

**TAQLĪD V. IJTIHĀD:**  
**THE RISE OF TAQLĪD AS THE SECONDARY JUDICIAL APPROACH IN ISLAMIC**  
**JURISPRUDENCE**

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**ABSTRACT**

*Muslims scholars often argue that ijtihād is the only intellectual process that Islamic law knows, and that taqlīd is an intruder process that has no legitimacy. However, although ijtibād remains the primary judiciary approach, taqlīd seems to be the secondary one. The main Islamic law sources, the Qur'an and the Sunnah, introduce taqlīd as an Islamic intellectual process that versus ijtihād. Further, the strict qualifications to be a mujtabid justify the emergence of taqlīd to fill in gaps when ijtihād is not workable. Otherwise, it will be an undue burden to require everyone to be a mujtabid. In this regard, I attempt to expound taqlīd in its judicial aspect as the secondary Islamic judicial approach in an attempt to apply its concept on the proper Islamic judge.*

**INTRODUCTION<sup>1</sup>**

Like any modern legal system, the principle of separation of powers influenced Islamic law in both structure and substance. The Islamic judiciary went through two distinct phases, both related to the principle of the separation of powers. The emergence of the maxim of separation of powers was a crucial point in the development of the Islamic judiciary.

During Muhammad's regime, Islamic law did not know the separation of powers. In fact, the concept of infallibility played an important role in establishing the principle of separation of powers. The principle was designed to prevent dictatorial governments by preserving to each authority its working field. Being an infallible Messenger who governed by revelations from God, Muhammad was immune from mistake. Thus, neither tyranny nor dictatorship was to be anticipated from Muhammad, and consequently, there was no need for a principle of separation of powers. At the beginning of the Islamic state, Muhammad monopolized all powers in his hands; he was the governor, the legislator, and the judge. This monopoly was a reasonable result of his infallibility, so there was no need to dilute or set aside any of his power.

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Right after Muhammad's death, the revelation/infallibility era came to an end and Muslims realized the importance of the separation of powers as any ruler after Muhammad would be prone to mistakes. Major changes took place in the post-Muhammad Islamic society and judges were obliged to face tremendous new issues that had no clear solution in the *Qur'an* or the *Sunnah*. Thus, Islamic law found its way to what is called *ijtihād*.<sup>2</sup>

*Ijtihād* literally means exerting an effort to do something.<sup>3</sup> However, legally it means exerting efforts toward the formation of a new law or reforming an existing law.<sup>4</sup> In other words, when the *Qur'an* and *Sunnah* lack a clear solution to an issue, whether legal or factual, it is the role of jurists to come with a solution depending on their own interpretation through the process of *ijtihād*.<sup>5</sup> Indeed, *ijtihād* was the tool of Islamic jurisprudence (*fiqh*) to shed light on new issues in Islamic law and to meet the changing needs of Islamic society after the Prophet's death.<sup>6</sup> Islamic *fiqh* is the method of developing new rules through the interpretation of the *Qur'an*

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<sup>2</sup> In fact, the transition from jurisprudence centred on ruling by Muhammad to more diverse jurisprudence of diverse judges after his death is a general issue of the transition from charismatic leadership to institutional structure, which is a general sociological issue and not really a legal one, although it has legal consequences.

<sup>3</sup> Muneer Goolam Fareed, *Legal Reform in the Muslim World: The Anatomy of a Scholarly Dispute in the 19<sup>th</sup> and the Early 20<sup>th</sup> Centuries on the Usage of Ijtihad as a Legal Tool* 19 (Austin & Winfield, 1996).

<sup>4</sup> Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to the Sunni Usul Al-Fiqh* 117 (Cambridge University Press, 1st ed. 1997). In other words, *ijtihād* is the exertion of the mind by returning the scriptures and interpreting the law. Norman Calder, *Law, Oxford Encyclopedia of the Modern Islamic World* 452 (John L. Esposito ed., 1995). See also Dr. Hussayn Hamid Hassan, *Usul Al-Fiqh [Rules of Jurisprudence]* (1970) (defining *ijtihād* as "the intense effort of a jurist in the deduction of a ruling in practical Shari'a."); `Abdul Karim Zaydan, *Al-Wajiz Fi Usul Al-Fiqh [Rules of Jurisprudence in a Nutshell]* (6th ed.). In this regard, *ijtihād* is to be considered as a kind of gap-filler.

<sup>5</sup> Amna Arshad, *Ijtihad as a Tool for Islamic Legal Reform: Advancing Women's Rights in Morocco*, 16 Kan. J.L. & Pub. Pol'y 129, 132 (2007).

<sup>6</sup> It is to be noted that right after the death of Prophet Muhammad and the approximately 30 years following his death, the Islamic state was ruled by the Prophet's companions, "the four right guided Caliphs." In this era, *ijtihād* was, to a great extent, monopolized by the Caliph as the one who held the authority to interpret the *Qur'an* and the *Sunnah*. After the era of the four right guided Caliphs, the situation started gradually to change to the extent that the power of *ijtihād* was surrendered to Islamic jurists and scholars. Indeed, this shift was a logical consequence to what the people felt regarding the weakness of the Caliphate, especially when uncertainty surrounded the office of the Caliphate regarding who legally deserved it. Further, the Islamic Caliphate lost much of its respect among Muslims when some Caliphs, who succeed the four right guided Caliphs, engaged in some issues that irrelevant to their main role of preserving the Islamic religion and the Islamic state.

and the *Sunnah*.<sup>7</sup> For the purpose of this, five schools of thought emerged, each with its own methods of using *ijtihād* to interpret the *Qur'an* and the *Sunnah* through specific rules of reasoning.<sup>8</sup>

Accordingly, in the context of Islamic law, a jurist who deduces rules, from the sources of Islamic law, through the process of *ijtihād* is called a *mujtahid*. Thus, an Islamic judge (*qadi*) who is able to figure out a solution for a new issue through his own interpretation of the *Qur'an* and the *Sunnah* is a *mujtahid* judge. Indeed, the rise of Islamic jurisprudence and the major role played by Islamic jurists in developing and maintaining Islamic law led Muslims to believe that a *mujtahid* jurist is ranked over a judge who only concerned with disputes settlement.<sup>9</sup> Muslims started to see the opinions of a *mujtahid* jurist as the method of maintaining the Islamic state by resolving difficult new issues caused by the rapid changes in society. Hence, the Islamic judge is the one who is entitled to apply laws depending on his affiliation with a certain school of *fiqh* and thus his decision is not binding unless he is a *mujtahid* jurist.<sup>10</sup>

For a judge or a jurist to declare himself a *mujtahid*, he should meet the following qualifications: (1) he must be Muslim; (2) he must master the Arabic language; (3) he must have surpassing knowledge of the legal and legislative verses in the *Qur'an*; (4) he must be well acquainted with the *Sunnah* and the authenticity of the *hadiths*; (5) he must possess surpassing knowledge of the principles of Islamic jurisprudence (*Ulm Usul Al-Fiqh*); (6) he must know the *Ijma* (the binding precedents in Islam); (7) he must know the main objectives of the *Shari'a*; and (8) he must be pious, modest, and avoid heresy.<sup>11</sup>

In the context of Islamic law, *ijtihād* is considered the primary judicial approach whereby the role of the judge is not only to try disputes, but also to deduce and develop rules to face new issues and fill in gaps. The Islamic judiciary was at its best when it was a creative judiciary in which judges were to be *mujtahids*. However, the era of *ijtihād* started gradually to decline and gave a way to the

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<sup>7</sup> See Ali Khan, *The Reopening of the Islamic Code: The Second Era of Ijtihad*, 1 Univ. St. Thomas L. J. 356 (2003).

<sup>8</sup> Islam knows five schools of *fiqh*: Hanafi, Maliki, Shafi, Hanbali, and Jafari, all founded by great Islamic scholars.

<sup>9</sup> Khan, *supra* note 6, at 361.

<sup>10</sup> *Id.* It is to be noted that the decision of a *mujtahid* judge will be considered binding precedent for those who follow that judge's school of *fiqh*. Only decisions reached by Islamic jurists through the process of *ijma* are binding precedents for all Muslims.

<sup>11</sup> For further discussion regarding the qualifications of a *mujtahid*, see Shaykh Tahir Mahmood Kiani, *Taqlid: Trusting a Mujtahid* 4-5.

emergence of the secondary approach, which is *al-taqlīd*.

The inspired era of *ijtihād* came to an end due to many events that took place in the Islamic state. One was the resignation of many Islamic jurists from continuing their intellectual work.<sup>12</sup> The fact that the most knowledgeable jurists and scholars who were engaged personally with the Prophet and his companions passed away is an important cause of the decline of *ijtihād*. Another reason for the fading of *ijtihād* is the belief that the full establishment of Islamic law and Islamic jurisprudence took place during the era of the Prophet and his companions and the establishment of the five major schools of jurisprudence.<sup>13</sup>

Despite the fact that the inspired era of *ijtihād* came to an end, the door of *ijtihād* has never been closed. However, the truth is that *taqlīd* overshadowed *ijtihād* thanks to some radical changes that reshaped Islamic jurisprudence. The purpose of this article is to shed light on the sources of Islamic law, discuss *taqlīd* as the secondary judicial approach in Islamic law, draw the crucial line between it and the *ijtihād*, and define the duties of *muqallid* judge.

## WHAT IS ISLAMIC LAW?

### ISLAMIC LAW IN GENERAL

The word Islam literally means peace and surrendering<sup>14</sup>. Islam is one of the main monotheistic religions alongside Judaism and Christianity.<sup>15</sup> Muslims believe that Islam is the last religion that came from God and delivered to and narrated by Prophet Muhammad. One of the cornerstones in Islam is to believe that God (*Allah*) is one and unique.<sup>16</sup>

Further, Muslims believe that Muhammad is a messenger of God; as they believe in all messengers who preceded Muhammad.<sup>17</sup> Mecca was the region from which

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<sup>12</sup> Khan, *supra* note 6, at 365.

<sup>13</sup> For further details concerning the reasons for *ijtihād*'s decline, see *id.*, at 366-369.

<sup>14</sup> Abou Hamed Al-Gazaly, Qwa'd Al-'Aka'd [Rules of Creeds], 58; Bernard Lewis & Buntizie Ellis churchill, *Islam: The Religion and the People* 8 (Wharton School Publishing, 2009).

<sup>15</sup> Matthew Lippman, Sean McConville, & Mordechai Yerushalmi, *Islamic Criminal Law and Procedure: An Introduction* 5 (1948).

<sup>16</sup> "Say, He is Allah, [who is] One." Qur'an 112:1.

<sup>17</sup> "The Messenger has believed in what was revealed to him from his Lord, and [so have] the believers. All of them have believed in Allah and His angels and His books and His messengers, [saying], "We make no distinction between any of His messengers." And they say, "We hear and we obey. [We seek] Your forgiveness, our Lord, and to You is the [final] destination." Qur'an 2:285.

Islam emerged<sup>18</sup> right after Prophet Muhammad was assigned by God to call for the new religion. Rapidly, Islam seized the Middle East in the second half of the seventh century A.D., heading to North Africa and Central Asia two centuries later.<sup>19</sup> Islam is divided into many schools; however, the majority of Muslims follow either the *Sunni* school or the *Shi'a* school.<sup>20</sup>

Islamic law, or “Shari’a Law,”<sup>21</sup> as some scholars prefer to call it, is a broad term which includes rules that came from God in the *Qur’an*, rules that Prophet Muhammad legislated by means of revelation, and the entire Islamic jurisprudential heritage developed by Islamic scholars.<sup>22</sup> Islamic law is not to be considered only as a celestial entity that deals only with religious issues. Although it concerns worship issues (*Tbadat*), it also includes rules that govern daily practices and transactions among individuals along with the relationships between them and the government (*Mo‘amalat*).

### SOURCES OF ISLAMIC LAW

Islam possesses a legal system distinct from any other.<sup>23</sup> Unlike any other legal system, Islamic law has a divine origin in which its scholars continued to realize and appreciate. In other words, Islamic law is the only legal system that reaches a fair result by combining mere legal rules with the rule of ethics.

Taking in account its divine origin, Islamic law arrived with rules to refine the individual’s soul and pays a great deal of attention to spiritual motives in human activities.<sup>24</sup> To that extent, Islamic law conquered a new area, the state government

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<sup>18</sup> Lippman et al., *supra* note 14.

<sup>19</sup> *Id.*

<sup>20</sup> The main schools of thought in Islam are the Sunni, Shi’a, Kharijism, Murji’ism, and Sufist schools. Although it is beyond the scope of this article to discuss each school for the purpose of this article, it is important to emphasize that the main controversy between these schools is a mere political one concerning the presidential and governmental Caliphate.

<sup>21</sup> Shari’a means “the path to follow” or “the right path.” Ahmed Zaki Yamani, *The Eternal Shari’a*, NY.U. J. Int’l L. & Pol. 12 (1979); Ramadan ‘Ali Al-Shoronbasy, *Al-Madkhl Le Derassat Al-Fiqh Al-Islami: Al-Goze’e Al-Awal* [An Introduction to the Study of Islamic Jurisprudence: Part I] (2003). Calling Islamic law as Shari’a law is to some extent misleading, especially for those who are not knowledgeable about Islam because they think that it is to deprive Islamic law from its broad meaning by dictating it only to organize the relation between individuals and God “i.e. worship issues.” However, in fact Shari’a is to give the same broad meaning, the Islamic law accommodates, unless it indicates otherwise.

<sup>22</sup> Isma’il R. Al-Faruqi & Lois L. Al-Faruqi, *The Cultural Atlas of Islam* 279 (Macmillan, 1986).

<sup>23</sup> Bernard G. Weiss, *The Spirit of Islamic Law* 1 (University of Georgia Press, 1998).

<sup>24</sup> Youssef Kassem, *Masader Al-Fiqh Al-Islami* [Sources of Islamic Law] 65 (2000).

with all of its features, which is very unusual for an early legal system.<sup>25</sup>

In doing so, Islamic law presented two different perspectives. First, it is a system that draws its rules directly from God. Second, it is a system that truly realized the real meaning of the word law, as it implicitly maintains the idea of continuous development according to the surrounding circumstances and emerging issues. In the second perspective, Islamic law devoted a great deal of attention to the rules of jurisprudence to develop its own rules in an attempt to accommodate new issues.<sup>26</sup> Islamic jurists made great efforts to devise new rules to face the changing needs of Islamic society.<sup>27</sup> In this regard, Islamic law resembles to some extent the Roman law that scoured its sources through the deliberations of jurists.<sup>28</sup> Thus, Islamic law is far from being a static legal system; rather, it adopts the idea of flexibility whereby it can adjust itself according to changed circumstances. Islamic law knows four sources that count as primary sources and two secondary sources. Among the four primary sources, two are textual sources: the *Qur'an* and the *Sunnah*.<sup>29</sup>

The *Qur'an* is considered to be the fundamental, first source of Islamic law by all scholars.<sup>30</sup> Muslims believe that the *Qur'an* is the word of God as revealed to Prophet Muhammad.<sup>31</sup> The *Qur'an* that is the constitution of Islamic law and contains 114 chapters (*Surah*) and 6,236 verses (*Ayah*). Among those verses, about 500 display legal sense.<sup>32</sup> According to Islamic jurists and scholars, the legal verses

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<sup>25</sup> Bryant W. Seaman, *Islamic Law And Modern Government: Saudi Arabia Supplements The Shari'a To Regulate Development*, 18 Colum. J. Transnat'l L. 417 (1979) (arguing that Islam aims to regulate all aspects of human existence, addressing the religious matters and practices that consider the relationship between the individual and God, as well as the whole governmental system including the citizens' relationship with the ruler). See also Weiss, *supra* note 22, at 3 (arguing that in Islam monotheistic law and monotheistic polity went hand in hand).

<sup>26</sup> Unlike other legal systems, Islam did not develop only by judicial decision as jurisprudence, represented by the Islamic scholars and the heads of schools, played a vital role in such development.

<sup>27</sup> Islamic history reveals that Islamic jurists were independent from the government; they realized that in order to continue their free-thinking ways and maintain their efforts in developing the law, they should be free from governmental restraints that could restrict their abilities and thoughts. Solomon D. Goitein & A. Ben Shemesh, *Muslim Law in Israel: An Introduction to Muslim Law* 25 (1961).

<sup>28</sup> J. F. Jolowicz & Barry Nicholas, *Historical Introduction to the Study of Roman Law* 94, 374 (Cambridge University Press, 3d ed., 1972).

<sup>29</sup> Arshad, *supra* note 4, at 132.

<sup>30</sup> Id. Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* 14 (Islamic Texts Society, 2d ed., 1991).

<sup>31</sup> Seyyed Hossein Nasr, *Ideals and Realities of Islam* 30 (ABC International Group, 2000).

<sup>32</sup> Yasir Billoo, *Change and Authority in Islamic Law: The Islamic Law of Inheritance on Modern Muslim States*, 84 U. Det. Mercy L. Rev. 637, 640 (2007). See also Kamali, *supra* note 29, at 20

are either definitive verses (*qat'i*) or speculative verses (*dhanni*).<sup>33</sup> Those definitive verses are clear and unequivocal to the extent that they do not provide any room for further interpretation.<sup>34</sup> The definitive verses include either a requirement to do something or a prohibition to refrain from doing something.<sup>35</sup> However, the speculative verses are open to interpretation.<sup>36</sup>

The second primary source is the *Sunnah*. Generally speaking, the *Sunnah* means the traditions of Prophet Muhammad.<sup>37</sup> More strictly, through the *Sunnah* Islamic law considers Prophet Muhammad's sayings, doings, tacit approvals, and normative practices among its primary sources. The *Sunnah* is the second primary source after the *Qur'an* so it is not higher than the *Qur'an*; rather, it helps in interpreting it.<sup>38</sup> Muslims gathered the *Sunnah* of Muhammad in written works called the *Hadith*, which means "speech."<sup>39</sup> Not all the *Hadiths* have the same degree of authentication. Islamic scholars authenticate them by the chains of transmission, "the power of *isnad*", and of their narrators' authorities.<sup>40</sup> Following the Prophet's practices embodies the verses of the *Qur'an* itself where God ordered Muslims to follow the *Sunnah* of Muhammad.<sup>41</sup>

The third primary source is *Ijma*, which means the unanimous consensus of the Islamic jurists, as the representatives of the whole Islamic state, on a particular

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(arguing that the understanding and the approach of each reader and interpreter are to determine such calculations).

<sup>33</sup> Id.

<sup>34</sup> Kamali, *supra* note 29, at 20-21.

<sup>35</sup> Lippman et al., *supra* note 14, at 29. An example of definitive verses of Qur'an is: "Divorced women remain in waiting for three periods, and it is not lawful for them to conceal what Allah has created in their wombs if they believe in Allah and the Last Day." Qur'an 2:228.

<sup>36</sup> Kamali, *supra* note 29, at 21. An example of speculative verses is the word "periods" in "Divorced women remain in waiting for three periods, and it is not lawful for them to conceal what Allah has created in their wombs if they believe in Allah and the Last Day." Qur'an 2:228. Here, the door of interpretation is open to determine whether it means three days, months, or years. Islamic jurists agreed that it means three months because this is the period after which it will be clear whether the divorced woman is pregnant from her ex-husband before getting married to another man in order to avoid mixed lineage.

<sup>37</sup> Lippman et al., *supra* note 14, at 30. See also M. Cherif Bassiouni & Gamal Badr, *The Sharia'h: Sources, Interpretation, and Rule-Making*, 1 UCLA J. Islamic & Near E.L. 135, 150 (2002).

<sup>38</sup> This means that only the Qur'an is infallible. The *Sunnah*, however, is prone to mistakes as scholars consider some hadiths to be very weak and doubtful. Michael Mumisa, *Islamic Law: Theory & Interpretation* 57 (2002).

<sup>39</sup> Billoo, *supra* note 31, at 641. See also *id.*

<sup>40</sup> Lippman et al., *supra* note 14, at 30. See also Kamali, *supra* note 29, at 50, 68. Islamic scholars used some standards to determine the narrator's veracity, including his good morals and how close he was to the Prophet.

<sup>41</sup> "There has certainly been for you in the Messenger of Allah an excellent pattern for anyone whose hope is in Allah and the Last Day and [who] remembers Allah often." Qur'an 33:21.

issue in a particular time. To form *ijma*, five conditions have to be met: (1) a sufficient number of jurists should participate in the deliberation and discussion, with this number governed by a reasonableness test; (2) a unanimous agreement should be reached regarding the issue in question; (3) a clear view or opinion must have been deduced from each jurist; (3) the unanimous consensus should be proved correct either by its popularity among all jurists and scholars or its wide transmission by trustworthy people; (4) and the unanimous consensus shouldn't be preceded by another consensus that contradicts it. *Ijma* is justified by both the *Qur'an* and the *Sunnah*.<sup>42</sup>

*Qiyas*, or analogical reasoning, is the fourth and the last primary source of Islamic law. Literally, it means the weighing or the assessment of two things. Technically, it means the extension of a known ruling on a certain issue to include a new issue which resembles it.<sup>43</sup> In other words, *Qiyas* is an intellectual process whereby jurists can face new issues, which have no explicit ruling in the *Qur'an* or the *Sunnah*, by broadening the ruling of an existing rule.<sup>44</sup> Jurists can trigger *Qiyas* only if a solution to the new issue is not found in the *Qur'an*, the *Sunnah*, or *Ijma*.<sup>45</sup> Consequently, it is obvious that jurists cannot use *Qiyas* to legislate a new rule that contradicts other rules legislated through the more authoritative sources. In fact, among Muslims scholars there is no unanimous consensus on the legitimacy of *Qiyas* as a source of Islamic law. Nevertheless, there is ample evidence in both the *Qur'an* and the *Sunnah* to support *Qiyas* as a legitimate source of Islamic law.<sup>46</sup>

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<sup>42</sup> "You are the best nation produced for mankind. You enjoin what is right and forbid what is wrong and believe in Allah. If only the People of the Scripture had believed, it would have been better for them. Among them are believers, but most of them are defiantly disobedient." Qur'an 3:110. Prophet Muhammad stated in a hadith that "My Community shall never unite upon error."

<sup>43</sup> Jurists agree that *Qiyas* has four elements: (1) the original case; (2) the sub-case (the new issue); (3) the effective cause between the two cases; (4) and the ruling of the original case that will be extended to the new case.

<sup>44</sup> An ideal example of deducing a new rule using *Qiyas* is the prohibition of drugs in Islam. The Qur'an explicitly prohibits drinking alcohol; however, it does not mention anything about drug addiction, nor does the *Sunnah*. Jurists agreed that the effective cause behind the prohibition of drinking alcohol is that alcohol causes defects in the drinker's mind, by which he/she cannot understand the consequences of acting. Jurists found that drug addiction resembles drinking alcohol in the same effective cause. Thus, drug addiction is prohibited through *Qiyas*.

<sup>45</sup> Kamali, *supra* note 29, at 197.

<sup>46</sup> "Say, He will give them life who produced them the first time; and He is, of all creation, Knowing." Qur'an 36:79. It has been narrated after Prophet Muhammad that before he delivered Mo'az ibn Gabal his commission as a judge he asked him "How you will judge when you try a case? Mo'az replied: by the Qur'an, then the Prophet asked: and what if you did not find the solution in the Qur'an? Mo'az replied: then I will judge by the *Sunnah*. The Prophet asked him again: and what if you did not find the solution in the *Sunnah*? Mo'az replied: then I will come to a decision according to my opinion without hesitation. The Prophet replied, Praise be to Allah who has led

There are also secondary or supplementary sources of Islamic law. *Istihsan*, or juristic preferences, is one of them. Literally, it means the inclination to the better way and is the process of choosing one solution over another because the selected solution appears to be more suitable to the issue in question.<sup>47</sup> Like *Qiyas*, *Istihsan* lacks unanimous consensus among the Islamic schools of thought.<sup>48</sup> However, there is ample evidence in the *Qur'an* and the *Sunnah* to support *Istihsan*.<sup>49</sup>

*Al-Masalih al-Mursalah*, or the public good, is another secondary source. It literally means bringing about public benefit and warding off public harm.<sup>50</sup> In terminology, it means the unrestricted public utility that God preserved for people regarding their life, minds, lineage, and money. To consider *Al-Masalih al-Mursalah* as a source of legislation in Islamic law, the *Maslaha* (Interest) should be (1) consistent with the intent of God so that it does not contradict any rule in the *Qur'an*; (2) reasonable; (3) and should be a public interest not a mere private one.<sup>51</sup> Examples of *Al-Masalih al-Mursalah* can be found in the agreement of Muslims to gather the whole verses of the *Qur'an* in one book (*Al-Mushaf*) and the guarantee of the mortgages. Muslim society found in the concept of *Al-Madalih al-Mursalah* a rich source of solutions for many issues.<sup>52</sup>

Finally, Islamic law considers *Al' Urf*, or usages and customs, the last secondary source. Like any other modern legal system, Islamic law recognizes useful social customs of a given area or a specific profession as a legal device to govern legal issues concerning that area or profession.<sup>53</sup> Islamic law adopted the modern tolerant approach to customs and usages, understanding that those customs and usages are vulnerable to change whenever the circumstances of society change. Thus, a ruling that has been reached on the bases of *Al' Urf* in a certain social

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Messenger of Allah to an answer that pleased him.” Sunnan Abou Dawood, *Al-Oqdia* book 3592 [The *Sunnah*: Book of Judgments].

<sup>47</sup> In other words, *Istihsan* requires a careful look at the possible solutions and alternatives and selecting the best of them that causes the least harm and serves the good of the public interest.

<sup>48</sup> The Hanafi, Maliki, and Hanbali schools recognize *Istihsan* as a secondary source of Islamic law, while the Shafi school denies its legitimacy.

<sup>49</sup> “Who listen to speech and follow the best of it. Those are the ones Allah has guided, and those are people of understanding.” *Qur'an* 39:18. Dealings and making transactions regarding a non-existing commodity or item has been approved in the *Sunnah*.

<sup>50</sup> Ibn Al-Manzor, *Lysan Al-Arab* [The Arabian Tongue] 2479/4.

<sup>51</sup> For further discussion regarding the conditions for applying *Al-Masalih al-Mursalah*, see Mohamed Ibrahim Al-Dahshory, *Al-Osolien W Al-Masalih al-Mursalah* [The Framers and the Public Utility] (1996).

<sup>52</sup> Mumisa, *supra* note 37, at 123-131.

<sup>53</sup> *Id.*, at 137. See also Lippman et al., *supra* note 14, at 33.

circumstance may not prevail in different circumstances.<sup>54</sup>

### WHAT IS *Taqīd* AND WHO IS THE *Muqallid*?

Literally, *taqīd* means simulation or imitation. However, technically it means putting a noose around one's neck.<sup>55</sup> For the purpose of Islamic law, *taqīd* means following the established opinions or decisions of a certain jurist rather than introducing a new rule or decision by engaging in an individual interpretation (*ijtihād*).<sup>56</sup> In other words, *taqīd* means adherence to others' opinions regarding the question at hand.<sup>57</sup> A *muqallid* is one who follows *taqīd*.<sup>58</sup> Thus, a *muqallid* judge is one who follows and adheres to previous opinions or decisions of a certain jurist or a certain school of thought to decide issues before him.<sup>59</sup>

Islamic law did not know *al-taqīd* during Muhammad's era, when rules and laws were legislated by God and revealed to Muhammad through the *Qur'anic* texts. In addition, Prophet Muhammad used to issue some rules or interpretations of the *Qur'an* in his *Sunnah*. We cannot consider imitating these rules to be *taqīd*. When a judge bases a decision on a *Qur'anic* rule or on a rule that came from the *Sunnah*, he is not a *muqallid* because he is obliged to follow these rules otherwise the his judgment will be rendered void. It is important to keep in mind the difference between *taqīd* and adherence to the *Qur'an* and the *Sunnah*. What distinguishes *taqīd* is that it is not mandatory, so an imitator judge "*muqallid*" is not bound to follow the decision or the opinion of a certain jurist, but can choose among the different jurists the one whose opinion fits his ideology and the issue in question. On the contrary, adhering to rules in the *Qur'an* and the *Sunnah* is mandatory in which all judges are obliged to follow as a matter of law.<sup>60</sup>

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<sup>54</sup> Mumisa, *supra* note 37, at 138.

<sup>55</sup> The Arabic Dictionary: Al-Baḥr Al-Moḥit [The General Sea] 270 (V. 6).

<sup>56</sup> Arshad, *supra* note 4, at 134. See also Al-A'mady, Al-Aḥkam [The Judgments] 445 (V. 4).

<sup>57</sup> Abou Al-Kassem Al-Khawthi, Al-Tnqih Fi Sharh Al-'Orwa Al-Wosqa, Al Ketab Al-Awal: Al-Ijtihad W Al-Taqlid [Explaining The Most Trustworthy Handhold, The First Book: Al-Ijtihad W Al-Taqlid] 77-79 (Al-Adab press).

<sup>58</sup> In Islam, *taqīd* can be expected from laypeople as well as judges.

<sup>59</sup> Bernard G. Weiss describes *taqīd* in a way that reveals the role of the *muqallid* judge, saying that *taqīd* "entail[ed] a choice, not of rules from a range of variant rules, but of an authority (i.e., a *mujtabid*) among a number of equally acceptable authorities." Bernard G. Weiss, *The Primacy of Revelation in Classical Islamic Legal Theory as Expounded by Sayf al-Dina l-Amidi* 97 (1984).

<sup>60</sup> Yehya Mohammad, Al-Ijtihad w Al-Taqlid w Al-Etb'aa w Al-Nazar: Bahes Estdlaly Moqaran Ly Tahdid Maw'qef Al-Muslim Al-Moḥaqaf [Al-Ijtihad, Al-Taqlid, Following, and Scrutiny: A Comparative Research in Determining the Educated Muslim] 93 (2000). In other words, we should notice the difference between following a provision and following a mere opinion or an individual decision. In Islamic law, the *Qur'an* and the *Sunnah* are the main sources of legislation. Thus, any

*Taqlīd* as a judicial approach does not enjoy unanimous consensus as some jurists and scholars denied its legitimacy, supporting their opinion on some *Qur'anic* texts and some of the *Hadīths* in the *Sunnah*.<sup>61</sup> Nevertheless, there is ample evidence in the *Qur'an* and the *Sunnah* that other jurists and scholars use to reinforce *taqlīd*. One piece of evidence from the *Qur'an* is “ask the people of remembrance, if you do not know.”<sup>62</sup> This verse is used to justify adhering to the opinion of a jurist who is more knowledgeable regarding a specific issue. Moreover, the *Sunnah* justifies *taqlīd* because Prophet Muhammad said, “the one who does not know should ask simply because by asking one can heal sickness and solve difficult issues.”<sup>63</sup> This supports the legitimacy of *taqlīd* because if *taqlīd* were not permissible, *ijtihād* would be a mandatory duty for laypersons and judges. Considering the very strict qualifications of the *mujtabid*, this would be an unbearable mandate because human nature means some can reach the level of *ijtihād* while others cannot.<sup>64</sup> Judges, being human, will always be among those who “do not know” regarding certain issues.<sup>65</sup> According to the *Qur'an* and the *Sunnah*, those who “do not know” should ask those who know, seeking their guidance and opinions.<sup>66</sup> In this regard, *taqlīd*, to some extent, resembles what is going on in the modern legal systems when a judge, who lacks knowledge and expertise in a specific issue, refers to an expert’s opinion.

### CONDITIONS OF *Taqlīd*

Not only Islamic scholars did make a great effort to justify *taqlīd*, but also they added some conditions to guarantee the validity of the whole process.

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rule in either is to be considered a legal provision which judges, as in any other legal system, are bound to follow. However, in Islamic law a judge who adheres to the opinion of a jurist is the same as a common law judge who chooses to adhere to a certain theory of legal doctrine. Consequently, he is not bound to follow it and he has the option to shift to another opinion or theory whenever the question at hand requires doing so.

<sup>61</sup> For example, Imam Ahmed Ibn Hanbal, the founder of Al-Hanbali school of jurisprudence (madhhab), argued that one shouldn’t imitate; rather, one should follow the path of the Prophet and his companions. Ibn Zohra argues that we should not consider *taqlīd* because one should decide the issue and state one’s opinion depending on one’s knowledge. Ibn Zohra, Al-‘Gania Dimn Al-Gawam’a Al-Fiqhia [The Wealth of the Universal Jurisprudence]. Ibn Al-Qaym lists 80 reasons to nullify *taqlīd*. Ibn Al-Qaym Al-Josie, E’alam Al-Mowaq’in ‘End Rab Al-‘Alameen [Informing the Investigators] V. 2.

<sup>62</sup> Qur’an 16:43.

<sup>63</sup> See Abou Dawood, supra note 45.

<sup>64</sup> See generally Mohammad Ibn Ali Ibn Mohammad Al-Shawkany, Al-Qawl Al-Mofied Fi Adelat Al-Ijtihad W Al-Taqlid [The Crucial Saying in the Evidence of Ijtihad and Taqlid].

<sup>65</sup> See Kiani, supra note 10, at 7.

<sup>66</sup> Id.

## THE *Muqallid* JUDGE SHOULD DO HIS BEST SEARCHING FOR HIS REFERENCE

The aim of the *muqallid* judge is to know the accurate ruling of the issue in question and to apply it, not to follow what suits his desires or seems to be easy to apply. Thus, a *muqallid* judge is obliged, for the purpose of his role, to exert his best efforts to figure out the most knowledgeable *mujtabid* regarding the issue in question. That person should be a pious and devout *mujtabid* because the way of a *muqallid* judge to a correct result will be paved if his reference is well knowledgeable and pious seeking a way to God by the mean of his knowledge.<sup>67</sup> Despite the consensus of Islamic scholars on the “most knowledgeable standard,” there is disagreement regarding the determination of its content. Some scholars argue that the standard of “the most knowledgeable *mujtabid*” is either that the *mujtabid* should be generally more knowledgeable than others, that he should be more knowledgeable than others regarding issues of Islamic jurisprudence, or his opinions should be the closest to the reality.<sup>68</sup> However, some scholars argue that this standard requires that a *muqallid* judge should defer to the opinions of the *mujtabid* jurist who is the most knowledgeable in the *Sunnah*. In other words, a *muqallid* judge should seek a jurist who has access to the majority of *hadiths* and is able to interpret them to derive decisions.<sup>69</sup> Further, some scholars tried to narrow the meaning of the standard by arguing that the duty of the *muqallid* judge is to search for that *mujtabid* who is the most knowledgeable in the issue in question and thus can figure out the proper solution to it.<sup>70</sup>

In fact, some of these requirements are not without much exaggeration that may hinder a *muqallid* judge from finding the appropriate *mujtabid*. A *muqallid* judge simply needs to look for a jurist in which *ijtihad* conditions are fulfilled in him. A cogitative study of the qualifications of a *mujtabid* is sufficient to give a sense of how these qualifications encompass the basic requirements for the judicial sciences.

### DEFERENCE TO LIVING *mujtabids*

When we carefully examine the role of a *mujtabid* in deducing new rules or interpreting existing ones for new circumstances, we find that a *mujtabid* acts as a

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<sup>67</sup> Wamied Ibn Ramzy Al-‘Amery, *Al-Minnhag Al-Farid Fi Al-Ijtihad W Al-Taqlid* [The Unique Approach in Ijtihad and Taqlid] 233 (1999).

<sup>68</sup> Murtada Al-Shirazy, *Shura Al-Foqah’ah* [Consult the Scholars] 289 (V. 1, 1st ed., 1990).

<sup>69</sup> See id.

<sup>70</sup> Mohammad Kazem Al-Yazdy, *AL-‘Orwa Al-Wosqa* [The Most Trustworthy Handhold] 7-8 (V. 1, 2d ed., 1988). Moreover, some scholars went on to say that the standard of “the most knowledgeable *mujtabid*” refers to the *mujtabid* who has the ultimate knowledge regarding sciences that are indispensable for *ijtihad* such as the Arabic language, philosophy, and syllogism.

guardian for Muslim society and a scientific reference. This is why God ordered laypersons to follow *mujtabids*, describing them as Muslims' guardians and people in authority: "O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result."<sup>71</sup> The command in this *Qur'anic* verse refers to those *mujtabids* who are alive because living people in each era are responsible for managing society. Nevertheless, a long debate took place regarding whether a *muqallid* judge can defer to a *mujtabid* jurist who has passed away.

Some Islamic scholars, citing the previous *Qur'anic* verse, denied the legitimacy of deferring to a *mujtabid* jurist who has passed away.<sup>72</sup> However, other scholars argue in favor of the validity of deferring to dead *mujtabids*. Indeed, a *muqallid* judge is allowed to defer to the opinions of a *mujtabid* jurist who passed away simply because their opinions have not died.<sup>73</sup> Further, as long as the aim of the *muqallid* judge is to reach the right legal ruling regarding a certain issue, it does not matter whether he defers to a living *mujtabid* or to a dead one, especially when the dead *mujtabid* is more knowledgeable on the issue than the living one.<sup>74</sup> The crucial issue here is that a *muqallid* judge should initially search for the opinions of living *mujtabids* and figure out among them which one to follow.<sup>75</sup> Nonetheless, a *muqallid* judge is still authorized to defer to a dead *mujtabid* as long as this deference will not cause him to completely ignore the living *mujtabids*.<sup>76</sup> Accordingly, *taqlid* for a dead *mujtabid* is to be considered an exception.

### THE MECHANISM OF *Taqlid*

While the role of a *mujtabid* jurist is to search for God's rule, the role of the *muqallid* judge who follows a certain jurist is to discover the opinion of his jurist regarding an issue.<sup>77</sup> Al-Qādī Ibn al-ʿArabī, an Islamic jurist, argued that:

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<sup>71</sup> Qur'an 4:59.

<sup>72</sup> See generally Mohammad Hassan Al-Nagafi, *Gawaher Al-Kalam Fi Sharh Shra'ah Al-Islam* [The Jewelries of Speech in Explaining the Islamic Rules] (1894). See also Hassan Al-Mosawi Al-Bagandori, *Montaha Al-Usul* [The Ultimate Rules]. Some Islamic scholars cite the *Qur'anic* verse: "ask the people of remembrance, if you do not know" as declaring that the verse excludes dead *mujtabids* from the people of remembrance.

<sup>73</sup> Wamied, *supra* note 66, at 239.

<sup>74</sup> Mohammad, *supra* note 59, at 117.

<sup>75</sup> Wamied, *supra* note 66, at 239.

<sup>76</sup> *Id.*

<sup>77</sup> Mohammad Fadel, *The Social Logic of Taqlid and the Rise of the Mukhatar*, 3 *Islamic L. & Soc.* 208 (1996).

Where the judge is a *muqallid* and the case is governed by an explicit rule, he should rule based only on the decisions or the opinions of the jurist/school he follows. However, if he made his ruling based on his analogy to the explicit rule, this means that he has transgressed his jurisdiction.<sup>78</sup>

The majority of Islamic scholars see the process of following knowledgeable jurists after the Prophet as a sort of obedience, not only as a belief in the validity of a certain school or opinion.<sup>79</sup> In fact, this obedience is to be given to the most knowledgeable and pious jurist. However, the crucial question that shapes the mechanism of *taqlid* is whether a *muqallid* judge is allowed to consider the opinions of only one jurist or school that he follows or whether he has a kind of discretion to refer to another jurist or school.

At the very beginning of Islam, especially in the first three centuries, Islamic jurisprudence never knew adherence to only one jurist or school of thought.<sup>80</sup> This is confirmed in the opinion of Shehab Al-Din Al-Qarāfī, a famous Islamic jurist. Al-Qarāfī argued that:

A consensus has been reached that any Muslim has the right to follow and imitate whoever he wants from the Islamic jurists. Further, the Prophet's companions agreed that the one who follows and imitates Abou Bakr and 'Umar could follow and imitate Abou Horaira and Moa'az ibn Gabal.<sup>81</sup>

Undoubtedly, Al-Qarāfī's opinion cuts in favor of the idea that a *muqallid* judge is not bound only to the opinions of the *mujtabid* he follows but can shift between different opinions on different issues in an attempt to select the most accurate and reasonable concerning the question at hand.<sup>82</sup> This is to be enhanced by the fact that a *muqallid* judge has no opinion to be followed; rather, he is a loyal obedient to the opinion of the *mujtabid* who he has to follow.

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<sup>78</sup> Muhammad B. Muhammad Al-Hattāb, *Mawāhib Al-Jalīl* [Talents of the Greatest] 6:92 (V. 6, 3d ed., 1992).

<sup>79</sup> Wamied, *supra* note 66, at 241.

<sup>80</sup> *Id.*, at 242.

<sup>81</sup> Shehab Al-Din Al-Qarāfī, *Sharh Tanqih Al-Fosol Fi Al-Usul* [Revising Sections of the Islamic Rules] 432-433.

<sup>82</sup> Al-Qarāfī's opinion is to some extent misleading. Al-Qarāfī argues that any Muslim has the right to *taqlid*; this is, however, not conclusively true. A Muslim who has the absolute right to *taqlid* is either a new Muslim who enters Islam recently or a mere layperson who is not indulged in legal issues, lacks the *ijtibād's* qualifications, and cannot figure out the different schools of thought. In fact, the word "any Muslim" is the reasons behinds this misleading for example, a Muslim *mujtabid* does not have the absolute right to *taqlid*; rather, he has to limit his *ijtibād* skills to issues in which he is knowledgeable.

Thus, a *muqallid* judge has discretionary power to look in the opinions of the *mujtabid* he follows and other *mujtabids*' opinions to decide which is the most suitable. Al-Qarāfi's view of the discretionary power of the *muqallid* judge reinforces this. He argues that the duty of a *muqallid* judge resembles that of a mere *muqallid* person in that he is forbidden to deduce rules from a source that is not considered by a *mujtabid* jurist and he is to act only on the basis of a *mujtabid*'s thoughts and opinions.<sup>83</sup> Although the *muqallid* judge enjoys such discretion, it is to be noted that he is not allowed to engage in what is called *rukhsa*.

In the Islamic terminology, *rukhsa* means concession in the enforced law.<sup>84</sup> In other words, Islamic law contains provisions and rules that are to be applied in normal circumstances; however, people always have concessions to use whenever the circumstances change.<sup>85</sup> Islamic jurisprudence knows many such *rukhsas* regarding different legal and religious issues. The question is whether a *muqallid* judge is permitted to defer to *rukhsas* from different schools (*madhhabs*) in an attempt to bring all of them together in formulating his ruling. In fact, when the *muqallid* judge traces *rukhsas* from multiple *madhhabs*, he is getting off the *taqlid* track simply because he is tracing what is easy for him to apply. Hence, he is following neither the most knowledgeable *mujtabid* nor the one who has the most accurate opinion regarding the question at hand; rather, he is following his desires. Bringing the *rukhsas* of different *madhhabs* together is known as *talfiq*.<sup>86</sup> The majority of Islamic scholars deny that a *muqallid* judge may engage in *talfiq*, arguing that the main purpose of *taqlid* is to reach God's ruling; however, when the *muqallid* judge counts on *talfiq*, he actually searches for his desire by applying the opinion that is easiest for him.<sup>87</sup> It is also prohibited for a *mujtabid* who has been consulted by a *muqallid* judge to answer him with an opinion that is the outcome of mixing and matching different *madhhabs*.<sup>88</sup>

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<sup>83</sup> Al-Hattāb, *supra* note 78, at 92-93. See also Fadel, *supra* note 76, at 206.

<sup>84</sup> Kiani, *supra* note 10, at 9.

<sup>85</sup> For example, Muslims should fast during the month of Ramadan month. However, if someone could not fast because of illness or travel, he/she has the right not to fast until the end of the disability. This is a *rukhsa*. The same rule applies regarding the mandatory prayers; for example, in the *zuhr* prayer there are four mandatory units. If someone is travelling over a specific distance away from his normal place of residence, he may shorten his prayer (*Qasr*) from four units to only two.

<sup>86</sup> Kiani, *supra* note 10, at 10.

<sup>87</sup> The Sunni Path 34-35 (15th ed. 2001) ("whoever reaches a decision concerning a legal or religious issue by following rules found in different *madhhabs* is disobedience to the *ijma* of these *madhhabs*. Thus, *talfiq* is forbidden."). Moreover, some scholars went further by saying that one who relies on *talfiq* is advocating for heresy and unbeliever.

<sup>88</sup> Wamied, *supra* note 66, at 256-257.

In addition, the *muqallid* judge should cease adhering to the opinions of the *mujtabid* he follows whenever it appears that his opinion is weak or no longer valid. For example, if it is clear that the *mujtabid*'s opinion contradicts the *Qur'an* and the *Sunnah*, the *muqallid* judge should not continue to follow him. Further, if the *mujtabid*'s opinion appears to contradict the *ijma*, the *muqallid* judge is not allowed to adhere to that opinion simply because *ijma*, in the context of Islamic law, represents the idea of the judicial precedent in the common law. Following an opinion that contradicts the *ijma* would disturb well-established precedents and make the law unpredictable. Seeking the opinion of a *mujtabid* jurist regarding certain issues does not mean absolute adherence; rather, the *muqallid* judge has to think about this opinion and examine its validity.<sup>89</sup> Once he has a doubt regarding the validity of the opinion or the unawareness of the *mujtabid*, he should not rely on that opinion and should seek another *mujtabid*. Consequently, the whole process depends on the confidence the *muqallid* judge has in his *mujtabid*'s opinions.<sup>90</sup>

It is worthy to mention that *taqlid* is not allowed when the issue in question is a disputable one (*Monaz'a Shar'ia*).<sup>91</sup> In other words, whenever an issue before a judge is not yet settled in Islamic law, the matter that makes it uncertain is subject to neither the primary judicial approach (*al-ijtihad*) nor the secondary approach (*al-taqlid*). The Qur'an sheds light on this dilemma when it says: "O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result."<sup>92</sup> This verse establishes the solution for disputable issues. In such issues, the role of the judge, whether a *muqallid* or a *mujtabid*, is to examine the disputable issue in the context of the *Qur'an* and the *Sunnah*. It is obvious that the verse does not refer to any sources other than the *Qur'an* and the *Sunnah*, thus under the theory of exclusion, judges are obliged not to examine the issue under either *al-ijtihad* or *al-taqlid*.<sup>93</sup>

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<sup>89</sup> Id., at 258-259. See also Ibn Al-Qaym Al-Josie, E'alam Al-Mowaq'in 'End Rab Al-'Alameen [Informing the Investigators] 254.

<sup>90</sup> Id.

<sup>91</sup> An example of a disputable issue is when the Islamic society started to see new situations regarding the commercial transactions. One new issue that came was dealing in something that has not yet formed such as selling and buying cattle before its birth. When Muslims started to engage in such contracts and disputes arose, judges found no agreement about the legitimacy of these contracts and no conclusive reference in the Qur'an. However, these contracts are prohibited in the Sunnah. Later on, the Prophet approved these contracts to facilitate commercial transactions and to keep pace with the new societal circumstances.

<sup>92</sup> Qur'an, supra note 70.

<sup>93</sup> Wamied, supra note 66, at 259.

Finally, it is important to argue that Islamic law knows the idea of judicial review. Some scholars deny that Islamic law knows judicial review, arguing that Muslim judges are accountable to none other than God.<sup>94</sup> Significantly, Islamic law does not know judicial review as an institutional tool; however, Islamic history is full of incidents in which judicial review apparently took place.<sup>95</sup> Islamic law recognizes the process whereby the issuing judge himself reviews the judgment, as took place when the Caliph ‘Umar ibn al-khattab excluded germane siblings from inheritance if they jostle the uterine siblings. Later, ‘Umar reversed his own judgment and declared that both germane and uterine siblings should share in an inheritance equally.<sup>96</sup>

In addition, Islamic law knows the situation in which a higher authority can review a judge’s decision. For example, there was a case in which a lion fall in a big hole and people gathered around to watch it. A man slipped and fell in the hole, catching hold of a second man. The second man pulled a third man, and the third man pulled a fourth man. The four men fall in the hole and were killed by the lion. The case was brought before ‘Ali ibn abi-talīb to decide who deserved the blood compensation. ‘Ali held that the first man was the lion’s prey and was responsible for one-third of the blood compensation to the second man. The second man, however, was responsible for two-thirds of the compensation to the third man, while the third man should fully compensate the fourth. When the Prophet reviewed the case, he approved Ali’s decision.<sup>97</sup> Furthermore, Islamic law knows the idea of judicial appeal, because it authorized an aggrieved litigant to bring his case for review before the authority that is responsible for the appointment of the judge who issued the first decision “the first tier judge.”<sup>98</sup> Later on, Islamic rulers started to institutionalize the process of judicial review when in the 9<sup>th</sup> century they established the *nazar al-mazālīm* (grievances investigation) to hear appeals from unsatisfied litigants who are not satisfied with the first decision.<sup>99</sup>

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<sup>94</sup> Coulson argues that: “[t]heory, of course, required that in cases of conflict the qāḍī should normally follow the dominant doctrine of his school. But in the interests of justice it was often a “preferable” or even a “weak” opinion which found favour with the courts. . .” N.J. Coulson, *A History of Islamic Law* 146 (Edinburgh University Press, 1964).

<sup>95</sup> The Qur’an reads “And whoever does not judge by what Allah has revealed - then it is those who are the wrongdoers.” Qur’an 5:45. This *Qur’anic* verse vaguely shed light on the process of judicial review by which it states that God will punish the judge who rules against his order. Thus, the verse refers to the issue from a religious view.

<sup>96</sup> David S. Powers, *On Judicial Review in Islamic Law*, 26 L. & Soc. Rev. 315, 320 (1992).

<sup>97</sup> *Id.*, at 321.

<sup>98</sup> *Id.*, at 316.

<sup>99</sup> *Id.* As a consequence of the development of the Islamic society’s needs in the era of the Islamic Caliphate, the system of *nazar al-mazālīm* emerged as a judiciary function besides judges, and developed to the extent that it occupied a significant position. Since judges are unable to hold this

With regard to the *muqallid* judge, he must defer to the *Qur'an*, the *Sunnah*, and the *ijma*. Deferring to the *Qur'an* and the *Sunnah* means deferring to *al-mansūs* (what is written down). When there is no clear solution to an issue in these sources, the *muqallid* judge has to figure out a solution by following the path (*minnhaḡ*) of a *mujtabid*. If the *muqallid* judge finds conflicting opinions within the *mujtabid*'s school, he will be obliged to figure out *al-mashbūr* (the most appreciated opinion) among these opinions.<sup>100</sup> In his notable work *Mukhtaṡar Khalīl*, Khalīl ibn Issac Al-Malki categorized judges into three types: the unjust judge, whether knowledgeable or ignorant; the just and the knowledgeable judge; and the ignorant judge who consults.<sup>101</sup> Khalīl stated that the decision of the unjust judge is null as a matter of law, while the decision of the just and the knowledgeable judge is valid and binding; however, the decision of the ignorant judge who consults will not be valid and binding unless it has been reviewed.<sup>102</sup> Khalīl argued that a judicial judgment could be tainted by some mistakes which could be only repealed by the judge who issued the judgment.<sup>103</sup> Among these mistakes is when a *muqallid* judge fails to apply the opinion of the *mujtabid* he follows, found a more accurate rule after deciding the case, or applied the wrong rule.<sup>104</sup>

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system because they lead the judiciary, this system was to be considered either by the Caliph himself or by senior statesmen. Later on, judges started to find their way into the system as some of them started to be appointed by the Caliph to better administer the system.

<sup>100</sup> Conflicting opinions within the same school of thought are likely to exist when the founder of the school has a certain opinion concerning an issue. However, his *mujtabid* students who follow the same reasoning and use the same tools of interpretation reached different opinions regarding the same issue. An *al-mashbūr* rule will come into the play whereby the task of the *muqallid* judge will be to consider which opinion is the most recognized.

<sup>101</sup> For more details and analysis regarding Khalīl's theory, see Muhammad b. Yūsuf al-'Abdari al-Mawwāq, *Al-Tāj wa-al-iklīl* on the margin of *Mawāhib al-jalīl* 6:125-38 (V. 6, 3d ed., 1992). See also Fadel, *supra* note 76, at 228-229.

<sup>102</sup> *Id.*, at 229.

<sup>103</sup> Khalīl argued that certain kinds of judicial mistakes could be repealed by any judge other than the one who issued the judgment. Examples for these mistakes are judgments that contradict the Islamic basic codes, judgments based on the judge's own knowledge, or when a judge ruled against his enemy. Fadel categorizes these mistakes as objective errors that are obviously contrary to the law. *Id.*

<sup>104</sup> Some scholars argue that the second and third mistakes apply only with regard to a *mujtabid* judge. See Al-Hattāb, *supra* note 78, at 6:138. However, some scholars argue that these two errors are applicable to a *mujtabid* and a *muqallid* judge who is able to weigh the different opinions within the school of thought he follows. See Mohammad ibn AbdulAllah Al-Kharshī, *Sharh al-Kharshī 'alā Mukhtaṡar sīdī Khalīl* [Al-Kharshī's Explanation to Mukhtaṡar Khalīl], 4:7:177.

## CONCLUSION

*Taqlīd* invaded Islamic jurisprudence in the 4<sup>th</sup> century AH.<sup>105</sup> In this era, the Islamic Caliphate had been fractured by the Abbasid's grants to a range of non-Arabs whom they have been given prominent positions in the Islamic state, as well as the brutal wars that took place among the Abbasid rulers.<sup>106</sup> The weakness of the political situation in this era precipitously affected Islamic jurisprudence as scientific and cultural progress deteriorated. Many factors contributed to that deterioration such as restricting the freedom of movement among the Islamic states because of hostility between the Islamic rulers, which led to limiting the movement of scholars to seek knowledge and education. Another factor led to the jurisprudence deterioration was that the rulers kept the scholars busy with political functions, which prevented them from attending to their principal role of writing and researching.<sup>107</sup> As a result of these factors, *ijtihād* pulled back surrendering its place to *taqlīd*. Strictly speaking, after the formation of the Islamic schools of jurisprudence, *taqlīd* found its place in the Islamic jurisprudence and judiciary because Muslims found a major jurisprudential heritage available that facilitated to them the process of standing on the rules without the process of *ijtihād*.<sup>108</sup>

Most prominent is the question of whether *taqlīd* is important to the Islamic judiciary. The best way to answer this question is to recall the meaning of *taqlīd*. Sajid A. Kaym gives *taqlīd* a judicial flavor defining it as “the acceptance of the statement of another without demanding proofs or evidence, on the belief that the statement is made in accordance with fact and proof.”<sup>109</sup> Further, Kaym repeated in his work the statement of Ashraf Ali Thanvi that shed light on the judicial sense of *taqlīd*. Thanvi explained the mechanism of *taqlīd* by saying “When asking your scholar for a ruling ask only the *mas’alah* (the rule or the law). Do not ask the *daleel* (the proof of the rule or the basis on which the ruling is given).”<sup>110</sup>

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<sup>105</sup> Ali Khan argues that *taqlīd* emerged as a result of the end of the first era of *ijtihād* (875-1875), measuring this era from the death of Imam Muslim (a notable Islamic jurist) in 875 to the rise of Jamal Abdal al-Afghani, who started the second era of *ijtihād* (1838-1897). Khan argued that the year 1875 is only to count the ten centuries of the closure of *ijtihād*. Khan, *supra* note 6, at 365.

<sup>106</sup> The Abbasid Caliphate was the third Islamic Caliphate. The Abbasids succeeded the Umayyads, taking Baghdad as their capital. The Abbasids' regime ended when the Mongolian leader Hulagu Khan invaded Baghdad.

<sup>107</sup> See generally Mohamed Ali Al-Sayes, *Tarīkh Al-Fiqh Al-Islami: Kalamat Fi Tarīkh Al-Tāshrīf Al-Islami* [The History of Islamic Jurisprudence: Note on the History of Islamic Legislation] (1990).

<sup>108</sup> Billo, *supra* note 31, at 639.

<sup>109</sup> Sajid A. Kaym, *The Jammāt Tableegh and the Deobandis*, available at <http://www.ahya.org/tjonline/eng/contents.html>.

<sup>110</sup> Maulavi Ashraf Ali Thanvi (Rah), *Aadaabul Muaasharat* [Etiquettes of Social life] (2010). See also *id.* Ali Khan argues the reasonability of the statement to the extent that it seems like an advice

Thanvi's statement can be seen from two perspectives; first from the layperson's perspective and second from a judicial perspective. Thanvi's analysis seems reasonable to laypersons who are neither trained nor qualified to deduce rules from legal texts because laypersons are not *mujtahids* who possess the qualifications for *ijtihād*, which is reserved for those who dedicate many years to learning and acquiring the necessary skills.<sup>111</sup> Thus, Islam considers *ijtihād* as *Fard kifayah*, that is, lay Muslims are freed if some *mujtahids* take it up.<sup>112</sup>

However, from a judicial perspective this statement has a further meaning. While, in Thanvi's analysis, laypeople are obliged to follow legal rules without asking for a justification or a proof, the *muqallid* judge will consider the *mujtahid's* rule as the justification for his ruling.<sup>113</sup> In other words, the *muqallid* judge will contemplate the whole process of *taqlīd* as the established model on which his legal decision is based.<sup>114</sup> In short, the *muqallid* judge cannot justify his *taqlīd* on the basis that he is not allowed to go beyond the *mujtahid's* rule in searching for its proof; however, what remains as a justification is that he lacks the qualifications of *ijtihād*.

In the debate on *taqlīd* versus *ijtihād*, some scholars argue that *taqlīd* is not a recognized or a binding tool of jurisprudence because there is no verse either in

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for laypersons who are not well-trained to figure out what is the law and how to deduce new rules and thus might fail to appreciate the reasoning in which the law finds its basis, making the law vulnerable to doubt. Khan, *supra* note 6, at 368.

<sup>111</sup> Mufti Muhammad Sajaad, *Understanding Taqlīd: Following One of the Four Great Imāms* 4 (2d ed.).

<sup>112</sup> Islam knows two kinds of mandates; the first is called *fard kifayah* and is the responsibility of the whole community; however, if a sufficient number of members of the community carry it out others will be free of the burden. Examples are *jihad* and *ijtibād*. The second kind of mandate is *fard 'ayn*, which is obligatory upon each Muslim to carry out by him/herself for example, praying and fasting.

<sup>113</sup> Shaykh Sa'id Ramadan al-Buti, *Non-Madhhabism: The Greatest Bida Threatening the Islamic Shari'a*, describes the process of *taqlīd* from a layman's perspective, asking "If one's child is seriously ill does one look for oneself in the medical textbooks for the proper diagnosis and cure, or should one go to a trained medical practitioner? Clearly, sanity dictates the latter option. And so it is in matters of religion, which are in reality even more important and potentially hazardous: we would be foolish and irresponsible to try to look through the sources ourselves, and become our own muftis. Instead, we should recognise that those who have spent their entire lives studying the Sunnah and the principles of law are far less likely to be mistaken than we are." See also Al-Buti's argument cited in Abdal-Hakim Murad, *Understanding the Four Madhhabs: The Problem with Anti-madhhabism*, available at <http://www.masud.co.uk/ISLAM/ahm/newmadhh.htm#73>.

<sup>114</sup> Sherman A. Jackson argues, "taqlīd is an attempt to gain authority for one's interpretation by associating it with the name or doctrine of an already established authority-figure." Sherman A. Jackson, *Taqīd, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory Muqālaq and Qāmm in the Jurisprudence of Shihāb al-Dīn al-Qarāfī*, 3 *Islamic L. & Soc.* 165, 169 (1996). Amna Arshad argues, "as in any legal system, under Islamic law, a legal decision is without basis unless it is made according to an established model." Arshad, *supra* note 4, at 140.

the *Qur'an* or in the *Sunnah* that refers to it.<sup>115</sup> Further, some scholars see *taqlīd* as a step towards legal formalism, whereby fresh reasoning would come to an end.<sup>116</sup> On the other hand, the proponents of *ijtihād* argue that it helps in preserving *Shari'a* to the extent that it enables *Shari'a* to cope with new issues and changing social circumstances.<sup>117</sup> Moreover, proponents of *ijtihād* deny the formation of a binding consensus (*ijma*) on the cessation of *ijtihād*, so that adhering to *taqlīd* became inevitable.<sup>118</sup> Proponents of *taqlīd* also contend that *taqlīd* helps to put *Shari'a* in the form of a unified corpus of law which would be disturbed and exposed to doubt through the application of *ijtihād*.<sup>119</sup> Some scholars see *taqlīd* as a solution to solve the problem of indeterminacy in Islamic law.<sup>120</sup> Others, argue that nowadays *taqlīd* has become an inevitable process simply because of the rigorousness of *ijtihād* qualification, which makes it very difficult for a person to fulfill all of them. Moreover, even if a jurist or a judge is qualified to be a *mujtahid*, he will find himself obliged to act like a *muqallid* in certain issues in which he lacks expertise or when he finds a *mujtahid* who is above him in the degrees of *ijtihād* excellence.<sup>121</sup>

*Ijtiḥād* was the primary approach when the Islamic judiciary began, in which judges were free to engage in independent reasoning towards individual decisions.<sup>122</sup> Gradually, the freedom of judges to introduce new rules started to be restricted in

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<sup>115</sup> Wael B. Hallaq, Was The Gate of Ijtihad closed?, 16 Int'l J. Middle East Studies 1, 4 (1984). See also Arshad, supra note 4, at 146.

<sup>116</sup> Khan, supra note 6, at 368. Schacht argued that around the beginning of the fourth/tenth century a consensus started to be formed that no one is qualified to engage in an individual reasoning in an attempt to reach an independent judgment. J. Schacht, An Introduction to Islamic Law 71 (Oxford Clarendon Press, 1964).

<sup>117</sup> Arshad, supra note 4, at 140-141.

<sup>118</sup> See Hallaq, supra note 114.

<sup>119</sup> Khan, supra note 6, at 365. See also Arshad, supra note 4, at 146 (arguing against this idea).

<sup>120</sup> Weiss, supra note 59, at 96. Mohammad Fadel relates the problem of indeterminacy in Islamic law to the death of Prophet Muhammad, whereby the Islamic society was deprived of the link that connects it with the primary lawgiver (Allah). This led to the development of Islamic jurisprudence in which many new rules and legal opinions raised the problem of legal indeterminacy. For further discussion regarding the indeterminacy problem, see Fadel, supra note 76, at 198-200. Sherman A. Jackson argues that institutional consensus serves as an effective solution to the problem of indeterminacy in Islamic law by prohibiting new rules and opinions. See Sherman A. Jackson, In Defense of Two-Tiered Orthodoxy (unpublished Ph.D. dissertation, University of Pennsylvania, 1991). In fact, Jackson's note can be argued in the context of *taqlīd* because *taqlīd* introduces the same idea of institutional consensus because it circumvents the area of introducing new rules as the *muqallid* judge will follow the rules of his *mujtahid* without engaging in individual reasoning that might led to a new rule.

<sup>121</sup> Kiani, supra note 10, at 11. Kiani argues that it is essential for the one who lacks the *ijtiḥād* qualifications to be a *muqallid* or a *muqayyad* (restricted to a *mujtahid's* juristic decisions).

<sup>122</sup> Fadel, supra note 76, 232.

an attempt to reach a coherent body of law through the process of *taqlīd*.<sup>123</sup> At this point, *taqlīd* is to be seen as a step towards the codification of Islamic law through the codification of *mujtahids' madhhabs*, the *Qur'an*, and the *Sunnah*. In fact, the Islamic judiciary possesses a degree of flexibility to the extent that it still accommodates the concept of *ijtihād* as an intellectual tool to face new developments and changing social needs.<sup>124</sup> In other words, we cannot divest Islamic law of one of its major tools to preserve and develop *Shari'a*.<sup>125</sup>

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<sup>123</sup> Id.

<sup>124</sup> For example, the Egyptian Supreme Constitutional Court took an interesting position to reconcile *taqlīd* with *ijtihād*. The Court distinguished itself as a proponent to *ijtihād* without completely neglect *taqlīd*. In 1996, a case reached the Court that challenging the constitutionality of the minister of Education decision that schoolgirls are prohibited from wearing veil to cover the hair “hijab” without a written permission from their parents; however, schoolgirls are prohibited from wearing “niqab” that covers their face and hands. A father of two daughters who wear “niqab” argued that the ministerial decision violates Article 2 of the Egyptian Constitution that reads, “The Principles of Islamic Shari'a are the main source of legislation.” The Court started by arguing that the *Qur'anic* verses undoubtedly commanded women to cover some part of their body; however, those parts that should be covered are not clear enough. The Court then addressed the fact that no unanimous consensus found among Islamic jurists that a woman should cover her face and hands. Further, the justices emphasized the main goals of the Shari'a, “preserving the religion, life, property, lineage, and honor”, to reach through their *ijtihād* that covering women's face and hands is not among the Shari'a main goals. Consequently, the Court ruled that the ministerial decision is constitutional. Indeed, the Court's approach is a perfect example of how *ijtihād* and *taqlīd* can work together. There is no doubt that Justices of the Court acknowledged the legitimacy of veiling the woman's hair “wearing hijab” by following the opinions of the prominent Islamic jurists who agreed on its legitimacy and necessity. However, when the Justices found a disagreement among the jurists regarding the legitimacy of veiling the woman's face and hands “wearing niqab”, they did not adhere to the opinion of a certain jurist; rather, they trigger their own *ijtihād* skills to reach their decision. The reasoning of the court, that if covering woman's face and hands is a mandatory rule it would impose an undue burden and might harm the concept of human rights that Islam maintains, justifies our conclusion that *ijtihād* could be used as a tool to preserve the Shari'a and keep it up-to-date with the changeable needs and circumstances. Case No. 8 of Judicial Year 17 “Egyptian Supreme Constitutional Court.”

<sup>125</sup> See generally Arshad, *supra* note 4 (arguing that Islamic *ijtihād* was a tool to develop women's rights in Morocco).