TWO SHIʿI JURISPRUDENTIAL METHODOLOGIES TO ADDRESS MEDICAL AND BIOETHICAL CHALLENGES: TRADITIONAL *IJTIHĀD* AND FOUNDATIONAL *IJTIHĀD*

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ABSTRACT

The legal-ethical dynamism in Islamic law which allows it to respond to the challenges of modernity is said to reside in the institution of *ijtihād* (independent legal thinking and hermeneutics). However, jurists like Mohsen Kadivar and Ayatollah Faḍlalla have argued that the "traditional *ijtihād*" paradigm has reached its limits of flexibility as it allows for only minor adaptations and lacks a rigorous methodology because of its reliance on vague and highly subjective juridical devices such as public welfare (*maṣlaḥa*), imperative necessity (*ḍarūra*), emergency (*iḍṭirār*), need (*ḥāja*), averting difficulty (*ʿusr*) and distress (*ḥaraj*), hardship (*mashaqqa*), and harm (*ḍarar*) without interrogating the fundamentals (*uṣūl*) of *ijtihād*. In contrast, in the "foundational *ijtihād*" model theology, ethics, intellect, epistemology, linguistics, hermeneutics, modern sciences, history, cosmology, anthropology, and the sources of Islamic legal theory (*uṣūl al-fiqh*) interact with one another to obtain resolutions that are just and non-discriminatory.

KEY WORDS: *Mohsen Kadivar*, *ijtihād*, *Shiʿi law and legal theory*, *Islamic legal reform*, *Islam and bioethics*, *applied jurisprudence in Islam*

We live in an age of globalization, modernization, transnational social movements, and secularization. Many scholars and pundits had presumed that the role of religion would drastically diminish or that religion itself would become obsolete, and that the public space would be emptied and expunged of God's presence or any reference to a transcendent reality. Consequently, these scholars argued, the public would be disenchanted with and distanced from religion. Many who had prepared eulogies for

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JRE 42.2:263–284.

this anticipated event, however, have had to retract their words,[1] for religion remains a core element in many people's lives and formulations of selfhood and identity.

Given this fact and the continued relevance of religious traditions in validating ethical responses, especially among Muslims, many of those who engage in discussions on bioethics tend to look toward religion. So, what is religion's role in the framing of medical and bioethical discourses? More particularly, which juridical approaches, devices, epistemologies, hermeneutics, theologies, sciences, and ethical theories have Shi'i jurisprudents invoked to deal with the complex debates and challenges engendered by these discourses? Are the approaches motivated exclusively by pragmatic considerations, or are they rigorously interrogated to ensure their compatibility with the existing framework and theoretical apparatus of Shi'i legal theory? If the former, is there a need to embark upon a paradigm shift in Islamic legal theory that questions not only the law and secondary principles, but also the sources of Islamic legal theory (*uṣūl al-fiqh*) in the interest of inner coherence and consistency?

The epistemological and ethical foundations of Islamic legal thinking related to human technologies depend upon the theological assumptions that inform them. Two rival schools of thought have dominated debate over the nature of legal validity and its relationship to the normative authority of law as law—Mu'tazili (ethical objectivism) and Ash'ari (theistic subjectivism). A third school, the Maturidi, can be situated somewhere between the two, but leans more toward Ash'arism. The latter maintains that the divine law's authority flows not from the wisdom, justice, or reasonableness of God's commands, but rather from the fact that they are God's commands and therefore expressions of God's will, coupled with His supreme power over us. "He cannot be called to account for anything He does, whereas they will be called to account" (Q. 21:23). In other words, prior to revelation there is an amoral space and so no moral valuation can be assigned to an act based upon reason or its inherent nature (Reinhart 1995, 7).

Eschewing the Ash'ari school however, Twelver Shi'is adopt some aspects of the Mu'tazilis' rationalist–naturalist theology which accords to reason the capacity to discover universal moral and ethical values. In addition, they regard the spheres of reason and revelation not as mutually exclusive, but as overlapping. Thus, they are better situated to engage in robust *ijtihād* (fresh intellectual exertion) to deduce legal/ethical decisions

[1] "The assumption that we live in a secularized world is false. The world today, with some exceptions to which I will come presently, is as furiously religious as it ever was, and in some places more so than ever" (Berger 1999, 2). José Casanova concurs with this assessment on the onset of de-secularization, re-sacralization, or "deprivatisation" of religion, but without hastily abandoning the secularization thesis in its entirety (Casanova 1994, 211).

via reliance on reason-based deliberation and on the revelatory texts' general principles, instead of opting to err on the side of caution and thus prohibit new technologies. Although, in the recent past, there has been a significant widening of the scope of *ijtihād* in Sunni Islam to tackle modern challenges by resorting to the concept of aims and objectives of the *Sharīʿa* (*maqāṣid al-Ṣharīʿa*) and public interest (*maṣlaḥa*).

This essay will examine the positions of Shiʿi jurists who advocate "traditional *ijtihād*" and contrast them with those who opine that it has reached its limits of flexibility and thus can neither resolve contemporary medical and bioethical issues nor such other pressing issues as the compatibility between Islam and human rights and gender equality. The second approach, known as "foundational *ijtihād*" (*ijtihād dar uṣūl*),[2] which stands in contrast to derivative *ijtihād* (*ijtihād dar furūʿ*), is best characterized by the jurist Mohsen Kadivar[3] and, to a lesser extent, Ayatollah Muḥammad Ḥusayn Faḍlalla (d. 2010).[4]

Partisans of both approaches largely agree that certain essential aspects of the Islamic creed/dogma ought to remain constant, unchanging, and immutable regardless of time and location. Moreover, they acknowledge that there is a specific separation among religious rituals (*ʿibādāt*), the belief system (*ʿaqīda*), and explicit injunctions on the one hand,[5] and human interrelations and social affairs (*muʿāmalāt*) on the other.[6] In general, the former are constant, immutable, essential, and transhistorical rulings that leave little or no room for contextualization or creative reinterpretation when faced with novel and unexpected contingencies. But the latter, which consist of rules of conduct and behavior, are open to public negotiation in a space that accommodates civic pluralism.

[2] Sunni scholar Tariq Ramadan is a zealous advocate of radical reform in Islamic legal theory. See Ramadan 2009.

[3] Kadivar, after conducting his own research under the rubric of traditional *ijtihād* for twenty years, concluded that it has reached its limits and cannot respond to modern challenges (Matsunaga 2011, 358–81). He has written three essays on this issue: two of them appeared in Kadivar 2008, 287–314 and 315–37, and the third is Kadivar 2013, 213–34.

[4] Faḍlalla was born in Najaf, Iraq in 1935 where he received his training to become a jurist and later on attained the rank of *marjaʿ al-taqlīd* (source of emulation). He moved to Lebanon and was believed to be the spiritual leader of the Hezbollah. Many jurists severely censured him because he broke from tradition and questioned well-established theological, legal, and historical positions in Shiʿism, and for his innovative approach to *ijtihād* that resulted in dissenting legal rulings.

[5] Kadivar includes marriage, food, and drinks in the first category of the immutable and unchanging because it is not possible for human intellect to fathom the wisdom behind their legal injunctions with a very high degree of probability or certainty. Similarly, acts of worship belong to the same category because human reasoning cannot discover the wisdom behind the nature and form of the act of worship, for example, why Muslims have been prescribed to offer two units of prayer in the morning (*fajr*) whereas three at sunset (*maghrib*). See Kadivar 2012.

[6] This division has recently been contested by Wael B. Hallaq in his work *The Impossible State* (Hallaq 2013, 113–18, 203n69, 203–4n73).

Historically, *ijtihād* accommodated a plurality of views on the basis that each qualified jurist exerts himself to the maximum by using different sources to derive a legal ruling that would remain a considered opinion subject to error and revision. The Shi'i school deemed the transition from certainty to probability to be necessary so it could deal with new contingencies and societal changes that are not covered in the texts and occur during the infallible Imam's occultation.[7] This prompted Shi'i jurists from the time of Muḥaqqiq al-Ḥillī (d. 1277) onward to accept *ijtihād* with a clear-cut epistemological distinction between certainty and probability. In other words, a legal ruling cannot be considered certain, regardless of the extent of human exertion expended, because no human being has the attribute of infallibility.

This is even more the case when one has to deal with complex medical and bioethical issues that require a collective (*al-ijtihād al-jamā'ī*), multidisciplinary, and rational process that relies on modern science. Those who undertake it must consult with experts in the relevant fields and pay serious attention to their advice while making their deliberations (Ghaly 2012, 177). Tariq Ramadan has proposed a further step, "transformation reform" (in contrast to "adaptation reform"), in which the specialists and jurists are equal partners in formulating legal opinions: "[The] text scholars (*'ulama an-nusus*) as context scholars (*'ulama al-waqi'*) should participate on an equal footing in elaborating ethical norms in the different fields of knowledge" (Ramadan 2009, 121).

Classical jurists define *ijtihād* as a process of discovering a new legal ruling on the basis of a particular set of principles and legal theory after having exerted oneself to the maximum extent possible ('Azīzī 2006, 321–26). The domain of *ijtihād* is restricted to the area in which no explicit and unambiguous decree can be derived from the clear-cut texts. It is invoked to resolve issues in which only highly probable (*ẓann*), as opposed to certain (*yaqīn*), solutions can be offered. In principle, the undertaking of *ijtihād* by a qualified jurist or *faqīh* remains a perpetual obligation upon the whole Muslim community, especially in the Shi'i and Hanbali schools of thought. This collective obligation (*farḍ 'ala-l-kifāya*) cannot be abandoned because it is a social necessity, just as it is mandatory to have a sufficient number of qualified professionals in other fields to address the needs of society. However, if a competent group undertakes this obligation, then the rest are absolved from doing so and cannot be accused of violating a religious obligation.

All *ijtihād* must be based upon the primary sources. For Shi'i law, these sources are the Qur'an, the Sunna of the Prophet, and the twelve infallible

[7] In the Twelver Shi'i belief system, the last and the twelfth infallible Imam was born in 874 CE and he went into major occultation in 941 CE. He is to remain in that state up until a time when God commands him to re-emerge with a mandate to establish justice and equity on earth.

guides which can be authenticated,[8] consensus (*ijmāʿ*), and reason (*ʿaql*).[9] However, only the first two qualify as demonstrative and certain sources that can stand on their own. Shiʿi jurists do not consider consensus to be an independent source, unlike their Sunni counterparts, who assert that it is "[t]he only binding and unassailable authority that could ratify a doctrine in the name of Islam as a whole" (Jackson 2009, 9). In Shiʿism, *ijmāʿ* is valid not because of the jurists' consensus, but due to the deduction that the infallible Imam of that time endorsed the unanimous consensus. Thus, *ijmāʿ* represents a means to discover the infallible Imam's opinion, for only his endorsement, as opposed to juristic consensus, validates it and assigns it a value of certainty. In addition, Shiʿi legal methodology has limited the scope for analogical reasoning (*qiyās*) because it is considered to produce, in general, only a conjectural ruling. In order for it to be valid, the efficacious cause (*ʿilla*) must be explicitly stated (*al-qiyās al-jalī*) and not subject to multiple readings, as is the case with hidden analogy (*al-qiyās al-khafī*). As such, the Imam occupies a central and pivotal position in Shiʿism, and during his occultation, it is argued, some of his authority is transmitted to the jurists to strive in resolving contemporary challenges to the best of their abilities without ever claiming to have attained certainty.

1. Doctrine of the Imamate in Shiʿism

The Muslim community was confronted with a major crisis of authority right after the Prophet's death in 632 CE: Who would succeed him? The group that later crystallized and was given the appellation of *Shiʿi*, which now comprises about fifteen percent of the global Muslim population, believed that the Prophet had explicitly appointed his cousin and son-in-law ʿAlī b. Abī Ṭālib as his temporal and religious successor (Imam). He

[8] All hadiths have to be interrogated to determine their level of reliability, as many were manufactured and managed to creep into the corpus undetected. The four early works of Shiʿi hadith collection are *al-Kāfī* by Kulaynī (d. 941), *Man la yaḥḍuruh al-faqīh* by Ibn Bābawayh al-Qummī (d. 991), and *Tahdhīb al-aḥkām*, and *al-Isṭibṣār* by Muḥammad Abū Jaʿfar al-Ṭūsī (d. 1067).

[9] Ayatollah Muḥammad Ṣādeqī Tehrānī (d. 2011) provides a scathing critique of the existing Shiʿi model of *ijtihād*. According to him, it claims to follow the Qur'an and the Sunna, but in reality prioritizes the intellect, consensus, and past precedents along with famous rulings and suspicious hadith reports. Due to this weak foundation, Shiʿi jurists are required to qualify their rulings with the following terms: *aḥwaṭ* (precautionary), *aqwā* (the stronger opinion), *fī-hi taraddud* (there is indecisiveness on the issue), and *taḍād* (contradiction). Sunni Islam, he argues, has emphasized analogy, consensus, juristic preference (*istiḥsān*), and public welfare (*istiṣlāḥ*). He offers one example: the temporary suspension of Friday prayers in Shiʿism while the infallible Imam is in occultation, even though the Qur'an is categorically clear that once a call to Friday prayer is given all Muslims must hasten toward it and abandon all business transactions (Q. 62:9); see Tehrānī 2005, 22–27.

would be followed by a series of eleven Imams from his progeny, the last one of whom is currently in the Greater Occultation and will reappear with Jesus at the end of time to usher in an era of global peace, justice, and equity.

The Imam's unique position with respect to his cumulative, inherited knowledge, as well as his role as the infallible, inerrant guide and leader, all imply that he is the ultimate authority on matters of the religious law, doctrine, and practice as well as spiritual mentorship. His authority is viewed as an extension of Muhammad's prophetic authority in the sense that he is the living embodiment, interpreter, and executor of the Qur'an. The only difference is that, unlike Muhammad, he does not receive direct revelation.

2. Indirect Deputyship of the Religious Scholars

In terms of religious authority and leadership, the messianic Imam's prolonged concealment and inaccessibility resulted in a vacuum that was gradually assumed by the religious scholars. In many respects, they have served as his general deputies (*nowwāb-e 'āmm*) and functional replacements during this period due to their possession of knowledge and piety (Calder 1982, 4). The traditionalist school of thought, which gained ascendancy and influence at the outset of the Imam's occultation in 874 and remained dominant until the tenth century, asserted that there is no room for reason and rationality, or any critical and analytical thought, as regards religious discourse during his absence. They cited hadiths attributed to the Imams that condemned the Sunnis' hermeneutical procedures of analogical deduction (*qiyās*) and independent inquiry (*ra'y*). As a result, even *ijtihād* acquired a negative connotation and was used in a pejorative sense until the twelfth century on the grounds that it was no more than a deduction based on conjecture and personal judgment (Stewart 1998, 1–24).

This denunciation of analytical thought created a climate that was not conducive to engendering a creative and innovative reinterpretation of the revelatory texts. Instead, the primary focus was on collecting and preserving the hadiths from the Prophet and the Imams in order to glean guidance from them. During this undertaking, the texts were not to be engaged with rationally and the validity of the transmitters, who reportedly conveyed them from the infallible guides, was not to be questioned. In the late tenth and early eleventh centuries, however, the traditionalists faced a serious challenge from Shaykh Mufīd (d. 1022), Sharīf al-Murtaḍā (d. 1044), and other eminent scholars whose skillful arguments weakened them and brought the rationalists to the fore.

Shaykh Muḥammad b. Ḥasan al-Ṭūsī (d. 1067) is credited with finding a balance and a synthesis between both schools. This trend toward

reviving *ijtihād* was cemented by ʻAllāma Ibn Muṭahhar al-Ḥillī (d. 1325), who established its epistemology and legitimacy in his works on *uṣūl al-fiqh* by affirming a clear-cut epistemological division of knowledge between certainty (*ʻilm qatʻī*) and probability (*ẓann*). He also insisted upon the need for jurists (*mujtahid*s or *faqīh*s) who can derive fresh legal rulings via *ijtihād*. Accordingly, Imami scholars from Muḥaqqiq al-Ḥillī onward gradually transitioned from the principle of certitude in deriving legal norms to probable opinion. This methodology was formally embraced in the fourteenth century by the jurists' acceptance of ʻAllama Ḥillī's *ijtihād* (Gleave 2007, 4–8; Ḥillī 1988, 240–49; Moussavi 1996, 61–77).

The Akhbaris of the seventeenth century, with Muḥammad Amīn al-Astarābādī (d. 1626–27) as their chief spokesman, sought to return to the earlier practice of rejecting *ijtihād* by claiming that one could attain certainty based on the available material. Thus personal judgment was not needed because it could lead to an innovation and a prohibited practice on the grounds that rational analysis and the principles of *uṣūl al-fiqh* could, at best, produce only personal conjectures. Given that certainty can be attained only from the statements attributed to the infallible Imams (hadiths) that everyone can fathom, there is no need to develop a special class of scholars or *mujtahid*s. This new traditionalist school, known as the Akhbari, eventually became dominant in almost all Shiʻi seminaries, for the majority of jurists subscribed to it. Thus there was no place for *mujtahid*s to engage in independent reasoning (Modarressi 1984, 141–58).

The Akhbari school only sustained its supremacy for a few decades until the eminent scholar Muḥammad Bāqir al-Bihbahānī (d. 1790–91) revived rationalism (the Uṣūlī school) and the legitimacy of using reason to derive legal rulings. This stance gradually became the distinctive mark of Shiʻism: *ijtihād* was both permissible and considered a perpetual imperative, as it was indispensable for dealing with novel issues and contingencies.

3. Immutable and Transient Rulings

The distinction between an immutable or permanent (*al-aḥkām al-thābita*) and a transient or temporary (*al-aḥkām al-mutaghayyira*) ruling is that the former has been derived from revelatory sources with the explicit directive that it is applicable at all times and places. In contrast, the latter ruling is applicable only in a particular situation or scenario, as it is both time- and context-bound.[10] This category also includes rulings superseded or abrogated by later Qur'anic verses.

[10] It may be more befitting and accurate to label the changing rulings (*mutaghayyir*) as context-bound rulings (*mawqiʻiyāt*) to underline that these rulings are not inherently in the state of change; rather, it is the different contexts and scenarios that necessitate change.

Jurists classify all rulings into these categories based on the evidence they can marshal in the form of categorical statements that can be authentically attributed to the Prophet or the Imams and the context or indication (*qarīna*) from the report. Some scholars have cautioned against making any definitive categorization of rulings under the rubric of "immutable" or "changing" because the human endeavor to fathom the divine message remains a fallible process, one that is open to question and subject to error. This lack of distinction and nuance is evident in assertions that the *Sharīʿa* is the sacred law of Islam that provides an all-inclusive guidance on matters connected with the human-divine and human-human relationships, thereby suggesting that it has dealt exhaustively with all contingencies. Moreover, Islamic rulings are in accordance with the divine primordial human nature (*fiṭra*), which Q. 30:30 portrays as constant and unchanging. Advocates of the determinacy and permanence of Islamic injunctions cite the following prophetic statement: "Acts assessed to be lawful (*ḥalāl*) by Muhammad will remain so forever until Judgment Day and his prohibitions (*ḥarām*) will remain so forever until Judgment Day" (Kulaynī 1974, 1:58, hadith 19).

This confusion arises partly because *Sharīʿa* and *fiqh* are used interchangeably, as if they were synonymous. It is critical, however, to distinguish between these two technical terms: *Sharīʿa* is the utopia, the immutable, the normative, and the ideal Islam that comprises a set of sacred and unchanging truths. In contrast, *fiqh* is the changing and mutable domain of legislation because it is only an approximation of the *Sharīʿa* arrived at via the human cognitive process: "This is a human endeavor that is subject to errors and inaccuracies: At a minimum, one conclusion of this book, salient to Muslim reformers, is that Islamic legal rules are to a significant extent the product of human and therefore fallible interpretive processes, and thus are susceptible to reform" (Ali 2010, 14). The corpus of Islamic law is, in reality, *fiqh* and not the divine *Sharīʿa*. The means and process through which new legal rulings are derived from Islam's foundational sources is referred to as *ijtihād*. This produces only a probable solution, just like medical judgments, and can never provide certainty.

This distinction between the timeless *Sharīʿa* and mutable jurisprudence is critical, for it allows for a mechanism that can review and revise juridical opinions in the light of new and fresh information. It is especially relevant to medical and bioethical deliberations, where new and revised information is plentiful. In other words, *fiqh* is always in a state of flux and is no more than a state of juridical reflection reached by Muslim scholars of the *Sharīʿa* at a certain time and in a certain context. As such, it is in a process of "becoming" rather than of "being" and is dynamic and in constant need of elaboration and evolution (*taṭawwur al-fiqh*) (Soroush 1996).

4. Traditional *Ijtihād*

As stated previously, the primary sources of Shi'i law are the Qur'an, the Sunna of the Prophet and the twelve infallible guides that can be authenticated, consensus (*ijmā'*), and reason (*'aql*). By contrast, in Sunni law, the primary sources are the Qur'an, the Sunna, consensus, and analogy (*qiyās*), as well as differing opinions on the validity and scope of public welfare (*istiṣlāḥ*), convention (*'urf*), and practice of the Prophet's companions in deriving a new legal ruling. The various methodological and juridical devices, along with the principles and legal maxims invoked under the paradigm of traditional *ijtihād* to resolve medical and bioethical problems, include the following:

a. A change in the legal ruling induced by alteration in the subject's (*mawḍū'*) essence: Certain subject matters, especially in the area of acts of worship (for example, the obligation to perform the five daily ritual prayers) remain constant and are unchanging. As a result, they do not lend themselves to a multiplicity of interpretations. However, it is possible for the subject matter itself to be non-static, yet to allow the ruling to be changed if it can be impacted by certain factors (for example, a change in time, place, customs, locality, or traditions). In other words, static subject matters would be regarded as essential parts (*umūr-e dhāti*) of religion, and the rest would fall into the category of accidental (*umūr-e 'araḍī*).
b. A change in the legal ruling induced by a change in the relationship between the subject matter and the basis upon which the ruling was issued: The different legal ruling is not due to a change in the subject matter's nature, as above, but to a change in the linkage or causality or criterion (*miṣdāq*) between the subject and the reason for its prohibition. For instance, in the past chess was prohibited because it was regarded as among those games that involved gambling. Over time, however, it was transformed into a game without any connection to gambling and thus is now considered lawful (Shamsuddin 2002, 31).[11] Participating in games that involve gambling is still prohibited; however, since chess is no longer associated with gambling in the new real situation (*mawḍū' wāqi'ī*), it can be ruled lawful because the proscription's evaluative measure or criterion (*miṣdāq*, that is, gambling) is now absent.
c. A change in the secondary injunction (*ḥukm-e thānawī-ye ilāhī*): Acts that become lawful due to presence of a certain characteristic (for example, necessity, compulsion, or public welfare) that render a

[11] Another example would be Khomeini's ruling on buying and selling musical instruments, which he made lawful because, in his estimation, certain kinds of music in the present time do have a beneficial component (Khomeini 1990, 21:34).

normally prohibited act permitted or vice versa. For instance, eating a human corpse is prohibited; however, in a life-or-death situation not only is it permissible but it becomes mandatory: "You are forbidden to eat carrion; blood; pig's meat; any animal over which any name other than God's has been invoked . . . but if any of you is forced by hunger to eat forbidden food, with no intention of doing wrong, then God is most forgiving and merciful" (Q. 5:3). This temporary dispensation loses its validity once the emergency or need ends.

d. A change in the legal ruling decreed by the ruler of an Islamic state: The ruler can use his own discretion to make various acts obligatory or proscribed on the basis of what he considers to be the most suitable and just way to redress any imbalance in a particular social context at a certain time and place. He may also do so to fulfill the *Sharīʿa's* aims and objectives (*maqāṣid al-Sharīʿa*): the preservation of life, property, mind, religion, and offspring. As such, this principle seeks to cultivate a just and egalitarian society and would not infringe upon the hadith that instructs Muslims to disobey His creation if it would lead to them disobeying God. Advocates of an Islamic state during the infallible Imam's Greater Occultation have designated the fallible ruler of an Islamic state as qualified to be considered part of the *ūlū al-amr*. This is quite a novel reading of the Shiʿi tradition, as this designation was generally applied only to the infallible guides unlike in Sunni Islam, where the reference was to temporal rulers: "O you who believe, obey God and the Messenger, and those in authority (*ūlū al-amr*) among you" (Q. 4:59).

5. Applied Jurisprudence: The Traditional Paradigm

In the case of organ donation, as an example, the Prophet has left a clear directive that dissecting a Muslim's corpse and removing its organs violates the principle of its sanctity or inviolability (*ḥurma*) and its dignity (*kārāma*). He is reported to have reproached a gravedigger: "Breaking the bone of one who is dead is like breaking it while he is living" (quoted in Krawietz 2003, 196–97). Moreover, the human body is a divine gift and constitutes a trust that has to be returned to the Creator without any mutilation, for humans are only its stewards and caretakers, as opposed to its real or sole owners[12]:

> It is not permissible to remove an organ from a deceased Muslim even if the person has made a will to donate his organs because the sanctity of a dead Muslim has to be preserved just like the sanctity of the living. In some of the

[12] This restriction does not apply to such regenerative and renewable tissue and organs as bone marrow and blood (Askoy 2001, 466).

> prophetic traditions, it prohibits clipping the nails of the deceased or cutting his hair. How then would it be possible to remove one of his organs? (Khū'ī and Tabrīzī 2006, 252–53)

Over time, the nature of the subject matter and situational context of organ donation changed. Jurists realized that donating organs could save lives, that it is a social obligation to provide transplantable organs to those community members who would otherwise die, that there are no other alternatives, and that the procedure's success rate has increased substantially. This change in the situational context prompted a new legal ruling: "There is no objection to removing an organ from a deceased, who has made a will to this effect, for the purpose of transplanting it into a living person but only under these two scenarios: the deceased was not a Muslim or someone who is regarded to be a Muslim; the life of a Muslim depends on such a procedure" (Sīstānī 2006, 165).

Upon greater reflection on the Qur'an's injunction to save human lives regardless of religious convictions (Q. 5:32) and the fear that a fatwa which discriminates between Muslims and non-Muslims could smear Islam's image, this fatwa was subsequently revised. As such, many Shi'i jurists now allow both donating to and receiving organs from Muslims and non-Muslims so long as this permission has been explicitly stated in one's last will and testament (Khāmene'ī 2008, 309–10).

However, this hierarchy of human dignity and human spirit—such as preferring Muslim patients over non-Muslim patients (Atighetchi 2007, 164–68); discouraging or prohibiting Muslims to be treated by or even consulting with a non-Muslim doctor, especially when a Muslim doctor is available (Rispler-Chaim 1993, 64–65); difference in the compensation (*diya*) for aborting an embryo after its ensoulment between a male and a female or a Muslim and a non-Muslim with a ratio of 2:1 respectively (Atighetchi 2007, 120); penal punishment for murdering a non-Muslim, slave, or a woman being half the sum in comparison to a free Muslim man (Khomeini 2008, 4:351–60); or the permissibility of slavery—would have to be treated as current and applicable under the paradigm of traditional *ijtihād* because these injunctions are viewed as fixed, permanent, and eternal under normal conditions. But this traditional approach marginalizes the Qur'an's ethico-moral outlook and disregards or minimizes the organic and inseparable relationship among theology, ethics, and law, which is value-based.

In contradistinction, exponents of foundational *ijtihād* would not be constrained by the parameters set by existing legal theory. This freedom would enable them to revisit rulings that "reasonable" (*'uqalā*) people view as unjust and as based on proportional equality by referring to "anthropology, cosmology, linguistics, hermeneutics and the methodology of jurisprudence (*uṣūl al-fiqh*)" (Kadivar 2013): "The moral values are the crucial pivot of the entire overall system, and from them flows the law. The law is therefore the last part in this chain and governs all the 'religious,'

social, political, and economic institutions of the society. Because law is to be formulated on the basis of the moral values, it will necessarily be organically related to the latter" (Rahman 1982, 156).

One can argue that all discriminatory rulings based on such man-made characteristics as race, gender, national origin, religion, economic status, and political ideology violate the Qur'anic ethos of justice, equity, fairness, and universal human dignity. Such a position is clearly evident from a thematic reading of the Qur'an and in the writings of the Shi'i infallible Imams. In Imam 'Alī's epistle to Mālik al-Ashtar before sending him off to Egypt, he underscores humanity's universal equality: "Infuse you heart with mercy, love and kindness for your subjects. Be not in face of them a voracious animal, counting them as easy prey, for they are of two kinds: *either they are your brothers in religion or your equals in creation*" (Sachedina 2001, 110).

Abdullah Saeed proposes a contextualized, thematic-holistic reading of the Qur'an, one that would reveal certain normative ethical values and general principles upon which one could develop a hierarchy of values (for example, justice, equity, and human dignity). This hierarchy, then, would receive priority over all other norms and values, especially those based on culturally specific values. If this were done, the above-mentioned organ donation discrimination scenario could not occur[13] because preferential injunctions based on religion, gender, or tribal affiliation would have to give way to the higher order principles of justice and human dignity (Saeed 2006, 124–44; Duderija 2011, 139–67).

Reformists have invoked the legal-ethical dynamism of *ijtihād* by advancing hermeneutical, exegetical, and juridical devices within the existing framework of Shi'i legal theory. This can be found in expanding the scope of reason (*'aql*), lacunae or the discretionary area (*minṭaqat al-farāgh*); and introducing such juridical devices as time (*zamān*), place (*makān*), customary practice (*'urf*), public welfare (*maṣlaḥa*), and objectives of law (*maqāṣid al-Sharī'a*). In addition, such secondary precepts as necessity (*ḍarūra*), emergency (*iḍṭirār*), need (*ḥāja*), averting difficulty (*'usr*) and distress (*ḥaraj*), hardship (*mashaqqa*), and harm (*ḍarar*) are invoked as exceptions that allow for minor legal adjustments to find dispensations or exemptions. But these devices do not resolve the problems with traditional *ijtihād* in tackling modern challenges.[14] Moreover, these secondary precepts could undermine the integrity of the juristic

[13] It is precisely to avoid generating such anomalous and bizarre outcomes that Abdulaziz Sachedina's ground-breaking work on biomedical ethics treats "Islamic bioethics as a subfield of Islamic social ethics rather than Islamic jurisprudence" (Sachedina 2009, 223).

[14] In Sunni Islam, the arbitrary patching up of the views (*talfīq*) and invoking the principle of choice (*takhayyur*) reflect lack of a rigorous methodology and a need for a renewal in the *uṣūl*.

theory if they are invoked to justify a disregard for the law or to legitimize a stratagem (*ḥīla*).

The concepts of *maṣlaḥa* and *maqāṣid al-Sharīʿa* were adopted from Sunni jurisprudents in the recent past, especially by Ayatollah Ruhollah Khomeini (d. 1989), whose novel approach to *ijtihād* relied heavily on *maṣlaḥa*. One outcome of this has been, in essence, the appearance of a jurisprudence of public welfare (*al-fiqh al-maṣlaḥa*) that could override scriptural authority and justify almost anything based on the loosely applied principle of *maṣlaḥa* (Sachedina 2009, 215).[15] Such importations run the risk of providing only partial, patchy, and petty formal modifications to existing legal rulings if they are motivated primarily by pragmatic considerations. In such a case, therefore, there is a great likelihood that they will be incompatible with the existing framework and theoretical apparatus and thereby result in only formal or marginal ethical coherence. As such, it remains an open question as to whether all of the above-mentioned juridical devices can function harmoniously within the traditional *ijtihādī* framework, which focuses on only secondary injunctions (*furūʿ*), without first introducing changes into the existing fundamentals and primary sources (*uṣūl*) of the Shiʿi legal theory (Shabestarī 2002, 468–69).

6. Foundational *Ijtihād*[16]

Traditional *ijtihād* is anchored in the secondary principles of Shiʿi legal theory, which has allowed little room for innovative and creative thinking

[15] Khomeini was a strong advocate of traditional *ijtihād* (*fiqh-e sunnatī*) in the early years after the Iranian revolution, but quickly realized that it could not address contemporary challenges. Even then, he couched his innovative ideas in such a manner that the traditionalists would not take exception to them (Khomeini 1990, 21:98). Toward the end of his life in January 1988, he invoked *maṣlaḥa* as the guiding principle in resolving all state issues: "The government is empowered to unilaterally revoke any *Sharīʿa* 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 [*ʿibād*, from *ʿibādāt*] 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 *ḥajj*, 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" (quoted in Mallat 1993, 90–92). But since he provided no methodology, this can result in arbitrary legal rulings. In Iran, the Expediency Discernment Council (*Majmaʿ-e tashkhīs-e maṣlaḥat*) was formed to deal with issues that the Assembly of Experts was consistently rejecting as being incompatible with Islamic law.

[16] The term "dynamic jihad" (*fiqh-e pūya*) received currency in the early days after the Iranian revolution in 1979. It was an acknowledgment that the existing traditional *ijtihād* could not address contemporary societal issues and, as such, the legal methodology needed to be reformed. However, the concept remained vague and ambiguous. Moreover, it was not employed by any eminent Shiʿi jurist, although it did find a degree of popularity among some journalists. Within a decade the term almost disappeared from the general discourse on legal reform. Ayatollah Faḍlalla labeled this revised jurisprudence as *al-ijtihād al-ḥarakī* (dynamic jurisprudence) (Faḍlalla 2000, 231–38).

due to its sanctification of precedence and allowance of addressing modern contingencies only through minor adaptations. In the past, the role of theology, ethics, intellect, anthropology, cosmology, modern science, and foundational principles in Islamic legal theory were either minimal or absent. This oversight transformed traditional *ijtihād* into a rigid, standardized, fixed, and sacrosanct methodology (*al-ijtihād al-jamīd*) (Faḍlalla 2000, 247). Foundational *ijtihād* attempts to remedy this by reconstructing an Islamic thought that is indigenous to the Islamic tradition, a system of thought that encompasses philosophy, theology, morality, and *fiqh*. It is also characterized by an organic relationship among reason, theology, law and ethics, history, modern sciences, fundamental principles of Islamic legal theory, and *fiqh* (Vasalou 2008, 44–45).

Kadivar argues that this *ijtihādī* model provides a coherent framework in which theology and ethics are reconstructed so that the intellect (*'aql*) is given a more expansive role in ethical decision-making; the attribute of justice is viewed as extra-religious and thus can vary depending upon the society's maturity; justice is considered to be in harmony with egalitarian justice in contrast to desert-based justice (*al-'adāla al-istiḥqāqiyya*), or one can say that justice is in agreement with fundamental equality in contrast to proportional equality; social, economic, political, and cultural conditions and circumstances are taken into account to revise a legal ruling if a "reasonable" person would judge it to be unjust, even if there is explicit textual evidence in the Qur'an or the Sunna validating the previous ruling; precedents and past consensus are not sanctified; and the revelatory texts are read with an appreciation that some of the legal rulings, viewed as unjust today due to a different historical and social context, were meant to be of a temporary nature and not permanent and fixed, based on the principle of gradualism and the notion of justice. It clearly distinguishes those principles and values that are unchanging and immutable from those that are historically and socially conditioned, and thus relative or contingent. In addition, it adopts a critical approach and re-reads the sources (*uṣūl*) of Islamic legal theory, consensus, hadith literature, and legal rulings of the jurists with a lens of ethics, egalitarian justice, reasonability, and Islam's ultimate goals.

Kadivar espouses the view that tinkering with the existing traditional *ijtihād* within the realm of secondary principles (*furū'*) by making petty formal readjustments or invoking various juridical devices (for example, *maṣlaḥa*, *zamān*, *makān*, *ḍarūra*, *ḍarar*, or *ḥāja*), all of which are highly subjective and relativistic in the absence of a rigorous methodology, cannot resolve modern challenges.[17] At times, jurists have resorted to

[17] Wael Hallaq delineates four trends in Sunni Islam that have emerged in response to modernity: (1) secularism, which advocates the complete abandonment of Islam; (2) a return to the pure and pristine teachings of the Qur'an and the Prophet, which is sponsored by the

loopholes and stratagems to make dubious and highly questionable acts lawful (Shīrāzī 2006). In his estimation, only foundational *ijtihād* and the reconstruction of Islamic thought can resolve the contemporary challenges raised by such modern issues as medical and bioethical questions, human rights, gender equality, and freedom of religion and political thought.

7. Applied Jurisprudence: Foundational Paradigm

In the past, the religious devices and principles invoked under traditional *ijtihād* and secondary rationally constructed legal precepts did address some of these issues, albeit inadequately. Today, however, they are deficient and ineffective, as will be illustrated in the case of such pressing issues as medical and bioethical problems.

Classifying human dignity and worth on the basis of religion, race, gender, class, or any other humanly constructed attribute would not be possible under this paradigm because justice is viewed as an extra-religious value that "reasonable" people can determine and thus can change over time. Today, any discrimination on the basis of religion, race, or other specific humanly constructed attributes is viewed as unjust, abhorrent, and repugnant. As such, no distinction can be made on the basis of religion between a Muslim and a non-Muslim (namely, "people of the book," polytheists, and atheists) in the matter of donating or receiving an organ for transplantation. With respect to the doctor-patient relationship, egalitarian justice would dictate that no distinction be made between a Muslim and a non-Muslim doctor when evaluating her merits and qualifications. Likewise, compensation awarded to the victim's family for aborting a fetus after its ensoulement cannot be determined on the basis of gender, religion, or any other humanly constructed criteria.

Ayatollah ʻAlī Sīstānī, an eminent Shiʻi jurist residing in Najaf, Iraq, who is a source of emulation (*marjaʻ*) for a substantial number of Shiʻis, has issued rulings in the area of medical ethics and bioethics that would have been impossible under the foundational model of *ijtihād* due to its prohibition of discrimination on the basis of one's religion. According to him, it is not mandatory for a Muslim to provide CPR to a non-Muslim patient; however, no efforts must be spared to resuscitate a Muslim patient. In a similar vein, he has presented an edict that pertains to a

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Wahhabi movement; (3) "religious utilitarianism," which relies heavily on the concept of public interest (*maṣlaḥa*) and necessity to either revise previous juridical rulings or provide new ones for fresh contingencies (Hallaq views both of these as highly subjective and arbitrary); and (4) "religious liberalism," which realizes that every text originates in a context and not in a vacuum. Thus, a changed context demands new rulings derived by applying universal principles in a particular context (Hallaq 1997, 207–54).

brain-dead patient, and again, differentiated the care to be given to a patient on the basis of his faith. For example, any life-supporting devices can be removed from a non-Muslim patient, but can never be removed from a Muslim patient (Takim 2009, 167).

In the case of traditional *ijtihād*, a change in a legal ruling can be induced by various factors, such as a different time, place, and custom that produce a new situational context and subject that warrants a new ruling. But in the foundational model, modern science, along with anthropology, hermeneutics, justice, and other contemporary disciplines, could dictate a change in the legal ruling without any change in the essence of the subject or situational context. For instance, the financial compensation awarded to a Muslim in relation to a non-Muslim, or to a free man in relation to a free woman, is amended to make it equivalent as opposed to the traditional ratio of 2:1 in favor of men. This new ruling is based on the contemporary principle of fundamental equality under the rubric of egalitarian justice, while the subject matter and the situational context could remain unchanged.

More importantly, the foundational paradigm would allow a legal ruling to be revised even in cases where there is textual proof but no indication of whether it is a temporary or a permanent injunction, if doing so is warranted on account of egalitarian justice, ethics, and the concept of gradualism of the Qur'anic dictates. For instance, the Qur'an states that the testimony of two women is equal to the testimony of one man (Q. 2:282) and that a man inherits twice as much as a woman (Q. 4:11 and 176), penal laws call for flogging the guilty person and cutting off a thief's hand (Q. 24:4–5 and 5:38), the inadmissibility of non-Muslim's testimony, or the inferior status of the protected minorities (*dhimmī*) under an Islamic state (Q. 9:29).

Therefore, Kadivar argues that a radical departure from traditional *ijtihād* to a new foundational *ijtihād* is now required, one with its own sources and principles, and one based on a new theology and an ethical theory gleaned from the Qur'an. Abdolkarem Soroush has argued that "in order to have a real reform in law, a real legal reform in any issue, you have to have reform in theology" (Lewis 2010). And yet those who seek to develop it must keep in mind, as Fazlur Rahman astutely pointed out, that the Qur'an has a situational character, for it "consists of moral, religious, and social pronouncements that respond to specific problems in concrete historical situations" (Rahman 2008, 5). This holistic approach should provide legal rulings that are in harmony with legal and ethical theory, instead of projecting inconsistency and a lack of coherence between the legal edict issued by the jurist and her legal methodology. One example of this problem is the many legal ordinances issued by Ayatollah Yūsef Ṣāneʿī in the form of dissenting legal opinions. Although they are compatible with the contemporary universal human rights discourse, they

do not modify the existing assumptions and theoretical framework of traditional *ijtihād*.[18]

The role of reason in deducing new legal judgments, especially in the sphere of medical and bioethical issues, is vital because these issues are classified as "lacunae" or "the discretionary area."[19] Here, the Qur'an has been silent and has therefore not prescribed any legal/moral valuation on the action concerned. But reason, which has ontological authority as a source of law, can determine the legal judgment or ordinance based on the epistemic formula adopted by the Mu'tazilis. In other words, judgment does not have to be suspended on the grounds of exercising caution. This outlook is based on the premise that scripture or revelatory texts have not provided legal decrees to cover each and every potentiality until the end of time (Shabestarī 2002, 346–47). Rather, it has provided general principles and values, along with a coherent epistemology, that can be employed while keeping in mind the new context and circumstances.[20] In other words, the Qur'anic decrees in the realm of human interrelationships should not be viewed as eternal and unchanging, even if there is explicit and unambiguous textual evidence for their validation without any indication that they were meant to be time- or context-bound, based on a particular efficacious cause.

8. Conclusion

New medical and bioethical issues and contingencies (for example, organ donation, stem-cell research, human cloning, abortion, genetic engineering, in-vitro fertilization, surrogacy, sex-change surgeries, transsexuality [Najmabadi 2008, 23–42], sperm banks, cosmetic enhancements, defining brain death, and euthanasia) have given rise to many moral and ethical challenges. These, in turn, require a paradigm shift away from the traditional *ijtihād* model, which has reached its limits and cannot provide cogent responses that accord with egalitarian justice and the Qur'anic ethos. The foundational *ijtihād* model, on the other hand, provides a coherent framework in which theology and ethics are reconstructed so that the intellect (*'aql*) and modern sciences will have a larger role in ethical decision-making. The attribute of justice is viewed as

[18] Ṣāne'ī negates the legal distinction between Muslim and non-Muslim, man and woman, and free person and slave while employing the traditional model and this is in direct conflict with its bases and premises, which are considered fixed and eternal (Ṣāne'ī 2005, 2004, 2006, and 2003).

[19] For a systematic discussion on *minṭaqat al-farāgh*, see 'Abd al-Lāwī 1996, 189–296. This is analogous to the Sunni concept of *maṣāliḥ al-mursala* (seeking the public good by using extra-revelatory sources when the revelatory texts are silent).

[20] A common example provided is the analogy between the concept of consultation (*shūra*) that is found in the Qur'an and a parliamentary system of government.

extra-religious and in harmony with egalitarian justice, in contrast to desert-based justice. In addition, this latter model takes the relevant social, economic, political, and cultural conditions and circumstances into account; does not sanctify past precedents and consensus; and reads the revelatory texts in a contextualized manner and measures them against universal moral-ethical values to determine what is mutable and temporal, in contrast to what is fixed and eternal.

Foundational *ijtihād* can incorporate new theology, a revised rationalist ethical theory, and a philosophically rooted system that has a moral outlook anchored in egalitarian, non-discriminatory, and fundamental justice instead of a desert-based justice or proportional equality.[21] Egalitarian justice is prior to religion and, by default, that which is considered extra-religious. Therefore, it allows some scope for dialogue with secular and communitarian ethics. As such, it is not circumscribed by creed and theology, except for some basic immutable and permanent principles (for example, the existence of God, prophecy, and belief in the hereafter). In this model, one is accorded rights and dignity by virtue of being human and not on the basis of religious or social categories.[22]

The interplay of foundational principles, theology, ethics, intellect, epistemology, modern sciences, history, and egalitarian justice is an attempt to reconstruct Islamic thought and Islamic legal theory, but without transgressing into the domain that is immutable and fixed (*thābit*) under the rubric of Islamic jurisprudence. This renewal in the paradigm of foundational *ijtihād* would entail a critical approach to consensus-based precedents, generally viewed as non-reversible, that collectively would prevent the issuance of unjust, unethical, discriminatory, and unreasonable legal rulings. The case of slavery is quite illustrative, for it underlines the need for a new paradigm in legal theory. This abhorrent practice was prevalent in Muhammad's society, and Islam never explicitly prohibited it. Its policy of gradual restriction indicates that the Qur'an is an evolutionary document that favors the gradual uprooting of evil practices in its midst as the society transitions toward a superior position that would conform to egalitarian justice. This is evident in the Qur'anic principle of abrogation. Traditional *ijtihād*, on the other hand, continues to view such injunctions

[21] Slavery, racism, and gender inequality have been justified by invoking desert-based justice and other standards of rationality.

[22] "In the Qur'an, God favours the children of Israel over other peoples: 'Children of Israel! Call to mind the (special) favours which I bestowed upon you, and that I preferred you to all others' (2:47, 122). Similarly, the supremacy of Israelites over the world is mentioned in 45:16 and 7:140. There is no doubt that the Israelites are not superior to the followers of Jesus Christ or the *umma* of Muhammad, and that 'other peoples' here means people before the calling of these two prophets. These verses are situational premises (*al-qaḍāyā al-khārijiyya*) not absolute premises (*al-qaḍāyā al-ḥaqīqiyya*), that is, they denote superiority in a specific time and place, not superiority innate and inherent in the children of Israel" (Kadivar 2013, 228).

as fixed and eternal because there is no explicit indication in the Qur'an or the Sunna that it was time- or context-bound. Given this, its proponents consider slavery to be permissible even now.[23]

The major deficiency of the foundational *ijtihād* paradigm is its lack of clarity and the subjective nature of the criterion (*miṣdāq*) used to distinguish between the permanent (acts of worship, belief system, and the essentials of religion) and the mutable (human inter-relations) domains. In addition, justice, public interest, and objectives of the *Sharīʿa* as defined by reasonable people, in actuality, do not transcend cultural and historical parameters. The clarity and precision of the attributes is further eroded by the need of the jurists to have a profound understanding of the social, political, and economic milieu to gauge whether previous rulings need to be amended or the potential effects of new legal rulings on society. In the absence of a rigorous methodology, these factors will inevitably become subjective and relativistic in their application to contemporary challenges and, as such, may result in inconsistencies and produce contradictory outcomes or legal rulings. Moreover, even though the model is based on universal norms and values that are extra-religious, its usage is limited primarily to Muslims because it assumes that the ethical decisions will be made under the rubric of the religious ethos of Islam.[24]

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[23] Ibn Khaldūn (d. 1406), the celebrated Muslim sociologist, writes in his famous *al-Muqaddima* that blacks in southern Africa "are not to be numbered among humans" (Ibn Khaldūn 1986, 45).

[24] I wish to acknowledge my profound gratitude to Dr. Mohsen Kadivar at Duke University for his invaluable help in writing this essay. I also received insightful and useful suggestions from two blind reviewers who were solicited by the editors of the *Journal of Religious Ethics*.

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