

Ijtihad in Contemporary Shi`ism: Transition from Individual-oriented to Society-oriented

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Abstract

The adoption of the Mu`tazili school of “rationalist” theology and the institution of *ijtihad* enabled Shi`i legal theory to exhibit vibrancy and made it adaptable to changing contingencies and circumstances. But because Shi`i jurists did not face the challenge of governing a state, their juridical focus and orientation remained fixated on resolving issues confronting the laity or their followers (*muqallid*) at a personal level and did not provide an ethical framework for the *ijtihad* process. The establishment of a Shi`i state in Iran in 1979, which forced them to tackle social, political, economic, educational, and cultural issues, demanded a change in orientation – away from the individual and toward society as the unit of analysis vis-à-vis *ijtihad*. They marshaled various methods, legal devices, and strategies to address contemporary social issues in order to provide pragmatic guidance to the citizens that would be in conformity with the moral and ethical principles laid out in the revelatory sources. This paper examines the writings of Ayatullahs Muhammad Baqir al-Sadr, Muhammad Mahdi Shamsuddin, Sayyid Muhammad Husayn Fadlullah, and Ruhullah Musavi al-Khomeini and studies this phenomenon of change from individual-oriented *ijtihad* to society-oriented *ijtihad*.

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Introduction

The Qur'an is permeated with an ethos in which law and ethics are organically intertwined to such an extent that even immutable and unchanging aspects of law, like the ritual prayers and fasting in the realm of acts of worship (*'ibadah*), are co-joined with an ethical imperative.¹ The theology of ethical objectivism adopted by the Shi'is should have strengthened this outlook and facilitated the formulation of methods, principles, and rules to address new contingencies on the social plane as well as to interrogate and refute existing legal decrees that violated Qur'anic moral and ethical norms. Although having intellect (*'aql*) as one of its sources in the endeavor to deduce fresh juridical rulings (*ijtihad*), Shi'i jurisprudence nevertheless failed to exploit such principles and juristic devices as *maslahah* (public interest) and *mafsadah* (that which promotes corruption and harm), *husn* (goodness) and *qubh* (evilness), *ma'ruf* (universally recognized as morally approved) and *munkar* (universally recognized as morally disapproved), *fitrah* (primordial disposition) and *'illah* (efficacious cause). Instead, it anchored itself in the text of the Qur'an and the hadith literature and provided only a limited role for the contextualization and extraction of universal values and principles from the primary sources. This is partly because for most of their history, the Shi'is were a minority and, as such, did not face the challenge of providing pragmatic and practical guidance to the lay people. At the same time, access to the infallible Imam (at least until the middle of the tenth century) removed the urgency of developing a legal theory with an ethical underpinning because he was viewed as the repository of authoritative information. Thus there was limited scope for *ijtihad*.

In the void created after the occultation of their twelfth divine guide, the Mahdi, Shi'i jurists were challenged to provide guidance to the laity on day-to-day issues. The discussion, however, was confined to resolving problems and providing juridical rulings at the individual, as opposed to the societal, level. Thus legal devices were used to formulate stratagems (*hiyal*)² and dispensations (*rukhas*) to alleviate the problems they faced as a minority by invoking the principle of preventing that which produces distress and anguish (*'usr wa haraj*), for the purpose of religion is to benefit humanity.³ For instance, to overcome the problem of obtaining a mortgage and depositing money in interest-bearing accounts, jurists would search for a loophole that would make such transactions permissible. This method was employed because the individual, not the society, was the point of focus.

This individualistic orientation towards resolving issues that targets the individual and not the society is also reflected in the manner in which the books of Islamic law are divided. For instance, the mode of division introduced by Muhaqqiq Hilli (d. 1277), which is the most popular one, results in four sections: acts of worship (*'ibadat*), bilateral obligations (*'uqud*), unilateral obligations (*iqa'at*), and rules (*ahkam*). This categorization can produce odd results – for example, marriage would be placed under *'uqud* because it involves two parties whereas divorce would fall under *iqa'at* because it is a unilateral act. Ayatullah Muhammad Baqir al-Sadr, aware of the deficiencies in this mode of division, proposes a different model that underlines the social aspect of law resulting in the following classification: worship, property (private and public), personal behavior and practices, and political subjects.⁴ A mode of classification that pays greater heed to political jurisprudence is the one proposed by Abbas Ali Zanjani: judicial matters (adjudication and laws of testimony), civil (contracts), family (marriage, divorce, inheritance, last will and testament), economics, worship, political subjects (government, foreign affairs, jihad, international rights).⁵

But with the triumph of the Iranian revolution in 1979 and the establishment of a Shi'i state, jurists were required to provide guidance in the social sphere (*mu'amalat*) on “ownership and its limitations, land and its distribution, public wealth and its protection, new financial structures, exchange and banking, foreign and domestic trade, cultural issues, environmental issues, biomedical issues connected with organ transplantation and related matters, women’s participation in public life, individual freedoms and responsibilities in the context of nation building and so on.”⁶

This prompted them to begin employing legal tools and devices that would enable them to deduce legal rulings that were in harmony with the moral and ethical standards as evidenced in the revelatory sources, namely, the Qur'an and the Sunnah. This paper will examine the scholarly works of Ayatullahs Muhammad Baqir al-Sadr (d. 1981), Muhammad Mahdi Shamsuddin (d. 2001), Sayyid Muhammad Husayn Fadlullah (d. 2010), and Ruhullah Musavi al-Khomeini (d. 1989) to observe and analyze the various methods, legal tools, devices, principles, and rules they marshaled to expand the scope of *ijtihad* in order to include the social, economic, and political aspects of human relations while being mindful and vigilant that ethics permeate the entirety of Islamic legal injunctions.⁷

It is not uncommon to find statements made in academic circles and at the level of Muslim communities to the effect that Islam is not just a “reli-

gion,” as understood in the West, but rather a comprehensive and all-encompassing way of life that has addressed and provided a moral/ethical valuation to every aspect of a Muslim’s life at the individual and social levels. This valuation is supposed to remain perpetually valid for all peoples and geographical localities until the end of time, suggesting that there is little or no room for any change or revision over time and/or changing circumstances. This conclusion is derived from the Qur’an and the Sunnah of the Prophet and the Imams.

The Qur’an is categorical that the revelation transmitted to humanity by the agency of Prophet Muhammad, the seal of all the prophets, is final and perfect, and that its contents will be preserved from all interpolation and distortion until the end of time: “Today, I have perfected your religion for you, completed My blessing upon you, and chosen as your religion *islam*: total devotion to God” (5:3); “We have sent down the Qur’an Ourself, and We Ourselves will guard it” (15:9); “All the creatures that crawl on the earth and those that fly with their wings are communities like yourselves — We have left nothing out of the Book — and in the end they will be gathered to their Lord” (6:38); and “We have sent the Scripture down to you explaining everything, and as guidance and mercy and good news to those who submit to God” (16:89). The Sunnah literature corroborates this perspective in a prophetic statement attributed to Muhammad: “Acts assessed to be lawful (*halal*) by Muhammad will remain so forever until Judgment Day, and his prohibitions (*haram*) will remain so forever until Judgment Day.”⁸

It is extrapolated from this worldview that all laws and regulations are immutable and fixed (*thabit*), leaving little or no room for contextualization or creative reinterpretation (*taghayyur*) in light of novel and unexpected contingencies. This raises a question: How can an unchanging and fossilized religion remain perpetually relevant in a constantly changing world? Both Sunni and Shi’i jurists have had to grapple with this challenging question. The latter jurists, however, have richer resources at their disposal because of their theology, which is closer to that of the Mu’tazilis, and the doctrine of Imamate, which allows them to posit responses that distinguish between those aspects of religion that are permanent and fixed as opposed to those that are time- and context-bound. As such, there is greater elasticity in the legal tradition. This is encapsulated in a statement attributed to Muhammad in which he asserts that the process of exoteric revelation ceased with his death, but that the necessity for a living, infallible guide would always remain in order to provide an authentic and authoritative

interpretation of the Qur'anic text. It is reported that Muhammad said to Ali: "O Ali, I am the possessor of revelation while you are the possessor of [its] hermeneutics. You will have to fight for the hermeneutics as I fought for the revelation"⁹ and "As long as the world continues to exist, there will be on it a Proof of God (*hujjah*) who will provide people with the knowledge of all that is lawful and prohibited, and will invite people towards the path of God."¹⁰

The flexibility in rulings, however, was primarily applied in resolving contemporary issues faced at the individual level, not on the social plane, because the Shi'is remained a minority during most of Islamic history and had adopted a deliberate policy of distancing themselves from politics after the massacre of the third Shi'i divine guide, Husayn, along with his male family members and companions in 680 at Karbala. The emergence of a Shi'i state in 1979 prompted Shi'i jurists to confront social issues in order to provide a religious response to the many challenges faced by the country and to create a culture of critical thinking and analysis wherein the works of previous traditional scholars (*ulama*) could be subjected to scrutiny instead of inhibiting critical discourse, as was the customary practice, by privileging the works of earlier scholars as sacrosanct (*muqaddas*).¹¹

Doctrine of Temporal and Spiritual Authority: The Imamate

The pre-eminent characteristic distinguishing Sunni Islam from Shi'i Islam¹² has to do with the doctrine of Imamate, namely, the rule of a particular individual over the community. There is general consensus on the necessity of such a leader (Imam)¹³ to provide guidance after the Prophet's demise; however, disagreement revolves around this individual's qualifications, the scope and nature of his authority, and the mode of selection.¹⁴ Shi'is insist that the Imamate is one of Islam's fundamental doctrines and that, as such, it is just as important as prophethood (*nubuwwah*), of which it is a necessary continuation. In their creedal exposition, for instance, Shi'i scholars divide the principles of religion (*usul al-din*) into five tenets, with imamate at the center; the others are divine unity (*tawhid*), divine justice (*`adl*), prophethood (*nubuwwah*), and the Day of Resurrection (*qiyamah*). In contrast, the Sunnis do not consider Imamate as a principle (*asl*).¹⁵

The Imam's unique position in Shi'ism with respect to his cumulative, inherited knowledge and his role as the infallible, inerrant guide and leader

imply that he is the ultimate authority in expounding the law, doctrine, and practice as well as spiritual mentorship. His authority is viewed as an extension of Muhammad's prophetic authority, with the difference that he is not a recipient of revelation. The Imams are described as *muhaddath* (spoken to by the angels by way of sounds in their ears [*naqr fi al-asma`*]) or *mufahham* (instructed by angels; caused to understand) to describe the mode of transmission of knowledge known as *ilham* (inspiration).¹⁶ Thus the function of revelation is continued, albeit in a different form, in the eleven divine guides among the descendants of Ali, the first Imam.

According to the Shi'is, God explicitly designated Ali as Muhammad's successor and announced that both spiritual and temporal authority would reside in him. This leadership of the ones who are inerrant and bestowed with divine knowledge was to continue in his lineage until the twelfth one, who would be empowered to inaugurate equity and justice when his period of concealment ended. One of the major proofs advanced to support this claim is that the Prophet is reported to have said in his sermon during the Farewell Pilgrimage: "I leave behind you two valuable items: one is the Book of God and the other is my family (Ahl al-Bayt)."¹⁷ This coupling of the Qur'an with the Prophet's close family underscored the latter's critical role in expounding the teachings of the Qur'an and the Prophet and in providing solutions to new contingencies that were not explicitly addressed by the revelatory sources.

The Prophet and the Imams are viewed as the speaking Qur'an (*al-Qur'an al-natiq*),¹⁸ embodying and personifying Qur'anic values in their conduct and behavior. In addition, they have access to the esoteric (*ta'wil*) and true meaning of the Qur'an's allegorical and metaphorical verses.¹⁹ In this sense, the Qur'an remains a living text with perpetual meaning and relevance: "The Qur'an is alive and will never die."²⁰ The fact that the Muslim community failed to heed the divine dictate and the Prophet's directive on succession, as argued by many Shi'is, will inevitably consign them to perpetual fragmentation, inequity, and injustice. This will be rectified only when the messianic Imam, the Mahdi, will reappear alongside Jesus Christ before the end of time to reaffirm the Imamate's centrality, avenge the injustices perpetrated against the Prophet's grandson, remove the excesses that led to deifying human beings, and establish a just and equitable social order.²¹

The twelfth messianic Imam's prolonged occultation, which commenced in 941 and continues even today, prompted religious scholars to fill the void by claiming to be his indirect deputies until his reappearance.²²

They were averse to occupying political office and governing, however, because they perceived the wielding of political authority to be the sole prerogative of the Twelfth Imam and thus their involvement in governing would usurp his exclusive right. Accordingly, in the early phase the ulama adopted a quietist attitude to worldly power. But as W. Montgomery Watt shrewdly observed, this concept of awaiting (*intizar*) the infallible Imam's return had the potential of being transformed into a militant and dynamic force when conducive circumstances presented themselves.²³ Thus, we observe that the ulama's adoption of a passive and withdrawn attitude toward politics was followed by a period when they questioned the monarchy's legitimacy and subsequently attempted to reduce the inevitable illegitimacy by constraining the ruler's power through a constitution. Their acceptance of *ijtihad*²⁴ and *taqlid*²⁵ – along with the process of deputization available through general deputyship (*al-niyabah al-'ammah*) and special deputyship (*al-niyabah al-khassah*) of the Twelfth Imam as a correlate to the process of designating the divine guides – facilitated this transference of charisma. Ultimately, it culminated in the full-fledged authority of the jurist (*al-wilayah al-mutlaqah*) as expounded by Ayatullah Khomeini.²⁶

This doctrine's importance is demonstrated by the fact that major differences and disputes in the Muslim community have arisen as a consequence of it: "The greatest dispute, indeed, in the community has been that over the Imamate; for no sword has ever been drawn in Islam on a religious question as it has been drawn at all times on the question of the Imamate."²⁷ Numerous works by both Shi'i and Sunni scholars have been written in defense of or in opposition to this concept. Moreover, the doctrines of Imamate and leadership have had a major influence on the formulation of both group's distinct worldviews, on the elaboration of fundamental doctrines and theology, and on their methodology of law (*usul al-fiqh*).²⁸

The primary sources employed to formulate their respective worldviews are the Qur'an and the corpus of hadith literature. For the Sunnis, the Prophet's Companions constitute the chief medium through which the prophetic message was preserved and transmitted. For the Shi'is, the sole channel is the divine guides, namely, the unerring (*ma'sum*) Imams, whose accounts of the prophetic message and interpretation of the Qur'an are considered to be just as authoritative as the reports received directly from the Prophet, because the Imams argued that there is no disparity between their statements and those of the Prophet. The Sixth Imam, Ja'far al-Sadiq (d. 765), is reported to have said:

My hadiths are the hadiths of my father, and the hadiths of my father are the hadiths of my grandfather, and the hadiths of my grandfather are the hadiths of al-Husayn, and the hadiths of al-Husayn are the hadiths of al-Hasan, and the hadiths of al-Hasan are the hadiths of the Commander of the Faithful (Ali b. Abi Talib) (s), and the hadiths of the Commander of the Faithful are the hadiths of the Messenger of God (s), and the hadiths of the Messenger of God are the words of God most high.²⁹

In this sense, the Imams are an extension of the prophetic authority and personality such that their authenticated sayings (*qawl*), actions (*fi'l*), and tacit approval (*taqrir*) are considered part of the Sunnah. These two different conceptions of the Sunnah had a significant influence on the elaboration of the respective schools' doctrines (*usul*) and practices (*furu'*).

The Qur'anic Ethos of Justice

For Muslims, the Qur'an is the timeless Divine Word revealed to Muhammad over a period of twenty-three years, an indication that it was intimately related to the social life of seventh-century Arabia. It was both the foundation and the constitution of its inhabitants' society. Thus its precepts, moral imperatives, and spiritual values became the norms of the Muslim community. It is a source of inspiration, comfort, and solace in times of crisis and tribulation; a companion and a guide throughout their journey. It is invoked when a child is born, at marriage and funeral services, in devotional services, during Ramadan, to avert danger, and to conclude agreements and transactions. It is recited, memorized, and copied, and its message is interiorized. Muhammad, its recipient and transmitter, thus becomes the speaking Qur'an (*al-Qur'an al-natiq*), the person who embodies and manifests the values contained in the silent (or textual) Qur'an, referred to as *al-Qur'an al-samit*.

Reading the Qur'an makes it crystal clear that the cornerstone of a virtuous society is the upholding of justice, equity, and fairness in all of their dimensions. This recurring theme, which is emphasized with great intensity as the primary purpose of sending scriptures and messengers, is second only to the doctrine of *tawhid* (unicity of God): "We sent Our messengers with clear signs, the Scripture and the Balance, so that people could uphold justice" (57:25). Muslims are instructed to steadfastly uphold the universal value of justice and not to digress from it under any circumstance: "O believers, be resolute in your allegiance to God, staunch witnesses for justice. On no account let hatred against any people cause you to swerve from dealing

justly. Be just (*i`dilu*): that is nearest to piety and God-consciousness (*huwa aqrabu li al-taqwa*)” (5:8). The Qur’an accords high respect to parents and commands their children to treat them with care and compassion, not to show the slightest disrespect to them, and not to reproach them when they are aged and weak. The necessity to uphold justice, however, overrides this respect and kindness:

O you who believe, stand out firmly for justice, as witnesses to God, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for God can best protect both. Follow not the lusts (of your hearts), lest you swerve, and if ye distort (justice) or decline to do justice, verily God is well-acquainted with all that ye do. (4:135)

The Qur’an calls for this value system of justice to prevail in all spheres: political, theological, philosophical, ethical, legal, international, and social. Thus, irrespective of whether the “other” shares the same religious worldview or not, the normative value of justice cannot be compromised: “and do good – to parents, kinsfolk, orphans, those in need, neighbors who are near, neighbors who are strangers, the companion by your side, the wayfarer (ye meet), and what your right hands possess: for God loveth not the arrogant, the vainglorious” (4:36) and “God loves those who are just” (60:8). This moral principle of fairness and equity extends to all aspects of one’s life and, as such, social, economic, and political justice is elevated to worshipping God.

Ethical Objectivism and Theistic Subjectivism

Debate over the role of reason in discovering universal ethical values from the normative sources and its impact upon formulating moral epistemology finds expression in two rival theological schools: the Mu`tazili (ethical objectivism) and the Ash`ari (theistic subjectivism). Each school drew a sharp distinction on whether there was a necessary conceptual connection between law and morality. The Mu`tazilis maintained that the divine law’s authority flows from the fact that there is inherent and innate virtue in an act mandated by God as obligatory as well as an inherent vice in things proscribed by God. In other words, there is an organic and intertwined relationship between law and morality that is an outcome of divine justice and wisdom. God does not act arbitrarily and whimsically (without a definitive purpose) by assigning a value to actions before taking into account their ethical and moral value as the basis of assigning a legal value.

In contrast, the Ash'aris argued that the law's normative authority depends solely on the fact that it is a divine command and an expression of God's will and absolute power over humanity. Therefore it has no connection to morality as a criterion of legal validity. God is Omnipotent and Self-Sufficient. As He is the one who created humanity, He is not bound by the constraints of those ethical principles or laws of causality that human beings deduce from the faculty of reason: "He cannot be called to account for anything He does, whereas they will be called to account" (21:23). As such, the law carries a normative force simply because it is the divine directive, not because of any moral merits or demerits that can be subjected to moral evaluation.

Moral and ethical categories are not objective categories that can be discovered, known, or attested to by a source other than revelation, because justice is defined as whatever God does or prescribes and injustice is its opposite.³⁰ Prior to revelation there is an amoral space, and therefore no moral valuation can be assigned to acts by recourse to reason or the act's inherent nature.³¹ There is no necessary correlation between a cause and an effect because, once again, circumscribing God by having Him operate within the parameters of the laws of causality would be an infringement of His boundless power and discretion. What appears outwardly to be a cause-effect relationship is, in actuality, a sequential act that we have constantly observed numerous times and, as a result, we regard the outcome as an "effect" in a metaphorical sense. But it does not necessarily have to be the same result, because God cannot be confined to acting in any particular way:

The connection between what is habitually believed to be a cause and what is habitually believed to be an effect is not necessary, according to us. ... it is not a necessity of the existence of the one that the other should exist, and it is not a necessity of the nonexistence of the one that the other should not exist – for example, the quenching of thirst and drinking, satiety and eating, burning and contact with fire, light and the appearance of the sun, death and decapitation, healing and the drinking of medicine, the purging of the bowels and the using of purgative, and so on to [include] all [that is] observable among connected things in medicine, astronomy, arts, and crafts. Their connection is due to the prior decree of God, who creates them side by side, not to its being necessary in itself, incapable of separation. On the contrary, it is within [divine] power to create satiety without eating, to create death without decapitation, to continue life after decapitation, and so on to all connected things.³²

In general, the Sunnis adopted Ash`ari theology³³ and the Twelver Shi`is adopted the rationalist-naturalist theology of the Mu`tazilis, which accorded reason the capacity to discover the universal moral and ethical values. Based upon divine justice and wisdom, it also argued that law and ethics are so completely interrelated that God's decree has to have a moral underpinning. This was said to be true because He does not act without an objective (*gharad*), as doing so would constitute a deficiency. The coupling of faith and purity of intention with good works, along with the Qur'an's repeated admonition to humanity to follow the path of servitude and repeated reminders of human accountability and invitations to reflect and meditate on the signs of God to attain conviction of His presence, all indicate the presence of human volition and free choice, both of which are free of any form of preordination or divine determinism. In fact, there is an unconditional and categorical Qur'anic verse that favors the freedom of religion and conscience and negates any form of force or coercion: "There is no compulsion in religion: true guidance has become distinct from error" (2:256).

Immutable and Transient Rulings

The distinction between immutable (*al-ahkam al-thabitah*)³⁴ and transient (*al-ahkam al-mutaghayyirah*) rulings is that the former has been derived from revelatory sources with the explicit directive that it is applicable at all times and places. In contrast, the latter is a ruling that is applicable in a particular situation or scenario, as it is both time- and context-bound.³⁵ This category also includes rulings that were superseded or abrogated by later verses. For example, the verse that prohibits the consumption of alcohol abrogated the verse that only admonished Muslims not to pray when drunk.³⁶

Jurists classify all rulings into these categories based on the evidence they can marshal in the form of categorical statements that can be authentically attributed to the Prophet or the Imams and the context or indication (*qarinah*) from the report. Some scholars have cautioned against making any definitive categorization of rulings under the rubric of "immutable" or "changing" because the human endeavor to fathom the divine message remains a fallible process, one that is open to question and subject to error. This lack of distinction and nuance is evident in assertions that the Shari`ah is the sacred law of Islam that provides an all-inclusive guidance on matters connected with the human-divine or human-creation inter-relationships, thereby suggesting that it has dealt with all contingencies. If so, there would be no need for jurists to deliberate and deduce fresh rulings.

Perhaps this confusion arises because *shari`ah* and *fiqh* are used interchangeably, as if they were synonymous. It is critical, however, to distinguish between these two technical terms. *Shari`ah* is the utopia, the immutable, the normative, and the ideal Islam that comprises a set of sacred and unchanging truths. In contrast, *fiqh* is the changing and mutable domain of legislation because it is only an approximation of the *Shari`ah* arrived at via the human cognitive process, a human endeavor that is subject to error and inaccuracy. The corpus of Islamic law or substantive law is, in reality, *fiqh* and not the divine *Shari`ah*. The means and process through which new legal rulings are derived from Islam's foundational sources are referred to as *ijtihad* (fresh scholarly research in the face of new contingencies). This produces only a probable (*ẓann*) solution, just like medical judgments, and can never provide certainty (*yaqin*). This critical distinction allows for a mechanism that can review and revise juridical opinions in light of new and fresh information. In other words, *fiqh* is always in a state of flux and is a state of juridical reflection reached by Muslim scholars at a certain time and in a certain context in light of their study of the *Shari`ah*. As such it has to be dynamic and in constant elaboration and evolution (*tatawwur al-fiqh*).³⁷

Another variable that can impinge upon a legal ruling's permanence or transience has to do with the nature of the situational context (*mawdu`*)³⁸ – whether it is, in essence, a subject matter that is fixed or variable, for in the former the rulings deduced would be immutable; however, this would not be the case for the latter.³⁹ Situations, rulings, and directives pertaining to human nature or conscience (*fitrah*) are unchanging, based on the verse: “So [O Prophet,] as a man of pure faith, stand firm in your devotion to the religion. This is the natural disposition God instilled in humanity – there is no altering God's creation” (30:30). All other subject matters can be evaluated to determine the possibility of entertaining variability in the legal rulings in light of changed situational contexts or circumstances. One method adopted in Sunni Islam is to identify those aspects of the Prophet's rulings and directives that were issued in his capacity as God's messenger and relate to essentially religious matters in order to distinguish them from admonitions disseminated on the basis of time, place, culture, or society.⁴⁰ This distinction is analogous to dividing the subject matter on the basis of its objective or purpose. If it is of fundamental significance to religion, then the ruling is counted as unchanging; if the subject matter is a secondary aspect of religion, then it is prone to change and modification.

The third scenario that would bring about change in a legal/ethical ruling would be an alteration in the relationship between the situational context and the criterion that made the act lawful or unlawful. For instance, in the past chess was prohibited because it was counted as among those games that involved gambling. Over time, however, it was transformed into a game without any connection to gambling. Accordingly, it would now be considered lawful. In this example, participating in games that involve gambling is still prohibited; however, since chess is no longer associated with gambling in the new real situation (*mawdu` waqi`i*), it can be ruled lawful because the evaluative measure or criterion (*misdaq*, i.e., gambling) for the proscription is now absent.⁴¹

The final major source of initiating change in a legal/ethical ruling can be prompted by characteristics such as a necessity or an exigency defined by the Lawgiver. Such rulings are referred to as secondary injunctions (*al-ahkam al-thanawiyah*). A classical example that is commonly advanced is the permissibility and, at times, obligation to consume prohibited items (e.g., pork and blood) when one's life is in jeopardy: "You are forbidden to eat carrion, blood, pig's meat, any animal over which any name other than God's has been invoked ... but if any of you is forced by hunger to eat forbidden food, with no intention of doing wrong, then God is most forgiving and merciful" (5:3). The secondary injunction remains operative so long as the necessity remains in force and, since this attribute is of a temporary or situational nature, the ruling is categorized under the rubric of a transient or variable injunction.⁴² The ruling prohibiting the mentioned items is the norm, and the exemption given to consume them under certain rare circumstances is an exception. This represents a case of making an evaluation based on personal ethics, one in which the individual is mandated to determine the point at which it is permissible to consume the prohibited food item.⁴³

In a social context, the ruler of the state would be required to use his/her discretionary authority to investigate the situation and decide at what point the secondary injunction could be actualized.⁴⁴ This is one of the most important vehicles that the state can use to institute change, especially when it falls in the category of situational rulings (*hukm wad`i*) where there is no categorical legal/ethical ruling on the issue. Ayatullah Khomeini stretched this concept to its farthest limit by arguing that this form of discretionary authority vested in the ruler has the same weight as the primary injunction (*hukm awwali*) and should not be viewed as only derivative. Consequently, the jurist can annul all the Shari`ah precepts that he deems to be against

the interest of the state. Ayatullah Sayyid Khamena'i, presently the highest political/religious authority in Iran, during a 1988 Friday prayer sermon expressed his view that the Islamic state has limited power and that both the executive and legislative bodies are subordinate to a superior religious law. This prompted a fierce response from Ayatullah Khomeini, in which he publicly disagreed with and castigated Sayyid Khamena'i:

It appears, [Khomeini writes to Khamena'i] from Your Excellency's remarks at the Friday prayer meeting that you do not recognize government as a supreme deputyship bestowed by God upon the Holy Prophet (S) and that it is among the most important of divine laws and has priority over all peripheral divine orders. Your interpretation of my remarks that 'the government exercises power only within the bounds of divine statutes' is completely contrary to what I have said. If the government exercises power only within the framework of peripheral divine laws, then the entrustment of divine rules and absolute deputyship to the Prophet of Islam ... would be hollow and meaningless ... For instance, the construction of roads which may entail requisition of houses or their environs is not within the framework of peripheral injunctions. Conscription, compulsory dispatch to the front, prevention of entry or exodus of any commodity, the ban on hoarding except in two or three cases, customs duty, taxes, prevention of profiteering, price-fixing, prevention of the distribution of narcotics, ban on addiction of any kind except in the case of alcoholic drinks, the carrying of all kinds of weapons, and hundreds of similar cases which are within the prerogative of the government would be inadmissible according to your interpretation.

The government is empowered to unilaterally revoke any *shari`a* agreements which it has concluded with the people when these agreements are contrary to the interests of the country or Islam. The Government can also prevent any devotional [*ibad*, from *ibadat*] or non-devotional affair if it is opposed to the interests of Islam and for so long as it is so. The government can prevent *hajj*, which is one of the important divine obligations, on a temporary basis, in cases when it is contrary to the interests of the Islamic country.⁴⁵

Ayatullah Khomeini's definition of the parameters of "discretionary area" is one that is quite novel and radical in the Shi'i tradition even when compared with Ayatullah Sadr's conception of the vacuous or empty space (*mintaqah al-faragh*). In this area there is no explicit legal/ethical ruling from the Lawgiver and, as such, the ruler has the prerogative to intervene and issue a ruling after taking into consideration the welfare (*maslahah*) of

the society, however, it does not extend to primary injunctions. He labeled this sphere the “lacunae or the discretionary area” (*mintaqah al-faragh*).⁴⁶

Lacunae or the Discretionary Area

The lacunae or the discretionary area⁴⁷ constitutes the sphere in which Islamic law prescribes no legal/moral value of prohibited (*haram*) or mandatory (*wajib*), meaning that it falls under the category of permissible (*mubah*) in its expansive sense, which is inclusive of recommended (*mandub*) and reprehensible or discouraged (*makruh*). The ruler has the discretion to ascribe certain acts from this sphere as obligatory or proscribed, on the basis of what is most suitable and just, to redress any imbalance that may be present in a particular social context at a certain time and place. As such, this principle seeks to cultivate a just and egalitarian society and would not, of course, infringe upon the hadith that instructs Muslims not to obey His creation if it leads to disobeying God.

Ayatullah Sadr views this void as a virtue and not as a deficiency in the Islamic legal/moral system, because it acknowledges the need for flexibility and elasticity in the system in order to deal with differing times and places and, as such, to provide perpetual relevant guidance to the community to generate a just society:

The gap or zone of lacuna is not indicative of defect or deficiency of the juridical form or omission of giving proper attention to some actually existing things and occurrences. On the contrary, it expresses the comprehensibility of the form and the power of the law to keep in pace with diverse ages because the *shari'ah* has not left the zone of lacuna in a form which would mean lack of proper attention or a deficiency but has specified its prescriptions for the zone of lacuna by giving every occurrence its primary juridical property along with conferring upon the Head of the State the power to give it a secondary juridical property according to circumstances. For instance, the cultivation of a land by an individual is by its nature, an operation legally permissible and the Head of the State has the right to forbid the carrying out of it according to exigencies of time and circumstances.⁴⁸

Those aspects of interpersonal relationships, the benefits and harm of which depend upon time, place, and certain conditions, are left in the neutral category of the sphere of lacuna. They can be invoked, if need be, on the basis of standards that have been set in Islam. Ayatullah Sadr adduces the Qur'anic verse on *ulu al-amr* to sustain his argument: “O you who believe, obey God and the Messenger, and those in authority (*ulu al-amr*) among

you” (4:59). He designates the Muslim state’s ruler as qualified to be the *ulu al-amr*, a reading that is quite novel in the Shi’i tradition as this designation was generally applied exclusively to the infallible divine guides.⁴⁹ A similar designation was made by Ayatullah Montazeri in his work on Islamic government, before his retraction, to buttress his claim that the jurists have a mandate to govern during the messianic Imam’s concealment.

Lebanese jurist Ayatullah Muhammad Shamsuddin concurs with Ayatullah Sadr that the term *ulu al-amr* can be applied to the Shi’i political leader because he is performing the same task as the Prophet: disseminating God’s message and establishing justice.⁵⁰ As an example, he provides a case in which the infallible divine guide intervened to rectify an economic imbalance for the public welfare in his capacity as the ruler. This occurred while Prophet Muhammad was residing in Madinah. It is reported that he ruled against accumulating surplus water that could be used by others to water palm trees.⁵¹ This is viewed as a temporary injunction because nothing in the corpus of Islamic literature prevents someone from not sharing his/her excess water with others. Another incident is reported during the caliphate of Imam Ali, when he instructed Malik al-Ashtar to fix the price of purchase and sale of commodities to prevent exploitation.⁵² Although Islamic law does not prohibit a seller from charging whatever price he/she desires, Imam Ali intervened in his capacity as the head of state to prevent the common people from being exploited by businesspeople who may have been motivated by greed and profiteering.⁵³ Once again, the ethical value of social justice is invoked to institute a new ruling and is given a new ethical value of mandatory (*wajib*) that all subjects are duty-bound to follow and respect.

The Law’s Aims and Intentions (*Maqasid al-Shari`ah*)

Abu Ishaq al-Shatibi (d. 1388), an eminent Sunni jurist who is credited with introducing a systematic and elaborate theory on the Lawgiver’s aims and intentions (*maqasid al-shari`ah*),⁵⁴ builds on the work and taxonomy of Imam al-Haramayn Juwayni (d. 1085) and Abu Hamid al-Ghazali (d. 1111). As such, he is greatly indebted to them in the formulation of his theory.⁵⁵ Along with its attendant concepts such as efficacious cause (*`illah*), public welfare (*maslahah*), benefit (*manfa`ah*), and harm (*madarraah*), this theory was in circulation in the nomenclature of Shi’i jurisprudence.⁵⁶ But it was not prevalent, as was the case in Sunni Islam, for a variety of reasons. First, the Imam, the repository of prophetic knowledge, was accessible for authentic guidance until the beginning of the major occultation in 941.

Therefore, Shi'i jurists had access to a larger body of hadith reports, for included therein were reports attributed to the twelve Imams, the last of whom was still present until about three centuries after the Prophet's death. This eliminated the need to search for the *'illah* of a ruling when the Imams had explicitly pointed it out.

Second, the hadith reports that were believed to come from the Imams strongly discouraged and, in many cases, prohibited analogy (*qiyas*), even though this proscription did not pertain to cases where *qiyas* was invoked to extrapolate a ruling that had a textual basis in the revelatory sources.⁵⁷ Third, the policy of distancing the community from the government and politics after Imam al-Husayn's martyrdom was implemented for the purpose of self-preservation and to avoid incessant persecution. But when opportunities presented themselves, Shi'i jurists did expand the scope of issues under the sphere of *ijtihad*. As an example, one can cite the periods of Safavid and Qajar rule, during which jurists deliberated upon social issues that would fall under political jurisprudence, such as the legitimacy of establishing Friday congregational prayer during the infallible Imam's absence, the *kharaj* tax, the type of government most suitable during the occultation, and etiquette and social norms that ought to be observed by the rulers.⁵⁸

The fourth reason was the Usuli-Akhbari dispute that arose under the Safavids. For example, the Akhbaris advocated a literalist approach to the textual sources without questioning the integrity of the hadith reports along with minimizing the role of intellect (*'aql*) in deriving Islamic laws.⁵⁹ For instance, one of the afore-mentioned concepts of *maslahah* was not exploited because, as Abdulaziz Sachedina points out, the "most common contemporary Shi'ite position in connection with 'seeking the maximal positive value' is that it is not a valid source for the derivation of legal-ethical rulings. It is for this reason that in their jurisprudence during the classical age (ninth to eleventh centuries) there is no discussion of this topic."⁶⁰ The establishment of the Islamic Republic in 1979, along with its attendant challenges of governance in this complex and sophisticated world, led progressive Shi'i jurists to actively invoke these concepts as ways to resolve contemporary issues.

The very close and inseparable relationship between the concepts of *maslahah*⁶¹ and *maqasid al-shari'ah* prompted al-Ghazali to assert that everything that promotes the *maqasid al-shari'ah* constitutes *maslahah*, whereas anything that detracts and digresses from the *maqasid* constitutes *mafsadah*, which is equivalent to opposing or rejecting *maslahah*.⁶² It is,

therefore, imperative to uncover the *'illah* of a legal judgment so that it can be applied to new cases about which the textual sources are either vague or silent – so long as these new contingencies fall under the rubric of promoting the Lawgiver's aims and objectives. These aims promote the public interest and welfare by "bringing about benefit (*manfa'ah*) or forestalling harm (*madarrah*)."⁶³

Is there a systematic method of deducing legal rulings from the revelatory texts that would ensure their conformity with the *maqasid al-shari'ah*? Is it possible to extract the rulings' objectives and evaluative tools based on these texts and formulate general principles and rules that could be employed in future contingencies and situations? Why has the Lawgiver not made these objectives and evaluative measures explicitly clear so that there would be no dissent and disagreement? Once the objectives that are in consonance with wisdom (*hikmah*) are discovered, is it possible to prioritize them so that the jurist would know which one to incline toward and favor if there were a clash between any two of them? These are some of the daunting issues discussed by jurists in the works of Islamic legal theory.

The above issues were tackled by the early Shi'i jurists; however, this undertaking assumed a systematic and elaborate manner only after the emergence of the Islamic Republic. In particular, the discourse on how to discover the *'illah* of a ruling has been on the rise because Iran was confronted with issues that formerly had not been part of the jurists' sphere of activity, since the primary focus of their intellectual exercise had been directed toward guiding the people to live up to the principles of Islam in their daily lives.

Ayatullah Muhammad Husayn Fadlullah does not contest the general opinion that acts of worship are constant and are not time- or context-bound; however, this does not preclude the possibility of understanding of the reasons behind the acts. In the realm of human inter-relationships (humanity-creation), he argues, there is a wide scope for changing the legal ruling because it is quite possible to disclose the *ratio legis* (*'illah*) of a religious ruling by having recourse to the precept's text, contextual evidence or signs, and indications (*qara'in*).⁶⁴ Ayatullah Muhammad Mahdi Shams-uddin subscribes to a similar worldview and agrees that jurists ought to probe for the reason behind the legislation even when it has already been assigned an apparently moral value. For instance, it is recommended (*mandub*) to start and end a meal with a pinch of salt. He argues that in all likelihood this advice is valid for one who is residing in a hot environment, but

not for one living in a cold climate, because salt has a great benefit in the case of the former but not in the latter.⁶⁵

The inattentiveness on the part of Shi`i jurists to formulating a detailed theoretical framework on *maqasid al-shari`ah* was not due to the neglect or unavailability of resources within the tradition; rather, it was on account of a sociopolitical situation that prompted them to dissociate themselves from politics and instead focus on the individual.⁶⁶ This individualistic approach resulted in many decrees calling for precaution (*ihhtiyat*) to err on the side of caution; however, such an attitude is untenable if a society is forced to select an option instead of exercising precaution through avoidance. Ayatullah Jawad Mughniyyah prescribes unquestioning obedience to matters that fall under the category of “acts of worship,” regardless of whether one appreciates their merit and value or not. In the case of human interrelationships, the case is different and one must examine the ruling because it is interconnected with a benefit that promotes public welfare and it is possible to discover this benefit.⁶⁷

Ayatullah Morteza Motahhari (d. 1979) laments that not a single rule or principle has been extracted from the concept of social justice (*`adalat-e ijtimai`i*) that permeates the entirety of the Qur`an.⁶⁸ To keep Islamic jurisprudence vibrant and perpetually relevant, Ayatullah Khomeini advocated a reevaluation of the ethical value of those rulings that fall in the social sphere to ensure that they are in keeping with the Lawgiver’s original intent and purpose. To reflect this notion of context and transiency, he introduced the concepts of time (*zaman*), place (*makan*), and customary law or convention (*`urf*).⁶⁹ He wrote to the Council of Guardians, advising them on how to overcome many of the issues dealing with governance:

I subscribe to the widespread *fiqh* current among jurists and the method of *ijtihad* adopted by the late Sahib-e Jawahir (Shaykh Muhammad Hasan Najafi). This type of *fiqh* and *ijtihad* is unavoidable; however, it does not mean that *fiqh* is not in need of adapting to time; rather, the factors of time and place affect and influence *ijtihad*. Often a situation would have a particular ruling (*hukm*) at one time but the same situation, on the basis of the fundamental laws that apply on the social, political, and economic spheres, would result in a different ruling.⁷⁰

The scope of discretion given to jurists under this new concept introduced by Khomeini is far broader than the scope under the rubric of situational context, criterion, and convention. Moreover, the perspective of the jurists in examining the necessary materials for deducing the ruling and the

method for obtaining the edict is greatly impacted by these concepts in favor of providing greater flexibility and elasticity. For instance, the hadith literature explicitly forbids dismembering a believer's body or removing his/her organs, which would make any kind of organ transplant religiously prohibited. But by invoking the principles of time, place, and contextualizing the reason for prohibition, jurists would be able to override such hadiths on the ground that the benefit accruing from the organ's transplantation and the need for such a procedure in different scenarios to save a life far outweighs the utility obtained by preserving and burying the dead body in its entirety.⁷¹

Ayatullah Baqir al-Sadr arrived at a similar conclusion by arguing that religion has certain goals and has provided certain principles that should be invoked in all situations where no moral/ethical evaluation is provided, such as in the field of economics and politics.⁷² This would inevitably result in the evolution (*tatawwur*) of Islamic law with changing social situations. It is interesting to observe that perhaps the first Shi'i jurist to put forth the concepts of time and place and link them to procuring benefit or removing harm was Allamah ibn Mutahhar al-Hilli (d. 1325):

Religious rulings are in conformity with that which is beneficial and procures benefits (*masalih*) and these [*masalih*] change with the passage of time (*zaman*) and differing circumstances of the followers.⁷³ Accordingly, it is possible that a particular ruling that was beneficial for a group at one time may be harmful in a different time and, as a result, it would be ruled as prohibited.⁷⁴

Conclusion

One of the unintended consequences of focusing on acts of worship and resolving issues at the individual (as opposed to the social) level by employing various stratagems was the implicit message that salvation can be attained by performing ritual acts that are not connected with ethics and that there is no need to be concerned with society's moral progression or public welfare in this life. Instead, the hereafter and the self must remain as pivots around which one's earthly life should revolve. Furthermore, jurists remained confined to the text⁷⁵ of the revelatory sources and, consequently, were unable to derive general principles that could be invoked for a variety of other – and different – situations by taking into account such factors as contextual indication and any change of circumstances that would have an impact upon defining the subject matter.

Such an individual-oriented and narrow approach toward *ijtihad* limited the scope of scholarly reflection on defining the objectives or purposes of the laws legislated by the Divine. Contemporary challenges that have moral and ethical implications and impinge on society have encouraged Shi'i jurists to move their orientation away from the individual as the unit of analysis and toward society by incorporating and extending the devices and tools at their disposal in Islamic legal theory and by reestablishing a close link between law and ethics to resolve contemporary issues.

Endnotes

1. "Keep up the prayer: prayer restrains indecent and immoral behavior" (29:45); "You who believe, fasting is prescribed for you, as it was prescribed for those before you, so that you may be mindful of God and morally vigilant" (2:183); and "Proclaim the Pilgrimage to all people. They will come to you on foot and on every kind of swift mount, emerging from every deep mountain pass to attain benefits and celebrate God's name..." (22:27-28). All translations of Qur'anic verses are taken from *The Qur'an: A New Translation*, tr. M. A. S. Abdel Haleem (Oxford: Oxford University Press, 2004).
2. Ayatullah Makarim Shirazi, *Hileh-ha-ye Shar'i*, 2d ed. (Qum: Madrasah al-Imam Ali b. Abi Talib, 2006).
3. This principle is used by Ayatullahs Shamsuddin and Yusef Saanei to make the case that a man forfeits his right to withhold giving a divorce to his wife and the latter becomes entitled to divorce her husband if continuing the relationship is a source of great difficulty and distress for her, as this would conflict with the verses: "Strive hard for God as is His due: He has chosen you and placed no hardship (*haraj*) in your religion, the faith of your forefather Abraham" (22:78); "God does not wish to place any burden (*haraj*) on you" (5:6); "God wants ease (*yusr*) for you, not hardship (*'usr*)" (2:185); and "God does not burden any soul with more than it can bear" (2:286). In addition, the denial of divorce to a wife would be in conflict with the ethical category of *ma'ruf* (universally recognized as morally approved), based on "live with them [women] in accordance with what is fair and kind (*ma'ruf*)" (2:286) and "Wives have [rights] similar to their [obligations], according to what is recognized to be fair (*ma'ruf*)" (2:228). Sayyid Muhammad Hasan al-Amin calls this principle one of the foundations of the Shari'ah (*asas al-shari'ah*) and not just a loophole to frustrate the intent of the Lawgiver: "*Hiwar ma'a al-Sayyid Muhammad Hasan al-Amin*," in *Maqasid al-Shari'ah*, ed. Abd al-Jabbar al-Rifa'i (Beirut: Dar al-Fiqr al-Mu'asir, 2002), 158. Likewise, Ayatullah Muhammad Mahdi Shamsuddin views this device as one part and parcel of Islamic jurisprudence that should not be grouped under "stratagems of the Shari'ah," because it is in keeping with the Qur'anic directive that reli-

- gion should facilitate ease and comfort for the believers and not be a cause of hardship and distress. *Ibid.*, 31-32.
4. For details, see Hossein Modarressi Tabataba'i, *An Introduction to Shi'i Law: A Bibliographical Study* (London: Ithaca Press, 1984), 16 and Ya'qub Ali Borji, "Nighahi beh dasteh bandi-ye babha-ye fiqh," *Fiqh-e Ahl-e bayt*, no. 3 (fall 1995), 241-56.
 5. Abbas Ali Zanjani, *Ashnayi ba 'ulum-e Islami* (Qum: Intisharat-e Islami, 1983), 342.
 6. Abdulaziz A. Sachedina, *Islamic Biomedical Ethics* (New York: Oxford University Press, 2009), 65.
 7. "The moral values are the crucial pivot of the entire overall system, and from them flows the law. The law is therefore the last part in this chain and governs all the 'religious,' social, political, and economic institutions of the society. Because law is to be formulated on the basis of the moral values, it will necessarily be organically related to the latter." Fazlur Rahman, *Islam & Modernity* (Chicago: The University of Chicago Press, 1982), 156.
 8. Muhammad b. Ya'qub b. Ishaq al-Kulayni, *Usul al-Kafi*, ed. Ali Akbar Ghaffari, 3d print, 8 vols. (Qum: Dar al-Kutub al-Islamiyyah, 1974), 1:58, hadith 19: "*Halal Muhammad halal abadan ila yawm al-qiyamah wa haramahu haram abadan ila yawm al-qiyamah.*" Another argument that is adduced in favor of the permanence of Islamic injunctions is the Qur'anic portrayal of human nature or conscience (*fitrah*) to be constant and unchanging: "So [O Prophet] as a man of pure faith, stand firm in your devotion to the religion. This is the natural disposition (*fitrah*) God instilled in mankind – there is no altering God's creation – and this is the right religion, though most people do not realize it" (30:30). Ayatullah Jawadi Amuli, *Shari'at dar A'ineh-ye Ma'refat* (Qum: Raja Publications, 1993), 115-16.
 9. Ismail K. Poonawala, "Ismaili *Ta'wil* of the Qur'an," in *Approaches to the History of the Interpretation of the Qur'an*, ed. Andrew Rippin (New York: Oxford University Press, 1988), 210.
 10. Al-Kulayni, *Al-Kafi*, 1:178.
 11. Ayatullah Sayyid Muhammad Husayn Fadlullah, *Al-Ijtihad bayn Asr al-Madi wa Afaq al-Mustaqbal* (Beirut: Markaz al-Thaqafi al-'Arabi, 2009), 247-48.
 12. I am referring here to the mainstream Twelver Shi'is who adopted a worldview in which the Imams were viewed as the legatees of the Prophet whose task was to explicate the message he had brought for humanity. However, there was a group that exaggerated the Imam's virtues and attributed to them divine characteristics. This group was referred to as the Ghulat (Exaggerators). See the work by Ayatullah Salehi Najafabadi, *Religious Extremism: Intellectual and Doctrinal Deviance in Islam*, tr. Hamid Mavani (Montreal: 2009).
 13. On the various definitions and significance of the term *imam* in Sunni Islam and the ancient schools of Islamic law, see Norman Calder, "The Structure of

- Authority in Imami Shi'i Jurisprudence" (Ph.D. diss., School of Oriental and African Studies, 1980), 1-23 and Muhammad Rafii Yunus, "The Necessity of Imamah According to Twelver-Shi'ism: With Special Reference to *Tajrid al-I'tiqad* of Nasir al-Din al-Tusi" (M.A. diss., McGill University, 1976), 8-26.
14. Mahmoud Ayoub, *The Crisis of Muslim History: Religion and Politics in Early Islam* (Oxford: Oneworld Publications, 2003).
 15. For a discussion on the progressive shift and modification of imamate in Sunni Islam from the time of al-Shafi'i to al-Baqillani, see Calder, "The Structure of Authority," 34-40. The imam's duties were confined to the executive domain and the ummah was promoted as the custodian, guarantor, and exponent of Islam.
 16. Kulayni, *Al-Kafi*, 1:176-77.
 17. Comprises Ali, Fatima, and eleven of their descendents. In Sunni collections of hadith, the majority of them couple the Qur'an with the traditions and practices (*sunnah*) of the Prophet, not his select family (*ahl al-bayt*).
 18. Mahmoud Ayoub, "The Speaking Qur'an and the Silent Qur'an: A Study of the Principles and Development of Imami Shi'i *Tafsir*," in *Approaches to the History of the Interpretation of the Qur'an*, ed. Andrew Rippin (New York: Oxford University Press, 1988).
 19. It is He who has sent this Scripture down to you (Prophet). Some of its verses are definite in meaning – these are the cornerstone of the Scripture – and others are ambiguous [metaphorical, allegorical, symbolic] (3:7).
 20. Kulayni, *Al-Kafi*, 4:54.
 21. *Ibid.*, 1:19, 35, 338.
 22. Norman Calder, "Doubt and Prerogative: The Emergence of an Imami Shi'i Theory of *Ijtihad*," *Studia Islamica*, 70 (1989): 57-78.
 23. Hamid Algar, *Religion and State in Iran, 1785-1906* (Berkeley: University of California Press, 1969), 3.
 24. In the Twelver Shi'i context, it means independent scholarly research undertaken by a qualified jurist (*faqih*) to derive a new ruling on a legal or theological question based on the interpretation and application of the four sources of the Islamic law: the Qur'an, the Sunnah, consensus, and reason. See Abdulaziz Sachedina, *Islamic Messianism: The Idea of the Mahdi in Twelver Shi'ism* (Albany: State University of New York Press, 1981), 199.
 25. The practice of the laity to emulate and follow the dictates of a jurist for religious guidance.
 26. See Abdulaziz Sachedina, *The Just Ruler (al-Sultan al-'Adil) in Shi'ite Islam: The Comprehensive Authority of the Jurist in Imamite Jurisprudence* (New York: Oxford University Press, 1988). Another work on this issue is by Liyakatali Takim, *The Heirs of the Prophet: Charisma and Religious Authority in Islam* (Albany: State University of New York Press, 2006). For a scholarly discussion between the Sunnis and the Shi'is in the medieval period on the issue of legitimate leadership and its theological underpinnings, see Asma

- Afsaruddin, *Excellence and Precedence: Medieval Islamic Discourse on Legitimate Leadership* (Leiden: Brill, 2002). On the use of methodological devices in *usul al-fiqh*, which Ayatullah Khomeini employed to advance his theory of absolute clerical authority, see the article by Hamid Enayat, "Iran: Khomeini's Concept of the 'Guardianship of the Jurisconsult,'" in *Islam in the Political Process*, ed. James P. Piscatori (Cambridge: Cambridge University Press, 1983), 160-80 and Hamid Dabashi, *The Theology of Discontent: The Ideological Foundations of the Islamic Revolution in Iran* (New York: New York University Press, 1993), 454-55.
27. Muhammad b. Abd al-Karim al-Shahrastani, *Kitab al-Milal wa al-Nihal*, tr. A. K. Kazi and J. G. Flynn (London: Kegan Paul International, 1984), 19.
 28. Devin J. Stewart makes a convincing case, with extensive documentation, that the development of the Twelver Shi'i legal school was greatly influenced by the development and crystallization of Sunni jurisprudence, especially in the post-occultation period wherein the inerrant divine guide was not accessible to provide guidance in matters of doctrine and practice. The particular system of authority and leadership adopted by the Twelver Shi'is to fill the vacuum of the absence of the inerrant imam was, to a great extent, determined by the desire of the marginal schools of thought (*madhahib*) to accept some of the principles of Sunni jurisprudence and conform to them so that they would be treated as equals in intellectual discourse and not be dismissed as a heretical or deviant sect. The case in point is the gradual acceptance and conformance to the concept of "consensus" (*ijma`*). Stewart's findings in the area of Shi'i jurisprudence and juridical tradition do not negate the fact that the presence of the person of the imam, the divine guide, is a central and pivotal concept in the Twelver Shi'i doctrinal and dogmatic tradition and has greatly shaped the Twelver Shi'is' vision and worldview. However, the extent and intensity of the influence diminished after the occultation of the Twelfth Imam in the fourth/ninth century. In addition, there was no need felt by the Shi'is to devise a legal methodology while the divine guide was present and accessible because he was to be the source of doctrine and practice. See Devin J. Stewart, *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System* (Salt Lake City: The University of Utah Press, 1998).
 29. Jonathan A. C. Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World* (Oxford: Oneworld Publications, 2009), 125.
 30. In response to a question on whether God is free to inflict pain on infants in the Hereafter, Ash'ari replies: "God is free to do that, and in doing it He would be just. Likewise, whenever He inflicts an infinite punishment for a finite sin, and subordinates some living beings to others, and is gracious to some and not to others, and creates men knowing well that they will disbelieve – all that is justice on His part. And it would not be evil on the part of God to create them in the painful punishment and to make it perpetual. Nor would it be evil on His part to punish the believers and to introduce the unbelievers into the Gardens.

Our only reason for saying that He will not do that is that He has informed us that He will punish the unbelievers – and He cannot lie when He gives information.” Abu al-Hasan al-Ash`ari, *The Theology of al-Ash`ari*, tr. Richard J. McCarthy (Beirut: Catholique, 1953), 99, question no. 169.

31. A. Kevin Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought* (Albany: State University of New York Press, 1995), 7.
32. Abu Hamid Muhammad al-Ghazali, *The Incoherence of the Philosophers*, tr. Michael E. Marmura (Provo: Brigham Young University Press, 1997), 170.
33. Compromises were made in Sunni Islam by recourse to legal tools and devices that were categorized under *adillah `aqliyah* (rational evidences) such as *qiyas* (analogy), *istislah* (public benefit), *istihsan* (juristic preference), and customary usage (*`urf*). Further, an implicit admission was made that divine decrees are based on wisdom and not the outcome of His whims and caprices with the theory of *maqasid al-shari`ah* (the aims and goals of the Divine Law can be discerned by human beings). Matters dealing with acts of worship (*`ibadat*) and injunctions that have textual revelatory proofs from the Qur`an and the Sunnah, however, are not be open to rational inquiry. See Muhammad Mustafa Shalabi, *Usul al-Fiqh al-Islami* (Cairo: Maktabat al-Nasr, 1991).
34. Acts of worship (*`ibadat*) are considered to be constant and unchanging and are required to be obeyed (*ta`abbud*) without exploring the reasons why they were legislated by God, because it is not possible to discover the goals and objectives (*maqasid al-shari`ah*) of the Divine in instituting the detailed acts of worship. For example, what is the merit of legislating two units of prayers (*rak`ah*) in the morning prayer but four units in the noon, afternoon, and night prayers? Thus, the whole discourse here is revolving around assigning a moral value to acts that are between humanity and God’s creation or *mu`amalat* because this sphere is conditioned by time and space and, as such, subject to change when the situational context (*mawdu`*) is altered. Ayatullah Muhammad Mahdi Shamuddin provides a detailed treatment on what ritual acts are categorized as part of worship (*`ibadah*) by Shi`i scholars from different historical periods. Ayatullah Muhammad Mahdi Shamsuddin, *Jame`eh-ye Siyasi-ye Islami: Mabani-ye Fiqhi wa Ta`rikhi*, tr. Sayyid Morteza Ayatullah Zadeh Shirazi (Tehran: University of Tehran, 2000), 61-67.
35. It may be more befitting and accurate to label the changing rulings (*mutaghayyir*) as context-bound rulings (*mawqi`iyat*) to underline that these rulings are not inherently in the state of change; rather, it is the different contexts and scenarios that necessitate change.
36. “They ask you [Prophet] about intoxicants and gambling: say, ‘There is great sin in both, and some benefit for people: the sin is greater than the benefit’” (2:219) followed by “You who believe, do not come anywhere near the prayer if you are intoxicated” (4:43) and finally a categorical prohibition “You who believe, intoxicants and gambling, idolatrous practices, and [divining with]

- arrows are repugnant acts – Satan's doing: shun them so that you may prosper" (5:90).
37. Abdokarim Soroush, *Qabz wa Bast-e Ti'urik-e Shari'at: Nazariyyeh-ye Takamul-e Ma'rifat-e Dini* (Tehran: Mu'assasah-ye Farhangi-ye Sirat, 1996). Ali Shari'ati, ideologue of the Iranian Revolution that climaxed in 1979, phrased this concept in a similar way. According to him religion, like nature, is immutable and perfect; however, the human understanding of religion cannot attain perfection without the interplay and participation of the mind, culture, spirituality, and the advancement of new sciences. See Ali Shari'ati, *Majmu'eh-ye Asar* (Tehran: Shirket-e Intishar, 1981), 23:257. In Sunni Islam, rulings and edicts on which there was a juridical consensus are construed as "immutable," and the rest on which differing opinions are expressed fall in the category of "changing." The latter are revised by recourse to the Qur'an and the Sunnah along with the principle of public welfare (*maslahah*).
 38. Sayyid Kamal al-Haydari, *La darar wa la dirar min abhath Sayyidina al-Ustadh Ayatullah al-'Uzma al-Shahid Muhammad Baqir al-Sadr*, 4th print (Qum: Dar al-Farqid, 2006), 180-212.
 39. Sayyid Morteza Taqawi, "Tahawwulat-e Mawdu'at Dar Fiqh," *Fiqh-e Ahl-e Bayt* (fall 1995), no. 3, 207-62.
 40. Abdolkarim Soroush, *Mudara wa Mudiriyyat* (Tehran: Mu'assasah-ye Farhangi-ye Sirat, 1996), 5-6.
 41. Ayatullah Muhammad Mahdi Shamsuddin, "Hiwar ma'a al-Shaykh Muhammad Mahdi Shamsuddin," in *Maqasid al-Shari'ah*, 31. Another example would be Ayatullah Khomeini's ruling on buying and selling musical instruments, which he made lawful because, in his estimation, certain kinds of music in the present time do have a beneficial component. Ayatullah Ruhullah Khomeini, *Sahifeh-ye Nur* (Tehran: Sazman-e Madarik-e Farhanghi-ye Inqilab-e Islami, 1990), 21:34.
 42. Ayatullah Muhammad Jawad Mughniyyah, *Al-Shi'ah fi al-Mizan* (Qum: Dar al-Kitab al-Islami, 2007), 709-15.
 43. Another example is the avoidance of fasting Ramadan for a person who is sick if he/she believes that fasting would harm his/her health or delay the recovery process, even if the doctor's opinion is to the contrary. Ayatullah al-Sayyid Abu al-Qasim al-Khu'i, *Minhaj al-Salihin*, 2 vols., 28th print (Qum: Madinah al-'Ilm, 1988), 1:275-76.
 44. Shamsuddin, *Jame'eh-ye Siyasi*, 161-99.
 45. Quoted by Chibli Mallat, *The Renewal of Islamic Law* (Cambridge: Cambridge University Press, 1993), 90, 91, and 92 from *Summary of World Broadcast: Middle East and Africa* (London), 8 January 1988. The original text was quoted in the Iranian newspaper *Ittila'at*, 7 January 1988 and *Kayhan-e hawa'i*, 6 January 1988. In Iran, the Expediency Discernment Council (*Majma'-e Tashkhis-e Maslahat*) was formed to deal with such issues that were consistently being rejected by the Assembly of Experts as incompatible with Islamic law.

46. Chibli Mallat, *Renewal*, 124.
47. This concept is analogous to *masalih al-mursalah* (seeking public good by using extra-revelatory sources when the revelatory texts are silent) in Sunni Islam. For a systematic discussion on the *mantaqah al-faragh*, see Muhammad Abd al-Lawi, “*Falsafah al-Ta’rikh min khilal Kitabat al-Imam al-Sadr wa Naqd Nihayah al-Ta’rikh*,” in Muhammad Baqir al-Sadr, *Dirasat fi Hayatih wa Fikrih* (London: Dar al-Islam, 1996), 189-296.
48. Sayyid Muhammad Baqir al-Sadr, *Iqtisaduna* (Our Economics), 2 vols. in 4 parts (Tehran: WOFIS, 1982), vol. 2, part 2, 183.
49. *Ibid.*, vol. 1, part 2, 57-58.
50. Ayatullah Muhammad Shamsuddin, “*Nizam-e Idari dar Hukumat-e Islami*,” in *Daramadi ber Andisheh-ye Siyasi-ye Islami*, ed. Sayyid Sadiq Haqiqat (Tehran: Intisharat-e bayn al-Milali-ye Huda, 1999), 398.
51. *Ibid.*, 59.
52. The religious edict on the prohibition of the use of tobacco issued in Iran by Ayatullah Hasan Shirazi in 1892 to prevent the British takeover of the industry is another example employing the same principle.
53. Baqir al-Sadr, vol. 2, part 2, 186. These types of rulings issued by the Imams must be rigorously examined to ensure that they were not issued out of exigency or fear under the rubric of dissimulation (*taqiyyah*). For example, the Seventh Imam, Musa al-Kadhim, instructed his companion Ali b. Yaqtin to perform ablution (*wudu’*) in a manner identical to that of the Sunnis because he was aware that the authorities had placed him under close surveillance to test his loyalty to the Sunni ruler. Muhammad Baqir al-Majlisi, *Bihar al-Anwar*, 2d ed., 110 vols. (Beirut: Mu’assasat al-Wafa’, 1983), 48:38.
54. Wael Hallaq, *Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (New York: Cambridge University Press, 2004), 162; and Abu Ishaq Ibrahim al-Shatibi, *Al-Muwafaqat fi Usul al-Shari’ah*, ed. M. Muhyi al-Din Abd al-Hamid, 4 vols. (Cairo: Matba’ah Muhammad Ali Shaybah, 1970).
55. Muhammad Mehrizi, “*Maqasid al-Shari’ah fi Madrasah Ahl al-Bayt*,” in *Falsafah al-Fiqh wa al-Maqasid al-Shari’ah*, ed. Abd al-Jabbar al-Rifa’i (Beirut: Dar al-Hadi, 2001), 509.
56. Bibliographical sources indicate that Shi’a scholars were writing works on efficacious causes (*kitab al-`ilal*) from the early part of tenth century; however, none of them are extant. The earliest preserved work is Shaykh Saduq’s (d. 991) *Ilal al-Shara’i wa al-Ahkam*. No Shi’i jurist authored an independent work on *maqasid al-shari’ah*; however, similar issues were discussed, sometimes tangentially, under the subject of *tanqih al-manat*, which deals with discovering the *illah* by segregating it from other characteristics that do not impinge on the legal ruling.
57. Modarresi Tabataba’i, *An Introduction to Shi’i Law*, 29-32.
58. Rasul Ja’fariyan, *Din wa Siyasat dar Dawre-ye Safawiyeh* (Qum: Ansariyan, 1981).

59. Morteza Motahhari, "*Asl-e Ijtihad dar Islam*," in *Deh Gofar*, 10th ed. (Tehran: Intisharat-e Sadra, 1995), 103-10.
60. Sachedina, *Islamic Biomedical Ethics*, 61.
61. Husayn Sabiri, *Fiqh wa Masalih-e 'Urfi* (Qum: Intisharat-e Daftar-e Tablighat-e Islami, 2004). Hallaq dismisses the concepts of *maslahah* and necessity (*darurah*) as highly subjective juristic devices that demand a rigorous methodology before they can prove to be of any use: "Ultimately, reliance on the concepts of *istislah* and necessity, the two major ingredients in the theories espoused by the school of religious utilitarianism, amounts to nothing short of subjectivism..." Hallaq, *Islamic Legal Theories*, 231.
62. Abu Hamid Muhammad al-Ghazali's *Al-Mustasfa min 'Ilm al-Usul*, as cited in Mehrizi, "*Maqasid al-Shari'ah*," 509. In the Shi'i sources, Sahib al-Jawahir (Shaykh Muhammad Hasan Najafi, d. 1849) wrote that "according to us, the legal rulings are the results obtained after undergoing the test of real public welfare (*masalih waqi'iyah*)." Muhammad Hasan al-Najafi, *Jawahir al-Kalam*, ed. Abbas al-Quchani, 43 vols (n.p.: Dar al-Kutub al-Islamiyyah, 1986), 2:129.
63. Sachedina, *Islamic Biomedical Ethics*, 227.
64. *Al-Ijtihad wa al-Hayat*, ed. Muhammad al-Husayni (Lebanon: Markaz al-Ghadir li al-Dirasat al-Islamiyyah, 1998), 44-45. The example cited is the prohibition of all intoxicants based on the Qur'anic verse that wine is forbidden because it is inebriating. "O you who believe, intoxicants and gambling, idolatrous practices, and [divining with] arrows are repugnant acts – Satan's doing: shun them so that you may prosper..." (Q5:90).
65. *Ibid.*, 21.
66. *Ibid.*, 24-25. The primary responsibility of the jurist is to provide guidance for the maintenance of a just society and not just to respond to personal questions to resolve his/her particular predicament.
67. Mughniyyah, *Al-Nizam al-Siyasi*, 723-30. Hadi Fadlullah, *Muhammad Jawad Mughniyyah: Fikr wa Islah* (Beirut: Dar al-Hadi, 1993), 111-12.
68. Mahdi Mehrizi, "*Fiqh-e Hukumati*" in *Naqd o Nazar*, 3d year, no. 4 (spring 1997): 144.
69. Sachedina, *Islamic Biomedical Ethics*, 65. 'Urf (custom, convention) is an important criterion in determining what is in the public welfare because *husn* (goodness) and *qabih* (reprehensibility) are defined according to the convention or customary practice referred to as *mawdu'ha-ye 'urfi*. See Taqawi, *Fiqh-e Ahl-e Bayt*, 231.
70. *Sahifeh-ye nur*, 21:98.
71. The concepts of time and space have been the subject of numerous conferences. Various author's speeches and articles have been published under the title *Ijtihad va Zaman va Makan: Majmu'ah-ye Maqalat*, 15 vols. (Qum: Mu'asseseh-ye Tanzim wa Nashr-e Asar-e Imam Khumayni, 1995-96). These concepts that were introduced by Khomeini are crucial when the jurist

deliberates on the political, social, and economic fields that are in constant flux with the passage of time and place. This subject matter is also dealt with by Ayatullahs Muhammad Mahdi Shamsuddin and Husayn Fadlullah in *Manahij al-Tajdid*, ed. Abd al-Jabbar al-Rifa'i (Beirut: Dar al-Fikr al-Mu'asir, 2000).

72. It is interesting to observe that even prior to Ayatullah Sadr, the eminent jurist Ayatullah Borujerdi (d. 1961) had emphatically pointed out that he entertains no doubt that Islamic rulings should encompass political and social issues and, as such, the jurists' scope should not be limited to providing juridical guidance in matters of worship to individuals to attain salvation in the Hereafter. Ayatullah Husayn Borujerdi, *Al-Badr al-Zahir fi Salat al-Jumu'ah wa al-Musafir* (Qum: Daftar-e tablighat-e Islami, 1983), 52.
73. Differing circumstances would include things like coercion (*ikrah*), stress and anxiety (*idtirar*), and distress and hardship (*haraj*).
74. Al-Hasan b. Mutahhar al-Hilli, *Kashf al-Murad fi Sharh al-Tajrid al-I'tiqad*, edited with footnotes by Ayatullah Ja'far Subhani (Qum: Mu'assasat al-Imam al-Sadiq, 2003), 173.
75. Ayatullah Fadlullah advocates an *ijtihad* method that takes into account the human intellect (*manhaj 'aqli*) instead of slavishly relying on the text when deducing legal rulings. "Hiwar ma'a al-Sayyid Muhammad Husayn Fadlullah," in *Maqasid al-Shari'ah*, 49. The number of verses in the Qur'an that invite people to engage in contemplation and analysis exceeds three hundred if one were to gather verses that use words derived from the roots *f-k-r*, *d-b-r*, *n-z-r*, *'l-m*, and *q-l-b*.