BRILL

METHODOLOGICAL ISSUES IN ISLAMIC JURISPRUDENCE

*Mohammad Hashim Kamali**

INTRODUCTION

The methodology of *uṣūl al-fiqh* embodies the basic approach and framework of thought Muslim jurists have proposed for the development of *Sharīʿa*. *Uṣūl al-fiqh* is concerned with the sources of law, their order of priority, and methods by which legal rules may be deduced from the source materials of *Sharīʿa*. It is also concerned with directing and regulating the exercise of *ijtihād*. The sources of *Sharīʿa* are of two kinds: revealed and non-revealed. The revealed sources, namely the Qu'ran and Sunnah, contain both specific injunctions and general guidelines on law and religion, but it is the broad and general directives which occupy the larger part of the legal content of the Qu'ran and Sunnah. The general directives that are found in these sources are concerned not so much with methodology as with substantive law and they provide indications which can be used as raw materials in the development of the law. The methodology of *uṣūl* refers mainly to rules of interpretation and deduction, and methods of reasoning such as analogy (*qiyās*), juristic preference (*istiḥsān*), presumption of continuity (*istiṣḥāb*), and so forth, which are all the sub-varieties of *ijtihād*. While the clear injunctions (*nuṣūṣ* pl. of *naṣṣ*) and general principles of the Qu'ran and Sunnah command permanent validity, the methodology of *uṣūl* does not, for it was developed after the revelation of the Qu'ran and Sunnah came to an end, and most of it consists of juristic propositions advanced by scholars of different periods of history addressing issues which may or may not be reflective of the dominant concerns of contemporary Muslims. There is little doubt that some of the doctrines of *uṣūl*, such as *ijmāʿ* (general consensus), and *qiyās* (analogical reasoning), were partly designed to encourage stability and curb the influence of foreign traditions into the *juris corpus* of Islam. The doctrines and methods that were so developed embodied the ulema responses to the growing diversity in the schools of thought, sects and factions, that was witnessed in the early period of the Abbasid rule around the fourth century hijrah. Evidence also suggests that the development of *uṣūl* was influenced by the rift over legitimacy between the ulema and rulers. The ulema refused to acknowledge to the rulers the authority to legislate and interpret the *Sharīʿa*. The rulers in turn denied to the ulema a share in political power. This pattern of relationship discouraged co-operation and harmony between the government and

*Professor (*Kulliyyah* of Laws), International Islamic University of Malaysia.

ulema. We also note a certain change in the nature of issues. While many of us today speak of the paralysing hold of *taqlīd* and the need to put a new meaning and impetus in *ijtihād*, the trend of opinion was in the opposite direction in the early fourth century when the ulema were positively encouraging *taqlīd*. The increased isolation of *Shari'a* from the realities of law and government in contemporary Muslim societies accentuates the need for fresh efforts to make the *Shari'a* a viable proposition and a living force in society. Our problems over *taqlīd* are exacerbated by the development of a new dimension to *taqlīd* as a result of Western colonialism which has led to indiscriminate imitation of the laws and institutions of the West. The prevailing legal practice in many Muslim countries, and indeed many of their constitutions, are modelled on a precedent that does not claim its origin in the legal heritage of Islam.

In a 1976 conference held by the International Institute of Islamic Thought, the participants reached the conclusion that the Muslim world was afflicted with an intellectual crisis (*al-azmah al-fikriyyah*) and any remedies that were to be attempted must therefore begin in this context. Questions have arisen over the need for correct methodology to ensure proper and disciplined thinking, to stimulate thought which aimed at establishing a correct balance of values, and thought that related itself to the actual problems the Muslim community were facing.[1] Among the problems singled out were also a certain poverty of vision (*ifiqār al-ru'yah al-ṣaḥīḥah*) which was neither goal-orientated nor purposeful: intellectual debate often conducted for its own sake rather than to find the needed solutions to problems.[2] It was further stated that the leading ulema and *mujtahids* of early Islam, the Companions and Followers, were right in their vision to see Islam, not just as a set of rules, commands and prohibitions, but as a mission and philosophy of life which required a strong sense of direction. This was to be achieved, not only by conformity to specific rules but also by following the broad principles, the vision and objectives of Islam without which conformity to specific rules would be reduced to a mechanical exercise. Only when Islamic thought lost its clarity and purpose, and its association with life in the community, it began to become a force of conservatism afflicted with dry and literalist conformity while oblivious of the overall philosophy and direction of Islam.[3] AbuSulayman has spoken of "the crisis of Islamic thought" which he associated with an outdated methodology of research that heavily relied on linguistic and textual analysis and paid little attention to empirical reality.[4] To remedy this situation, AbuSulayman proposed the following three-point scheme: first, the relationship between reason and revelation should be redefined. Second, the meaning of *ijtihād* and the role of the *faqīh* (jurist) in the process of intellectual reform should also be redefined. Thirdly, the religious-secular dualism which is a creation of Western science

[1] Al-Ma'had al-'Ālami li al-Fikr al-Islami, *Islamiyyah al-Ma'rifah*, Herndon, VA, 1981, p. 166 ff.
[2] *Ibid.*, p. 35.
[3] *Cf. ibid.*, p. 62.
[4] Abdul Hamid AbuSulayman, "Islamization of Knowledge with Special Reference to Political Science", *The American Journal of Islamic Social Sciences* 2 (1985), 268–9.

should be ended as it is alien to Islamic thought.[5] The author, however, did not elaborate on his proposed redefinition of the relationship between revelation and reason. There were suggestions as to what aspects of the conventional methodology of *uṣūl* needed to be revised and redefined but the question as to how this should be done was not addressed. This was perhaps partly because AbuSulayman tended to look beyond the boundaries of the conventional *uṣūl*, rather than working within that framework. In his 1991 publication, *Azmah al-ʿAql al-Muslim* (*Crisis of the Muslim Mind*), AbuSulayman further elaborated on the shortcomings of *uṣūl* and provided much insight on the relationship of revelation and reason, but he confirmed his earlier tendency to dismiss the conventional *uṣūl* rather than working it from within and proposing reforms for the parts that were seen to be defective. This also brings into question the second point of AbuSulayman's proposal on the redefinition of *ijtihād*. Is this not included and subsumed under the first? Is *ijtihād* not the principal vehicle and method by which the conventional *uṣūl* regulates/defines the relationship between revelation and reason, be it in the form of analogical reasoning (*qiyās*), juristic preference (*istiḥsān*), or other such methods as are expounded in *uṣūl al-fiqh*? There is, in other words, a certain overlap in AbuSulayman's first two proposals. But his critique of *ijtihād* itself, its weakness on grounds of empiricism, and its excessive concern with linguistic reasoning is sound. I shall in the following pages attempt to elaborate on both of these points and shall also have occasion to refer again to AbuSulayman's contributions to the methodology of Islamic thought.

In his discussion of the Islamisation of knowledge, al-'Alwani has also accentuated the need for "the formulation of an exact and precise definition of the relationship between revelation (*waḥy*) and reason (*'aql*), for this will help Muslims solve many of the problems arising from the relationship of knowledge to religion and of knowledge to empirical reality; it will also help us to acquire a better understanding of *ijtihād*".[6]

Another aspect of the conventional methodology of *uṣūl* which merits attention is its emphasis on literalism and a certain neglect, in some instances at least, of the basic objective and rationale of the law. The early formulations of *uṣūl* have not significantly addressed this issue and it was not until al-Shāṭibi (d. 790 AH) who developed his major theme on the objectives and philosophy of *Sharīʿa* (*maqāṣid al-sharīʿah*). Al-Shāṭibi's contribution came, however, too late to make a visible impact on the basic scheme and methodology of *uṣūl*. Al-Shāṭibi thus emphasised that the higher objectives of the law such as *maṣlaḥah* and justice, rather than technical accuracy and formal logic, must in the final analysis command higher priority in the conduct of *ijtihād*, a theme which had not received adequate attention in the early works of the ulema of *uṣūl*. Al-Shāṭibi's comprehensive treatment of the *maqāṣid* and his emphasis on the purpose and consequence of behaviour and the underlying intention of conduct (*maʾālāt al-afʿāl*) rather than

[5] *Ibid.*, pp. 272–73.

[6] Taha Jābir al-'Alwani, "Taqlīd and Ijtihād", *The American Journal of Islamic Social Sciences* 8 (1991), 142.

their visible forms and structures opened a new chapter in the history of Islamic jurisprudence.[7]

This article addresses two types of issues: general issues which concern the legal theory of *uṣūl* as a whole, and this includes a discussion of the gap that has developed between legal theory and practice, technical orientations of *uṣūl al-fiqh*, revelation and reason, neglect of empiricism and the role of the time-space factor in conventional *uṣūl al-fiqh*. This is followed by a discussion of issues that are encountered in particular areas, namely *ijtihād*, *ijmāʿ* and *qiyās*. The article concludes with the discussion of a new scheme which proposes reorganisation and adjustment in the conventional methodology of *uṣūl al-fiqh*.

THEORETICAL ORIENTATIONS OF UṢŪL

Uṣūl al-fiqh is often described as a theoretical, rather than empirical, discipline which is studied more for its own sake than as means by which to develop the law in relationship to new issues. This is one of the problematics of the legal theory of *uṣūl* which took a turning for the worse with the domination of *taqlīd* around the fourth century hijrah. With the so-called closure of the door of *ijtihād*, the ulema resorted less and less to the sources of *Sharīʿa* for finding solutions to problems. Instead of addressing social issues and attempting new solutions the ulema of the later ages (*al-muta'akhkhirūn*) occupied themselves mainly with elaboration, annotation, abridgement, summaries and glosses of the works of their predecessors. At first, *ijtihād* was prohibited. Then in the fifth and sixth centuries, scholars were restricted to *tarjīḥ*, or giving preference to the opinion of one imam or another on questions of *fiqh*. But then *tarjīḥ* was prohibited and scholars were restricted to choosing between rulings within a single *madhhab*. In this way "the door to independent legal thought was shut and then barred".[8] With the development of a gap between legal theory and practice there then came a stage where *uṣūl al-fiqh* began to be used as a means by which to justify *taqlīd*. The imitators studied the *uṣūl* and utilised its methodology in order to defend their unquestioning conformity to the established doctrines of the past. Unwarranted references to general consensus, or *ijmāʿ*, of the ulema of the past over one ruling or another proliferated, and often minor and relatively obscure opinions were elevated to the rank of *ijmāʿ*.[9] The methodology of *uṣūl* which was primarily designed to regulate and encourage *ijtihād* was then used for purposes which were alien to its original intention.

A certain lag between the theory and practice of a discipline is admittedly not unexpected. Theoretical articulation often follows practical development. It is

[7] Abū Ishāq Ibrāhīm al-Shātibī, *Al-Muwāfaqāt fi Uṣūl al-Aḥkām*, ed. M. Ḥasanayn Makhluf, Cairo: Maṭbaʿah al-Salafiyyah, 1341 AH, II, 197ff.

[8] Ṭahā Jābir al-'Alwani, "The Crisis of Fiqh and the Methodology of *Ijtihād*", *The American Journal of Islamic Social Sciences* 8 (1991), 332.

[9] Wizarah al-Awqaf, *Al-Mawsuʿah al-Fiqhiyyah*, Cairo: Dār al-Kitab al-Misri, n.d., I, 18.

therefore not surprising to note that *uṣūl al-fiqh* had a certain degree of theoretical orientation even during the era of *ijtihād*. The question has thus arisen and been debated in many a reputable text of *uṣūl* as to which came into being first, *fiqh*, or *uṣūl al-fiqh*, the law itself or the theory and sources of law?[10] One of the two opposing answers to this question has it that *fiqh* could not have developed without its sources, and this would mean that *uṣūl al-fiqh* preceded the *fiqh*. But it seems more likely that *fiqh* preceded the *uṣūl al-fiqh*: *fiqh* began to develop during the lifetime of the Prophet, at a time when there was no urgent need for methodology, and this situation continued unchanged during the period of Companions. Important developments in *uṣūl* occurred only during the second and early third centuries hijrah.[11] As one observer commented "*uṣūl al-fiqh* was a retrospective construct .... Indications are that *uṣūl al-fiqh* was a manner of systematising positive law that had already been arrived at largely as a result of local and other needs without necessary recourse to the sources".[12] The theoretical orientation of *uṣūl* persisted even after it was articulated and refined. In historical terms, articulation of the doctrines of *uṣūl* took place around the early third century, that is in the last third of the three centuries of *ijtihād*. Thus the main purpose for which the theory was supposed to be utilised, that is to regulate *ijtihād*, was soon beginning to decline. Furthermore, many of the doctrines of *uṣūl* remained controversial and were increasingly subjected to technicality and stipulations which tended to erode their effectiveness. The increased complexity of doctrines such as *qiyās* and *istiḥsān* and conditions such as unanimity and universal consensus as a prerequisite of *ijmāʿ* were bound to affect the practical utility of these doctrines. The legal theory that al-Shāfʿi articulated in his *Risalah* was not burdened with technicality and regimentation of the kind that were subsequently webbed into it by the proponents of *taqlīd*. These latent additions were in turn not so much motivated by the ideal of accommodating social change as by the concern to preserve the heritage and traditions of the past. Some of the complexities of Hellenistic thought and logic found their way into *uṣūl al-fiqh* which moved it further away from the realities of social life.[13]

AbuSulayman has spoken of the lack of empiricism and systematisation saying that the ulema of *uṣūl* relied on "deduction from the Islamic texts as their main method in acquiring knowledge ... and not much attention was paid to developing systematic rational knowledge pertaining to law and social structure".[14] He then

[10] *Cf.* Muhammad Abu Zahrah, *Uṣūl al-Fiqh*, Cairo: Dār al-Fikr al-'Arabi, 1377/1958, p. 8ff; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Cambridge: The Islamic Texts Society, 1991, p. 3ff.

[11] *Cf.* Zafar Ishaq Ansari, "The Significance of Shafi'i's Criticism of the Madinese School of Law", *Islamic Studies* 30 (1991), 485.

[12] Aziz al-Azmah, "Islamic Legal Theory and the Appropriation of Reality", in Aziz al-Azmeh, ed. *Islamic Law, Social and Historical Contexts*, London: Routledge & Kegan Paul, 1988, p. 251.

[13] *Cf.* Hasan Turabi, *Tajdīd Uṣūl al-Fiqh al-Islami*, Jiddah: Dar al-Su'udiyyah li'l-Nashr wa'l-Tawzi', 1401/1984, p. 13.

[14] Abdul Hamid AbuSulayman, *The Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought*, Herndon, VA: International Institute of Islamic Thought, 1987, p. 77.

stated that in regard to other subjects such as medicine, mathematics, and geography Muslim scholars relied on text and reason. They were empirical, experimental and applied both induction and deduction.[15] However, this was not the case in conventional *uṣūl* which was "developed in response to the needs of maintaining the classical social system of the dynastic period". With the emergence of the rapidly changing industrial society " the classical frame of analysis is no longer workable or acceptable".[16]

The gap between theory and practice grew wider as a result of the fact that *uṣūl al-fiqh* was developed, like the rest of Islamic law, by private jurists who worked in isolation from government. The ulema were not involved in the practicalities of government and their relations with government authorities were often less than amicable. Juristic doctrines were often advanced and elaborated without involving government policy. Note, for example, that nearly all the instances of *ijmāʿ* that are cited in the textbooks refer to the consensus of ulema and private jurists – there being hardly a single record of a government sponsored assembly of the learned to have acted as a vehicle of *ijmāʿ*, or even of *ijmāʿ* in which the government played a visible role. On their part, the government authorities seem to have condoned and encouraged *taqlīd* as this meant that leadership and initiative in both political and legal spheres rested with the government in power. The ulema were consequently left to their own devices to utilise and even modify the legal theory so as to suit the requirements of *taqlīd*.

The ulema denied the increasingly secular Umayyad rulers the legitimacy to legislate and to interpret the law, and the rift became more visible under the Abbasids who did not allow the ulema a share in political power. Thus the struggle over legitimacy had "a serious negative influence in changing the sound psychological and rational environment created by the Prophet and which had dominated earlier periods".[17] The rulers strove to enhance the role and authority of reason over the text as this would give them freedom in the sphere of legislation, but the ulema were keen to deny them that very freedom. It was against this background that the ulema articulated the methodology of *uṣūl* in order to minimise abuse of power by the rulers and their liberty with the *Sharīʿa*. Imam al-Shāfiʿi's attempt, for example, to equate *ijtihād* with *qiyās* as two terms with the same meaning was clearly indicative of a purpose to minimise the role of independent reasoning in the development of *Sharīʿa*. The wider scope of reasoning was thus to be reduced to only one form that is analogical reasoning. The result was a certain "distortion of issues, arbitrariness and spread of spurious materials within the fabric of *uṣūl al-fiqh*".[18] And then the ulema assertion that there was no further need for original *ijtihād*, the so-called closure of the door of *ijtihād*, was prompted by the struggle over legitimacy and this was a step that could

[15] *Ibid.*, p. 83.
[16] *Ibid.*, p. 84.
[17] Tahā Jābir al-'Alwani, *Ijtihād*, Herndon, VA: International Institute of Islamic Thought, 1993, p. 10.
[18] *Ibid.*, p. 16.

only have been taken in an atmosphere of despondency at a time when Islamic thought and scholarship has lost enthusiasm for originality and renewal.[19]

It seems that the problem over legitimacy persisted and continued to isolate the ulema and political leaders in Muslim societies. The pattern that has prevailed during the era of nationalism and constitutional government is also one of isolation between the ulema and government, although for different reasons. It now appears that the popular vote, rather than the ulema approval, is seen as a legitimising force in politics. The advent of constitutionalism and government under the rule of law brought the hegemony of statutory legislation that has largely dominated legal and judicial practice in Muslim societies. The government and its legislative branch tend to act as the sole repository of legislative power. The ulema have no recognised role in legislation, and the role and relevance of *uṣūl* to the applied law of the land appears to have become even more uncertain and remote.

THE TIME-SPACE FACTOR

The legal theory of *uṣūl* falls short of integrating the time-space factor into the fabric of its methodology. This is also a *taqlīd*-related phenomenon and it is reflective of an influence that fails to comply with the Qu'ranic teachings on rational enquiry and pragmatism in finding effective solutions to problems.[20] The precedent of the Companions and leading imams of jurisprudence during the era of *ijtihād* is also indicative of versatility and dynamism in that they exercised initiative and responded to situations without feeling the urge to conform to a strict methodology and framework.[21] The role of the time-space factor becomes evident in the early history of the Qu'ran when we compare its Makki and Madini portions to one another. The Qu'ran contemplated the prevailing conditions of Arabian society, which were reflected not only in the substantive laws that it introduced in each phase, but also in the form and style of its language, the intensity of its appeal and the psychology of its discourse.[22] The fact that the Qu'ran was revealed gradually over a period of 23 years is itself testimony to its regard for change of circumstances in the life of the nascent community. God Most High revealed His message to the people in contemplation of their capacity at receiving it and the realities with which they were surrounded in Makkah and Madinah respectively.[23]

The time-space factor is also the principal cause behind the incidence of abrogation (*al-naskh*) in the Qu'ran and Sunnah. *Naskh* is by and large a Madinese phenomenon which occurred as a result of the changes the Muslim community

[19] *Ibid.*, p. 18.

[20] *Cf.*, Muhammad Iqbal, *Reconstruction of Religious Thought in Islam*, Lahore: Shah Muhammad Ashraf, reprint 1982, p. 147.

[21] *Cf.*, Turabi, n. 13 at 12.

[22] For further information on the Makki-Madini division of the Qu'ran see Kamali, *Jurisprudence*, n. 10 at 17ff.

[23] *Cf.*, Al-Shāṭibī, n. 7 at III, 244; Ahmad Amin, *Fajr al-Islam*, 14th edn. Cairo: Maktabah al-Nahdah al-Misriyyah, 1986, p. 231.

experienced following the Prophet's migration to Madinah. Certain rules were introduced at an early stage of the advent of Islam at a time when Muslims were a minority in a dominantly non-Muslim environment. Later when they acquired sovereign authority, some of the earlier laws were abrogated and replaced by new legislation.[24] There are also instances in the precedent of Companions where the rulings of Sunnah were changed in order to reflect the change of circumstances. We read in a Ḥadīth, for example, that the Prophet had granted women the right to attend the mosque for congregational prayer. Due to the change of circumstances, however, the Prophet's widow, Ā'ishah, later changed this ruling as she concluded "had the Messenger of God observed what was happening to women, he would have forbidden them from attending the mosque".[25] According to another Ḥadīth, the Prophet refused to validate price control and declined a request by the Companions to this effect, but later the Caliph 'Umar, and the leading ulema of Madinah, validated introduction of price control on grounds of public interest and prevention of harm to the people.[26] And then we note Caliph'Umar's decision to suspend the share in *zakah* revenues that the Qu'ran had assigned for *mu'allafah al-qulūb*. These were people of influence whose support was important for the victory of Islam. Later when circumstances had changed, the Caliph discontinued this and stated, in his widely-quoted phrase, that "God Most High has exalted Islam and it is no longer in need of their favour".[27] This shows that the Companions were versatile and their pragmatism stood in contrast with the rigidity that later prevailed during the era of *taqlīd*.[28] The ulema of *uṣūl* and also of political science and international law have treated the materials of the Qu'ran and Sunnah with a certain degree of dogmatic absolution which tends to amount to a misreading of the text if it is to be forcibly applied to a totally different set of circumstances. The problem here is particularly noticeable with regard to the Sunnah which has often been treated in total isolation from the time-space influence.[29]

Among the prominent scholars of *Shari'a*, Shah Wali Allah Dihlawi stands alone in his overt recognition of the role of time-space in the development of *Shari'a*. He considered the *Shari'a* to be changeable in accordance with the changing *maṣlaḥah* of the community. In bare outline, Dihlawi observed that the Prophet established a

[24] The number of daily prayers, for example, were initially fixed at two, but were later increased to five, and the initially charitable and undefined character of *zakah* (legal alms), in the Makki period was later given the force and precision of positive law. See for more examples al-Shātibī, *Muwāfaqāt*, n. 7 at III, 63; Abu al-'Aynayn Badran, *Uṣūl al-fiqh al-Islami*, Alexandria: Mu'assasah Shabab al-Jami'ah, 1404/1984, p. 148.

[25] Abū Ḥāmid al-Ghazali, *Ihyā' 'Ulūm al-Dīn*, 2nd edn. Cairo: Dār al-Fikr, 1400/1980, II, 48.

[26] The Ḥadīth thus provided: "God alone determines the sustenance of people. He restricts and opens the supplies and He is the true controller of prices. I only hope to meet Him while none of you has a grievance against me over your lives and properties". Abu Bakr Ahmad Al-Bayhaqi, *Al-Sunan al-Kubrā*, Beirut: Dār al-Fikr, n.d., VI, 29.

[27] Abd. al-Rahman Taj, *Al-Siyasah al-Shar'iyyah wa'l Fiqh al-Islami*, Cairo: Matba'ah Dar al-Ta'lif, 1373/1953, p. 28.

[28] *Cf.*, AbuSulayman, n. 14 at 76.

[29] *Ibid.*, p. 69.

model for conduct which contemplated his contemporary Arabian society and its prevailing conditions at the time. To follow the spirit of this model we too should contemplate the realities of our time and thereby introduce the necessary change into the rules of *Shari'a*. The change that is deemed necessary is envisaged by Dihlawi to be such that "were the Prophet alive, he would have validated it himself".[30] In sum, graduality in the revelation of the Qu'ran, recognition of the change of circumstances in the language and laws of the Qu'ran, and abrogation of some of its laws and their replacement by new legislation all point to the recognition of the time-space factor in the early development of *Shari'a*, and yet we find that this has not been duly recognised in the legal theory of *uṣūl al-fiqh*. The propensity toward literalism, a "word-for-word and an issue-for-issue comparison and analogy" has led many a prominent jurist like al-Shāfi'i to generalisations that do not sustain the test of time. In dealing with non-Muslim powers, for example, al-Shāfi'i advised Muslim rulers to attack the *mushrikūn* (disbelievers) at least once a year and not to accept a truce for more than 10 years by analogy to the Sunnah of the Prophet because he was engaged in battle with enemy forces at least once a year and did not accept a truce for more than 10 years. "No statesman could accept this kind of analogy and understanding" under the existing conditions of today or in the foreseeable future.[31] Al-Shāfi'i's conclusion might have been suitable under the circumstances of early Abbasid rule, but unless this is clearly stated and the temporary and circumstantial nature of his ruling is specified, its validity as a general ruling of the *madhhab* is bound to remain questionable. As a matter of fact the whole concept of the division between *dār al-Islam* (abode of Islam) and *dār al-ḥarb* (abode of war) is anachronistic; it is a juristic construct of the *fuqahā'* which has no Qu'ranic origin, and it is unsustainable under the prevailing conditions of Muslim society today.

The failure in classical jurisprudence to admit the time-space factor into the fabric of its methodology of interpretation and *ijtihād* has added to the problem over the authenticity of Sunnah. When a certain circumstantial instruction of the Prophet is taken to be the embodiment of a permanent Sunnah, it is no longer enough to verify the basic outline and message of the reported Sunnah but the precise wording as well; and this is extremely difficult. Neglect of the time-space factor in the treatment of Sunnah has added to the problem over its authenticity especially when the Ḥadīth is read without proper consideration and understanding of the effect of time-space on concrete situations.[32]

Since the Qu'ran is for the most part devoted to establishing the broad outline and structure of values, the role of the time-space factor would seem to be relatively less prominent with regard to the Qu'ran when compared to the Sunnah. The general import of the Qu'ran, the inspiration and guidance that it provides tend on the whole to transcend particularities of time and space. But the Qu'ran

[30] For details see Mi'raj Muhammad, "Shah Wali Allah's concept of the Shari'a." in K. Ahmad and Z.I. Ansari, eds. *Islamic Perspectives*, London: The Islamic Foundation, 1979, pp. 335–43.
[31] AbuSulayman, n. 14 at 68.
[32] *Cf. ibid.*, p. 34.

too contains specific provisions and concrete rulings which "like most of the Sunnah, involves a time-space element. In these instances, readers ought to be extremely careful in deducing generalities". AbuSulayman has observed that simple and direct deductions from specific textual materials "without properly accounting for changes involving the time-space element of the early Muslim period is a retrogressive step".[33] We may refer for illustration to the debate over the purpose and import of the Qu'ranic text which provides that a smaller number of Muslim warriors would overcome, given their commitment, perseverance and sacrifice, over a large number of enemy soldiers (see Al-Anfāl, 8:66). Commentators have focused attention entirely on the numbers involved and are preoccupied with questions as to whether or not it is permissible to flee from the battle if the enemy forces were less than double and so on.[34] The debate here ignores the point, although mentioned by Imam Mālik, that strength or weakness is not necessarily a question of numbers but of power, state of readiness, and equipment. To relate the purport of this passage to warfare in a different time and space, one would surely need to depart from the particularities of the text and highlight instead its general purpose.

This concern for literalism at the expense of empiricism has led many a devout Muslim to insist on adhering to the letter of the Ḥadīth, for instance, on the giving of foodgrains in *zakat al-fiṭr* (charity given on the occasion of Eid marking the end of Ramadan). The text has admittedly not mentioned that the monetary equivalent of a staple grain may also be given on this occasion. The ruling of the Ḥadīth was obviously suitable for its own time, bearing in mind the uncertainty of food supplies in the market place of Madinah, but that situation has evidently changed since. In this connection, Al-'Alwani has written of his personal experience, when he addressed a gathering and said that *zakat al-fiṭr* may, under contemporary conditions, be paid in cash equivalent in accordance with today's living standards. He then writes that: "My explanation made some people extremely angry and one *faqīh* came the next day to the mosque with quantities of barley and corn and a measuring cup and started giving out to people in an effort to prove that you can literally implement the Prophet's instructions today".[35]

The beginning of the fasting month of Ramadan is signified, as the Qu'ran provides by the sighting of the new moon. This was of course the most reliable method that could be thought of in the early days of Islam. But sighting of the new moon with the naked eye would seem to be unnecessary if the beginning and end of Ramadan could be established with the aid of scientific methods, and therefore to insist on a literal enforcement of the text while turning a blind eye to new technological means would not only amount to hardship (*ḥaraj*), under certain circumstances at least, but would also defy the essence of Qu'ranic teaching on rational enquiry, and empirical truth.

The leading imams of jurisprudence are all noted for their latitude in

[33] *Ibid.*, p. 70.
[34] *Ibid.*, p. 72 ff.
[35] *Cf.* al-'Alwani, *Ijtihād*, p. 26.

recommending that their conclusions should not be followed in isolation from the source evidence on which they are founded. But what actually happened was the opposite in that the ulema of subsequent generations subscribed to *taqlīd* and generally insisted on literal adherence. "It is just not possible today" as al-'Alwani rightly observed " to impose proposals and ideas put forward in Madinah by Imam Mālik and his contemporaries fourteen hundred years ago".[36] To ignore subsequent developments in human sciences, modern commerce and economics is likely to result in poverty and hardship and would therefore contravene the general objectives of the Qu'ran and Sunnah. Ignoring the role of time-space in the understanding of the Qu'ranic has also encouraged a certain tendency toward fragmentation and neglect of the internal structure of its values. To say for example that the verse of the sword (Q. 9:36: "and wage war on all the idolaters as they wage war on all of you") has abrogated the Qu'ranic address which validates peaceful relations with non-Muslims "who fight you not for (your) faith nor drive you out of your home" (60:8) is not only neglectful of the time-space factor but totally unwarranted. The claim does not end with this but goes on to maintain that the verse of the sword has abrogated over 100 verses in the Qu'ran which advocated a wide range of moral virtues including mercy, forgiveness, peace, fair treatment, and tolerance toward non-Muslims. To invoke *naskh* in such terms might have served a purpose at a time when Muslims were the dominant military and political power on earth, but such an approach, questionable as it was, could hardly be said to be acceptable under a totally different set of circumstances.

The conventional doctrine of *naskh* has not been free of distortion and forced logic, yet the scholastic works of the *madhāhib* took for granted the conceptual validity and occurrence of abrogation in the Qu'ran and Sunnah. The inherent tension that is visited here has perhaps been manifested in the ulema disagreement over the actual incidents of *naskh* in the Qu'ran, and the distinction that is drawn between *naskh*, and specification of the general *takhṣīṣ al-'āmm*). Some of the instances of *naskh* were accordingly seen to be amounting to no more than *takhṣīṣ*. The scope of disagreement over the occurrence of *naskh* was initially very wide and claims of several hundred instances of *naskh* in the Qu'ran were gradually scrutinised and reduced, by Jalāl al-Dīin al-Suyuti, for example, to about 30 cases, and then to only five by Shah Wali Allah Dihlawi. One of the early fourth century commentators of the Qu'ran, Abū Muslim al-Isfahāni, even claimed that abrogation had no place in the Qu'ran whatsoever, stating that all the alleged cases of *naskh* were in effect instances of *takhṣīṣ*. The scholastic formulation of the ulema on *naskh* have thus turned an essentially time-bound and temporary phenomenon into a juridical principle of permanent validity. In doing so, they were probably encouraged by military strategists and rulers whose purposes were better served by exaggerated claims of abrogation.

The basic tension between the classical theory of *naskh* and the timeless validity of the Qu'ran prompted Imam al-Shāfi'i into advancing the view that *naskh* was a

[36] Al-'Alwani, *Ijtihād*, p. 26.

form of explanation (*bayān*), rather than annulment, of one ruling by another. The other point on which al-Shāfi'i has differed with the majority is that he considered *naskh* to be an internal phenomenon in the Qu'ran. This meant that the Sunnah did not abrogate the Qu'ran nor did the Qu'ran abrogate the Sunnah. Whatever instances of *naskh* that were found in the Qu'ran were by the Qu'ran itself, not by the Sunnah. Al-Shāfi'i's theory of *naskh* was thus inclined on the one hand to make *naskh* a more acceptable proposition and then to confine its scope to cases on which the Qu'ran was self-evident. Modern reformist opinion is perhaps more receptive to this approach as it maintains that the application of *naskh* should be minimised and confined to only the clear cases on which the evidence is conclusive. The methodological inaccuracy of *naskh* is further visualised in its attempt to take a particular ruling of the Qu'ran and Sunnah out of its original context and instead of reading it within its relevant set of circumstances and upholding it within that framework would advocate the idea that the ruling in question should be nullified and set aside. Abrogation which was originally meant to maintain harmony between the law and social reality thus began to be used contrary to its original purpose. The classical jurists thus advocated abrogation as a juridical doctrine in its own right rather than seeking it as an aid to the role of the time-space factor in the development of law. A revised methodology of *naskh* might thus enable us to cut down on ambiguity and confusion that was caused by the classical formulations of this doctrine.[37]

REVELATION AND REASON

Revelation expounds the purpose of the creation of man, the basic framework of his relationship with the creator and the nature of his role and mission in this life. Revelation also spells out the broad outline of values that human reason should follow and promote. Without the aid of revelation the attempt to provide a basic framework of values is likely to engage man in perpetual doubt as to the purpose of his own existence and the nature of his relationship with God and His creation. Revelation thus complements reason and gives it a sense of assurance and purpose which helps prevent it from indulgence in boundless speculation. Reason is man's principal tool for the advancement of knowledge but the merit and demerit of that knowledge is ascertained with the aid of revelation. Reason is the torchlight which illuminates man's path in the material world of observation and investigation (*'ālam al-shahādah*), whereas revelation is the source of transcendental knowledge (*'ālam al-ghayb*) of the world beyond perception. One is the realm of investigation and the other of faith and submission to divine providence.

Islam's vision of reality, truth, and its moral values of right and wrong are initially determined by revelation and then elaborated and developed by reason. But reason alone, in the methodology of *uṣūl*, does not have the final say in the

[37] *Cf.* Kamali, *Jurisprudence*, n. 10, p. 149 ff.

determination of values. The early scholastic position of the Ash'ariyyah that good and evil, rights and duties in Islam were determined by the divine law (*shar'*) not by human reason (*'aql*) was challenged by the Mu'tazilah who accepted the overriding authority of revelation but stated that right and wrong and the inherent beauty or enormity (i.e. *ḥusn wa qubḥ*) of things could be ascertained by reason even in the absence of revelation. The Mu'tazilah thus maintained that a person may be held responsible and punished on grounds of reason alone, for every reasonable man can ascertain the evil of murder and theft even if there were no law to declare them as crimes. The mainstream of legal thought in Islam has however upheld the Ash'arite stance although many leading figures, including Imam Abu Hanifah, have favoured the Māturīdi position which took an intermediate approach by combining elements of the Ash'arite and Mu'tazilah thought on the subject. Reason in the Māturīdi philosophy is thus capable of ascertaining the basic values of good and evil often by reference to the nature of things but that law (*ḥukm*) is determined by the authority of revelation and so is the question of responsibility which is determined by reference to *Shari'a*.

Revelation provides basic guidance for the valid operation of reason through its affirmation of the relationship between cause and effect (*sabab* and *musabbab*, *'illah* and *ma'lūl*). The Qu'ran is affirmative on this in numerous places where the text refers to the cause, rationale, benefit, and objective of its rulings. Although ratiocination (*ta'līl*) pervades the whole of the Qu'ran, it is more noticeable perhaps in the Makki portions of the text where references are made to the cause, outcome and rationale of its premises in order to inspire faith and conviction.[38] The merit and demerit of man's conduct is determined by reference to causes which he attempts in order to obtain a certain outcome. The outcome may or may not materialise but unless a rational attempt is made to realise an end by attempting the means towards it, issues such as man's responsibility, freedom, punishment and reward could hardly find sound ethical foundations on which to operate. Man's faculty of reason thus plays an essential role in receiving and comprehending the revelation, expounding its premises and determining its consequences in a way that reason and revelation are merged and unified into coherent and purposeful guidelines for thought and conduct.

Revelation and reason are in unison on the recognition and validity of scientific truth and empirical observation. In numerous places the Qu'ran invites investigations and enquiry into the creation of God, and this validates in principle the conclusion that man's approach to the understanding of reality and truth should be guided by rational and empirical methods, just as he should also be ready to accept the outcome of his enquiry and observation. The lesson must therefore be that one should be purposeful and effective and be ready to make necessary adjustments in line with the results of one's observation of reality and the prevailing conditions of life in society.[39] The Qu'ran conveys the message

[38] 'Imād al-Dīn Khalīl, *Hawl Tādah Tashkīl al-'Aql al-Mulsim*, Qatar: Kitab al-Ummah, 1403/1984, p. 50.

[39] *Ibid.*, p. 56 ff.

nevertheless that God's power and knowledge are not bound by the dictates of rationality and scientific observation. Belief in the absolute and unqualified knowledge, power, and other attributes of God is an essential feature of faith (*īmān*), and any attempt to subjugate them to the laws of rationality and science is tantamount to compromising the integrity of (*īmān*). Faith cannot be reduced to a logical set of premises and human reason has little role to play in such matters as the essence and attributes of God, resurrection, free will and predestination, and transcental matters which are beyond the bounds of sense perception and observation. There are words and letters in the Qu'ran, known as *mutashābihāt* which are unintelligible to human reason just as there are references to miracles especially in those of its narratives concerning prophets and messengers with the distinct purpose obviously of conveying the message that there are limits to rationality in matters of the faith. Note, for example, the narrative where Mary was given the tiding that she will give birth to Jesus the Messiah, to which her response was "My Lord, how can I have a son if no man has touched me?" The text then proceeds to declare that "when God determines a matter He only says to it, Be, and it is" (Al-'Imrān, 3:36–46). The text here is explicit on the supremacy of God's will, the limits that are envisaged to the law of causation and on denial to human reason of unlimited knowledge. Thus in the realm of faith, the exalted attributes of God and of ritual submission to Him (i.e. the *'ibādāt*) there is limited scope for rationality and causation. No one may therefore argue to change the manner in which the ritual prayer (*ṣalāh*) is performed or pray in any direction other than Ka'bah. Human reason does have a role but on a different level, which is to enable man to receive and comprehend the revelation. This is a receptive role and it does not confer upon reason the authority to formulate or change the terms of the original message.

The Qu'ran is also affirmative of empirical truth in its references to historical evidence. The passages on the history of bygone nations and narratives of the prophets of old generally accentuate the lessons that can be learned from the experience and example. In this there is affirmation that history is not just a series of accidents but that it is governed by certain laws, conventions and customs that provide a framework for rational conclusions. The Qu'ran's view of history is thus an expression of continuity of the basic laws and standards on which to evaluate and judge man's conduct in the course of history, for historical enquiry would be of little significance and would fail to provide lessons for future generations unless it is seen as an arena in which the interplay of men and events conformed to a set of basic laws. The Qu'ran often refers to these laws as God's practice (*sunnat Allah*) which is predicted on the notion of man's freedom in regards to, and responsibility for, the course of conduct he chose at a particular point of time.[40]

The practical legal rulings of the Qu'ran and Sunnah in respect of such categories of values as the *wājib* and *ḥarām* (obligatory and forbidden) are not changeable and human reason is only expected to play a supportive role in their

[40] *Ibid.*, p. 52.

enforcement. But the Qu'ran itself provides the authority that these may be temporarily suspended in circumstances of necessity and in emergency situations. It then remains for the ruler and *mujtahid*, or the individual who is involved, to evaluate the circumstances, on rational grounds of course, and decide whether an emergency situation has actually arisen and also to decide as to when it should be lifted and normal order restored.

The basic structure of the moral values of Islam, although of divine provenance, is entirely consistent and in harmony with reason. The moral virtues of justice, realisation of benefit and truth, or the evil of dishonesty and transgression, for example, have been articulated in the Qu'ran and Sunnah. These are basically unchangeable and rationality is neither expected, nor does it have the authority to reverse them into their opposites. It may thus be concluded that revelation and reason are generally consistent on the basic structure of moral values and legal injunctions of *Shari'a*. The definitive injunctions, namely the *wājib* and *ḥarām*, are determined by the revelation and they are on the whole specific and inflexible. We do expect on the other hand a certain degree of flexibility in regards to the other three categories of values, namely the *mandūb*, *makruh* and *mubāḥ* (recommended, reprehensible, and permissible). The last of these is neutral on both legal and moral grounds and is therefore not expected to be a subject of concern over the harmony or otherwise of revelation and reason. The *mandūb* and the *makruh* are both moral categories in the sense that the *Shari'a* does not envisage any sanctions for their enforcement in individual cases. Only in the unlikely situation where the community as a whole abandons a *mandūb* or adopts a *makruh*, the authorities would be within their rights to act and take measures in order to redress the balance of values. The lawful leadership of the Muslim community and the *'ūlu al-amr* may act in pursuit of *maṣlaḥah* and in doing so may elevate a *mandūb* into a *wājib* a *makruh* into a *ḥarām*, or put a ban even on *mubāḥ* in order to obstruct the means to an evil. The authorities may take these measures, whether in the context of what is known as *sadd al-dharā'i'*, or any other variety of *ijtihād* that are known to conventional *uṣūl al-fiqh*, in order to protect and vindicate the basic structure of values.

Civil transactions, or *mu'āmalāt*, in the widest sense of the word, generally remain open, almost without restriction, to rational considerations and may be regulated, prescribed or proscribed on that basis. This is also the main area for the operation of social custom and *maṣlaḥah* both of which are inherently utilitarian and rational. The *Shari'a* has never meant to regulate the *mu'āmalāt* in exhaustive detail but only to provide certain guidelines in order to ensure propriety and fair play. Any restrictions that the revealed *Shari'a* might have imposed here are rationally comprehensible and justified. Reason is thus authoritative and yet as one commentator observed "it is not sovereign in the sense that it plays its role in contemplation of the values that are enshrined in the *nuṣūṣ* of the Qu'ran".[41] Al-

[41] *Cf.* 'Abd al-'Āl Sālim Mukarram, *Al-Fikr al-Islami Bayn al-'Aql wa'l-Wahy*, Beirut: Dār al-Shurūg, 1402/1982, p. 49.

Rissi has pertinently highlighted the role that reason plays *vis-à-vis* revelation when he wrote that there were three proofs (*ḥujaj*) in Islam which determined man's responsibility towards God, namely reason, scripture and Messenger. The first enables the knowledge of God, the second expounds the necessity of submission and worship to Him and the third explains the manner in which God is to be worshipped. But reason (*'aql*) is the vehicle of the other two proofs, which are only known and comprehended through the light of reason and not vice versa.[42]

Conventional *uṣūl al-fiqh* is, from beginning to end, an essay on the relationship of revelation and reason. To regulate the valid exercise of *ra'y*, rational judgment and *ijtihād* in light of the rulings of revelation is the expressed purpose of *uṣūl al-fiqh*. To say that *qiyās* is a source and proof of *Shari'a* is another way of saying that reason is authoritative if it is exercised by way of a rational analogy whereby the revealed law is taken to its logical conclusion in regards to a new issue. Reason in the form of analogy can only operate in a supportive capacity to revelation but not otherwise. In order to ensure this, *uṣūl al-fiqh* lays down a certain methodology and conditions which must be observed in the construction of analogy. Whether it is *qiyās* or *istiḥsān* or *istiṣḥāb* etc., these are all different models for the exercise of human reasoning and *ra'y* in the development of *Shari'a*. The methods that they each propose are respectively designed to securing the same general objective of *uṣūl al-fiqh*, namely to ensure the valid exercise of *'aql* in the light of the guidance of *waḥy*. None of these formulas are open to the idea of establishing reason as a source of law independently of revelation. But the ways in which they each operate range from a strictly regulated exercise of reason under the close guidance of revelation (such as in *qiyās* or *istiṣḥāb*) to a fairly open-ended and flexible formula where the relationship of reason and revelation may not be as visible (such as in *istiṣlāḥ* and *istiḥsān*). Whereas the outcome of an analogy and its harmony with the relevant textual ruling can be ascertained, *istiṣlāḥ* and *istiḥsān* may not be amenable to this kind of measurement. It is normally sufficient to establish that the benefit which is pursued in *istiṣlāḥ* and *istiḥsān* does not conflict with the established rules and values of *waḥy*. This is a negative test, which unlike the one in *qiyās*, does not require that the results that are reached must be affirmatively harmonious with the textual rulings of the Qu'ran and Sunnah. It is in view of the dominantly rationalist contents of *istiṣlāḥ*, *istiḥsān* and *sadd al-dharā'i'* etc. that the ulema of *uṣūl* have differed over their validity and have gone so far, as in the case of imam al-Shāfi'i, to refute the validity of *istiḥsān* altogether and strictly to confine the scope of *ijtihād* to analogical reasoning alone.

Notwithstanding the difficulties over its feasibility and proof, *ijmā'* was accepted as a binding source of law next to the Qu'ran and Sunnah. This was mainly because *ijmā'* guaranteed its own conformity to the values and principles of the revealed law, for it was thought inconceivable that the unanimous consensus of all the *mujtahids* could possibly materialise over something that contravened the

[42] Imam al-Qāsim al-Rissī, *Uṣūl al-'Adl wa'l-Tawḥīd* (unpublished manuscript in a Cairo collection), folio 113, quoted by Mukarram, n. 41 at 49–50.

Qu'ran or the authentic Sunnah. There is no textual proof to declare *ijmāᶜ* as a source of law and yet the legal theory of *uṣūl* approved it as a decisive (*qaṭᶜī*) proof presumably because *ijmāᶜ* involved a process that was significantly different from the other rational proofs in that it did not depend on the opinion of odd individuals. The absolute unanimity that was required in *ijmāᶜ* provided the assurance that *ijmāᶜ*'s conformity to the revealed law was not in question. The fact that the legal theory admitted *ijmāᶜ* as a prominent proof next only to the Qu'ran and Sunnah also shows a resolute stance on the authority of reason, for *ijmāᶜ* is essentially a rational proof but unlike *qiyās* does not involve either a close or an obvious linkage with the textual rulings of the Qu'ran and Sunnah. Although the theory of *ijmāᶜ* does stipulate that *ijmāᶜ* must have a basis (*sanad*) in the divine law, for it is deemed to be unlikely for unanimity to materialise over something on which there is no indication in the revealed sources, yet there is little emphasis on this point and many of the textbook expositions of *ijmāᶜ* even omit to refer to the requirement over the *sanad*. Whereas the legal theory is specific on the identification of the *'illah* (or *ḥikmah*) in the construction of *qiyās* and lays down elaborate procedures for the identification of its effective *'illah*, the theory of *ijmāᶜ* has not significantly emphasised the *sanad* of *ijmāᶜ* and has formulated no procedure as to how should this be identified and tested. *Ijmāᶜ* in other words stands on its own footing. The legal theory of *uṣūl* is preoccupied with preventing the arbitrary exercise of *ra'y* in the development of *Shariᶜa* and proposes in references to almost every rational proof that these should not be treated as decisive evidence. Yet the outlook changes dramatically with regard to *ijmāᶜ* notwithstanding the fact that *ijmāᶜ* too is a rationalist doctrine and in that sense it is not inherently different to these other evidences. The legal theory of *uṣūl* favoured *ijmāᶜ* as a decisive proof partly because *ijmāᶜ* did not propose any particular method of reasoning. It was rather a vehicle through which any of the other rational proofs could be elevated into binding law, and this authority could only be conferred by the unanimous approval of the learned. More importantly perhaps, the fact that the *uṣūl al-fiqh* proposed *ijmāᶜ* as a decisive proof is indicative of the view that there must be a procedure in the legal theory of Islam which could create binding law on grounds of rationality side by side with the revealed laws of the Qu'ran and Sunnah, and *ijmāᶜ* was chosen for that purpose. A great deal of the rulings of *ijmāᶜ* is said to be founded in *maṣlaḥah* which is entirely rational and has strong utilitarian leanings. When *ijmāᶜ* serves as a vehicle of *maṣlaḥah* the law that is created as a result is rational in content, which is elevated into binding law by virtue of consensus. This is tantamount to an acknowledgement, although not openly declared in the legal theory of *uṣūl*, that reason is a source of law in Islam.

ISSUES IN IJTIHĀD

Throughout the history of Islamic law, *ijtihād* has remained to be a concern of the private jurist and *mujtahid*. No procedure or machinery was attempted to

institutionalise *ijtihād* and identify its *locus* and authority within the state organisation. To define and identify the *mujtahid* and the role that *ijtihād* might play in the legislative and processes of modern government still remain to be among the unresolved issues of *ijtihād*. The theory of *ijtihād* specified the qualifications of *mujtahid* such as knowledge of the sources of *Sharī'a*, knowledge of Arabic and familiarity with the prevailing customs of society, as well as the ability to formulate independent opinion and judgment. But the reality remained somewhat illusive and hardly any *mujtahid* volunteered openly to declare himself upon attaining this rank. Identification of *mujtahids* by others has often occurred long after the demise of the scholars concerned. There was no procedure specifically designed for the purpose other than a general recognition of the ability and competence of individual scholars by the ulema and the community at large. It is revealing to note, in al-Shawkāni's (d.1255/1839) discussion of *ijtihād*, a reference to al-Ghazali (d.505/1111), who is on record to have stated that the independent *mujtahid* had become extinct. Al-Shawkāni was obviously not convinced and tersely posed the question "did al-Ghazali not forget himself?"[43] Modesty being a moral virtue of Islam, and especially appealing in scholars of high calibre, has al-Ghazali been almost self-effacing? But he was by no means an exception. As if *ijtihād* could offer solutions to all sorts of problems except defining/identifying its own carrier and agent! Another problem we face at present is that despite the door of *ijtihād* having been declared wide open, we fail to detect any effective movement toward the regeneration of *ijtihād*. A great deal has been said about *ijtihād* for about a century, that is ever since the days of al-Afghani and 'Abduh, but the repeated calls for revivification of *ijtihād* have failed to bring about the desired result. With regard to the qualifications that the theory of *ijtihād* has demanded of the *mujtahid* it is often said that these are heavy and exacting. But this is, in my opinion, just another *taqlīd*-oriented assertion by those who wished to bring *ijtihād* to a close. The qualifications so stated were not excessive and were frequently fulfilled, as al-Shawkāni has stated, by a long series of prominent scholars across the centuries even during the era of *taqlīd*.[44] Furthermore, the uncertainties surrounding *ijtihād* have in modern times been exacerbated by the spread of secularism and the fact that the state has become the sole law-making authority in its own territorial domain. The *mujtahid* has no recognised status. But assuming that there is a certain adjustment of attitude as a result perhaps of the recent decades of Islamic resurgence, then it should be possible to devise a procedure which would integrate *ijtihād* in the legislative processes of government. Universities and legal professions in many Muslim countries are currently engaged in training lawyers and barristers in modern law streams. To institute an effective programme of training for prospective *mujtahids*, which would integrate studies in both traditional and modern disciplines should not be beyond the combined capabilities of these institutions. Unless the government takes an active interest in

[43] Yahyā b. 'Ali al-Shawkāni, *Irshād al-Fuḥūl ilā Taḥqīq al-Ḥaqq min 'Ilm al-Uṣūl*, Cairo: Mustafa al-Babi al-Ḥalabi, 1357/1957, p. 254.

[44] *Ibid.* For a summary of al-Shawkāni's account see my *Jurisprudence*, n. 10 at 390.

making *ijtihād* a reality it will remain isolated. 'Abd al-Wahhāb Khallāf is right in suggesting that the government in every Muslim country should specify certain conditions for attainment to the rank of *mujtahid* and make this contingent upon obtaining a recognised certificate. This would enable every government to identify the *mujtahids* and to verify their views when the occasion so requires.[45] Two other reform measures need to be taken in order to make *ijtihād* a viable proposition; firstly that *ijtihād* in modern times needs to be a collective endeavour so as to combine the skill and contribution, not only of the scholars of *Shari'a*, but of experts in various disciplines. This is because acquiring a total mastery of all relevant skills that are important to contemporary society is difficult for any one individual to attain. We need to combine *ijtihād* with the Qu'ranic principle of consultation (*shūrā*) and make *ijtihād* a consultative process. Many observers, including Muhammad Iqbal, Sulayman al-Ṭamāwi, Yusuf al-Qaraḍāwi, among others, have spoken in support of collective *ijtihād* although none has suggested discontinuation of *ijtihād* by individual scholars.[46] The private jurist and *mujtahid* should of course be able to exercise *ijtihād* and no attempt is warranted to interfere with their basic right to do so. But if collective *ijtihād* were to be institutionalised it should naturally carry greater authority and weight. A basic framework for collective *ijtihād* was indeed proposed by Muhammad Iqbal who suggested in his *Reconstruction of Religious Thought in Islam*, that the power to carry out *ijtihād* and *ijmā'* should be vested in the Muslim legislative assembly. The substance of this proposal has since been echoed by numerous other commentators who have spoken in support of the institutionalisation of both *ijmā'* and *ijtihād* within the fabric of modern government.

The second point to be proposed concerning *ijtihād* is related to the first in that *ijtihād* has in the past been seen as a juristic concept and it remained the preserve of the jurist – *mujtahid*. This might have been due to the fact that *Shari'a* in many ways dominated nearly all other fields of Islamic scholarship, but *ijtihād* in the sense of self-exertion is a method of finding solutions to new issues in light of the guidance of *waḥy*. It is in this sense a wider proposition which may be exercised by scholars of *Shari'a* as well as experts in other disciplines, provided that the person who attempts it acquires mastery of the relevant data, especially in the Qu'ran and Sunnah, pertaining to his subject.

The non-revealed sources of *Shari'a*, such as a general consensus, analogical reasoning, and juristic preference are all sub-varieties of *ijtihād*. They serve the purpose, each in their respective capacities, to relate the general principles of *Shari'a* to new issues. These are nearly all rationalist doctrines which enable the qualified scholar to find fair and reasonable solutions to problems as they arise. The detailed methods and procedures that each of these doctrines propose are

[45] 'Abd al-Wahhab Khallāf, *'Ilm Uṣūl al-Fiqh*, 12th edn., Kuwait: Dar al-Qalam, 1398/1978, pp. 49–50.

[46] *Cf.* Khallāf, *'Ilm*, p. 50; Iqbal, *Reconstruction*, n. 20, p. 174; Sulayman Muhammad adl-Ṭamāwi, *Al-Sulṭāt al-Thalāth fi al-Dasātīr al-'Arabiyyah wa'l-fikr al-Siyāsi al-Islami*, 2nd edn., Cairo: Dar al-Fikr al-'Arabi, 1973, p. 307.

founded on the premise that the law of Islam was not given and delivered all at once. The idea that the law must evolve and move abreast with social reality lies at the root of *ijtihād* and all of its sub-divisions. Some of the doctrines of *uṣūl* such as *maṣlaḥah*, *istiḥsān* hold great potential in diversifying the substance of *ijtihād*. Yet the conventional *uṣūl* has subjected most of them to a variety of conditions which tended to suppress their originality and potential. These can now be utilised perhaps each as a means of injecting fresh impetus in *ijtihād* in order to enhance the adaptability of law to social reality. One way of doing this would be an explicit recognition of doctrines such as *maṣlaḥah* and *istiḥsān* and the ways they can be utilised in contemporary legislative and judicial processes. We note, for example, that *maṣlaḥah* relates more meaningfully to legislation, while *istiḥsān* involves making necessary exceptions and refinements in the existing law and may therefore relate better to the process of adjudication, although the potential contribution of *istiḥsān* to legislation and reforming certain aspects of the *Shari'a* may also be utilised.[47]

A fresh approach may also be taken toward *istiṣḥāb* (presumption of continuity), as this doctrine has the potential of incorporating within its scope the concept of natural justice and the approved mores and customs of society. *Istiṣḥāb* derives its basic validity from the premise that Islam did not aim at a total break with the mores and traditions of the past, nor did it aim at nullifying and replacing all the laws and customs of Arabian society. The Prophet allowed and accepted the bulk of the then existing social values and sought only to nullify or replace those which were repressive and unacceptable. Similarly, when the Qu'ran called for implementation of justice and beneficence (*'adl wa iḥsān*), it referred, *inter alia*, to the basic principles of justice which were upheld by the humanity at large and appealed to the good conscience of decent individuals. The *Shari'a* has also left many things unregulated, and when this is the case, human action may in regard to them be guided by good conscience and general teachings of *Shari'a* on equity and justice. This is the substance of the doctrine of *istiṣḥāb* which declares permissibility to be the basic norm of *Shari'a*, and validates conformity with the rules of natural justice, good conscience of decent individuals, and social custom.[48]

We may in the meantime discard some of the unwarranted detail in the margins of the legal theory of *uṣūl* such as the attempt at classifying scholars and ulema into rigid categories of independent *mujtahid* (*mujtahid muṭlaq/mustaqil*), *mujtahid* within the confines of a particular school (*mujtahid fi al-mudhhab*) and *mujtahid* in particular issues (*mujtahid fi al-masā'il*). The classification goes on to divide even the imitators into those who were conversant in the rulings of a particular school and related them to prevailing conditions (*aṣḥāb al-takhrīj*), those who were able to make comparison and attempt preference (*aṣḥāb al-tarjih*), and then those who could distinguish the manifest from the rare and obscure ruling of a particular

[47] For further detail on the uses of *istihsān* see my *Jurisprudence*, n. 10 at 263–64. For details on *maslahah* see article "Have we neglected the Shari'a Law Doctrine of Maslahah", *Islamic Studies* 27 (1988), 287–305.

[48] Turabi, n. 13, at 27–28.

school (*ashāb al-tashih*). This classification implies, according to one commentator "a gratuitous assumption that the latter *mujtahids* could not show greater independence of thought",[49] while another has considered it "unrealistic and presumptuous".[50] People's ability and performance should be judged by the merit of what they contribute and everyone should have the opportunity to do so to the extent of his or her ability and role.

FEASIBILITY OF IJMĀ'

As already stated *ijmā'* is the only non-revealed source of *Shari'a* which commands binding authority and has in it the potentials of both preserving the best heritage of the past and of validating future reform in the fabric of the existing *Shari'a*. It is also the only vehicle known to conventional *usūl al-fiqh* that ensures the propriety and correctness of *ijtihād* by individual scholars. A ruling of *ijtihād* acquires the force of law only when it is supported by *ijmā'*. The potential benefits of *ijmā'* and its contribution to the development of a representative government was brought into sharp relief by al-Sanhūri when he tersely posed the question "what is more democratic than to affirm that the will of the nation is the expression of the will of God Himself?" Only the nation can legislate, he underscores, on the same basis as that of modern parliamentary régimes, with the difference, however, that the constituents of *ijmā'*, namely the *mujtahids*, are not elected by the populace.[51] Hasan Turabi has also highlighted the role *ijmā'* can play in the democratisation of the political system in Muslim societies. In this effort, a reinterpretation of consensus is crucial. *Ijmā'* as Turabi put it "was not the consensus of the learned elite but the more popular consensus of the Muslim community enlightened by its more learned members".[52] It is thus evident in this proposal that *ijmā'* must be stripped of the difficult conditions that are webbed into it by the ulema of *usūl* and an effort should be made to bring back the original *ijmā'* as we know from the precedent of Companions. The theory of *ijmā'* is clear on the point that it is a binding proof. But it seems that the very nature of this high status has demanded that only an absolute and universal consensus of all the *mujtahids* would qualify. The difficulty in obtaining and ascertaining complete unanimity is the central issue in the feasibility of *ijmā'*. Many scholars have gone on record to state that universal consensus is no more than an unfulfilled Utopia, and a purely theoretical proposition which can hardly relate to the political and legislative concerns of contemporary Muslim society.[53] The theory of *ijmā'* has in other words been consistently at odds with its practice. Another unresolved issue in the feasibility of

[49] Nicolas Aghnides, *Muhammadan Theories of Finance*, New York: Longman, 1916, p. 96.
[50] Turabi, n. 13 at 32.
[51] Enid Hill's translation, in Aziz al-Azmah, n. 12 at 15.
[52] Abelwahhab el-Affendi, *Turabi's revolution: Islam and Power in the Sudan*, London: Grey Seal, 1991, p. 160.
[53] *Cf.* Abdul Hamid AbuSulayman, *Azmat al-'Aql al-Muslim*, Herndon, Va: Al-Ma'had al-'Alami li'l-Firk al-Islami, 1412/1991, p. 78.

ijmāʿ is to define and identify its participants, namely the *mujtahids*. Ambiguity in identifying the constituents of *ijmāʿ* on the one hand and then uncertainty over the nature of their agreement have meant that *ijmāʿ* has almost invariably remained incapable of positive proof. In actual terms, *ijmāʿ* has meant a relative consensus of either the majority of *mujtahids* or only of those who were involved in deliberating a particular issue. Imam Aḥmad ibn Ḥanbal has gone on record to deny the feasibility of universal consensus on the one hand and to affirm on the other that *ijmāʿ* in reality has meant only a ruling on which no disagreement was known to exist (*-ʿadam al-ʿilm bi'l-mukhālif*).[54] *Ijmāʿ* was feasible perhaps only during the early decades of the advent of Islam when the community was fairly small and the views of all the leading Companions could be identified and obtained. This became increasingly difficult with the territorial expansion of Islam and dispersion of scholars to distant localities. ʿAbd al-Wahhāb Khallāf has rightly observed that even during the period of Companions, *ijmāʿ* consisted of the consensus only of those who were involved in consultation and deliberation of particular issues, and were present at the time in Madinah.[55] It has been further suggested that *ijmāʿ* should no longer be the prerogative of the ulema and *mujtahidūn*, as they do not necessarily represent the mainstream of contemporary Muslim intellectuals and public, that *ijmāʿ* in modern times should consist not only of the consensus of ulema but of other segments of society, and that the concept of permanent *ijmāʿ* is no longer feasible nor practical under contemporary conditions.[56]

As already noted Muhammad Iqbal proposed that *ijmāʿ* (and *ijtihād*) should be institutionalised and integrated into the working of Muslim legislative assemblies whose membership consisted not only of *mujtahids* but also of experts in other fields. This he considered to be "the only possible form *ijmāʿ* can take in modern times".[57] Commentators have also suggested that *ijmāʿ* should be seen as a relative, rather than universal, concept and its meaning and role should be defined in relationship to locality, legislative function, and prevailing political system.[58] Despite some criticism of Iqbal's proposal that institutionalisation might turn *ijmāʿ* into an instrument of power politics, the substance of Iqbal's proposed reform is sound and has been generally well-received. The *ijmāʿ* that we need to advocate today is a consultative *ijmāʿ* which combines *ijtihād* and *shūrā* of the representative majority of the community and their leaders in various professions and disciplines.[59] Maḥmūd Shaltūt has envisaged the main issue concerning the institutionalisation of *ijmāʿ* to be that the participants of *ijmāʿ* must enjoy total freedom of expression.[60] This is indeed the essence of the challenge which must be met if *ijmāʿ* were to be utilised as a meaningful proposition in modern legislative

[54] Maḥmūd Shaltūt, *Al-Islam ʿAqīdah wa Sharīʿa*, Kuwait: Dar al-Qalam, 1966, p. 558.
[55] Khallāf, *ʿIlm*, n. 45 at 49–50.
[56] *Cf.* AbuSulayman, n. 14 at 76.
[57] Muhammad Iqbal, n. 20 at 173–74.
[58] An early opinion on the relativity of *ijmāʿ* was contributed by Shah Wali Allah Dihlawi. For a summary of Dihlawi's analysis see my *Jurisprudence*, n. 10 at 00.
[59] *Cf.* AbuSulayman, n. 53 at 78.
[60] Shaltūt, n. 54, pp. 558–59.

processes. The potential benefits of *ijmā'* as an all-embracing vehicle which could inject pragmatism in the entire corpus of *uṣūl al-fiqh*, and its contribution to the prospects of a consultative government could hardly be over-estimated.

PROBLEMATICS OF QIYĀS

Some of the constraints that *uṣūl al-fiqh* has imposed on *qiyās* were a symptom of the conflict over legitimacy between the ulema and rulers.[61] The attempt by al-Shāfi'i, for example, to confine the role of *'aql* and *ijtihād* to analogical reasoning alone sowed the seeds of distortion in the methodology of *qiyās*. Some ulema have consequently perceived *qiyās* differently to others and this can be seen, for instance in the Shāfi'i view of *qiyās* which tend to be more flexible and broad than the technical *qiyās* of the Hanafis. The methodology of *qiyās* is indicative of an excessive concern over conformity to the formalism of syllogistical logic. The emphasis that the ulema have laid on the conditions that the effective cause (*'illah, manāṭ*) and other pillars (*arkān*) of *qiyās* must fulfil tends to restrict the scope of analogical reasoning to specific incidents. The methodology of *qiyās*, in other words, is burdened with technicality so much so that it robs the whole idea of analogy of its original intention and purpose. The textual ruling of an original case is consequently extended to a new case only when the latter is a near replica of the former in which case *qiyās* would basically be redundant and the case would be most likely to fall within the meaning and interpretation of the given text. It is of interest to note in this connection that the Hanafis have criticised the Shāfi'i concept of *qiyās al-awlā* (analogy of superior) precisely on the ground that this is not *qiyās* proper and that the process involved therein amounts to no more than a mere application of the law of the text. The Shāfi'is, Hanbalis, the Uṣūli Shi'ah and others who approve *qiyās al-awlā* as the preferred variety, and sometimes the only valid form, of *qiyās* have done so in order to minimise reliance on speculative reasoning in the identification of *'illah*. Notwithstanding the propriety of their intention, the proponents of *qiyās al-awlā* tend to take the advice of caution so far as to defeat the whole logic of *qiyās* and its potential for originality and growth.[62]

Qiyās should, as a matter of principle, be attempted only when no ruling concerning a new issue can be found in the clear text. *Qiyās* is therefore expected to extend the law to new territories and serve as a vehicle for enhancing and enriching the existing law. But when the element of novelty is minimised to the point that the new case is new only in name, then *qiyās* would have little to offer as a means of developing the law. It seems likely that the medieval jurists of the Abbasid period might have used *qiyās* as a means partly of validating the existing *status quo*, for

[61] 'Alwani, *Ijtihād*, p. 23.

[62] In *qiyās al-awlā* the effective cause of analogy is more evident in the new case than the original case. If wine drinking is forbidden because it intoxicates, then heroin in which the cause of intoxication is even more evident would be prohibited by way of *qiyās al-awlā*. For further detail see my *Jurisprudence*, n. 10, ch. 9 on *qiyās*.

qiyās highlighted the similarity between new situations and early practices. It was, in other words, utilised as a means of projecting and imposing the old values over new situations.[63] Turabi has observed that "the conventional *qiyās* (*al-qiyās al-taqlīdi*) is a restrictive form of analogy which is supplementary to interpretation and sheds light only in clarifying some aspects of the *aḥkām*". In the context of contemporary jurisprudence, *qiyās* that hold the promise of enrichment, Turabi adds, is the natural and original *qiyās* (*al-qiyās al-fiṭrī al-ḥurr*) which is free from the difficult conditions that were appended to it initially by the Greeks and subsequently by Muslim jurists in order to ensure stability in the development of *Shariʿa*.[64] AbuSulayman has observed that *qiyās* in areas of social interactions should be broad and comprehensive. "A long loss of time and a radical change of place may leave little practical room for the method of partial and case to case *qiyās*." We need to depart from the pedanticism of conventional *qiyās* to one which is "systematic, conceptual, abstract and comprehensive".[65]

The *mujtahid* and the judge would naturally need to exercise caution in the construction and application of *qiyās*. The jurist normally ascertains the *ratio legis* of an existing law which is extended by analogy to a new problem. The process involved here resembles that of the common law doctrine of *stare decisis*. The judge distinguishes the *ratio decidendi* of an existing judicial decision in references to a new case and once it is established that the two cases have the same ratio in common, the ruling of the earlier decision is analogically extended to the new case. The idea of *ratio legis* in the civil law system, and of *ratio decidendi* in common law, is substantially the same as that of the *ʿillah* (and its broader equivalent, the *ḥikmah*) in Islamic jurisprudence.[66] With regard to the identification of *ʿillah* in *qiyās* the precedent of Companions and the leading imams is unequivocal on the point that the norm in regards to *taʿlīl* (ratiocination) is *maṣlaḥah* from which *taʿlīl* derived its basic argument. It was only at a later stage when the jurists of the Hanafi and Shāfiʿi schools departed from the *maṣlaḥah*-based *taʿlīl*, known as *ḥikmah*, toward the more technical concept of *ʿillah*. But even so the *ʿillah* was still largely based on *maṣlaḥah*, only that *ʿillah* stipulated certain conditions, namely that the *maṣlaḥah* in question should be constant (*munabaṭ*) so that it did not change with the change of circumstances. The *ʿillah* was also to rely on *maṣlaḥah* that was evident (*ẓāhir*) and not a hidden factor that could not be ascertained by the senses. Al-Ghazali thus noted that it is the *maṣlaḥah* which determines the *ḥukm* but since it could be a hidden factor, *ʿillah* was proposed as a substitute, for the latter only relied on the manifest attributes of that *maṣlaḥah*.[67] Al-Shāṭibi attempted to equate the two concepts of *ʿillah* and *ḥikmah* by saying that *ʿillah* consisted of nothing other than the rationale and benefit (*al-ḥikam wa'l-maṣālih*)

[63] AbuSulayman, n. 14, pp. 65–66.
[64] Turabi, *Tajdīd*, n. 13 at 24.
[65] AbuSulayman, n. 14 at 69 and 84.
[66] *Cf.* Abu Zahrah, *Uṣūl al-Fiqh*, n. 10, at 184.
[67] Abū Ḥāmid al-Ghazali, *Al-Mustafa min ʿIlm al-Uṣūl*, Cairo: al-Maktabah al-Tijāriyyah, 1356/1937, II, 310.

which lay at the root of the laws (*aḥkām*) of *Shari'a*. Hence "the *'illah* is identical with the *maṣlaḥah* and it does not merely represent a manifest attribute of *maṣlaḥah*; we therefore disregard the notion of it (*'illah*) being constant and evident".[68] It is indeed the *ḥikmah* itself in which the *'illah* is rooted, such as the lapse of intellect, which is the *ḥikmah* in the prohibition of wine drinking, and this is reflected in intoxication, the latter being the *'illah* of the same prohibition. The Mālikis and Ḥanbalis who validated *ḥikmah* as the basis of *qiyās* did not require the *ḥikmah* to be constant and evident provided that it consisted of a proper attribute (*wasf munāsib*) and was in harmony with the objective of the Lawgiver. *Ḥikmah* is thus a more open concept than *'illah* and is a direct embodiment of the rationale and objective of a particular *ḥukm* on which an analogy may validly be founded. The fact still remains however that the jurists of the post-classical period (*muta'akhkhirūn*) went a long way in the direction of adding to the technicalities of *'illah* in *qiyās*. The result of this was that *qiyās* itself lost its grounding in *maṣlaḥah*, and its original vision and purpose of grasping the *maṣlaḥah* of the people became subject to the exercise of specious reasoning.[69] We note yet another irregularity in the application of *qiyās* in that the jurists of the post-classical period showed a tendency to declare many things, including transactions that served popular needs, prohibited on grounds merely of doubtful *qiyās*. This somewhat facile application of *qiyās* stood in contrast with the Qu'ranic principle of *raf' al-ḥaraj* (removal of hardship) and its declaration that "what is forbidden to you has been clearly explained" (6:119), and also the legal maxim which declared that "permissibility is the normal state of things". A careful observance of these guidelines would surely suggest that a liberal use of *qiyās* in regard to prohibitions was not advisable.[70]

It is perhaps the *ḥikmah* (objective, rationale) which is closer to our concept of natural and original *qiyās*. But we note that in all of this, it is the judge/jurist whose attitude and vision in the application of *qiyās* is the more important determinant of the contribution this doctrine can make to the enrichment of *Shari'a*. Parviz Owsia has ascertained the utility of *qiyās* in judicial decision-making and compared it to some of its parallel concepts in modern law. It is thus noted that the search in the civil law system for *ratio legis* and under the common law system for *ratio decidendi*, or under an Islamic system for the underlying rationale (*ḥikmah* or *manāt*) of a rule, may all discharge similar functions, depending, of course, on the basic approach one is inclined to take. They cause, under a restrictive vision, the rigidity of the law, but conversely they serve, with a visionary outlook, the flexibility and adaptability of the law.[71] The skill and insight of the judge in determining the ratio of a case is once again highlighted by another observer who stated that the ratio is neither found in the reason given in the judge's opinion nor in the rule of law set forth in that opinion, nor even by a consideration of all

[68] Al-Shāṭibī, *Muwāfaqāt*, n. 7 at I, 265.

[69] Muhammad Mustafa Shalabī, *Al-Fiqh al-Islami Bayn al-Mithāliyyah wa al-Wāqi'iyyah*, Beirut: Dār al-Jāmi'iyyah, 1982, pp. 166–68.

[70] *Ibid.*, p. 168.

[71] Parviz Owsia, "Sources of Law Under English, French, Islamic and Iranian Law" [1991] ALQ 33 at p. 61.

ascertainable facts. Rather the ratio is to be found by reference to the facts that the judge has treated as material and the decision that is based on those facts.[72] The following three stages of enquiry are involved in the construction of analogy:

(1) Perception of relevant likeness between the factual issues as defined by the court in a previous case;
(2) Determination of the *ratio decidendi* of the previous case; and
(3) The decision to apply the ruling of the previous case to the present case.

It is then suggested that the first of these three steps is essentially psychological which is not entirely governed by the elements in the legal system.[73] Wisdom and application of "good sense" rather than a mechanical or fixed set of logical rules, is recommended in the determination of *ratio decidendi*. It thus appears that the fear of rigidity and the concern over strict adherence to precedent is ever-present in constructing an analogy in both Islamic law and Western jurisprudence. The concern here was vividly voiced by Lord Gardener who declared in 1966, while representing the Lords of Appeal in Ordinary that "their Lordships regard the use of precedent as an indispensable foundation ... they recognise nevertheless that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law".[74] The broad purpose of this message is applicable to *qiyās*, which is the nearest equivalent in Islamic law to the common law doctrine of judicial precedent. It is ironical to note, however, that Islamic law does not recognise judicial precedent as a binding proof precisely because of its restrictive effect on *ijtihād*. The integrity of *ijtihād* was deemed to be liable to compromise if judicial precedent were to carry a binding force on the lower courts. The ruling of one judge or *mujtahid* essentially carries the same authority as that of another. But the rigidity that the Muslim jurist tried to avoid in this instance was visited by him through the imposition of burdensome technicalities on *qiyās*. The correct advice in both instances is surely to avoid rigid conformity to precedent at the expense of losing sight of the broad purpose and objective of the law.

A NEW SCHEME FOR UṢŪL AL-FIQH

There are two areas where improvements can be made in conventional *uṣūl al-fiqh*. We note on one hand that the methodology of *uṣūl* has not integrated the Qu'ranic principle of consultation into its doctrines and procedures. The second shortcoming of *uṣūl al-fiqh* which is not unrelated to the first is its detachment from the practicalities of government and its near-total reliance on private *ijtihād* by

[72] Judge Goodhart, "Determining the Ratio Decidendi of case 40", *Yale Law Journal* 161 (1930).
[73] John Makdisi, "Formal Rationality in Islamic Law and the Common Law", *Cleveland State Law Review* 34 (1985–86), p. 104.
[74] Quoted in Michael Zander, *The Law Making Process*, London: Weidenfeld and Nicolson, 1989, p. 104.

individual jurists. Here we note once again that the Qu'ranic dictum of obedience to those who are in charge of community affairs, the *'ūlu al-amr*, has not received due attention in the conventional legal theory. Despite the unmistakeable reference of *'ūlu al-amr* to government the jurists and commentators have tended to ignore this and have instead considered the ulema to be the principal or even the only frame of reference in the understanding of this term. The ulema of *uṣūl* were obviously content with a somewhat one-sided interpretation of the Qu'ran in that the theory they developed was such that it could, from beginning to end, be operated by the ulema without the involvement of the government in power and in total isolation from it. This aspect of the legal theory is conspicuous in the conventional expositions of *ijmā'* which is defined as "the unanimous agreement of the *mujtahids* of the Muslim community at any period of time following the demise of the Prophet Muhammad on any matter".[75] It is remarkable that the definition of *ijmā'* is oblivious of both of the Qu'ranic concepts of *shūrā* and *'ūlu al-amr* especially in reference to the government and the role it might reasonably be expected to play in consultation and in taking charge of the community affairs. *Ijmā'* was defined such that the ulema could in theory conclude it and make it binding on the government without either consulting or seeking consent of government authorities. We are aware on the other hand that *ijmā'* represents the single most important concept in the legal theory of *uṣūl* which offers the potential of making the whole of the legal theory pragmatic and viable. *Ijmā'* should naturally involve consultation among the broad spectrum of the *'ūlu al-amr* and ensure collective decision-making through participation and involvement of both the government and the ulema, and of virtually everyone who can contribute toward its objectives.

Jamāl al-Dīn 'Aṭiyyah has suggested a new scheme for conventional *uṣūl al-fiqh* in which he proposed to divide the sources of *Shari'a* into the five main headings of:

(1) The transmitted proofs which includes the Qu'ran, Sunnah, and revealed laws preceding the *Shari'a* of Islam;
(2) Ordinances of the *'ūlu al-amr* which includes *ijmā'* and *ijtihād*;
(3) The existing conditions or *status quo*, in so far as it bears harmony with the preceding two categories, and this includes custom and presumption of continuity (*istiṣḥāb*);
(4) Rationality (*'aql*) in areas where a full juridical *ijtihād* may not be necessary (the day to day ruling of government departments, for example, that seek to ensure good management of affairs may be based on rationality alone);
(5) Original absence of liability (*al-barā'ah al-aṣliyyah*) which presumes permissibility and freedom from liability as the basic norm of *Shari'a* in

[75] Sayf al-Dīn al-Āmidi, *Al-Ihkām fi Uṣūl al-Ahkām*, ed. 'Abd al-Razzāq 'Afifi, 2nd edn., Beirut: Al-Maktab al-Islami, 1402/1982, I, 96; al-Shawāni, *Irshād*, p. 71. For a detailed discussion of the definition of *ijmā'* see Kamali, *Jurisprudence*, n. 10 at 169 ff.

respect of things, acts and transactions that have not been expressly prohibited.[76]

The broad outline of the scheme is acceptable, notwithstanding certain reservations which I shall presently explain. 'Aṭiyyah has himself stated that the scheme he has proposed, especially in its reference to the transmitted proofs, relies almost totally on conventional *uṣūl al-fiqh*. It is the second heading in 'Aṭiyyah's scheme where he proposes a revised structure for *ijmā'* and *ijtihād*. These are undoubtedly among the most important themes of the methodology of *uṣūl al-fiqh*, and bringing them both under the umbrella of the ordinances of *'ūlu al-amr* offers the advantage of linking this classification directly to the Qu'ran on the one hand and taking an affirmative stance on government participation in the conclusion of *ijtihād* and *ijmā'* on the other. I shall presently return to 'Aṭiyyah's views, but here I note a relevant observation from Hasan Turabi who stated that the decline of *ijtihād* was partly due to decline in *shūrā* and then proposed that the state and the *'ūlu al-amr* should take every step to make *shūrā* an integral part of decision-making processes. The public and the media can also play a role in stimulating participation, consultation and debate until a consensus emerges and the majority makes its voice known. Turabi adds that "decisions which are made through *shūrā* and ratified by the *'ūlu al-amr* and implemented as juridical *ijmā'* (*ijmā' tashri'ī*) or the ordinances of government (*amr ḥukūmī*)".[77]

The third heading in 'Atiyyah's proposed scheme consolidates under one category the two recognised proofs of *uṣūl al-fiqh*, namely *istiṣḥāb* and custom and tends to attach to it a degree of prominence which they were not given in their conventional expositions. A mere difference of emphasis in the scholastic doctrines of the *madhāhib*, such as the Ḥanafī and Shāfi'i emphasis on custom and *istiṣḥāb* respectively, was not enough to underscore the importance of social custom in the development of *Shari'a*. 'Aṭiyyah's treatment of custom and *istiṣḥāb* consolidates these two logically related themes, gives them greater prominence, and thereby tries to inject pragmatism into the rubric of the legal theory.

I have hitherto commented on the first three of 'Aṭiyyah's five-point scheme and I am of the view that the remaining two headings in that scheme, namely rationality, and original non-liability are superfluous and should therefore be omitted. This would mean that we would have consolidated the entire range of topics in conventional *uṣūl al-fiqh* under the three headings of transmitted proofs, the ordinances of *'ūlu al-amr* and valid *status quo*. The second of these, namely the ordinance of *'ūlu al-amr* is comprehensive, bearing in mind that the broad concept of *ijtihād* subsumes a whole range of topics such as *qiyās, istiḥsān, sadd al-dharā'i'*, which however featured, somewhat atomistically, in conventional *uṣūl al-fiqh*, each as a separate chapter rather than an integrated theme of a unified whole. This list of *ijtihād*-related topics could, of course, be extended to *istiṣḥāb* which may be seen

[76] Jamāl al-Dīn Aṭiyyah, *Al-Naẓariyyah al-'Āmmah li'l-Shari'a*, Cairo: Maṭba'ah al-Madinah, 1407/1988, p. 189 ff.

[77] Turabi, *Tajdīd*, n. 13 at 30.

as another sub-variety of *ijtihād*, and yet it is justified to treat *istiṣḥāb*, or presumption of continuity, under the "valid *status quo*" in the proposed scheme, for *istiṣḥāb* is grounded in the idea of presuming the continued validity of existing facts and situations unless there is evidence to suggest otherwise. Even if we include *istiṣḥāb* under the general concept of *ijtihād*, it would come only as per conventional legal theory, at the very end of the list of rational proofs, as it is generally regarded to be the weakest of all proofs, which is why it is known in the conventional *uṣūl* as the last ground of *fatwā* (*ākhir madār al-fatwā*). To classify *istiṣḥāb* under valid *status quo* would thus appear to be acceptable as it is not likely to feature prominently under the category of *ijtihād* and *ijmāʿ* and it seems more coherent to classify it under one heading with custom (*ʿurf*).

There is one topic in the conventional proofs of *uṣūl al-fiqh* which ʿAṭiyyah has not mentioned, namely the *fatwā* of Companion. Notwithstanding some disagreement as to its authority as a proof, I propose that the *fatwā* of Companion should be included in the main category of transmitted proofs, for we may otherwise find no place in the legal theory for the outstanding contributions of Companions like Umar b. al-Khaṭṭāb, Abd Allah b. Masʿūd and many others. Most of the important rulings of the leading Companions were perhaps eventually adopted under the broad concept of *ijmāʿ*. Yet there remains a fairly rich legacy of rulings on which they have recorded different opinions and interpretations and these may be included under the broad category of transmitted yet only persuasive rather than binding, proofs of *Sharīʿa*.

As I stated earlier, the remaining two categories in ʿAṭiyyah's proposed scheme, namely rationality (*ʿaql*) and original non-liability (*barāʾah al-aṣliyyah*) seem somewhat unnecessary and controversial, for they add but little to its preceding three categories. We note for example, that rationality could be subsumed under the broad concept of *ijtihād*, or under any of its sub-varieties such as analogy, juristic preference, and *maṣlaḥah*. These are all rationalist doctrines and if we were to open a separate category for rationality, it would be difficult to decide where to place such other concepts as *maṣlaḥah* and *istiḥsān*, under rationality or *ijtihād*. Furthermore, opening a new category of proof in the name of *ʿaql* is bound to raise questions as to the nature of the relationship between revelation and reason. Opening a new chapter under *ʿaql* can only be justified if ʿAṭiyyah had clearly articulated the respective roles of *ʿaql* and *waḥy*, which he has not. Since the broad outline of ʿAṭiyyah's proposed scheme is in conformity with the basic order of priorities that are upheld in conventional *uṣūl al-fiqh*, opening a new chapter in the name of rationality would not only interfere with other parts of the proposed scheme but is also inherently ambiguous and unjustified.

As for the proposed recognition of *al-barāʾah al-aṣliyyah* as a source or proof of *Sharīʿa*, it will be noted once again that this is subsumed, in conventional *uṣūl al-fiqh*, under the presumption of continuity, or *istiṣḥāb*, and it is as such, a presumption, not a proof. Original non-liability presumes in reference, for example, to accusation of criminal conduct, that the accused person is innocent, or in reference to civil litigations, that there is no liability, unless the contrary is

proven in each case. *Istiṣḥāb* in this context presumes the normal or original state of things, that is non-liability, which should prevail unless there is evidence to suggest otherwise. Since this is only a presumption, it is a weak ground for decision-making and it does not, in any case, present a case for it to be recognised as a source or proof *Shari'a* in its own right. I therefore propose that this too should be subsumed under the third heading of Aṭiyyah's proposed scheme, namely the valid *status quo*. I have in sum proposed a consolidation of Aṭiyyah's five-point scheme into three and submitted that the remaining two headings are somewhat repetitive and need not be included.

CONCLUSION

Ever since the onset of indiscriminate imitation (*taqlīd*), the *uṣūl al-fiqh* became increasingly detached from social reality and lost its openness to the evolutionary influence of empirical observation. Empiricism naturally encourages openness to interaction and receptiveness to developments in other disciplines. This is because knowledge cannot be contained in rigid compartments and important developments in human and in natural sciences are bound to interact and influence one another. It is unlikely for example that a *faqīh* and *mujtahid* will be successful in the conduct of *ijtihād* if they confined themselves to the narrow spheres of their specialisation and remain aloof to developments in other disciplines. A *faqīh* who turns a blind eye to changes in the world around him, to the custom of society, and to progress in science, technology and civilisation has remained indifferent to the empirical input of *ijtihād*. The theory of *ijtihād* is in fact explicit on the requirement of familiarity with the custom of society and people in which the *mujtahid* lives. The decline of *ijtihād* is in no small measure due to neglect of empirical reality and rigidity of outlook to accommodate its consequences. A *faqīh* whose world view and perception of God, man and society is blemished by rigid conservatism and indifference to the changing nature of the world and newly developing relations in it can hardly be expected to reflect these influences in his *ijtihād*. His will remain, as it has in fact for a long time, a world apart from the fast developing world of civilisation and science. The testing ground of the ability and acumen of such a *faqīh* is likely to be, not his knowledge of *fiqh*, but his other information and understanding of the world outside this sphere.[78]

The doctrines of *uṣūl* are essentially resourceful and provide a diversified methodological framework and a rich heritage of guidance for reconstruction and *ijtihād*. And yet in the age of statutory legislation where reliance on formal statutory text has everywhere prevailed, the scope of juridical *ijtihād* has been

[78] See for detail the recent book by Abdol Karim Sorush, labelled as the second Shari'ati of Iran, bearing the somewhat unusual title, *Qabd-O Bast-e Theorik-e Shari'at* (Theoretical contraction and expansion of *Shari'a*), 2nd printing, Tehran: Mu'assasa-e Farhangi-e Sirat, 1371/1992, pp. 105–6, and generally on the theme of how our perception and understanding of Islam and the *Shari'a* is changeable with the advancement of knowledge and developments in other disciplines.

proportionately restricted. In relationship to crimes and penalties, for example, we have provisions in many a modern constitution which require these to be determined under the terms of a clear text, not by analogy to the text. Strict conformity to the statute may also impose limits on the judges' ability to depart from the textual ruling of statute to an alternative ruling of *istiḥsān*. Procedural rules and time limits for hearing of claims may likewise limit the scope of recourse to presumption of continuity, or *istiṣḥāb*. The ubiquitous and exclusive application of the statute book has nowhere been envisaged in conventional *uṣūl al-fiqh*, and it does not have the capability to accommodate this new reality without necessary adjustments. The rich legacy of *uṣūl* and its methodology of *ijtihād* can only be utilised, under the present circumstances, if they are given a clear role in decision-making processes. Where and when can the legislature and the courts apply the respective doctrines of *uṣūl*, and what general and specific guidelines are they expected to comply with are some of the questions that need to be addressed if *ijtihād* were to be given a role in the decision-making processes of modern government.

The main preoccupation of this article has been with the question that many of the rational doctrines of *uṣūl* have become burdened with stultifying technicality or unrealistic stipulations which often frustrate their original purpose and undermine their capacity to be used as effective formulas for legal reconstruction. This is the nature of the issue we face over the conventional *uṣūl al-fiqh*. But I take exception with commentators who set off from a premise which is dismissive of the whole endeavour of *uṣūl* and proceed on the assumption as if it was no longer relevant to the concerns of contemporary Muslims. The problem over technicality and empirical weakness of *uṣūl al-fiqh* has been exacerbated by the fact that prevailing practice in the area of statutory legislation has departed from some of the operational premises of the conventional methodology of *uṣūl*. The new scheme for *uṣūl al-fiqh* that I have presented and discussed here contemplates effective solutions to some of these issues, and given a receptive attitude on the part of government leaders and the *'ūlu al-amr* it will go a long way in building upon the existing heritage of *uṣūl al-fiqh*. The proper approach is surely to utilise the best potentials of that methodology but also to reform it by identifying the problems in regard to each of its particular doctrines and then to find ways of resolving them. We may also need to depart from some of the strictures of the conventional methodology and its unfeasible propositions, but we do not propose to throw, as it were, the baby out with the bath water. The basic approach must surely be one of continuity and imaginative reform which might well entail taking bold steps along the way as well as adding new dimensions to the existing methodology of *uṣūl al-fiqh*. But a *laissez-faire* attitude to these issues can only mean continued domination of the Western methods of law and government in Muslim societies. The Islamic revivalism and resurgence of recent decades has brought home the message that a reformed methodology of *uṣūl al-fiqh* would appeal to the Muslim masses who are desirous of harmony and cohesion between their cultural heritage and the applied laws of their lands.