: A Contextualist Approach* (New York: Routledge, 2014), 20.

[8] Abdulaziz Sachedina, "Freedom of Conscience and Religion in the Qur'an," in David Little, John Kelsay, and Abdulaziz Sachedina, eds., *Human Rights and the Conflict of Cultures: Western and Islamic Perspective on Religious Liberty* (Columbia: University of South Carolina Press, 1988), 53–91.

ridda wars and the threat it posed to the Muslim community are in stark contrast to that of a person who chooses to forsake Islam for personal reasons without agitating against Muslims or threatening the political establishment.

Furthermore, the stipulation of the death penalty for an apostate is not compatible with the Qur'anic verse on freedom of conscience (2:255) and the right to accept or reject a religion.[9] In fact, whenever the Qur'an mentions apostasy, it does not prescribe any earthly punishment for it.[10] From a moral point of view, it is impossible for God to decree the death sentence for an apostate especially after He has offered humans the right to choose between accepting or abjuring faith. More significantly, the Qur'anic verse granting human beings the right to choose between accepting or rejecting God's message is general, without any conditions attached. Equally, the traditionalist stance that once a person has chosen to become a Muslim or is born one, s/he cannot later choose to renounce Islam can be disputed. As previously noted, some contemporary jurists, including Ayatullah al-Muntaziri, have rejected the death penalty for an apostate. The view that the punishment for apostasy has more political than religious connotations is supported by Ayatullah Makarim Shirazi, who states that the death penalty for apostasy was instituted to preserve social order and to uphold the interests of the Muslim community. The death penalty is to be restricted to cases where apostates pose a threat to the national security (*amniyat-e umumi*) of the country.[11] Thus, the legal ruling concerning apostasy, according to these jurists, should be revised as it does not represent the Qur'anic prescription on this act.

A revisionist rendition of Qur'anic precepts also means that some of its injunctions that were seen as fair and just at the time of revelation may not be so today. For example, the *fuqaha*' claim that the inheritance portions as stipulated in the Qur'an are just and valid eternally even if the socioeconomic situation changes and dictates otherwise. The inheritance laws should be viewed as a moral trajectory so as to understand the concept of justice in the Divine text in the context in which they were revealed. In other words, if the socioeconomic structure of a society changes and demands that the inheritance portions be adjusted in keeping with the Qur'anic commitment to justice then the alteration would be in accordance with the Qur'an's moral (but not necessarily legal) trajectory. It is justice, rather than seventh-century social normative praxis, that should determine how a person's inheritance should be divided.

Historically, the Qur'anic rules of inheritance were premised on a tribal community where a woman was financially dependent on and provided for by her husband, father, or tribe. Women were given half the inheritance share of a man

[9] See also verse 18:29, where the Qur'an states that people have a right to accept or reject faith.
[10] See, for example, 3:90, 9:66, 16:106.
[11] N. Makarim Shirazi, "Latest Lecture about the Punishment for *Fitri* Apostates," *Maktab-e Islam* (1984): 17.

because social dynamics dictated that she should have no financial responsibilities. In the Qur'an (4:34) men were considered the *qawwamun* (maintainers) of women, since they were required to provide for the family. The Qur'anic laws on women's inheritance reflect their role in traditional societies. Since that tribal social structure is no longer extant and women share many of the financial responsibilities with men, the rules of inheritance should be re-examined to ensure a more just and equitable division of an estate. Especially in the West, a woman is often the sole earner in the family. To assume that the Qur'an would insist on a woman receiving half the share of an inheritance that a man does regardless of the financial responsibilities placed on her in future generations would be to penalize a woman for her gender, something that she had no choice over. This would be tantamount to treating her unjustly.

Ahmad Qabil argues along the same lines. He cites many traditions from the Imams to substantiate the view that in the Qur'an, men are apportioned double the share of inheritance due to their greater financial responsibilities. Qabil further argues that, logically, the effect is connected to the cause. Since the cause has now been removed or changed (as women also bear many financial burdens) the effect (women getting half the share of inheritance) should also be revised.[12] Given the fact that before the coming of Islam women were not able to inherit anything, it can be argued that the Qur'anic position on women is historically progressive, meaning that, if allowed to unfold, the progression would lead to an equal share of inheritance for women.[13]

The matter of unfair division of assets and the need to adjust the laws of inheritance is also applicable when a woman is widowed. If the husband dies, the wife inherits only an eighth of his estate if he leaves behind any children. If he has no children, she inherits a quarter of his estate. The remainder of the assets will be divided between his other heirs. Financially, this places her in a vulnerable position because she is dependent on the children or the husband's other heirs if she is living alone and does not have sufficient income. She is further disadvantaged because, according to Shiʿi law, a wife cannot inherit from the land of a house or even a garden or farm that the husband owned. Nor can she inherit from the proceeds of any land he may have possessed.[14]

The question of unequal treatment of women also arises in cases of divorce. A number of exegetes like Muhammad b. Jarir al-Tabari (d. 923), al-Qurtubi (d. 1273), Ibn Kathir (d. 1373), and Zamakhshari supported the notion of postdivorce spousal support (called *mutʿa al-talaq*) based on Qur'anic verses like 2:236,

[12] See his arguments in Ahmad Qabil, *Ahkam Banuvan dar Shariʿati Muhammadi* (Tehran: Shariʿat-e Aqlani, 2018), 48–52.

[13] Zayd, *Reformation of Islamic Thought*, 150.

[14] Sistani, *Islamic Laws*, 526, fatwa # 2779. Scholars like Bujnurdi and Fadlallah challenge the edict that a woman cannot inherit land from her husband. Fadlallah, *Nazariyya fi al-Manhaj*, 46–48.

2:241, and 33:49. However, most jurists did not recognize spousal support as obligatory.[15] For them, a husband is obliged to maintain his wife until the end of her *'idda* (waiting period). Once this period is over, he is no longer obliged to maintain or support her. This creates major financial hardships for her, especially as, in order to care for the children, she may have sacrificed the pursuit of further studies or may have turned down employment opportunities while she was married to him. The absence of spousal support makes her emotionally and financially vulnerable in the event of a divorce. In fact, Muslim women are frequently accorded more protection and rights under secular than Islamic law. An essential component in the reformist agenda is for neo-*ijtihadists* to revisit and revise statements in the exegetical literature to address such gender imbalances in Islamic jurisprudence.

In his discussion on juridical laws pertaining to women, Kamal Haydari contests the ruling that the blood money (*diya*) payable for the murder a woman should be equivalent to half of that of killing a man. Although the Qur'an is silent on the basis of the differentiation between the *diya* of a man and woman, the law is rooted in the social milieu of the time. The ruling was legislated in an era when gender hierarchy was considered natural. Additionally, it was rooted on the financial worth of a woman at that time. Along with other jurists like Sane'i, Bujnurdi, Mostafa Mohaghegh Damad, and Kadivar, Haydari states that since a woman is, at times, more responsible for the financial support of a family than a man, justice demands that the law on *diya* be revised to reflect the new reality regarding women's economic status.[16] In the interpretive process, neo-*ijtihadism* posits that justice rather than previous edicts should undergird Islamic jurisprudence. If the current social and economic dynamics dictate that women bear the same financial responsibilities that men do, then it is more consistent with the Qur'anic commitment to justice and fairness that women should receive an equal share of inheritance, blood money, and that provisions be made for spousal support when required.

Many Muslim scholars resist any changes to Qur'anic laws, stating that human beings have no right to alter what has been Divinely prescribed and legislated. Ironically, the same scholars have opined that even though it is permitted by the Qur'an, slavery is no longer appropriate and should be abolished. They also argue that the Qur'anic legislation on warfare, especially the sword verses (9:5,

[15] Mohamad Adam El Sheikh, "Post-Divorce Financial Support from the Islamic Perspective (*Mut'a al-Talaq*)," in Mahmoud Ayoub, ed., *Contemporary Approaches to the Qur'an and Sunnah* (London: The International Institute of Islamic Thought, 2012), 172–96.

[16] Haydari, *Ta'ammulat Intiqadi dar barey-e Mabani-ye fiqh-i Mashhur*. See also Mahrizi, *Mas'ala al-Mar'a*, 109; Ayatullah Mohsen Kadivar, https://en.kadivar.com/2013/05/24/revisiting-womena-rights-in-islam/ (accessed June 22, 2020); On Sane'i's ruling, see http://saanei.org/index.php?view=01,02,48,927,0; http://saanei.xyz/?view=01,01,09,10,0; Ayatullah Mohaghegh Damad https://www.kaleme.com/1394/12/24/klm-239495/?theme=fast (accessed June 23, 2020).

2:190–91) should be contextualized and that their relevance and application be confined to a particular time in history. Similarly, the Qur'anic verse on not taking Christians and Jews as friends (5:51) should be interpreted within a particular sociopolitical framework.

Ayatullah Fadlallah is critical of the traditional process deployed in deducing laws from the Qur'an. He complains that when interpreting the Qur'an, many jurists examine verses in isolation rather than focusing on the overall ethical and moral tenor of the Qur'an. For example, when commenting on the verse prohibiting wine and gambling (2:219) jurists restrict the proscription to the two items mentioned without stressing a crucial principle that undergirds these verses. The Qur'an intends to prohibit whatever is harmful or deleterious to a person's spiritual and physical well-being. Hence, this interdiction is not to be confined to intoxicants and gambling.[17] Based on this understanding, Fadlallah issued an injunction banning smoking.[18] For him, verses such as 2:219 highlight the Qur'anic prescription of refraining from and prohibiting whatever is detrimental to a person's health or well-being.

Increasingly, many jurists seek a rationale behind a particular legislative verse and draw general ethical and legislative principles from it. In the case of verse 2:229 (divorce is only permissible twice: after that, the parties should either hold together on equitable terms, or separate with kindness), Fadlallah interprets the verse to mean that a man cannot imprison or oppress a woman because God gave him the choice either to live with her based on the principle of justice or to free her in kindness.[19]

It is important to underscore that, in the discourse on *ijtihad* and Qur'anic hermeneutics, jurists often attach more significance to traditions than to the Qur'an itself. Even though the Qur'an does not deal with legal issues in great detail, many reformist jurists within the seminaries argue that the Qur'an should be the main criterion in determining whether to accept or reject traditions. This view is echoed by scholars like Muhammad Hossain Tabataba'i (d. 1981), the great Shi'i exegete of the last century. He states that most Shi'i scholars have treated traditions of the Prophet's family (*ahl al-bayt*), especially the non-*fiqhi* ones, along the same lines that Sunni scholars have treated the *ahadith* of the Prophet in that they accept traditions without comparing them with the Qur'an. Some Shi'i scholars have also argued that *hadith* can interpret the Qur'an even if the former contradicts the explicit meaning of the latter. This is akin to what some Sunni scholars have claimed that *hadith* can abrogate the Qur'an. Tabataba'i continues that today the Islamic sciences—that is, religious studies and Arabic

[17] Al-Husayni, *Al-Ijtihad wa'l-Hayat*, 38–39.
[18] See Fadlallah, *Nazariyya fi al-Manhaj*, 19.
[19] Ibid., 19–20.

literature—are delinked from the Qur'an to the extent that a person can study and master them without even reading or touching the scripture. Thus, eventually nothing will remain of the Qur'an except for reciting it to attain reward or to protect children and other family members from calamities.[20] Tabataba'i also complains that since his arrival in Qum in 1946, he has noted that the *tafsir* of the Qur'an is largely neglected. This, he states, is a major deficiency in the seminary's curriculum.[21]

In reality, many juridical edicts do not reflect the essence or ethical tone of the Qur'an. This can be substantiated by reviewing laws that regulate contentious issues such as apostasy, gender inequality, and the sanctity of the lives and status of non-Muslims. As we have seen in previous chapters, they often contravene the essence of the Qur'anic teaching but are preferred based on traditions narrated from the Prophet and Imams, consensus, and the legal derivations in *usul al-fiqh*.

The question of prioritizing *hadith* over the Qur'an is also raised by the aforementioned jurist Kamal Haydari. He complains that women's rights have been undermined in *fiqh* since many of the *fatawa* regarding women's issues like those of *diya* and child custody are based on the *hadith* instead of the Qur'an or rational considerations. Haydari suggests that those traditions that are diametrically opposed to Qur'anic values like social justice, human values, and integrity should be rejected. He further states that despite their claims of being Usulis, many jurists still adopt the Akhbari methodology in their *ijtihad* and prefer *hadith* over the Qur'an.[22] The demand for a new method of Qur'anic hermeneutics requires a different approach to the traditional form of exegesis which is heavily loaded with *hadith* quotations.

The overreliance on erstwhile Qur'anic exegesis and interpretations of *hadith* is also criticized by Ahmad Qabil. He maintains that the historical interpretive method with its emphasis on the grammatical and linguistic nuances that characterize every verse, the focus on traditions pertaining to a verse and the heavy citation of the views of previous exegetes have resulted in the ossification and rigidity of contemporary jurisprudence,[23] a point that is also emphasized by Fadlallah, who states that the dependence on and repetition of the views of previous scholars have resulted in the stagnation and ossification of *ijtihad*.[24]

[20] ʿAllama al-Sayyid Muhammad Husayn al-Tabataba'i, *al-Mizan fi Tafsir al-Qur'an* (Beirut: Mu'assasa al-ʿAlami li-l-Matbuʿa, 1970), 5/276. Mahrizi, *Mas'ala al-Mar'a*, 125. See also Fadlallah, *Nazariyya fi al-Manhaj*, 15–16.

[21] M. T. Misbah, "Naqsh `Allama Tabataba'i Dar Nahd-i Fikri Hawzeh `Ilmiyya Qum," in *Yadnama Mufassir Kabir Ustad 'Allama Sayyid Muhammad Husayn Tabataba'i* (Qum: Shafaq, 1942), 135–44. See also Hamid Algar, "Allama Sayyid Muhammad Husayn Tabataba'i: Philosopher, Exegete, and Gnostic," *Journal of Islamic Studies* 17, no. 3 (2006): 333.

[22] Haydari, *Taʿammulat Intiqadi dar bare-ye Mabani-ye fiqh-i Mashhur*.

[23] Mehran Kamrava, "Iranian Shiʿism at The Gates of Historic Change," 74.

[24] Muhammad Husayn Fadlallah, *al-Ijtihad Bayn 'Asr al-Madi wa-Afaq al-Mustaqbal* (Beirut: Markaz al-Thaqafi al-ʿArabi, 2009), 124.

Usul al-Fiqh and Neo-*Ijtihadism*

Besides revising the Qur'anic hermeneutics and exegetical literature, reformist discourse has also focused on revising *usul al-fiqh* and its methods and principles, since it is this discipline that jurists depend on most when issuing their edicts. To be sure, legal systems are fastidiously concerned with the correct process of methodical derivation of legal enactments, inner logic, and the extrapolation of rulings from the textual sources. In theory, a jurist extracts a ruling by applying certain fixed hermeneutical and legal principles to the sacred texts. Provided he applies the same principles of derivation correctly, any other jurist faced with a similar question would infer similar laws within certain parameters.

As I have shown in the previous chapters, Islamic jurisprudence is largely based and dependent on Islamic legal theory; unless the methodology, hermeneutical tools, and epistemology in the latter are changed, the genre of rulings in the juridical manuals will remain the same with minor changes in some rulings. Scholars like Mahdi Mahrizi admit that *usul al-fiqh* discourse has become overly technical and long-winded, often discussing topics that are either irrelevant or unnecessary. Discussions center on topics such as the subject of knowledge, the definition of and need for *usul al-fiqh*, the principles of derivatives (*al-mushtaqq*), the obligatoriness of a prelude to what is incumbent (*wujub muqaddam-e wajib*), and some of the subtle and nuanced points pertaining to linguistics.[25]

Usul al-fiqh discourse has also become convoluted, with jurists engaged in stating and valorizing particular legal points and endorsing or refuting the views articulated by other jurists. To be sure, many Shiʿi jurists within the seminaries have also become increasingly critical of contemporary *usul al-fiqh* and its methodology. Although they are part of the inherited jurisprudential heritage, these seminarians are critical of its methodologies and conclusions. Mahdi ʿAli-Pour, a contemporary scholar in Islamic legal theory, complains that the principles employed in *usul al-fiqh* today are the same as those used during the times of Murtada Ansari in the nineteenth century. Among the reasons for this stagnation is that topics which are relevant in contemporary times are not discussed; neither are different methodological and interpretive tools introduced.[26] Although the method and style of writing and presentation in the *usul* manuals may have changed, the topics, parameters, contents, and methodology have remained essentially the same.[27]

To be efficacious in present times, Islamic legal theory has to go beyond the traditional epistemological confines and use a wider range of hermeneutical

[25] Mahrizi, *Fiqh Pazhuhi*, 2/195–98, 203.
[26] ʿAli-Pour, *al-Madkhal Ila Ta'rikh*, 376.
[27] Al-Husayni, *al-Ijtihad wa'l-Hayat*, 14.

devices such as *sira al-'uqala'*, *'urf*, and the role of time and place in deducing new rulings. Most of these devices have been dismissed as being conjectural. Although new challenges have arisen, contemporary jurists still follow the juristic principles outlined by Muhaqqiq al-Hilli in the thirteenth century.[28] Kamal Haydari complains that in some instances, scholars spend up to seventeen, twenty, or even twenty-five years to complete an entire series of lectures on *usul al-fiqh*. Many topics that are discussed in *usul* classes are superfluous and are inapposite for the application of rulings today.[29]

Rather than focusing on concepts like the probative force of the apparent meaning of words, general and specific commands, conditional and unconditional sentences, and the probative force of isolated reports, neo-*ijtihadist* discourse has to be more wholistic in the sense that it should consider under what social and historical circumstances the Prophet and Imams uttered certain traditions. An analysis of the historical element in the classical articulation of Islamic law could impugn previous scholars' hermeneutics of the sources. Furthermore, course offerings on *usul al-fiqh* need to be more extensive and comprehensive by offering a wider range of courses like theories of textual hermeneutics, the critical readings of texts, literary criticism, and the principle of hermeneutical cycles so as to discern their possible signification in today's world.

The need to revise *usul al-fiqh* and its course offerings and syllabi is highlighted by the fact that present-day *mujtahids* are required to master only the traditional Islamic sciences like *usul al-fiqh*, jurisprudence, Arabic language, *hadith*, and biographical literature, and in some instances logic. According to al-Khu'i, a *mujtahid* is required to be proficient in only three subjects, Arabic, *usul al-fiqh*, and *'ilm al-rijal* (the biographical sciences). Akhund al-Khurasani, on the other hand, states that a *mujtahid* needs to be familiar with *usul al-fiqh* only.[30] He is not required to study or master subjects like Qur'anic exegesis, the historical development and evolution of Islamic law, ethics, the social or historical circumstances that led jurists to issue particular rulings or the moral basis of Islamic law. A *mujtahid* is also not required to be acquainted with subjects like sociology, psychology, theories of social change, economics, and so on. These subjects will definitely impact the genres of rulings that a *mujtahid* issues.

An important element in neo-*ijtihadist* discourse on reformation is the revision and nullification of laws that are no longer applicable. In his discussion on the revision of previous edicts, Kamal Haydari raises an important point. If Islamic law could change during the short period of the Prophet's lifetime, it is unreasonable to expect it to remain fixed and inert for fourteen hundred years

[28] Ibid., 46–47; 118–19.
[29] Sayyid Kamal al-Haydari, http://alhaydari.com/fa/2014/12/2940/ (accessed June 7, 2020).
[30] Al-Khu'i, *al-Tanqih fi Sharh al-'Urwa al-Wuthqa* [transcribed notes of al-Khu'i's lectures by Mirza 'Ali al-Gharawi], vol 1 (Najaf: Mu'assasa al-Khu'i al-Islamiyya, 2013, n.p.), www.alkhoei.net.

after that. There are many instances of laws being abrogated and altered during the time of the Prophet.[31] This indicates that laws are amenable to change even within a short span of time. If the historicity and mutability of Islamic laws is acknowledged, then there is a clear need to study and comprehend the early Muslim community and the factors that led to juridical changes in the early period of Islam.

Haydari further states since the precedents set and the agreement of previous jurists are neither sacred nor immutable, the *ijmaʿ* of jurists on any particular ruling should not prevent scholars from challenging and revising it. The juristic community today cannot depend on a consensus reached at the time of Tusi as his understanding and those of other scholars around him were conditioned by certain mitigating factors during their times. However, many edicts currently circulated in the seminaries are often grounded on the consensus of previous scholars.[32] A ruling can sometimes vary between different communities during the same time period. The ruling regarding a father's consent for the marriage of his virgin daughter, for instance, might be valid in some traditional Muslim societies. In such communities, girls live with their families and under their protection until the time of marriage. Thus, it is reasonable to argue that the father should have a say in and consent to the marriage of his daughter. Such a rule, however, is not applicable to girls living independently in the West, as they are able to provide for themselves and are not under the custody of their families.[33] Thus, the consent of the guardian is not required under different circumstances. Such mitigating factors are often neglected in the seminary discussions.[34]

Kamal Haydari, who is a strong advocate for legal change, also acknowledges that due to the plurality of readings of Islamic texts, it is not possible to determine or identify an absolutely correct or false opinion. Religious knowledge cannot be complete or beyond reproach, since no scholar can claim that his interpretation is absolutely correct and cannot be advanced further. Hence, it is correct to claim that there are no permanent fundamentals or principles in religious knowledge, and that they are all subject to revisions.[35] Haydari's remarks resonate strongly with the observations of reformers like Kadivar, Shabistari, and Soroush that polyvalent readings of a text can coexist and that there can be no final or complete understanding of the sacred sources. This is especially so since

[31] See the examples of abrogating and abrogated verses cited by Mohsen Kadivar, "Human Rights and Intellectual Islam," 69.

[32] Haydari, *Taʿammulat Intiqadi dar bare-ye Mabani-ye fiqh-i Mashhur*.

[33] Ibid.

[34] Ahmad Qabil challenges the traditional view on child custody. He privileges the right of the mother over the paternal grandfather to obtain custody of her children upon the death of her husband. See Jahanbakhsh, "Rational Shari'ah," 12.

[35] Ali al-Ali, *al-Thabit wa-l-Mutaghayyir fi al-Maʿrifa al-Diniyya* [transcribed notes of lectures by Sayyid Kamal al-Haydari] (Beirut: al-Huda Publications, 2013), 47–53.

every exegete brings his/her own horizons of understanding to a text and that human consciousness and knowledge evolve perpetually. This inevitably leads to a multiplicity of interpretations of the same text.

In his assessment of the challenges confronting *usul al-fiqh*, Fadlallah claims that jurists often deduce new or variant rulings but are scared to proclaim them publicly due to a fear of criticism and condemnation that they may face, especially if their views contradict the rulings issued by previous, more illustrious scholars. Ahmad Qabil quotes Murtada Mutahhari as stating:

> The tendency in humans to conform is very strong. Among the jurists this problem is [also] strong. One jurist produces an inference on a case, but he does not have the bravery to express it. He goes and looks to find whether there are like-minded jurists of [his] time with the same opinion. There are few jurists who after going and looking and [finding] that no-one has said the same thing, have the bravery to declare their *fatwas*. In other words, the jurist is scared when he sees he is alone on the path.[36]

To be sure, an inherited law often militates against any kind of revision. This is because authority is attached to the views and readings of the preceding jurists. There is much pressure on jurists to preserve and practise the law as prescribed and transmitted from previous generation of scholars. Through their hermeneutics, jurists determine how a text is to be interpreted. With time, and especially if their readings of a text gain currency, the appraisals of jurists can become sufficiently ensconced to assert a normative and exclusivist reading of a text.

These jurists construct a normative and a standardized reading of a text, thereby defining and even limiting future juristic hermeneutics. The "orthodox" and normative reading of the texts would be difficult for subsequent scholars to disregard. They would have to introduce other hermeneutical principles and offer solid reasons for any deviation from the normative reading. The imposition of canonical assessments also has the effect of limiting or reducing subsequent juristic deviation. This creates a major obstacle to any revisionist rendition of a text.[37]

The pressure to perpetuate the inherited law and judgments of previous scholars means that a jurist may not share his research findings publicly. In this context, it is possible to discern two types of juristic edicts, *al-fatwa al-ʿilmi* and *al-fatwa al-ʿamali*. The former reflects the actual conclusion that a jurist has arrived at on a particular issue. However, in order to comply with the consensus reached by previous scholars or to avoid a hostile response from his peers or

[36] Ridgeon, "Ahmad Qabil," 10.
[37] On the authority of texts see Takim, *The Heirs of the Prophet*, 162–63.

from the masses, he chooses to opt for a *fatwa* that is based on precaution or one that is more common (*mashhur*). He therefore issues *al-fatwa al-ʿamali* for the general public. In reality, the same jurist has two different *fatwas* on an issue. The interdiction on shaving a beard, for instance, does not arise from the Qur'an or any authenticated tradition from the Imams; rather, it is based on the social conventions of the people who abided by the *shariʿa* (called *sira al-mutasharrʿia*) at a particular point in time.[38] Neo-*ijtihadists* claim that *sira al-mutasharriʿa* is based on the social conventions of a particular community and hence is transient and not eternally binding. In contrast to the rulings of other jurists, and especially in the absence of any opposing textual or rational evidence, Fadlallah rules that it is permissible for a man to shave his beard.[39]

Prominent jurists have often not declared their *al-fatwa al-ʿilmi* publicly. For example, in his research, al-Khu'i had concluded that the correct time for *maghrib* prayers is when the sun sets. This is the common view and is his *al-fatwa al-ʿilmi*. However, in order not to contravene an even more popular finding (*ashhar*) of other scholars, he states in his juridical treatise that correct the time for *maghrib* prayers is after darkness has set in.[40] Similarly, when discussing the sensitive issue of a person who has committed adultery with a married woman, al-Khu'i initially agrees with Muhaqqiq al-Hilli, who had stated that after she is divorced, a man can marry the same woman with whom he had committed adultery.[41] However, in his juridical tract that is widely available to the public, al-Khu'i rules based on what has been commonly accepted (*mashhur*). He states that, as a precaution, the person is prohibited from marrying her permanently.[42]

The pressure to succumb to well-known or commonly accepted edicts can be discerned from many other genres of juridical statements. When Khumayni was asked whether a woman can unilaterally divorce her husband, his response was, "Caution demands that first, the husband be persuaded, or even compelled, to divorce; if he does not, [then] with the permission of the judge, divorce is effected; but there is a simpler way, [and] if I had the courage [I would have said it]."[43] Examples such as these indicate that, in their attempts at revising juridical edicts, neo-*ijtihadists* have to boldly question the views of other scholars and publicly declare their findings.

[38] Al-Husayni, *Al-Ijtihad* wa'l-Hayat, 40.

[39] Ayatullah al-'Uzma al-Sayyid Muhammad Husayn Fadlallah, *World of Our Youth*, trans. Khaleel Mohammed (Montreal: Organization for the Advancement of Islamic Learning and Humanitarian Services, 1998), 226.

[40] Murtada al-Burujardi, *Mustanad al-'Urwa al-Wuthqa* [Compiled notes of lectures delivered by al-Khu'i in Najaf], 5th ed. (Najaf: Mu'assasa al-Khu'i al-Islamiyya, 2013), 11/184, 186.

[41] Al-Khu'i, *Mabani al-'Urwa al-Wuthqa*, 1/279–80.

[42] Al-Khu'i, *Minhaj*, fatwa # 1263.

[43] Mir-Hosseini, *Islam and Gender*, 165.

In his critique of the Islamic legal tradition, the reformist thinker Muhammad Taqi al-Mudarrisi (b. 1945) claims that contemporary *fiqh* has reached a point where it is no longer capable of responding to modern challenges. The legal system might have been potent and efficacious in the past, but given the new circumstances, the old paradigm is no longer able to address current issues. Al-Mudarrisi calls for a new jurisprudential framework that is radically different from the present one. He advocates the *maqasid* approach and suggests it should be based on a new hermeneutical strategy that accentuates the overall purpose and ethical understanding of the *shariʿa*. This paradigm focuses on the objectives of the laws instituted and modifies them when they are not able to fulfill those goals. His proposed model also aims to enhance social awareness in deriving legal injunctions.[44]

Textual Hermeneutics and *Usul al-Fiqh*

The preceding discussion has demonstrated that many reform-minded jurists within the seminaries are critical and seemingly dissatisfied with contemporary *usul al-fiqh*. In their attempts at revising the foundations and parameters of *usul al-fiqh*, neo-*ijtihadists* maintain that there is a need to distinguish between eternal and immutable scriptural values from those that are transient and socially conditioned. This distinction entails a more critical and nuanced approach to reading textual sources, one that reads the sources through the prism of ethics, justice, and what is considered proper by the people of sound mind. If the *shariʿa* endorsed certain laws at a particular time in history, they cannot be treated as permanent and unalterable.

An example of this is the institution of slavery. The selling and purchase of humans is unethical and an affront to human values. However, in a world where slavery was rampant and Muslims were often enslaved, Muslims could not be prohibited from capturing slaves who could be used to ransom Muslim ones. The Qur'anic endorsement of slavery cannot be extended to modern times, when the institution has been abolished. Texts that argue for the acceptance of slavery today should be rejected, since the permission to enslave was temporary. This is especially so because the Qur'an encourages and even requires the manumission of slaves in many verses. Hence, although contemporary juridical manuals still discuss the topic, slavery-related edicts should not be seen as a part of normative Islam. Rather than merely omitting the discussion on slavery in their texts, jurists should unreservedly prohibit the institution.

[44] Hasan Beloushi, "The Theory of *Maqasid al-Shariʿa* in Shiʿi Jurisprudence: Muhammad Taqi al-Mudarrisi as a Model" (PhD Thesis, Exeter University, 2014).

The need for a novel interpretive approach to Qur'anic hermeneutics that would address modern and challenging circumstances has made it essential to conceive of new methodological and interpretive tools that are quite different from the classical and medieval exegesis which were heavily reliant on *hadith* quotations and the views of earlier exegetes.[45] In revising the methodology deployed in *usul al-fiqh*, some scholars seek modifications in the hermeneutical stratagems traditionally deployed in *usul al-fiqh*.

For example, when confronted with contradictory traditions most Shiʿi jurists try to harmonize or reconcile them by using various exegetical tools explicated in legal theory. They differentiate and reconcile (*al-jamʿ*) between the mass of sound but contradictory *ahadith* so as to construct a unified and standardized legal code. If this is not possible, they will then try to eliminate the less favorable (*marjuh*) traditions. They will do this by systematically determining the merits of contradictory traditions and then by deciding which one to prioritize. Usuli manuals have created a typology of criteria so that some traditions are prioritized and preferred over other traditions. For example,

1. Accepting a tradition that is the most recent.
2. Accepting a tradition based on the qualities of the reporters (*sifat al-ruwat*).
3. Accepting that tradition which is followed by the majority of the Shiʿis (*shuhra*).
4. Accepting a tradition that concurs with the Qur'an.
5. Accepting that tradition which opposes the Sunni ruling on the case.[46]

Rather than resorting to prioritizing the *ahadith* based on the *murajjahat* (those which are more preferable), some scholars claim that traditions from the Prophet or the Imams contradict each other, as they were cited within the context of different social, political, and economic conditions of their times.[47] In other words, contradictions between *ahadith* are not due to deficiencies in the contents of the traditions or their narrators, rather, they arise due to the different time periods that the Imams lived under. In their attempts at harmonizing traditions reported from the Imams, Shiʿi legal manuals do not discuss the disparate social and political conditions between the earlier and the later Imams that would cause diverse genres of traditions being transmitted from them on the same topic.[48] Faced with contradictory traditions, jurists resort to various stratagems in order to

[45] See, for example, the thoughts of Zayd, *Reformation of Islamic Thought*, 27.

[46] Mahmud Hashimi, *Taʿarud al-Adilla al-Sharʿiyya* [compiled notes of lectures delivered by Muhammad al-Baqir al-Sadr in Najaf] (Beirut: 1975), 358–59.

[47] ʿAbd al-Jabbar al-Rifaʿi, *Qadaya Islamiyya: Fikr al-Imam al-Shahid Muhammad Baqir al-Sadr* (Qum: n.p., 1996), 240.

[48] Ibid. Fayd, *Vizhegiha-yi Ijtihad*, 165.

harmonize them. At times, they claim that the discrepancies between them arise out of *taqiyya* (dissimulation).[49]

In his discussion on the contradictory traditions reported from the Imams, Fayd al-Kashani states that the conflicting traditions from the Imams on a subject should not be resolved by resorting to principles of abrogation or the nullification of a ruling. Rather, he argues that the differing traditions reflect the disparate social and political milieu that the Imams lived in.[50] Al-Kashani maintains that a jurist has not only to examine the discrepancies between the traditions but also to study the conditions under which those traditions were uttered since changes in circumstances will inevitably lead to the Imams issuing dissimilar statements.[51] For al-Kashani, a legal ruling is connected to a particular *mawdu'* (situation). If it changes then the rulings must be altered to reflect the new circumstances.

Al-Kashani's observations are replicated by Kamal Haydari. In his critique of *usul al-fiqh*, he states that rather than trying to reconcile apparently contradictory traditions, the divergent statements uttered by the Imams in the *hadith* literature can be explicated by the diverse conditions under which the same subject was addressed. In essence, this means that rather than trying to harmonize contradictory traditions by resorting to various exegetical techniques, jurists should instead focus on the Imams' social and political lives and acknowledge that different times and places will ineluctably generate divergent rulings even on the same topic. Significantly, this principle can be extended and applied to our times, where current circumstances may dictate alternative readings of traditions than those understood by previous jurists.

A Revision of *Usul al-Fiqh* Epistemology and Methodology

An important element in neo-*ijtihadist* reformist discourse concerns the epistemology and methodology used in *usul al-fiqh*. On the surface the diversity in jurisprudential pronouncements may appear to be due to divergent interpretations and hermeneutical perspectives between neo-*ijtihadists* and traditional jurists. The differences, however, are more deeply rooted. In reality, the clash is between the rational and ethical presuppositions of neo-*ijtihadism* on the one hand and the methodology and quintessential epistemological assumptions of traditional *ijtihad* on the other. Neo-*ijtihadists* argue for an extensive rethinking

[49] For examples of how traditions are harmonized based on *taqiyya*, see Takim, "Offering Complete or Shortened Prayers?" 401–422.

[50] Mohaghegh-Damad, "The Role of Time and Social Welfare in the Modification of Legal Rulings," 217–18.

[51] Ibid., 218.

of the religious epistemologies and normative premises underpinning the legal system since they guide the jurists in their interpretive enterprises.

As mentioned in chapter 1, the philosophical hermeneutical tradition posits the notion that every exegete is influenced by his/her cultural milieu and presuppositions. These create "horizons" of understanding. A horizon can dictate, limit, or even expand the genres of questions an exegete poses and how s/he engages with a text. Due to this factor, hermeneutical strategies by different exegetes will likely result in variant readings of the same text. By postulating the notion of different horizons, the philosophical hermeneutical theory accentuates the role of human agency in textual interpretation and the possibility of continuous fluctuation and evolution in understanding texts. In the context of the present discussion on reformation and neo-*ijtihadism*, the moral rationalist presuppositions of neo-*ijtihadists* stand in complete contrast to the traditional jurists' text-centered epistemological assumptions. As such, their conclusions are bound to clash. Furthermore, the foundations of a legal system play a significant role in helping a jurist decide and prioritize between the different genres of proofs he encounters. There is a need therefore to examine the ethical and rational foundations and presuppositions of *fiqh* in which such conflicts are rooted. This hermeneutical enterprise involves engaging the epistemology that undergirds the legal edifice.

The main challenge confronting neo-*ijtihadists* today is not jurisprudence itself; rather, the challenge lies with the ethical foundations and hypothesis as well as the epistemological assumptions that undergird contemporary Shiʿi legal theory. In his discourse on the topic, Kadivar states that there is a crisis in Usuli epistemology. In advocating for a restructuring of *usul al-fiqh*, he contends that the *shariʿa* should be viewed in terms of moral rationalist propositions than mere juristic prescriptions. The structural *ijtihad*, as he calls it, entails "definitive epistemological, cosmological, ontological, anthropological, sociological, psychological, and theological changes so that juristic reasoning and *ijtihad* becomes more ethical and practical in their outlook."[52]

The form of *ijtihad* he advocates would have its own source principles, be based on a new theology (*kalam-e jadid*) and an ethical trajectory that is couched in the Qur'an. In addition, he proposes that justice be an indispensable component that undergirds Islamic jurisprudence. By focusing on justice, the new *ijtihad* would fulfill the objectives (*maqasid*) of the law on the one hand and the Qur'anic vision of creating a just social order on the other.[53] According to Kadivar, "If there were revisions in these foundations, without doubt the outcome of the jurisprudence of the *mujtahids* would have been different. We must not fear disciplined change

[52] Mavani, *Religious Authority*, 226. Takim, "Islamic Law and the Neoijtihadist Phenomenon."
[53] Kadivar, "*Ijtihad* in *Usul al-Fiqh*," 7–8.

in *shar'i* rulings. On the contrary, we should fear presenting temporary rulings as permanent, and thereby weakening Islam."[54]

In highlighting the need for a new form of *ijtihad*, Kadivar states that many problematic areas of traditional *ijtihad* stem from the juristic notion that espousing a particular religious tradition is a legitimate reason for the differentiation between rights accorded to human beings. Based on the concept of desert justice, classical and medieval scholars accorded Muslims greater rights and benefits than non-Muslims living under Muslim rule. Purportedly, this exhibited the preponderance of Islam over other religious traditions. Similarly, men were granted more rights than women. Kadivar calls for a transformation in the foundations underlying such propositions by adopting egalitarian justice, whereby all human beings, regardless of their gender, religious or cultural affiliations, would be accorded equal rights. Such changes would be compatible with contemporary standards of justice. The *ijtihad* that he proposes would also revise the major principles of Islamic legal thought. This means theology, ethics, the interpretation of scripture, and even material from the *hadith* literature that emasculate and undermine egalitarian justice would be modified.

Kadivar therefore proposes that rules that do not comport with current needs and values should be overlooked or annulled even if they are stated in the sacred texts.[55] For him, a commitment to *ijtihad* means that there should be a minimal role played by premodern understandings of the sacred texts. Kadivar's theory is clearly breaking new ground as far as the revamping of traditional forms of *ijtihad* is concerned. As he states, "There is no reason that the rules that fit Arabia in the seventh century should fit the modern time."[56]

Kadivar further claims that his *ijtihad* model is based on moral rational judgments. Egalitarian justice replaces desert-based justice, and various social, economic, and political factors are considered when revising a legal ruling. This is based on how the people of sound mind would judge, even if "there is explicit evidence in the Qur'an or the *sunna* validating a prior ruling."[57] Although he outlines the broad framework of structural *ijtihad*, Kadivar's theory is conceptually amorphous and does not clearly delineate or conceptualize what a different or new form of *ijtihad* would look like.

Like Kadivar, Abdolkarim Soroush also maintains that the current legal system requires major epistemological and methodological transformations. For him, *ijtihad* in the derivatives (*furu'*) is futile as long as there is no concurrent

[54] Kadivar, "Revisiting Women's Rights in Islam," 231.
[55] Kadivar, "*Ijtihad* in *Usul al-Fiqh*," 9.
[56] Ibid., 4.
[57] Hamid Mavani, "Two Shi'i Jurisprudential Methodologies to Address Medical and Bioethical Challenges: Traditional Ijtihad and Foundational Ijtihad," *Journal of Religious Ethics* 42, no. 2 (2014): 276.

application of *ijtihad* in the *usul* of jurisprudence. By this he means *ijtihad* in the foundational principles, that is, matters pertaining to the fundamental theological principles of religion like those of Divinity, Prophethood, revelation, the hereafter, theology, morality, and so forth.[58] Any reform in substantive law must be preceded by changes in the basic epistemological and ontological presuppositions and foundations of Islamic legal theory. Without engaging in *ijtihad dar usul* (*ijtihad* in foundations), Soroush states, revisions in the secondary principles would be casuistic and inconsequential at best.[59] The current form of *ijtihad* transforms the body but not the essence of jurisprudence. This is seen by the fact that although there are variations between scholars and some modifications in their rulings, the essence and methodology of their approach to *ijtihad* are essentially the same.

Ijtihad in the foundations of *usul al-fiqh* also necessitates a change in a scholar's juristic vision and outlook. So far, the seminaries' main focus has been *usul al-fiqh* and *fiqh.* The *hawza* (seminary) curriculum is structured in such a way that a *faqih* needs to follow the principles entrenched in Islamic legal theory so as to derive Islamic laws accurately. As mentioned before, Akhund al-Khurasani maintained that a scholar needs to be proficient in *usul al-fiqh* only to become a *mujtahid*. This strict and parochial vision of the juridical sciences should be revised so as to incorporate other disciplines that can impinge on religion and social sciences. These include various and disparate fields of learning such as theology, ethics, sociology, psychology, the interpretation of scripture, critical studies of religion, and so on. For a jurist, familiarity with other fields of learning is just as important as an understanding of the principles of Islamic jurisprudence. Such an understanding is a prerequisite for generating correct and updated judgments on matters pertaining to *fiqh*.

One of Soroush's most important works on epistemology is on the expansion and contraction of religious knowledge. Central to his theory is the distinction between the essence of religion and the human comprehension of it. According to him, the essence of religion is Divine and is composed of sacred and immutable truths.[60] The understanding of religion, on the other hand, is a human endeavor to comprehend God's message based on certain theories and sociohistorical constructs. As with all other fields of human knowledge, the understanding of religion is an interpretive process that reflects an interpreter's personal experiences, presumptions, and horizons of understanding. This genre of knowledge is pliable and subject to change with time, that is, it is subject to contraction and expansion. Whereas the essentials of religion do not need

[58] Shadi, *The Philosophy of Religion in Post-Revolutionary Iran*, 56.
[59] Dahlen, *Islamic Law,* 248–49.
[60] Soroush, *Qabz va-bast-i*, 45.

reconstruction as they are sacred and eternal, religious knowledge, on the other hand, can be continuously revised. This is because the understanding of religion is an interpretive engagement with the sources and subject to the same principles that apply to other fields of learning.[61]

Soroush goes on to argue that there is continuous interaction between religious knowledge and other disciplines. For him, "a particular religious knowledge is always affected by other knowledge systems, and as a result there can be no absolute and eternally correct interpretation of a given religion, including Islam. The logical conclusion of this statement is that different knowledge systems, being human products, are subject to change and are therefore fallible."[62] Significantly, the different spheres of learning are so deeply intertwined that a revision or development in one field almost inevitably impacts other spheres. Evolution and incremental growth in the social sciences and humanities, for example, is reflected in the field of religious knowledge.

Soroush goes further and claims that not only are religious understandings based on extrareligious sciences but that if the nonreligious fields undergo any changes, they will inexorably impact how the religious sciences are understood. Hence, our understanding of religion must constantly be connected to and altered by our understanding of subjects such as physics and metaphysics, science and philosophy.[63] Because of its connections with other disciplines, Islamic jurisprudence and the laws derived in it are subject to revision based on changes in other fields.

Since no understanding of religion is independent of extrareligious understanding, and as the different fields of learning are incomplete and interrelated, the understanding of religion, too, can never be complete at any point in time. The interaction between different disciplines also means that no field can remain immune to and be unaffected by developments in other disciplines. A change in a jurist's theological outlook, horizon of understanding, or methodology will inevitably impact his juridical views. For example, a debate about the rules of inheritance and women's rights can force theologians and exegetes to engage in a discussion on justice in Islam. When the concept of Islamic justice is more clearly defined, it could result in changes in many other verdicts in *fiqh*.

As mentioned in the first chapter, Friedrich Schleiermacher's theory of hermeneutics claims that by becoming more acquainted with a narrator's world and worldview, we can understand the text better. Becoming more familiar with God, His essence and attributes, and the Prophet is a major prerequisite for understanding the discourse on God. In this sense, not only does accepting a religion

[61] Jahanbakhsh, *Islam, Democracy and Religious Modernism in Iran*, 148.
[62] Shadi, *The Philosophy of Religion in Post-Revolutionary Iran*, 23.
[63] Soroush, *Qabz va bast-i*, 280.

depend on the acknowledgment of God's existence but also reaching a better understanding of the religion depends on becoming more acquainted with the essence and attributes of God.

Hence, theology can have a profound impact on *fiqh*. Becoming better acquainted with God will lead to a more profound understanding of a religion's teachings. As the discipline of theology expands and grows, so will religious knowledge and the understanding of scripture become transformed. The most important factor here is the extent of a jurist's acumen of other fields of learning. The more extensive this is, the better will he be able to see new apertures and apply information that other jurists cannot envisage.[64]

Soroush cites the example of the connection between the existence of the poet Saʿdi Shirazi (d. 1291–2) and the Qur'an. On the face of it, the two appear unrelated. The method that establishes Saʿdi's historical existence and the century in which he was born is the same as that which is used to prove the existence of the Prophet and the presentation of the Qur'an by him (i.e., the method of successive oral transmission). If a scholar refuses to accept the existence of Saʿdi despite multitudinous reports regarding his life and achievement, s/he will not only have denied Saʿdi's existence but will have also questioned the existence of the Prophet, something that is also substantiated by successive reports. This is because accepting one and denying the other on the basis of the same method is equivalent to adopting double standards.

Furthermore, information contained in the Qur'an regarding historical events and personalities, the existence of previous prophets, and that of the final Prophet of Islam can be negated with the denial of the existence of Saʿdi. If the veracity of the Qur'an's historical accounts is doubted, the integrity of its entire contents can be questioned. Therefore, a denial of Saʿdi's existence will entail the denial of other fields of learning.[65]

The question of interaction between diverse fields of learning and that changes in one discipline can impinge on another can be illustrated on the issue of the purity of non-Muslims in the exegetical and juridical literature. Early Shiʿi jurists like al-Murtada and Tusi had prohibited the consumption of food prepared or handled by all non-Muslims, including the People of the Book. This was based on their understanding of verse 5:5 in the Qur'an and that the word *najas* as used in verse 9:128 refers to the physical uncleanliness of all polytheists including the People of the Book. The only exception to this prohibition applies to dried food like grain.[66] Later on, al-Bihbahani quotes

[64] Ibid., 244; 390–92.
[65] Ibid., 379–80.
[66] Tusi, *al-Nihaya*, 582. See also David M. Freidenreich, "The Implications of Unbelief: Tracing the Emergence of Distinctively Shiʿi Notions Regarding the Food and Impurity of Non-Muslims," *Islamic Law and Society* 18 (2011): 76–78.

Muhammad b. ʿAli al-ʿAmili as stating that al-Sharif al-Murtada and Ibn Idris had claimed that Shiʿi scholars had reached a consensus regarding the impurity even of the People of the Book.[67] Al-Bihbahani's claim to a Shiʿi consensus on the issue is not accurate because, before his time, jurists like Ibn Junayd, al-Mufid, Fayd al-Kashani, and others had maintained that the *ahl al-kitab* were pure.

In recent times, many exegetes have claimed that the term *najas* as used in verse 9:28 refers to the spiritual as opposed to physical impurity of nonbelievers. Most jurists, including al-Sadr, have therefore ruled that the *ahl al-kitab* are intrinsically pure.[68] A number of jurists including prominent figures such as Fadlallah, Kadivar, Nasir Makarim Shirazi, Ibrahim Jannati, Saneʿi, and Soroush al-Mahallati (b. 1961) have extended the notion of ritual purity to include all human beings, Muslims or otherwise. For them, the notion of the divinely bestowed *karama* (dignity) mentioned in the Qur'an (17:70) refers to all human beings regardless of their religious affiliations.[69] Ayatullah Nasir Makarim Shirazi states, "when it comes to the ones who are not *ahl al-kitab*, no matter to which category they belong, there is also no evidence of their impurity. So, if we do not have any evidence for their purity either—due to it [purity of non-Muslims other than *ahl al-kitab*] being out of the context of our *hadiths*—then we apply the principle of purity by default (*asala al-tahara*)."[70] Ibrahim Jannati is more forthcoming. He states "a *kafir* is pure by essence . . . but he is unclean when it comes to his soul and spirituality."[71] Saneʿi is equally equivocal in his views, "All humans are pure. No one is unclean unless they have found the truth in Islam, and yet, nevertheless, express hostility against it. Such a person is exceptionally rare and should be given the benefit of the doubt. Thus, all non-Muslims, including Hindus, Fire worshipers, and so on are pure."[72] The foregoing demonstrates that an exegetical reassessment of the notions of *najas* and *karama* as used in the Qur'an impinges on the juridical ruling regarding the purity of non-Muslims and whether Muslims can consume food prepared by them.

[67] Al-Bihbahani, *Hashiyat Madarik al-Ahkam* (Qum: Mu'assasa Al al-Bayt li Ihya' al-Turath, 1998), 2/199, http://lib.eshia.ir/27746/2/199.

[68] Baqir al-Sadr, *al-Fatawa al-Wadiha*, 1/330.

[69] See, for example, https://kadivar.com/10862.

[70] Al-Yazdi, *al-ʿUrwa al-Wuthqa*, Nasir Makarim Shirazi's commentary, 1/64.

[71] Mohammad Ebrahim Jannati, *Risala Tawdih al-Masa'il* (Qum: Intisharat Ansariyan, 2002), 76. See also *Tahara va Najasa Ahl al-Kitab va Mushrikan dar Fiqh Islami* (Qum: Institution of Islamic Publishing, 1958), 1/356; https://hawzah.net/fa/Book/View/45246/

[72] Takim, "Revivalism or Reformation," 72. This was based on a personal interview with him in 2011.

Qabz va-Bast and Interpretive Pluralism

Soroush's theory of contraction and expansion and the interface between religion and other fields of learning lead him to claim that Islamic jurisprudence is malleable and open to diverse rulings since it is conducive to a large degree of interpretive pluralism. All juristic opinions are provisional and can be rectified. In the final analysis the conclusion a jurist arrives at is based on conjecture rather than certitude. Due to this, it is subject to contraction or expansion and can be challenged.

Soroush also distinguishes between the necessary and accidental elements of a religion. Among the first he counts the major beliefs of Islam, namely, the unity of God, the prophecy of the Prophet Mohammed, the justice of God, and belief in resurrection. Included in this category are principles such as freedom of conscience, justice, and human rights. These are not just religious values; they are actually universal ones. They are values of the first degree, which Muslims and non-Muslims agree on. All other beliefs and practices are accidental elements of a religion. They are the product of historical, cultural, and social contexts in which Islam developed. More specifically, they refer to decrees on the details of faith and ritual practices, which differ among religions. Since the latter are pliant and contingent, Soroush maintains a person's commitment to a religious tradition can be measured by her/his dedication to its intrinsic rather than contingent components.[73]

Soroush also challenges scholars to expand their juristic vision to accommodate major changes in *usul al-fiqh* epistemology. This would ensure that the foundations not just the substance of the law are revised. By distinguishing between religion and religious knowledge and based on the theory of contract and expansion, he is able to argue for a major overhaul in the Islamic legal system.

Another important aspect of reformation in the Islamic legal system is that of re-engaging the methodology employed in deriving rulings. New rules by themselves do not engender a new legal system. A new *ijtihad* cannot be created by simply replacing old rules with newer ones or by citing supporting Qur'anic verses and traditions. Rather, there is a need for a new or different methodology and epistemology for the development of a legal system that caters for a different set of circumstances. As I have discussed, the science of Islamic jurisprudence is a human construct that was established due to the necessity of deriving laws at a particular point in time. It involved the efforts of a juristic interpretive community that created devices to respond to situations as they arose. An important epistemological consideration is the need to understand not only *fiqh* but also, more importantly, the history of *fiqh*. There is a difference between history

[73] Hunter, *Islamic Reformist Discourse in Iran*, 78–79.

and the science of history; the latter is a human construct on how to study history. Similarly, the science of jurisprudence is a human construct on how to derive laws.

Understanding the history of *fiqh* would enable a researcher to study not only the divergent opinions held by various jurists on particular points of law but also the factors that led them to issue the rulings they did. A study of the history of jurisprudence would also enable a researcher to trace the provenance and development of jurisprudential rulings and the incorporation of various interpretive devices such as *darura*, *maslaha*, *la darar* etc. at different times in history. Identifying the mitigating factors and forces which led jurists to hold different opinions on the same subject in the past could be a catalyst for a jurist to issue different rulings on the same subject in present times.

Reformation and the Divine Will

One of the most important studies on reformation in the epistemology of Islamic legal theory in recent times is the work of Abulqasem Fanaei, an Iranian theologian-cum-philosopher in ethics. In his *Akhlaq-i-Din-Shinasi* (The Ethics of Religious Knowledge), Fanaei examines the ethical presuppositions that undergird current jurisprudence and delineates the reasons for some of the immoral and unjust injunctions in the juridical tracts. He also explores the epistemological and ethical challenges of modern Islamic jurisprudence and critiques the methodology jurists use in legal inferences.

According to him, the evidence that jurists depend on in extracting juridical laws is predicated on certain methodologies and presuppositions. In resolving conflicts between the different genres of proofs that a jurist may encounter, the following factors must be borne in mind:[74]

1. Creation and nature arise from the creative will (*irada-yi takwini*) of God. This embodies God's ethics.
2. God's legislative will (*irada-yi tashri'i*) follows His creative will, that is, His creative will forms the foundation and framework for His legislative will.
3. Our understanding of texts that represent God's legislative will is valid only if it is compatible with His creative will. In other words, jurists need to ensure that their juristic inferences from the sacred sources are compatible with the creative will of God, not just His legislative will.
4. The rights of all human beings are independent of His legislative will. Human rights are based on normative principles that all human beings

[74] See the discussion on this in Fanaei, *Akhlaq-i Din-Shinasi*, 463–66.

enjoy regardless of their beliefs, color, nationality, ethnicity, gender, and religion. Since these rights are intrinsic, they cannot be obliterated by legislative means. Stated differently, there are no Islamic and non-Islamic natural rights (*huquq-i tabiʿi-yi insan*). Any understanding of the sacred texts that negates the natural rights of some human beings based on the will of the Legislator is, in fact, a reading that contravenes the creative will of God, even though such a reading may be compatible with religious texts that purportedly reflect God's legislative will.

5. Denying human beings their fundamental natural rights contradict God's attribute of justice. If God's creatures do not have natural rights, then God's justice would be rendered meaningless.
6. Since God's creative will precedes His legislative will, it is correct to state that human rights can be discerned through reason, independently of revelation. This is because human rights cannot be contingent on God's legislative will, as they precede it. Since God has empowered His creatures with innate rights and the intellectual ability to recognize those rights, how can *ʿaql* acknowledge the rights of God but not the rights of human beings?

Fanaei's basic thesis is that since human beings are created by God, and as their natural rights are rooted in their very essence as human beings, and are therefore inalienable, these rights are acknowledged and accorded by God prior to His legislation. As such, even God cannot legislate a ruling that will contravene His creative will.[75] Fanaei's statement suggests jurists often overlook the creative will of God and instead accentuate His legislative will, even if the two are incongruent. This is the primary cause of the iniquitous laws in juristic works. Fanaei's assertions also indicate that many religious edicts are deemed immoral by people of sound mind due to their inconsistency with ethical principles like those that discriminate in matters concerning civil rights, between men and women, a descendant of the Prophet (*sayyid*) from a nondescendant, Muslim and non-Muslim, and so forth. These distinctions contravene the basic rights that all beings are entitled to.

Based on what has been said, it is not an exaggeration to state that one of the major challenges that contemporary neo-*ijtihadi* thinkers face is to go beyond extracting juridical rulings from the textual sources. Instead, they should initially focus on discerning and asserting the attributes of God that embody His creative will. It is His *irada-yi takwini* (creative will) that determines and asserts ethical and rational principles like the justice, equality, and the intrinsic dignity of all beings. These precede God's legislative will, and as such the two *iradat* (wills) cannot oppose each other.

[75] Ibid., 14, 45–46, 466.

The Epistemic Dilemma of Islamic Legal Theory

An Islamic reformation will also necessitate a re-examination and revision of the epistemological, ethical foundations and presuppositions of jurisprudence. These are the principles and regulations that guide a *faqih* so as to methodically interpret and apply the information he extracts, what proofs to employ, the criteria for assessing a reliable jurisprudential argument, and so on. The epistemological presuppositions also posit principles that guide a jurist on how to resolve various genres of contradictions that he may encounter in the sources.

As mentioned in chapter 2, in issuing legal edicts, jurists search for proofs that provide *qat'*. If an indicator does not provide certainty in itself, and is only based on probability (*zanni*), then its authority is contingent on establishing a validation for the permissibility of its usage. Unlike *khabar al-wahid*, there is no accreditation from the Lawgiver for judgments based on moral rationalism. Shi'i jurists argue that, without textual proofs, a jurist cannot rely on purely rational or independent moral judgments in inferring *shari'a* precepts as they are not indicative of the will of the Lawgiver.

In contrast to the traditional jurists, Fanaei's epistemology is centered on a moral rationalist horizon of understanding. He strongly disputes the juristic prioritization and preference of certain conjectural proofs over others and maintains that God speaks to human beings through both reason (*'aql*) and revelation (*naql*). God, who is the most wise, cannot grant human beings reason and then instruct them to neglect or disregard it, especially when reason informs them that what has been transmitted in a *hadith* report is unethical, unjust, or improper in a particular instance.

In critiquing the epistemological basis of contemporary jurisprudence, Fanaei invokes the concept of "secular ethics (*akhlaq-i secular*)," a term which denotes that ethical values are transreligious and predicated on human faculties like reason and moral intuition. The identification and acknowledgment of ethical concepts and values do not depend on God's pronouncements, as they are independent of religious decrees. Furthermore, they are not contingent on accepting a particular faith or revelatory text. Stated differently, ethical values and norms can be discerned by human cognition and validated by people of sound mind regardless of their religious or cultural affiliations.

These values and norms, which Fanaei terms "the *shari'a* of reason" (*shari'at-i aql*), precede and are independent of "the *shari'a* of jurisprudence (*shari'at-i fiqh*)."[76] According to the *shari'a* of reason, jurists ought to predicate their understanding of religious texts on ethical values especially when the ethical precepts conflict with textual proofs.[77] For example, the conception of God's justice is

[76] Ibid., 14.
[77] Ibid., 95.

premised on the view that basic moral values are independent of God's legislative commands and can be understood by humans independently of the scripture. The opposite end of the spectrum is the *shariʿa* of jurisprudence. According to this view, there are no rational or transreligious values or norms. Even if such norms exist, reason is not able to discern them independently of revelation and the transmitted sources.

For Fanaei, since ethics is transreligious and entrenched in the creative will of God, it is rationally impossible that a religious ruling could contain an antiethical component. The Lawgiver, who is committed to upholding the highest moral standards, cannot promulgate or endorse what is unethical. Similarly, He cannot forbid or prohibit what is ethically right and sound. The essence of the Lawmaker is important in illustrating the type of law He ordains. Moreover, He cannot ignore natural laws or violate duties that arise from these laws. Neither can the Lawgiver condone or ask anyone to violate basic ethical values like the equal rights of all human beings. This is because any infringement of human rights is a violation of the principle of justice, which is one of the attributes of God.

Another important consideration is that in legislating a law, jurists need to bear in mind that since they reflect God's creative will, ethical values are absolute and applicable to all human beings regardless of their religion, sect, culture, or gender. Since the *shariʿa* has an ethical framework, those readings of *shariʿa* laws that are not absolute and are prejudiced or discriminatory against a particular group are incompatible with ethical precepts as understood by rational beings. Texts that allow or promote discrimination between human beings should be construed as having been culturally or politically generated at a particular time in history. In other words, they are endorsed, transient, and mutable laws. Due to this, they cannot be generalized or treated as incontrovertible.

These epistemological assumptions that undergird the horizons of understanding for the advocates of secular ethics contrast sharply with those of the proponents of the *shariʿa* of jurisprudence or scriptural ethics. The latter maintain that ethics is epistemologically and logically dependent on religion. In contrast to secular ethics, theorists of scriptural ethics believe that the will and commandments of the Lawgiver is prior to moral rationalist commandments, and that moral values cannot be discerned with complete certainly independently of religion. According to them:

1. Human intellect is incomplete, whereas the Lawgiver's intellect is complete.
2. The *shariʿa* has come to rectify and perfect human reason which is incomplete and, at times, fallacious.
3. Jurisprudence rather than reason can pronounce human duties and responsibilities.

4. Therefore, jurisprudence precedes ethics. Proponents of the *shari'a* of jurisprudence or scriptural ethics conclude that only the juridical *fatawa* that are correctly derived from the textual sources are the correct expression of God's pronouncements.[78]

Rather than evaluating the validity of an ethical precept by a statement from the revelatory sources, proponents of the *shari'a* of ethics turn the arguments of the proponents of the *shari'a* of jurisprudence on its head. They claim that ethics is not, epistemologically and logically, dependent on any religion. Moreover, the validity of a jurisprudential pronouncement has to be measured with ethical values rather than the other way around. Jurists ought to assess the validity of their understanding of religious texts based on ethical precepts. Proponents of the *shari'a* of ethics also claim that while it is not possible to refute moral values based on textual evidence it is quite possible to reject a juridical *fatwa* based on moral rationalist pronouncements because moral principles precede and are independent of the legislative will of Lawgiver. In other words, even God is obligated to act in a moral way. Hence, values like human rights, justice, and so forth, are transreligious and transcultural.[79]

In essence, the root of the conflict between the *shari'a* of jurisprudence and the *shari'a* of ethics lies in their distinctive epistemologies and horizons of understanding. For the proponents of the *shari'a* of jurisprudence, ethics is subservient to law, whereas for the advocates of the *shari'a* of ethics, the law is subservient to ethics. This is one of the reasons that jurists sometimes issue conflicting rulings.

In critiquing the ethical and structural problems of contemporary *ijtihad* Fanaei also identifies and highlights its epistemological deficiencies. He further divides religious rulings into "rational," "irrational," and "non-rational" and argues that:

1. A "rational" rule (*fatwa khirad pazir*) is that which is supported by an independent rational proof, like the prohibition of injustice and the need to observe the rights of all human beings.
2. A "non-rational" religious rule (*fatwa khirad ghariz*) is that which has no independent rational proof against or in favor of it, like the obligation of fasting in the month of Ramadan, forms of prayers or the rate of paying the *zakat*.
3. An "irrational" religious rule (*fatwa khirad satiz*) has an independent rationale against it, like the stipulation that women do not have the same

[78] Ibid., 32–33.
[79] Ibid., 42.

> rights to divorce as men do or that there is no intellectual property rights, or that an apostate's life is not sacred.[80]

According to Fanaei, the third group of religious rules (irrational rules) cannot be decreed by the Divine since a transcendent deity is above issuing commands that deny women equal rights to divorce, or denies them the right to be guardians of their children, or discriminates one group of human beings against another, and so forth. Fanaei argues that since, by His very essence, God is above wrongdoing or moral vices, it is impossible for Him to issue irrational rules. Moreover, there cannot be any irrational rules in religion, because a just and wise deity cannot ask human beings to stop using their intellect in understanding and practicing religion. Thus, He cannot issue irrational commands.

God's sagacity and justice transcend His legislative powers. Thus, although Divine laws do not necessarily originate from rational norms, they cannot contradict them either. Indeed, even if they are supported by the sacred sources, attributing irrational, unethical, and immoral decrees to God is one of the greatest sins a person can commit. In other words, juridical ordinances that are incompatible with ethical values are not part of the absolute or ahistorical religion. If such decrees are found in a religious text, then either the text is forged, or if it is authentic, then the irrational jurisprudential rules are incorrect due to the methodology employed in deriving laws from the sacred sources.

Jurists must therefore identify the irrational rules and declare them invalid. In expounding the point, Fanaei compares the presuppositions of the *hawza*'s rationality (*aqlaniyat-i hawzawi*) with conventional (*aqlaniyat-i ʿurfi*) ones. According to him, the *hawza* rationality says:

1. God is wise. So, there is no irrational law in *shariʿa*.
2. It is, however, quite possible to find irrational rules in religious texts. We can only dismiss a rule as irrational if we are sure of its irrationality, this cannot be ascertained by mere conjecture.
3. It is possible that the rules which seemingly contradict conventional and extrareligious reason would not in reality be irrational. Thus:
4. A certain rule can only be deemed to be irrational if we are certain of its irrationality.
5. We are rational beings. However, the Legislator is the head of all rational beings and knows things that other rational beings are ignorant of.
6. Thus, it is only God, not us, who can identify and dismiss what we deem to be irrational rules.[81]

[80] Ibid., 242–43.
[81] Ibid., 245.

As opposed to the *fiqhi* rationality of the seminaries, the conventional (*'urfi*) rationality claims the opposite. It states:

a. God is wise. Hence, there cannot be an irrational law in the *shari'a*.
b. It is quite possible to find irrational rules in religious texts. However, there is no need to attain certainty in identifying and dismissing them. Rather, *'aql* is sufficient to recognize whether a rule is irrational or not. Reason even initiates the obligation to dismiss such rules as irrational and declares them void.

For Fanaei, the *'uqala'* have certain moral responsibilities as they are people of sound mind. They can recognize and identify irrational rules without recourse to textual proofs. Since God is the epitome and head of those of sound mind (*ra'is al-'uqala'*), it is God's judgment that must be followed. Thus, when certain rules are approved or disapproved by the people of sound mind or are deemed irrational, God is included in that group because He is the *ra'is al-'uqala'*. Thus, if God's judgment agrees with that of the *'uqala'*, He ratifies their judgment. If He does not approve their assessment, He will provide proper and incontrovertible proof to demonstrate that their judgment is incorrect.

The present discussion focuses on discovering or discerning the judgment of the *ra'is al-'uqala'*. The dispute, however, is not between the judgment of God as the head of people of sound mind with that of the *'uqala'*. Rather, it is between the conjectural claims of *'aql* and *naql* and on whether or not the head of people of sound mind has imposed certain rules in extrapolating injunctions. In other words, the contradiction here is epistemological and not a metaphysical or an existential one. The judgment of the *ra'is al-'uqala'* cannot, by definition, be different from that of the other *'uqala'*.[82] Stated differently, human reason is capable of recognizing and establishing the correlation between judgments of moral rationalism and Divine commandments. In case the two do not concur, God would have to furnish proof to prove to the *'uqala'* that their collective judgment is fallacious.

Fanaei also argues that to derive religious law from its sources, one must examine the principles of jurisprudential rationality. If these principles are replaced with ones that are approved by people of sound mind, religious texts would not produce irrational rules. Based on this, it is correct to conclude that:

1. Jurisprudential *fatawa* must be evaluated based on reason and according to rational criteria.

[82] Ibid., 247.

2. Irrational *fatawa* are not rooted in religious sources per se. Rather, they are the outcome of incorrect approaches/methods used to derive religious laws.
3. Rational critique of jurisprudential rules is the right of and obligation on all believers, not on jurists only.

According to Fanaei, the irrationality of some *fatawa* is rooted in the epistemological problem of replacing ethics with *fiqh*. If a jurist does not ignore or invalidate the dictates of moral rationalism, he would not find any jurisprudential proofs to issue an irrational *fatwa*. Many Muslim scholars and advocates of current jurisprudential rationality maintain that the *fatawa* are derived solely from the Qur'an and *sunna* and that moral rationalist judgments do not play any role in the derivation of legal rulings. They conclude, therefore, that whoever objects to an irrational or immoral *fatwa* has in effect defied and denied the statements of God and the Prophet.[83]

In contrast, Fanaei lays the blame for the irrational *fatawa* squarely on the improper application of the methodological and epistemological principles outlined in Islamic legal theory. If these were followed properly in accordance with the principles of the *shari'a* of reason, jurisprudential manuals would not contain irrational rulings which, in many instances, people of sound mind find highly objectionable. He further argues that scholarly critique of the *fuqaha's fatawa*, their principles of rationality, and objecting to the irrational *fatawa* that are anchored in current jurisprudential rationality will not render one an apostate or a heretic. On the contrary, objecting to irrational *fatawa* is an obligation on every Muslim.[84]

The Epistemological Basis of Conjectures in *Ijtihad*

In the Usuli view, both moral rationalist determinations and legal norms based on *hadith* reports are seen as conjectural. According to the epistemological principles established in *usul al-fiqh*, moral rationalist pronouncements are neither authoritative nor admissible in juristic inferences. In case they contradict *naqli* conjectures, the latter must be followed. Even if there is no contradiction, a jurist can ignore moral judgments and legal norms derived from rational sources and issue a ruling instead based on the principle of *asl al-ibaha.* Thus, in cases where a specific moral value is grounded on conjecture, it would not be regarded as valid in discovering religious commands or in challenging a jurist's ruling.

[83] Ibid., 248.
[84] Ibid., 249.

Apart from discussing the creative will of God and the reasons for irrational laws in the legal literature, Fanaei also critiques the epistemological foundations of conjectures in *ijtihad.* He questions the validity of the epistemological basis of the current form of *ijtihad.* Initially, he argues that epistemologically, both *'aql* and *naql* are variant forms of conjecture. Fanaei strongly disagrees with the jurists' assessment that when *'aql* and *naql* clash, *naql* should take precedence. How can *naql*, which is based on *zann*, tell us to ignore *'aql*, which is also grounded on *zann*?

Although jurists argue that *naql* has higher epistemic value (because it has been accredited by the Lawgiver) this is not always correct. The answer to the dichotomy between *naql* and *'aql* should be sought in the response of the *'uqala'*. Fanaei asks poignantly, "when two conjectures (*zunun*) contradict each other, which one do the people of sound mind rely on?" He states that they rely on the stronger and more reliable of the two conjectures.[85] For him, a stronger conjecture is one that is more ethical and acceptable to the *'uqala'*.

From a purely rational point of view, beliefs and religious rulings must be derived from trustworthy sources. When there is a clash, people of sound mind accept what appears more convincing and credible. While it is true that the *'uqala'* accept *khabar al-wahid* and *zahir al-kalam*, this acceptance is dependent on the assumption that another *zann* (of *'aql*) should not be stronger or be able to override it. Stated differently, the people of sound mind rely on an isolated *hadith* report as a trusted source only when there is no other conflicting and more reliable source of knowledge. Otherwise, they will abjure the *hadith* and accept the judgment of moral rationalism. By claiming that the *'uqala'* will reject *khabar al-wahid* if its contents are iniquitous, Fanaei is able to repudiate the argument of those who claim that an authentic *khabar al-wahid* must be accepted regardless of its contents because it has been accredited by the Lawgiver. As noted in the discussion on child marriage and sexual gratification in the last chapter, what is legally correct is not necessarily morally correct; in fact, the opposite could be the case.

By accepting the stronger of the two *zanns*, Fanaei argues that religious acts will be more likely to conform to the apparent ruling (*al-hukm al-zahiri*) and would be justified before the just and wise God even if the apparent law may differ from the actual law (*al-hukm al-waqi'i*). The two forms of conjecture have to be assessed based on the Divinely endowed intellectual faculties, which can independently discern the "right" thing to do under certain circumstances. By prioritizing *naql* over *'aql*, jurists are guilty of violating basic epistemic precepts. For them, it is the lack of probative value (*hujjiyya*) that prevents rulings based on moral rationalism from playing any role in the inference of legal precepts. In

[85] Ibid., 61–62, 252, 256.

this regard, it is quite ironic that although God cannot and does not issue decrees that the *ʿuqala*' deem immoral or unethical (since He is the *raʾis al-ʿuqala*'), the *fuqaha*' do it on his behalf.

Fanaei's epistemic outline resonates closely to mine, namely, in case of a conflict between reason and revelation, that proof which is based on moral rationalist principles should be preferred. Regardless of its authenticity, a tradition should be discarded if its contents are immoral in the eyes of the people of sound mind. Fanaei argues that declaring moral rationalist conjectures invalid and preferring *naqli* conjectures instead often results in iniquitous and improper rulings. He cites the example of the rights of authorship and intellectual property. Based on the current form of jurisprudential rationality, a jurist first searches for evidence of such a right and ownership in the Qur'an and *hadith* and, as he cannot find one, he acts on the precepts ensconced in *al-usul al-ʿamaliyya*. Basing his decision on the principle of *asl al-ibaha*, the jurist issues a *fatwa* stating that there is no obligation and hence no right of authorship or intellectual property in Islam.[86]

Even if it is not mentioned in the textual sources, a jurist needs to consider what moral rationalism dictates in the matter. He cannot simply negate the necessary moral and legal obligations on such issues since the authority of convention (*ʿurf*) is not contingent on God's explicit approval (His tacit approval, i.e., His silence/passive endorsement, suffices). In such cases, Fanaei suggests that the jurist should judge by what reason dictates and should rule that copyright and intellectual property rights do exist in Islam.

Proponents of *naql* insist that a *mujtahid* must accept the authority of *naql* and revelation. In fact, they argue, the intellect's shortcoming is the main reason for which human beings need religion, revelation, and Divine guidance. Moral rationalist commandments are valid only when they are certain and irrefutable. Consequently, to comply by *zann* is akin to following one's desires and temptations. To prove their point, proponents of *naql* quote Qur'anic verses that condemn the reliance on conjecture: "And most of them follow only conjecture; surely conjecture will not avail against the truth; surely Allah is cognizant of what they do" (10:36).[87]

Proponents of *ʿaql* argue that such verses apply to instances where the truth is patently clear and accessible to all but despite this, some people follow their desires and impulses. Such verses are considered advisory (*irshadi*) commands and reminders of one's rational and epistemic obligations.[88] They

[86] Ibid., 251. See, for example, https://www.al-islam.org/contemporary-legal-rulings-shii-law-ayatullah-ali-al-sistani/b-muamalat#copyright.

[87] See also "And follow not that of which you have not the knowledge [ilm]; surely the hearing and the sight and the heart, all of these, shall be questioned about that." 17:36.

[88] Fanaei, *Akhlaq-i Din-Shinasi*, 226.

are not normative or legislative (*tashri'i*) commandments, nor are they directive (*mawlawi*). Moreover, these genres of verses prohibit all types of conjecture and their application cannot be restricted to moral rationalist conjecture as assumed by the proponents of *naql*.

A blanket refutation of all forms of conjecture would require human beings to refrain from using their intellectual faculties altogether and would lead to skepticism about the validity of all rational perceptions. This, in turn, would mean that *naqli* proofs are invalid too.[89] Fanaei concludes that when the truth is neither clear nor accessible, and certainty is impossible or difficult to attain, both reason and revelation oblige us to act on conjectures. The interdiction on using rational conjecture would render revelation invalid as well.

A corollary to the view that when the two clash, *'aql* can overrule a *naql*-based ruling gives rise to the possibility that *shari'a* precepts based on revelation can be abrogated by reason. This is especially applicable when a particular ruling is an endorsed (*imda'i*) one and therefore temporary. If it is clear that the context of the original edict has changed and that the ruling is no longer relevant, a precept based on a *hadith* report, for example, can be abrogated based on the dictates of moral rationalism. If *'aql* can discern or infer jurisprudential laws, it can also abnegate them when they are no longer deemed to be relevant.[90]

It is noteworthy also that the presuppositions that Muslims depend on, like the proofs for the existence of God and the acceptance of Prophethood are also based on the very same reason which, according to the proponents of *naql*, is subject to possible delusions by desires and temptations. Thus, by declaring rational conjectures to be invalid because of the possibility of mistakes, the validity of *naqli* proofs and basic religious beliefs can be challenged too. This is akin to claiming that traditions from the Prophet and the Imams are valid only if we are 100 percent sure of their authenticity. Since no one claims that *naql* must be banned because of the possibility of false narrations, one cannot argue against the validity of rational conjectures because of the possibility of error in some of them.

Fanaei methodically challenges and undermines the epistemological parameters of the current legal system. More specifically, he refutes the contention that moral rationalist judgments have no role to play in extracting legal rulings. By invoking the concept of secular ethics, he claims that reason can discern the creative will of God independently of revelation. Due to this, the legislative will cannot contradict reason or the creative will of God. When *'aql* and *naql* clash, depending on the strengths of the proofs, the former can override the

[89] Ibid., 223.
[90] https://en.kadivar.com/2009/05/15/human-rights-and-intellectual-islam/.

latter. The presence of irrational and immoral rulings in the books of law is because the jurists have refused to accept this assertion.

The Dichotomy between Ethical and Juridical Pronouncements

The dilemma for Muslim reformers is that since moral rationalist determinations are based on human intuition and therefore deemed not to yield certitude, the Shiʿi legal system does not consider them to be sources for *shariʿa* precepts however just or ethical they may be. Textual sources, on other hand, which also do not yield certitude, are considered authoritative however morally wrong they may be, because they have supposedly been accredited by the Lawgiver. This is the epistemological dilemma that proponents of a moral rationalist reading of the *shariʿa* encounter. The insistence on interlacing authority with certitude has meant that rational judgments, however moral or rational they may be, have no significant impact on the actual inference of *shariʿa* precepts. Consequently, practices and customs like child marriages, the inherent deficiency of a woman, gender hierarchy, and laws surrounding child custody that were premised on seventh- and eighth-century Arab tribal culture are taken as permanent and immutable commandments. Such customs and normative practices are imposed on contemporary times even if people of sound mind find them unconscionable. This is one of the major epistemological deficiencies of contemporary *usul al-fiqh*.

Not only is there a dichotomy between ethics and law but also there is tension between the judgment of sound people and the law. Jurists argue that *sira al-ʿuqala'* accepts and acts on an isolated report if it is reported by a single reliable narrator. As I have countered previously, people of sound mind do not indiscriminately accept or act on a *hadith* report even if it is narrated from the Prophet or an Imam when confronted with the immorality or irrationality of the report. Stated differently, the same *sira al-ʿuqala'* which depends on *khabar al-wahid* that is transmitted from the Prophet or an Imam also insists that an iniquitous *khabar al-wahid* cannot have originated from them and should therefore be discarded. The *sira al-ʿuqala'* that validates the usage of an isolated report also supports and prioritizes judgments based on moral rationalism like the equal rights of divorce for a woman and the abhorrence of prepubescent sex even if these moral conjectures are not based on reports from the Imams.

Thus, when confronted with the choice of accepting either an immoral *hadith* or a moral rationalist judgment, people of sound mind will accept the latter. Ironically, as I have pointed out in this work, jurists tend to prioritize immoral laws over moral rational judgments. They ignore *sira al-ʿuqala'*, however moral it

may be, in favor of an isolated report, however immoral it may be. In the process, they pass judgments that most rational beings find morally offensive and obnoxious. By prioritizing isolated reports over moral rationalist judgments, jurists also impute injustice and wrongdoing to a moral God.

Within the context of assessing traditions and their role in formulating juridical directives, as previously mentioned, the early Shi'i scholars rejected *khabar al-wahid* unless it was attached to an indicator (*qarina*). This was because they felt that, in itself, an isolated report was not binding as it was not authoritative. Even if the *isnad* attached to a *hadith* was sound, they searched for other corroborative proof to accept the tradition. It was Tusi who opposed the views of his teachers al-Mufid and al-Murtada and accepted the authority of *khabar al-wahid* as long as it was transmitted by an Imami reporter. Whereas his acceptance of isolated traditions greatly expanded the pool of resources from which jurists could extrapolate rulings, it had a major deleterious effect on the moral sphere, since, without proper indicators, it was the legality rather than morality of the traditions that was accentuated.

The Reassertion of Reason and Ethics in Islamic Jurisprudence

To date, Muslim jurists have failed to acknowledge that the moral law should also adjudicate and discern the Divine will. To address this deficiency, an epistemological transformation is necessary from the text-centered classical position in which a jurist claims to discover the Divine law and extends it to new cases based on humanly constructed hermeneutical strategies toward a more moral and rational approach. This paradigm shift accentuates and asserts universal ethical principles by focusing on the objectives and ethical foundations of the law and those considerations that promote the welfare of the community over the specific injunctions of legal texts. As we have seen in the case of Iran in recent times, it has accepted what Shi'i jurists had rejected for a long time—the use of *maslaha* as a cogent interpretive device in inferring fresh legal rulings based on pragmatic considerations and the sociopolitical needs of a modern Islamic state.

Although most Shi'i scholars acknowledge the importance of reason in the legal process and accept that what is just is praiseworthy and what is evil is rationally wrong, these general principles are not applied in the area of substantive law due to the epistemic obstacles discussed. Hence, in reality these principles are redundant and hardly used in legal decision-making. Neo-*ijtihadist* scholars need to rethink and relink the connection between ethics and law. The juridical tradition has to be couched on the intrinsic ability of the intellect to discern basic

ethical values without recourse to the revealed sources. Stated differently, jurists need to go beyond specific textual commandments in the sources.

There is a concurrent need to locate and examine the ethical objectives in the Qur'anic discourse so as to formulate laws that meet up to these goals. In this way, ethical precepts rather than mere legal injunctions can be derived from the Qur'an. This will be an interpretive enterprise that connects the moral vision of the *shari'a* to its legal injunctions. Furthermore, there is a need for an epistemic shift from one that prioritizes *naql* over *'aql* to one that evaluates the virtues of both sets of conjectures and accords precedence based on their merits. Neo-*ijtihadists* assert that it is only by challenging and altering the old methodological parameters that *fiqh* can become more dynamic and responsive to contemporary challenges.

In this revisionist hermeneutical enterprise, verses in the Qur'an should not be viewed and interpreted in isolation. With regard to the issues surrounding the treatment of women, for example, the Qur'an was responding to an abusive situation in seventh-century Arabia. The principle that can be derived from the Qur'anic treatment of women is that an abusive situation, against women or anybody else, must be opposed and combatted under any circumstance. To be sure, the Qur'an establishes an ethical imperative on dealing with situations that are abusive to women.[91] Similar ethical prescriptions can be derived on subjects like opposing injustice and upholding the moral standards in a community.

The need for an ethical reassessment and a revision of the legal corpus can be discerned from the fact that even in today's juridical manuals, there is an endorsement of domestic violence if wives are recalcitrant, prepubescent sex, that the custody of the child automatically reverts to the father after a certain age, that soteriology is restricted to Muslims only,[92] and that, in divorce proceedings, the testimony of women, even if accompanied with the testimony of men, is not acceptable.[93] Other juristic laws state that a wife is required to provide sexual pleasure to her husband whenever he desires it unless she is ill or menstruating. Otherwise, she is considered to be *nashiza* (rebellious). The husband, on the other hand, can travel for as long as he wishes to as long as he provides for her maintenance.

Even though there is no verse in the Qur'an or a *hadith* to stop a woman from becoming a judge, most jurists have opined that women cannot be judges based on the assumption that a woman is emotionally weak and intellectually deficient

[91] Abou el Fadl, *Reasoning with God*, 378.

[92] Al-Khu'i goes further in stating that in the hereafter, Sunnis will be treated as nonbelievers. Mavani, *Religious Authority*, 22. Muhaqqiq al-Karaki (d. 1534) had ruled that Sunnis were ritually impure (*najis*). Colin Turner, *Islam without Allah? The Rise of Religious Externalism in Safavid Iran* (Richmond: Curzon Press, 2002), 84.

[93] https://www.al-islam.org/divorce-according-five-schools-islamic-law-sheikh-muhammad-jawad-mughniyya/divorce.

and cannot therefore undertake a profession that requires her to be strong.[94] The moral relevance of such interpretations in contemporary times is highly questionable. In reality, Muslims are experiencing moral regression rather than progression.

In this revisionist enterprise, neo-*ijtihadists* need to bear in mind that the Qur'an not only responded to the prevailing sociopolitical conditions in the Arabian community but also more significantly it engaged and responded to the moral issues of the time. The Qur'an perpetually mentions and addresses issues such as egalitarianism, honesty, chastity, moral accountability, and social justice. A vital component in the interpretive exercise is that such ethical themes be included as essential elements in any reformist project. It is because of such oversights that Fazlur Rahman (d. 1988) complained that there was a general failure during the course of Islamic intellectual history in identifying the underlying themes of the Qur'an, namely those of ethics and justice.[95]

The neo-*ijtihadist* commitment to reformation does not mean that no mediating role can be played by premodern understandings of the sacred sources. Rather, the challenge is to revise the old methodology and refine the hermeneutical tools that would lead to rulings that promote the public good. Rather than suggesting superficial changes based on humanly constructed hermeneutical tools, scholars need to modify their exegetical judgment as to what constitutes the intention and creative will of the Legislator more accurately and how these can be translated into legal precepts in present times. Rather than being worried if a *fatwa* has been derived correctly, neo-*ijtihadists* need to be more concerned with whether it accords with the Qur'an's ethical tone.

The jurisprudence that is advocated here is distinctly moral in its tenor. I say this because the sacred sources are contingent on the commandments of a being who has committed Himself to uphold the highest moral standards. The Qur'an also commends the Prophet for having exhibited and upheld the most exalted moral character (68:4). As they engage the socially conditioned and humanly constructed juridical texts, scholars must bear in mind that the *shari'a* should be seen not only as an expression of Divine will but more importantly of Divine morality. This is linked to the worldview that reason and ethics should play indispensable roles in juristic hermeneutics. As Hallaq has correctly observed, "To search for the "strictly legal" and to isolate it from the overarching landscape of the moral would be not only to misunderstand what the Qur'an was all about, but to deform the structure and episteme of the Shari'a at large."[96] The validity of current juridical laws should constantly be measured against Divine values rather

[94] Mahrizi, *Mas'ala al-Mar'a*, 283.
[95] Akbar, *Contemporary Perspectives on Revelation*, 45.
[96] W. B. Hallaq, "Groundwork of the Moral Law: A New Look at the Qur'an and the Genesis of Shari'a," *Islamic Law and Society* 16 (2009): 278.

than the opinions proffered by previous scholars. By highlighting the incongruence between laws and moral sensibilities, it is hoped that neo-*ijtihadist* scholars can rethink and revise many decisions, especially those which are an affront to human dignity.[97]

Mohsen Kadivar goes further than most scholars by arguing that all religious precepts that are unjust and irrational in the context of the customs of times and place should be abnegated. Social prescriptions that are regarded as rational, just, and the best solutions by the conventions of the time should be preserved. These can also be adjusted based on changing social mores. For Kadivar, a moral understanding of the *shariʿa* rejects the attribution to God of any scriptural precept that contradicts moral rationalist judgments.[98]

In this context, it should be borne in mind that our conception of justice does not necessarily accord with the classical understandings of what is just. It is inapposite to pass judgment on the values espoused by previous generations by comparing them with today's values and standards. Conceptions of what is just and equitable acquire meaning within evolving and shifting contexts. Notions of what is just can also vary depending on a community's collective understanding of it. Some revelatory verses may appear unjust today as they were directed at and meant for a different historical and social context. The gender inequality in some Muslim exegesis and juridical tracts, for example, were rooted and in accord with the normative values of the classical and medieval eras. For them, equality and hierarchy could coexist without any tension. Similarly, imposing modern notions of when a person can consensually enter into a marital relationship or whether a woman can serve as a judge on the texts may be inappropriate.[99] By insisting on and imposing our values and standards, it is possible to unconsciously distort or misinterpret classical texts to make them accord with contemporary values. With the changes of times and normative principles, rules formulated in classical texts can also undermine Qur'anic principles like justice, equity, and human dignity.

Justice in the Reformation Process

An important heuristic device in the reformist project is that of justice. As a universal moral category, justice is a concept that is ingrained in the human conscience and transcends all religions. Thus, terms like "justice" and "injustice" can be comprehended by human beings without recourse to confirmation or

[97] Takim, "Islamic Law and the Neoijtihadist Phenomenon."
[98] Ghobadzadeh, *Religious Secularity*, 104–107.
[99] Ali, *Sexual Ethics and Islam*, 148.

elucidation from the revelatory texts. Like other moral traits, Shi'is believe that values like honesty, loyalty, and justice are known axiomatically.

The Qur'an underscores justice to be an essential trait that human beings should display in their demeanor. It states that God commands people to act based on justice,[100] just as He Himself upholds justice.[101] His Laws are based on justice;[102] God sent Prophets so that people can uphold justice in society.[103] Furthermore, people are to bear witness based on justice, even if that means bearing witness against their own selves, their parents, or close ones.[104] The Qur'an also requires its adherents to behave justly even with those whom they detest. It states "and do not let the hatred of a people prevent you from being just. Be just! because that is closer to righteousness" (5:8). Not only does the scripture prescribe that human beings act justly but also it insists that the concept of justice become an important criterion in assessing the moral probity of an act. If *'urf*, combined with the judgment of people of sound mind, decides that a particular juristic precept is unethical and unjust then that legal injunction should be questioned and even rejected because of its incompatibility with God's justice.

Since reason precedes revelation in Shi'ism, justice should not be sought from the juridically inferred laws, which are often based on pre-Islamic norms and endorsed by revelation. This is because, based on the prevalent social norms, they met the criteria of justice in their times. Instead, justice should be sought in the innate moral cognition instilled in the human conscience. It should also be sought in the collective judgment of the people of sound mind, that is, common understanding of what is just in a particular context. The emphasis on justice as a *shar'i* value does not require Muslim legists to adhere to a particular form or model of justice. Legal injunctions can be adjusted to particular situations as long as the criterion of justice is met.

Paradoxically, although God's justice prevents Him from any unjust decree, it does not prevent human beings from an unjust reading of or inference from the sacred texts. Traditional scholars argue that due to its fallibility, reason, in itself, cannot comprehend what is just or unjust. What may appear to be unjust, if viewed from a broader perspective, could actually be just. In other words, for these scholars, notions of justice cannot be determined by the human intellect but only by Divine prescription.[105] They also vindicate unjust rulings by claiming that they are sanctioned by the revelatory texts.

[100] Qur'an, 7:29.
[101] Qur'an, 3:18, 21:47.
[102] Qur'an, 2:282.
[103] Qur'an, 57:25.
[104] Qur'an, 4.135.
[105] Kadivar, "Human Rights and Intellectual Islam," 51.

It is only by engaging in a continuous cycle of hermeneutics that cases of injustice in social transactions and immoral *fatawa* can be confronted and revised. Unjust readings of religious texts as viewed by the *'uqala'* can be rejected because of their incompatibility with God's justice and His creative will. God's legislative will cannot contravene His creative will. Neo-*ijtihadists* maintain that current renditions of the *shari'a* must accord with the Qur'anic objective of constructing a just social order and that Islamic laws should not contravene that ideal. As Masʿud Aghayi, a contemporary scholar in Iran, states, "If a jurist deduces a law that is contrary to justice then that deduction is wrong and must be revised."[106]

The universality of the Islamic message demands that concepts such as morality, reason, and justice should be extended to all beings regardless of gender, religion, or cultural setting. Legal injunctions are not only supposed to be fair and just; they must also be general (*'amm*) and universal in their application. This means that justice should be extended to those who follow the *shari'a* and those who do not. Since justice is a universal trait and is applicable to all human beings, no limitations can be imposed on it. It is improper, for example, to insist that justice will be meted out to a wife only if she inserts certain conditions or clauses in her prenuptial agreement giving her the right to divorce. Otherwise, she forfeits the same right that her husband enjoys, namely, the unilateral right to divorce. Equally, it would be wrong and unfair to argue that a girl will only get the same share of inheritance as her brother does only if her father allocates a third of his estate to her. Otherwise, even if she has greater financial obligations than her brother, she will receive only half the estate that he does. The concept of a universal system of justice necessitates that no condition or restriction be imposed so as to diminish or remove the injustice that is embedded in an injunction in the first place.

At the ontological level, the Qur'an posits all human beings as being equal and having the same reward or punishment for the same deeds. Nowhere does the Qur'an state that men will be rewarded more for performing the same deeds as women. Neither does it claim that they are spiritually equal but socially unequal. The ontological equality of every human being has to be expanded and expressed at the societal level. Similarly, there is no Qur'anic verse to support some of the unjust legal prescriptions issued against minorities mentioned in chapter 4.

Viewed from this perspective, the *fatawa* cited in the juridical corpus are a means to demonstrate and implement God's justice. Hence, no juridical precept can be unjust. Despite the great stress on reason as the determinant of what is morally right and wrong, in the juridical field, it is the revelatory sources that determine the outcome of juridical deductions even if they oppose the determination of reason on the morality of a decision. As Shabistari says, "currently, it

[106] See Aghayi, "Ijtihad va Tahavvol," 1/26.

is legal opinions that decide what the criterion of justice is but, in reality, justice should be the criterion for legal opinions."[107]

Besides reason, *sira al-'uqala'* can also act as a criterion in determining if an act is just or not. If a jurist disagrees with custom concerning the justice of a transaction, he is to provide the rationale for his deduction. Otherwise, the views of the *'uqala'* and the custom of the times should prevail. As Sane'i states, "custom recognizes injustice. The *shari'a* cannot interfere in creating a benchmark. Justice and injustice are subjects that must be determined by custom."[108] Contemporary jurists have often sacrificed the principles of equality and justice when faced with the pronouncements of erstwhile jurists regardless of the sociocultural contexts of the earlier statements.

The Application of Justice in the Juridical Corpus

One of the few jurists to accentuate the role of justice in juridical reflection is Ayatullah Sane'i. He insists that justice and moral considerations have to be foremost in a jurist's mind when extracting an injunction from the textual sources.[109] He also emphasizes the need to observe justice and acknowledge the intrinsic dignity of all God's creatures irrespective of their religious beliefs and that partaking or assisting in any act of injustice is wrong.[110]

In arguing for both parties to have equal rights to divorce, Sane'i states that there is nothing in the *shari'a* that rejects what reason determines to be fair and just, namely, that the parties should have the same rights to divorce. To further substantiate his arguments, he states that people of sound mind would opine that the view that both parties should have equal rights to divorce is correct. Anything that contradicts it is unjust to the wife. Sane'i concludes that there is no other alternative but to rule that it is obligatory on the husband to grant *khul' talaq* if his wife insists on it and that she has equal rights to divorce.[111]

He also maintains that both reason and ethics dictate that in matters of divorce, it is wrong to grant the right of *talaq* to one gender and deny it to another, since no one has a choice in deciding their gender. Thus, from both rational and moral points of view, gender should not dictate which party has the right of divorce.[112] To further vindicate his ruling, Sane'i appeals to other rationally derived principles that are mentioned in the Qur'an. Traditions which state that a

[107] Mavani, *Religious Authority*, 13.
[108] Quoted in Goudarzi and Najafinejad, "Necessity of Reinterpretation of *Sharia*," 14.
[109] Sane'i, *Qa'ida 'Adala*, 13–14.
[110] Yousuf Sane'i, *Ijtihad-e Puya* (Qum: 2011), 20.
[111] See Takim, "Privileging the Qur'an," 84, 90–91. *Khul' talaq* refers to a case when the wife demands a divorce.
[112] Sane'i, *Wujub Talaq al-Khul'*, 52.

man can demand any amount of *mahr* he wants from his wife are unfair. Such traditions cannot be accepted since justice is one of the major principles in Islam. He quotes Murtada Mutahhari as saying, "justice is one of the standards of Islam, whatever justice decides, religion rules likewise."[113] By appealing to the principle of *ʿadl*, Saneʿi maintains that since He has promised to be just to all His creatures, even the Lawgiver is bound (*mudtarr*) to enact laws that will uphold the principle of justice.

The proclamation that a man can demand as much as his wishes in return for granting a *khulʿ talaq* is another example of a juridical ruling that is against the Qur'anic ethical principles especially verse 41:46: "Your Lord will not be unjust to His servants." Based on this Qur'anic principle, Saneʿi argues that if a man can give a certain amount of *mahr* and then divorce his wife at will, why should she be compelled to give more than the *mahr* she received when she seeks a divorce? Saneʿi is, in fact, repudiating edicts issued by those jurists who state, "[t]he property which the husband takes in *mubarat* divorce should not exceed the *mahr* of his wife. But in the case of *khulʿ* divorce, there is no harm if it exceeds her *mahr*."[114]

For Saneʿi, such rulings are examples of privileging *hadith* over the Qur'an, since it violates the Qur'anic principle of justice applicable to all regardless of gender or race. By focusing on the Qur'an and its principles, Saneʿi refutes *ahadith* that give preference to a husband by empowering him to demand as much money as he wishes to in cases of *khulʿ talaq*. This would be unfair to the wife and deny her the financial resources she would need after the *talaq* to lead a decent lifestyle.[115]

Saneʿi's appeal to the principle of justice in juristic deliberations is evident in other edicts he has issued. For example, referring to the ruling issued by many jurists that the *diya* (blood money) of a woman is half of that of a man, he says that *ʿurf* and the people of sound mind would declare that this oppresses a woman and is therefore unjust.[116] He insists that the *diya* of men and women should be the same, especially because at the level of humanity they are both equal.[117] Apparently, ʿAllama al-Hilli had also issued rulings based on *ʿadl* in certain cases.[118] Saneʿi cites many instances and cases where *fatawa* were issued based on justice and on the need to prevent injustice (*zulm*).[119]

Although there is much emphasis on justice in Shiʿism, the fact of the matter is that juristic discourse on justice is focused primarily at the personal rather than

[113] Saneʿi, *Qa'ida ʿAdala*, 76–77.
[114] Sistani, *Islamic Laws*, 471, #2544. *Mubarat* is a form of divorce in which both parties seek a divorce as the relationship has completely broken down.
[115] Saneʿi, *Wujub Talaq al-Khulʿ*, 77–78. Takim, "Privileging the Qur'an," 92–93.
[116] Saneʿi, *Qa'ida ʿAdala*, 228.
[117] Ibid., 120.
[118] Ibid., 118.
[119] Ibid., 144–45.

social level. There is much discussion in the *fiqh* manuals, for example, that a *mujtahid*, a prayer leader, a witness in a law court, or one who claims that he has sighted the new moon has to be just. Yet, there is little discussion in these manuals that judicial rulings have to be just or that the principles of justice should permeate a society. Both Murtada Mutahhari and al-Sadr have complained about the lack of discourse on social justice in the *fiqh* works.[120] Despite the emphasis on social justice in the Qur'an, Mutahhari complains that not even one *fatwa* has been issued based on this principle in the *fiqh* works.[121]

Methodology and Hermeneutics in Islamic Reformation

I have cited Sane'i on many occasions in this work. This is because he is one of the few seminarians who has openly challenged traditional edicts and revised them based on principles such as justice, equality, the equal dignity of all human beings, *maslaha*, and *la darar wa-la dirar*. Sane'i complains that besides these principles, jurists overlook Qur'anic ethical values like egalitarianism, upright moral behavior, and *'adl* in their pronouncements.

Although he does not address or suggest changes to the epistemological deficiencies in the current legal system, Sane'i uses a wide range of methodological and hermeneutical devices in the rulings he issues. At the same time, he refuses to accept some of the discriminatory and unjust rulings that pervade the juridical literature. When inferring legal injunctions from the sources, Sane'i applies certain principles that are rooted in the Qur'an. One of these is that a religion should not impose any difficulties for its followers. This is predicated on the verse: "God wants ease for you, not hardship" (2:185). Similarly, based on the principle of removing hardship, Sane'i permits abortion in the first trimester. Most jurists believe that ensoulment occurs at the time of conception, hence they prohibit abortion at all stages. Sane'i states, "Islam is also a religion of compassion and if there are serious problems, sometimes God does not require His creatures to practice His law. So, under some conditions—such as parents' poverty or overpopulation—then abortion is allowed."[122] Sane'i goes on to clarify, "this doesn't mean that we are changing God's laws . . . it just means we are reinterpreting laws according to the development of science—and the realities of the times."[123] Very few jurists have issued such radically different and controversial rulings in contemporary times.

[120] Ibid., 54–55.
[121] Mahrizi, *Fiqh Pazhuhi*, 1/123.
[122] Hashemi, *Islam, Secularism, and Liberal Democracy*, 93.
[123] Ibid.

The discussion regarding the ongoing debate about an Islamic reformation within the Muslim community indicates that many neo-*ijtihadists* question and challenge the traditional articulations of Islam and have posited various alternative solutions in their place. The success of an Islamic reformation is contingent on much soul searching and self-critique within the juristic interpretive communities and a willingness to accept the deficiencies and failings in its legal system. Furthermore, neo-*ijtihadists* face the unenviable challenge of reassessing and revising the classical and medieval juridical corpus. This will inevitably be met with much resistance and charges of heresy.

Conclusion

I have argued in this chapter that there is a need for an extensive rethinking of religious epistemology so that it can be a guide to juridical decision-making. I have quoted the views of several neo-*ijtihadist* thinkers and outlined some of the epistemological and methodological changes necessary in *usul al-fiqh*. These include the need to reassess the validity of preferring *naql* over *ʿaql* conjectures, the incorporation of moral rationalist judgments in juridical decision-making, and the need to couch legal inferences on changes in other disciplines and sciences. I have also suggested a possible framework for a more ethical and just legal system. A key element to any reformation in the Islamic legal system is the concordance between God's creative and legislative wills.

The challenge that confronts neo-*ijtihadists* is to synthesize hermeneutical strategies with current exigencies so that the law can be a relevant guide in the daily lives of Muslims. This is an important role that the hermeneutical cycle can play in religious reformation. Neo-*ijtihadists* also face a major dilemma of being faithful to the sacred texts on the one hand and harmonizing their understanding of juridical texts with ethical measures on the other. Frequently, their interpretations are circumvented by the determinacy of past rulings. Traditional scholars reject the contention that values based on moral rationalism can override the scripturally pronounced laws which, for them, clearly enunciate the Divine will on the topic.

If allowed to function within Muslim communities, neo-*ijtihadism* could provide a basis for alternative juristic paradigms along with various other disciplines to restructure the Islamic legal edifice that would provide a basis for civil society which accommodates notions such as justice, morality, egalitarianism, and pluralism. Precisely how this new *ijtihad* will look and function, the results it will achieve, how it will resolve new challenges without ignoring traditional Islamic legal theory are still being deliberated.

Conclusion

My exploration of an Islamic reformation has sought to uncover and explain the methods and strategies used by the scholarly elite to restate and re-explicate the law. In this study, I have traced the development of *ijtihad* and the underlying Shiʿi legal theory. I have also examined the interaction between religion and culture, how custom and people of sound mind can shape and influence Shiʿi judicial consciousness, and the role of textual hermeneutics in determining the Shiʿi religious experience. More pertinently, my analysis of the underlying epistemologies has highlighted the fact that that the current *ijtihad* is too text-centered and lacks the moral and intellectual vision to provide a more relevant and coherent legal system in present times.

To be sure, contemporary Shiʿis are confronted with the juristic heritage of the past and contemporary realities that challenge the applicability of that legacy. So far, most jurists have read their textual sources through a legal prism and issued rulings regardless of their moral and social implications. Such readings from the canonical texts have often led to a dichotomous relationship between the *shariʿa* and moral imperatives. In many instances, the universal ethical claims of moral rationalism have been undermined in favor of laws rooted in a patriarchal tribal culture. For example, what the Islamic texts state regarding women's ability to function effectively in a society is often in stark contrast with the realities of the contemporary world, where women play dominant social and economic roles.

Significantly, many Shiʿi jurists in the seminaries have realized that there is a need for a continuous engagement with and interpretation of the normative sources. They have also concluded that they cannot continue to confine their resources to the revelatory texts and hermeneutical principles like *al-usul al-ʿamaliyya* and *maslaha*. In the process, both the seminarians and neo-*ijtihadists* have challenged the idea of a normative and singular reading of sacred texts or the concept of an "official" reading of the revelatory sources. It is to be remembered that in the past, when faced with tensions between the sacred sources and the realities of the time, Shiʿi scholars often adjusted their epistemological parameters to respond accordingly. Notably, the scholars of Hilla had to compromise on the traditional insistence of *qatʿ* and had to accommodate *zann* as an epistemological alternative. This was a legal innovation that allowed for the issuance of a wider range of rulings based on the *ijtihad* of the texts. Similarly, Murtada Ansari established and propounded juristic tools that accommodated not only conjectural but

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also speculative cases in his epistemic scheme. At the same time, he empowered jurists to cover a much wider range of juristic cases.

Likewise, contemporary Shiʿi scholars need to rethink and reformulate juridical laws especially as they relate to the public realm. There is a concurrent necessity to revisit and recast the epistemological foundations of Shiʿi legal theory and to assert the view that the moral and creative wills of God should precede His legislative will. Hence, what He legislates cannot possibly be antithetical to what He wills. Jurists have to also resolve the epistemological dichotomy between *ʿaql* and *naql* conjectural proofs. A revised reading of texts also requires neo-*ijtihadists* to assert the concept of secular ethics, revive moral rationalism as an independent source of law, and promote values that people of sound mind find palatable.

This study has also illustrated that some of the doctrines that are supposedly "Islamic" emerged in the past as a result of human interpretive endeavors and need not be binding for all times. It has further demonstrated that besides engaging the textual sources, earlier scholars exercised their own judgments and applied the customs prevalent in their societies to interpret Qur'anic legislations and Prophetic practices. Contemporary jurists can replicate such interpretive and adaptive processes today. More than ever, Muslims are challenged to recapture and reassert the ecumenical and universal thrust of the Qur'an rather than the juridical and exegetical understandings that were articulated in particular sociohistorical settings.

Contemporary jurists also need to retrieve core values from the Qur'an and the *sunna* so as to posit a different paradigm for modern jurisprudence. At the same time, they need to engage Islamic legal literature to ensure that its enactments accord with the objectives and moral injunctions of the Qur'an, thus infusing the *fatawa* issued with the Qur'anic ethos. It is only by retrieving and reviving the ethical-moral normative values from the Qur'an that a new framework of jurisprudence for contemporary times can be constructed. This approach will empower jurists to engage with the sacred sources without being constrained by the hermeneutics of earlier jurists who asserted discriminatory practices and social hierarchies based on their own cultures and times.

For reformation to be efficacious, besides their hermeneutical and epistemic activities, Muslim reformers need to also engage their communities. Muslims need to understand that the reformation of Islamic law does not entail its marginalization or the secularization of the Islamic world. Scholars also need to explain to the community that contemporary realities demand a revision or reinterpretation of the traditional exegesis. This exercise is contingent on recognizing that for a text to be relevant, it has to be able to speak to future generations of readers. It cannot be confined or limited to a particular group or generation of readers. If a text is denied its independent voice and is monopolized by the juristic interpretive communities, then it will no longer be able to speak on its

own. Stated differently, the hermeneutical cycle demands that textual interpretation and expression be an ongoing exercise and that there cannot be a final or perfect rendition of a text.

Reforms such as those suggested in this work are possible only if Muslims are free to express themselves and discuss matters candidly without fear of intimidation or reprisals. At issue is producing authoritative renditions of the legal tradition that would be acceptable by a wide section of the Muslim public. This requires an engagement and dialogue with the community. It also requires the possession of considerable spiritual and moral authority that is respected by the community.[1] To date, no credible institution or seminary has been able to exert as much authority or influence over the Muslim laity as the traditional scholars, preachers, and seminaries have. Quite simply, unlike the religious seminaries, neo-*ijtihadists* do not have a viable authoritative institution to support them.

I conclude by restating that in the struggle for reformation, neo-*ijtihadists* cannot ignore the role of religion in shaping and molding sociopolitical consciousness. This is because they are entangled in societies where religion is a key marker of identity and where religious values shape local communities. Given the salience of religious values in shaping social and political norms in the Muslim world today, reconciling Islamic religious thought with modernity is a critical precondition for the construction of a new juristic culture.[2] This is a challenge that I leave for others to pursue.

[1] El-Affendi, "The People on the Edge," 43–45.
[2] Hashemi, *Islam, Secularism, and Liberal Democracy*, 23.

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