

The Beginnings of Shi'i Ijtihad

After the demise of the Prophet (S) in the year 11/632, the need for *ijtihad* was felt acutely by the Sunnis, for they thought that the continuity of Divine guidance in the form of authoritative texts (*nass*) had ceased with his (S) demise and the only means of determining the Divine laws that remained was to search for them in the Book of God and the statements and acts of the Prophet (S).

The Shi'ah, on the other hand, believed in the continuity of religious authority and *nass* after the Prophet (S), and they considered the Infallible Imams of the Ahl al-Bayt (A) as embodying the Prophet's authority.

Their statements (*qawl*), acts (*fi'l*) and approvals (*taqrir*) were considered by them authoritative like those of the Holy Prophet (S), and hence as part of the Sunnah. Accordingly, the Shi'ah did not feel the need for *ijtihad* contemporaneously with the Sunnis; it was only after the Greater Occultation (*al ghaybat al-kubra*) of the Twelfth Imam (A) that the Shi'ah came to feel the need to practice *ijtihad* on an extensive scale.

Moreover, the Ahl al-Sunnah came to face various constrictions in the way of deducing laws of Shari'ah for contingent issues on account of distancing themselves from the Imams of the Ahl al-Bayt (A) after the Prophet's demise.

This was because, on the one hand, about two thirds of Qur'anic verses were seen to deal with doctrines, social principles, higher ethical values, historical events relating to past messengers and their peoples, and accounts of their struggle against the oppressors and *taghuts* of their times; on the other hand, though the remaining one-third of them relate to legal matters (such as: *salat*, *sawm*, *khums*, *zakatt*, *Hajj*, *jihad*, *al-'amr bi al-maruf wa al-nahy 'an al-munkar*, *tawalli*, *tabari*).

Legal contracts and economic deals, such as matters relating to marriage, divorce, will and inheritance, sale, lease and mortgage; penal matters, such as those relating to *hudud*, *diyat* and *qisas*; matters relating to government, judiciary, judgement, testimony, qualifications for judgeship; matters relating to the rights of parents, debts, etc.) they deal mostly with general principles, leaving the details and

particulars to the Sunnah in accordance with the verse:

وَمَا آتَاكُمُ الرَّسُولُ فَخُذُوهُ وَمَا نَهَاكُمْ عَنْهُ فَانْتَهُوا ﴿٩﴾

Take whatever the Apostle brings you, and abstain from whatever he forbids you from. (59:7)

The Qur'an as the Source of Law

It may be argued that the Qur'an and some traditions expressly state that the Qur'an contains everything and that there can be no shortage while we possess the Qur'an. Accordingly, it may be said, there is no reason why the Ahl al-Sunnah should have faced any difficulty in deducing *ahkam* after the Prophet's demise.

In reply to this, we should say that it is undoubtedly true that:

وَلَا رَطْبٌ وَلَا يَابِسٌ إِلَّا فِي كِتَابٍ مُّبِينٍ

(not a thing, fresh or withered, but it is in a Book Manifest) (6:59),

but the belief that everything has been mentioned in the Qur'an and that nothing has been omitted by it, in accordance with the verse:

مَا فَرَّطْنَا فِي الْكِتَابِ مِنْ شَيْءٍ

(We have not omitted anything in the Book) (6:38),

does not imply that everyone, regardless of his qualifications, is capable of obtaining the pearls lying in the depths of its shoreless oceans. The belief that the Qur'an contains all the *ahkam* and is capable of answering every question that can be raised by man does not conflict with the view that an extraordinary level of knowledge, effort and learning is essential for obtaining all the *ahkam* of the Shari'ah from the Qur'an' and for finding the answer to any question.

Thus we find that some traditions that expressly declare that there is everything in the Qur'an also adds that it is not possible to understand part of Qur'anic meanings without reference to someone who is infallible (*Masum*). *Usul al-Kafi* (vol. I, p. 62) records the following statement of Amir al-Mu'minin (A) in this regard:

ذلك القرآن فاستنبطوه فلن ينطق لكم أخبركم عنه إن فيه علم ما مضى وعلم ما يأتي إلى يوم القيمة وحكم ما بينكم وبين ما أصبهتم فيه مختلفين فلو سألتمنوني عنه لأخبرتكم عنه لعلمتكم

There is the Qur'an: ask it to speak, but it will never speak to you (because its profound speech is audible only to the *Ma'sum* and it is he who can make it speak unreservedly), yet I will inform you about it; verily, in it is the knowledge of the past and the future up to the Day of Resurrection. In it is the judgment touching whatever passes between you and the explanations of your differences. If you ask me about it, I will inform you.

Difficulty of Utilizing the Sunnah

Some, while admitting that it has been a difficult task for Islamic scholars to deduce the *ahkam* from the Qur'an – i.e. to make the Qur'an weak, in Imam 'Ali's words, the task lying basically beyond the Power of ordinary persons – may argue that the Ahl al-Sunnah did have access to the Prophet's traditions on legal issues and that such traditions were sufficient to meet their needs.

In reply to this conjecture it must be said that unfortunately these traditions were very few in comparison to the number of contingent issues that arose, and therefore they were not sufficient to answer all the questions that arose.

It was exactly for this reason that terrible gaps appeared in the Sunni fiqh of this period, and the inadequacy of the existing sources and foundations led to the invention of instruments for drawing legal conjectures (such as *ijtihad bi al-ra'y* and other instruments as *qiyyas*, *istihsan*, *masalih mursalah*, *istislah*, *madhhab al-sahabi*, *sadd al-dhara'i*; *fath al-dhara'i*; *shari'at al-salaf*, *'urf*, *istidlal*, etc.)

The Need for Ijtihad amongst the Shi'ah

As said above, the Shi'ah did not face any constriction in respect of legal source for finding answers to emergent issues after the Prophet's era. They did not face any vacuum in Islamic law after the prophet's demise because of their belief that 'Ali (A) and his descendants had been invested by the Prophet (S) with Imamate, the authority to expound the Prophet's Sunnah and to perpetuate it, which to them was an inexhaustible treasure that had been left by the Prophet (S) for the Ummah.

As a result of this belief the Shi'ah referred to the living Imam for the solution of new problems and obtained the solution in the form of an exposition of a verse of the Qur'an or through a tradition of the Prophet (S). They never felt any need to turn to *ijtihad bi al-ra'y* or to resort to conjectural methods.

The only time the Shi'ah met with any difficulty in this regard with the beginning of the Minor Occultation of the Twelfth Imam (A), a period of 69 years from 260/874 to 328/940. During this period the Shi'ah could obtain replies to their queries through the deputies (*nuwwab*) of the hidden Imam (A) who served as intermediaries.

These deputies, one after another, were four: Abu 'Amr 'Uthman ibn Sa'id, Abu Ja'far Muhammad ibn 'Uthman (d. 304 or 5/916 or 7), Abu al-Qasim Husayn ibn Ruh al-Nawbakhti (d. 326/938), and Abu

al-Hasan 'Ali ibn Muhammad al-Samari (d. 329/941).

With the end of the Minor Occultation and the beginning of the Major Occultation in the year 329/941, in the absence of access to the Imam (A) or his deputies, the Shi'ah were confronted with greater difficulty in regard to obtaining *ahkam* for new issues, which increased with the passage of time and the growing distance from the era of nass, together with the growing variety of the emergent issues and problems created by new conditions of life.

Moreover, with the passage of time, increasing number of doubts took the place of the previous certainty about the meaning and import of the texts which served as the bases of legal deductions. It was at this time that the Shi'ah began to search for ways to solve this problem by deducing the *ahkam* for new issues from the available legal sources.

This new path was that of "*ijtihad*" whose pioneer was the treat *mujtahid* and creative jurisprudent al-Hasan ibn Abi 'Aqil al Umani. After him, we can name al-Shaykh al-Tusi, the great scholar and highly original mujtahid who employed the foundations built by Ibn Abi 'Aqil for extensive deduction of *ahkam* of the Shar'i'ah. In this way the difficulties living in the way of Shi'i jurisprudence were removed and it overcame its hurdles.

The Difference between Shi'i and Sunni Ijtihad

'*Ijtihad*' is a familiar term both in Shi'i and Sunni fiqh, but its meaning and characteristics are different in the contexts of the two. Whereas *ijtihad* in the Shi'i sense means deduction of *ahkam* from the sources and through the principles of the Shar'i'ah, the same term in Sunni fiqh means deduction of *ahkam* through such means as *ray*, *qiyyas*, *istihsan*, *masalih mursalah*, etc.

Therefore, it has been said that Shi'i *ijtihad* does not involve legislation (*tashri'*) of new laws as Divine commands regarding emergent issues and events; it confines itself to applying the unchanging general principles to emergent, changing particulars (*tafri'*).

The Shi'ah do not look upon *ijtihad* as an independent source of *ahkam* but as the meant of their identification through a study of the sources of the Shar'i'ah. The Ahl al-Sunnah, on the contrary, consider *ijtihad* as an independent source of legislation.

Ijtihad during the Era of the Imams (A)

Though, it would appear that the Shi'ah had no need of *ijtihad* during the era of accessibility to the Infallible Imams (A), the fact is that some Shi'i jurists did confront the need to perform *ijtihad* occasionally under some special circumstances, and the path of deducing secondary *ahkam* from the basic sources was open to them. The evidence of it is as follows:

1. There are traditions in which mention is made of certain common elements pertaining to the general

principles of legal deduction. In these traditions, the Imams – particularly al-‘Imam al-Sadiq (A) – are reported to have been questioned about such principles (*usul*) and roles (*qawa'id*), and they gave replies to such questions.

These traditions by themselves indicate that issues related to *ijtihad* were relevant for the Shi'ah during that period. ‘The Imams (A) propounded such *usul* as that of *Bara'ah*, *Ihtiyat*, *Istishab*, and *Takhyir*, and such *aqaid* as that of *taharah*, *yad*, *ibadah*, *hilliyah*, *sihhah*, *tajawuz*, *faragh*, *la darar*, *la haraj*, etc. These *usul* and *qawa'id* provide effective assistance – to the faqih in his effort to deduce the *hukm* of the Shari'ah about any contingent issue.

Historical accounts reveal that whenever the companions of the Imams (A) came across the texts of their ahadith – which differed from one another in respect to ‘amm and khass, mutlaq and muqayyad, mujmal and mubin, zahir and azhar, zahir and nass – they would try, to reconcile them according to the rules of objective reconciliation (*jam mawdu'i*) so far as it was possible (such as between ‘amm and khass, mutlaq and muqayyad, mujmal and mubin). But if objective reconciliation was not possible (such as between zahir and azhar, zahir and nass) they would reconcile the tradition in accordance with the rule of *jam' hukmi* and remove their apparent conflict.

When none of these two methods of reconciliation worked (such as when there were totally divergent narrations regarding a certain issue), the narrators would ask the Imams (A) to suggest some criterion for distinguishing between reliable and unreliable traditions. In this relation numerous traditions have been reported from the Imams (A) which are termed in *ilm al-usul* as *akhbar ilajiyah* (remedial traditions). In *Usul al-Kafi* (vol. I), *‘Awali al-la’ali*, and other works, there are chapters related to this topic and here we shall cite one tradition as an example.

In *‘Awali al-la’ali* (vol. IV, p. 133) a tradition is recorded from Zurarah ibn A'yan:

Zurarah says: "I said to Abu Ja'far, 'May I be your ransom, if two conflicting traditions are narrated from you which one of them are we to accept?' The Imam (A) said, 'Take the one which is well-known among your companions (i.e. the Shi'is) and leave the one which is unfamiliar: I said, 'What should we do if both of the traditions are equally well-known?' The Imam (A) replied, 'Take the one which seems more balanced (*a'dal*) and more reliable (*awthaq*) to you.' I said, 'What if both of them are equally balanced, acceptable and reliable?' The Imam (A) said, 'See which of them is in accordance with the standpoint of the 'Ammanah (i.e. non-Shi'i Muslims); leave it, and take the opposite of what the 'Ammanah hold, for the truth lies in that which contradicts them.'

I said, 'Sometimes we come across two traditions both of which are in agreement with the 'Ammanah or both of them contradict with their standpoint; what are we to do in such cases?' The Imam – (A) replied, 'Select the tradition which is nearer to caution and leave the other one.' I said, 'What is our duty if both the traditions are in accordance with caution or if both of them are opposed to it?' The Imam (A) replied, 'In such a case, take anyone of the two and leave the other.'"

The traditions which deal with the resolution of conflict between traditions are great many and there is no need to cite them here. The aim of quoting the above tradition was to show that the principles of jurisprudence were often discussed during the era of the Imams (A) and that these principles were generally employed for the practice of *ijtihad*. On this basis, the practice of *ijtihad* was not limited to the period of inaccessibility to the Imams (A).

2. The presence of books dealing with some issues of '*ilm al-'usul*' among the writings of the contemporaries of the Imams (A) is indicative of the fact that the practice of *ijtihad* was current and the principles of jurisprudence were relevant during the era of accessibility. We shall discuss this matter in detail while studying the various periods in the history of *ijtihad*; here we shall cite few instances of it for the sake of example:

- (a) Hisham ibn al-Hakam, a pupil of al-'Imam Al-Sadiq (A), compiled a treatise on word usage (*alfad*).
- (b) Yunus ibn 'Abd al-Rahman, a pupil of al-'Imam Al-Rida (A), wrote a short treatise on *usul al-fiqh*.
- (c) Al-Fadl ibn Shadhan al-'Azdi al-Nishaburi, a pupil of al-'Imam al-Hadi (A), was the author of a number of *fatawa* issued on the basis of jurisprudential principles. For instance, he gave a *fatwa* upholding the validity of prayers offered in an usurped place, in accordance with his belief in the permissibility of the concurrence of *amr* and *nahy*. Apparently he was the first to believe in the permissibility of the concurrence of *amr* and *nahy* in matters of primary significance.

3. During the era of accessibility to the Imams (A), the Shi'is who lived in distant lands, such as Khurasan and Ray, could not easily contact the Imam (A) and question him about the problems they came across. Although historical accounts show that the Shi'is sent their queries to the Imams (A) through travellers and pilgrims, who brought them the Imam's answers on returning, it should be noted that this method was not followed in respect to all the problems encountered.

Secondly, the replies in such cases arrived after the passage of considerable time during which we cannot say that they remained without any obligation to fulfill.

Thirdly, the travellers and the messengers sent were not always successful in getting access to the Imams (A), because most of the time the Imams (A) were either under surveillance or in the prisons of tyrannical caliphs, so that the Shi'is could not contact their Imam. For instance, al-'Imam Al-Sadiq (A) was under such strict and oppressive surveillance of the 'Abbasid caliph al-Mansur that no one could easily approach the Imam (A). The Shi'is had to resort to various kinds of tactics to approach the Imam's house in the garb of peddlers or tradesmen to ask questions while observing intense caution.

After al-'Imam Al-Sadiq (A), the next Imam, Musa ibn Ja'far (A), spent long years in the prisons of Basrah and Baghdad until his martyrdom. During such periods, eminent Shi'i fuqaha', such as Zurarah, Muhammad ibn Muslim, al-Fadl ibn Shadhan, Safwan ibn Yahya and others fulfilled the legal needs of the Shi'is through their own *ijtihad*.

4. There are traditions which indicate that the Imams' companions and pupils were required to apply the general juristic principles to particular instances. The following tradition of *Safinat al-Bihar* (vol. I, p.22) is an example:

قال الصادق (ع): إنما علينا أن نلقي الأصول وعليكم أن تفرعوا.

Al-'Imam Al-Sadiq (A) said: "Our duty is to teach you the principles and your duty is to ramify."

Ayan al-Shi'ah records the following tradition of al-'Imam Al-Rida (A):

عن كتاب أحمد بن محمد بن أبي نصر البيزنطي عن الرضا عليه السلام: علينا إلقاء الأصول وعليكم التفريع.

From the book of Ahmad ibn Muhammad ibn Muhammad ibn Abi Nasr al-Bizanti from al-Rida (A): "Our duty is to teach the principles and yours to ramify."

5. Another evidence of the existence of *ijtihad* during the era of accessibility to the Imam are the *fatwas* issued by the legists among the Imams' contemporaries, and the Imams' approval of their verdicts. The following tradition narrated by Mu'adh ibn Muslim is recorded in *Wasa'il al-Shi'ah* (vol. 18, 11th of the chapters on *sifat al-qadi*, hadith 37):

Mu'idh ibn Muslim said: "Al-'Imam Al-Sadiq (A) said to me, 'I have ... been told that you sit in the mosque and give *fatwa* to the people'. I said, 'Yes, I am doing it.' Then I said, 'Before I leave you I have to ask you a question: (My practice is that) When I sit in the mosque (giving *fatwas*) a man comes and asks me a certain question. If I know that he is one of your opponents and does not act according to your views, I narrate to him a *fatwa* which is acceptable in his legal school. If I know that he is one of your followers, I give a *fatwa* in accordance with the Shi'i school. But if I cannot find out to which group he belongs I explain to him various *fatwas* putting in your views amongst them.' The Imam (A) replied, 'Carry on in the same fashion, for such is also my method.'"

6. Some traditions show that the Imams (A) ordered the outstanding among their companions to give *fatwas* to the people. In *Usd al-ghabah* (vol. 4, p.197) it is reported that Imam 'Ali (A), while appointing his cousin Qutham ibn al-'Abbas as governor of Makkah, said to him:

أقت المستغنى وعلم الجاهل.

Give *fatwa* to the initiated and teach the ignorant.

Al-'Imam Al-Sadiq (A) is reported to have said to Aban ibn Taghib (Jami' al-ruwat, vol. I, p.9):

اجلس في مسجد المدينة وافت الناس فإني أحب أن يُرى في شيعتي مثلك

Sit in the Mosque of Madinah and give *fatwas* to the people, for I love the like of you to be seen amongst my Shi'ah.

7. Some traditions indicate that the Imams (A) referred some of their followers to some of their outstanding pupils in matters relating to hadith and fatwa.

عبد العزيز بن مهندى، قال: سألت أبا الحسن الرضا (ع)، فقلت: إنى لا أقدر على لقائك كل وقت فممن آخذ معاليم ديني؟ فقال عليه السلام: خذ عن يونس بن عبد الرحمن.

'Abd al-'Aziz ibn Muhtadi said: "I asked Aba al-Hasan al-Rida (A), 'I am unable to meet you every time, so from whom should I take my religious instruction?' 'Take if from Yunus ibn 'Abd al-Rahman,' said the Imam (A)." (*Wasa'il al-Shi'ah*, vol. 18, eleventh of the chapters on *sifatal-qadi*, hadith 34)

عن شعيب العقر قوفي، قال: قلت لأبي عبد الله عليه السلام: ربما احتجنا أن نسأل عن الشيء فمن نسأ؟ قال: عليك بالأسدي.

Shu'ayb says: "I said to al-'Imam al-Sadiq (A), 'Often we have to ask about something; whom should we ask?' The Imam said, 'Ask al-'Asadi (Abu Basir).'" (*Ibid.*)

عن علي بن مسيب الهمداني، قال: قلت للرضا (ع): شققي بعيدة ولست أصل إليك في كل وقت، فمن آخذ معاليم ديني؟ قال عليه السلام: من زكريا بن آدم القمي، المأمون على الدين والدنيا. قال علي بن المسيب: فلما انصرفت قدمنا على زكريا بن آدم، فسألته عما احتجت إليه .

'Ali ibn Musayyab al-Hamadani says, "I said to al-Rida (A), 'I have to come a long distance and I cannot reach you every time (when I have to ask you something). From whom should I take the teachings of my faith?' The Iman (A) said, 'From Zakariyya ibn Adam; he is my trustee in regard to religious and secular matters.'" 'Ali ibn Musayyab adds, "On returning I went to Zakariyya ibn Adam and asked him whatever I needed to ask." (*Usul al-Kafi*, vol: 1, p.67)

قال الصادق (ع): ينظر إلى من كان منكم ممن قد روى حديثنا ونظر في حلالنا وحرامنا وعرف أحكامنا فليرضوا به حكماً فإني جعلته عليكم حاكماً

Al-'Imam al-Sadiq (A) said: "The two (Shi'i disputants) should look for one who narrates our traditions and has in view our *halal* and *haram* and who as well understands our *ahkam*. Then (having found such a person) they should accept him as a judge." (*Ibid.*)

قال أبو محمد الحسن العسكري (ع): ... فاما من كان من الفقهاء صائناً لنفسه حافظاً لدينه مخالفًا لهواه مطيناً
لأمر مولاه فللعلماء أن يقلدوه.

Al-'Imam al-'Askari (A) said:... "As to the faqih who preserves the integrity of his self, defends his faith, opposes his lust and obeys the command of his Master (*mawla*), then it is for the laymen ('awamm) to imitate him."(al-Tabarsi, *al- Ihtijaj*)

8. The traditions quoted above expressly indicate the permissibility of giving fatwa in accordance with the principles of Shi'i jurisprudence. There are other traditions which, though they do not expressly state such a sanction, are relevant in that we can infer such a permissibility from them.

Al-'Imam Al-Baqir (A) said: "Anyone who gives *fatwa* without knowledge or guidance is cursed by the angels of Divine wrath and mercy. The sins of those who act upon his *fatwas* also lie upon him." (*Wasa'il al-Shi'ah*, vol. 18, fourth of the chapters of *sifat al-qadi*, a *sahih* tradition narrated on the authority of Abu 'Ubaydah)

Al 'Imam Al-Sadiq (A) said: "Anyone who acts upon *qiyyas* destroys himself and others who act upon his verdict. Whoever gives *fatwa* without knowledge and without knowing *nasikh* and *mansukh* or *muhkam* and *mutashabih*, brings perdition upon himself and others." (*Usul al-Kafi*, vol. 1, *bab al-nahy 'an al-qawl bi ghayr al-'ilm*, hadith 9)

The Prophet (S) said: "Whoever gives *fatwa* without knowledge or learning, his abode shall be hellfire."
(*Tuhaf al-uqul*, the *riwayah* of al-Hasan ibn 'Ali ibn Shu'bah)

9. In regard to the books of certain Shi'i groups (such as Banu Faddall and individuals (such as al-Shalamghani), the Imams (A) are reported to have said: 'خذوا ما دروا وذرعوا ما دروا' Take their narrations and leave their conclusions.' It can be inferred from this tradition that *ijtihad* was practised by the Shi'is of that era. Banu Faddal and al-Shalamghani had diverted from the right path, and, therefore, the Imams (A) forbade the Shi'is from acting upon their verdicts, judgements and opinions.

Conclusion

From the nine reasons given above it can be concluded that the practice of *ijtihad*, in the sense of derivation of *ahkam* from Shar'i sources, existed during the era of the eleven Imams (S).?

The companions of the Imams (A) derived secondary *ahkam* from the legal sources, for issues for which there existed no *nass* either in the Book or in the Sunnah of the Prophet (S) or in *riwdydt* of the *Ma'sumun* (A), and this practice enjoyed the approval of the Imams (A).

Ijtihad, a Perennial Spring

The essential sources of Islamic law are the Qur'an, the Prophet's Sunnah, and the traditions of the Infallible Imams (A), which are the most vital source of man's spiritual life. This is because the life and continuity of human societies depends on the existence of proper laws and regulations.

These fundamental sources of law are like precious deposits in which the higher, transcendental teachings are kept in the form of general, universal – principles. In order to extract this vital material from the core of general and universal principles and to use it for the fulfilment of multifarious needs of man's spiritual and corporeal existence, there is the need of some instrument and means. Such an instrument is provided by *ijtihad*.

Ijtihad, on the one hand, gives vigour and viability to legal thought and, on the other, does not allow the *ahkam* to remain in the outdated moulds of obsolete expressions and terms, by expounding them in the language of every age and in accordance with its needs.

Although the Divine laws are fixed and unchangeable, the mode of their expression and exposition is subject to variation. A part of the function of *ijtihad* is to recognize the consequences arising from this fact. Hence it has been said that *ijtihad* is an agent of renovation in fiqh, and that it is a force that operates in history by developing the scope of fiqh with the expansion of its applications. At the same time, *ijtihad* safeguards the stability of legislation through time.

Since the Sacred Lawgiver knew that various aspects of human life are subject to change its multifarious needs are open to variation, He recognized the role of *ijtihadd* as a force which should emerge with the emergence of fiqh and remain in its service throughout the course of history in order to enable fiqh to fulfil the human need for law.

The *ijtihad* which the lawgiver has sanctioned and which is to be employed in the service of fiqh, represents a specific meaning of the term '*ijtihad*'. In this particular sense it embodies one of the most outstanding characteristics of the spirit of Islam as reflected in Islamic legal studies, and it is in this sense that the Shi'ah have adopted the term.

If the practice of *ijtihad* is carried on in a correct manner, Islamic fiqh cannot remain static or face any kind of stagnation, nor will there appear any kind of deficiency or vacuum in any of its various branch.

The innate dynamism of Islamic fiqh became apparent when the great Shi'i *mujtahid* al-Hasan ibn Abi 'Aqil al-'Umani, a contemporary of al-Kulayni, gave a scientific structure to fiqh. The practical impact of his work became evident when the great Shi'i legislist Shaykh al-Ta'ifah Muhammad ibn al-Hasan al Tusi employed the groundwork prepared by him for deriving *ahkam* from Shar'i sources for new issues and problems. Thus it was by these two great minds that fiqh was set upon a course upon which it progressed with time and developed with historical change.

The Source of the Inadequacies

That which is sometimes referred to as the inadequacy of fiqh is in fact a result of inadequate research effort undertaken in some of the branches of Islamic legal studies. In other words, the main cause of these inadequacies is the failure to study the general and particular elements relating to some branches of fiqh. The reason for this neglect was the absence of any practical background during the past ages.

Accordingly, these inadequacies do not relate to the essence of Islamic law as such. It is we who have not worked hard enough to explore its hidden treasures. Undoubtedly, had we explored them, there would not have remained any unanswered question in this domain. On this account, the inadequacy pertains to our performance, not to Islamic law.

For instance, some issues of fiqh either totally lacked practical relevance in the past before the establishment of the Islamic Republic, or their relevance was very limited. This was true of matters relating to land, limits of private ownership, *anfal*, *jihad*, penal laws, judiciary, *qisas*, *ta'zirat*, etc., or issues pertaining to civil, economic and social legislation.

As a result of the past irrelevance of these issues, due to the absence of any background necessary for implementation, sufficient work was not done on these topics and whenever some work was done it was sketchy and perfunctory.

On the other hand, other kinds of legal issues, such as matters pertaining to *wudu* ; *ghusl*, *tayammum*, *salat*, *sawm* and so on, were studied in extremely meticulous detail due to the existence of a practical background, and now we don't face any kind of inadequacy with regard to the problems pertaining to these topics.

Today, with Divine succour, the background required for the implementation of all the Divine *ahkam* in society has emerged with the victory of the Islamic Revolution and the realization of the sovereignty of the Islamic Republic. Now the theological centres should continue their endeavour by giving more attention to those branches of fiqh that were neglected in the past.

This author believes that should a one-third of the research effort put formerly into such topics as *taharah* (ritual purification) and *salat* be devoted to other branches of fiqh, all the inadequacies would disappear and we would obtain clear and unambiguous *ahkam* in all the spheres.

The Qualifications Required for Ijtihad

There are certain requirements which must be met in order to exercise *ijtihad* in economic, political, social, cultural, ethical and legal spheres. These are as follows:

1. The *mujtahid* should have sufficient knowledge and expertise in the field of *ijtihad* and must be thoroughly familiar with the statements of the Prophet ('a) and the Imams (A). Otherwise he cannot be

called a *mujtahid* or a *faqih*:

لَا يَكُونُ الْفَقِيهُ فَقِيهًا حَتَّىٰ يَعْرَفَ مَعَارِيضَ كَلَامِنَا.

One is not a *faqih* unless he understands the meaning of our statements.

In a tradition recorded in *Misbah al-Shari'ah* (p. 355, bab 63), al-'Imam Al-Sadiq (A) is reported to have said:

وَالْمُفْتِيُّ يَحْتَاجُ إِلَىٰ مَعْرِفَةِ مَعْانِي الْقُرْآنِ وَحَقَائِقِ السُّنْنِ وَبِوَاطِنِ الإِشَارَاتِ وَالآدَابِ وَالإِجْمَاعِ وَالاِخْتِلَافِ وَالإِطْلَاعِ عَلَىٰ أُصُولِ مَا أَجْمَعُوا عَلَيْهِ وَمَا اخْتَلَفُوا فِيهِ ثُمَّ حَسْنِ الْاخْتِيَارِ ثُمَّ الْعَمَلِ الصَّالِحِ ثُمَّ الْحِكْمَةِ ثُمَّ التَّقْوَىٰ ثُمَّ حِينَئِذٍ إِنْ قَدْرٍ.

The mufti (one who gives fatwa) stands in need of knowledge of the meanings of the Qur'an, understanding of the real meaning of ahadith and the inward meaning of signs and indications, and familiarity with matters relating to etiquette and conduct. He should have thorough knowledge of the points of consensus and disagreement and be well-informed about the essentials of what they have agreed or disagreed about. Then he should possess the capacity to make a proper choice. Then he needs to be righteous in his actions, wise and pious. After possessing all these qualities, he may give fatwa if he has the capacity to do so.

Fiqh is like an ocean which does not yield its pearls and treasures to those divers who lack discrimination, knowledge, experience and expertise. Those who try to fathom it without possessing these qualities are drowned and destroyed.

2. The exercise of *ijtihad* should be in accordance with the criteria and principles of '*ilm al-'usul*'; otherwise any claims to *ijtihad* cannot be recognized.
3. Perpetual research about the factors that relate to the process of ramification (*tafr'i*) of the principles and their application to particular cases. These elements are as follows:
 - (a) The usul (fundamental principles) of *ahkam*, in whose light the *ahkam* for new *furu'* are obtained.
 - (b) The general rules of *ahkam*, which are applicable to individual instances in external reality.
4. Perpetual research about the elements relevant to derivation of *ahkam*, such as:
 - (a) The common (*mushtarak*) *usuli* elements of derivation.
 - (b) The specific elements (traditions) related to derivation that do not contain the causes ('*ilal*) behind the *ahkam*.

- (c) The specific elements that do contain the cause underlying a *hukm* and which can be used for extending it to other cases. This extension of a law to similar cases is called *qiya mansus al-illah*, extension of the jurisdiction of a law in cases where the cause underlying it has been stated by the Lawgiver), however, the *qiyas* based on analogy and similarity, which is considered valid by Ahl al-Sunnah with the exception of Hanbalis and *Zahiris*, is rejected by the Shi'ah.
- (d) Extraction of definite criteria of *ahkam* from tradition through reason, as a result of which a *hukm* can be extended beyond the application mentioned in hadith.

In the terminology of fiqh this is called *tanqih al-manat al-qat'i* (isolation of the definite cause) and is considered valid by the Shi'ah. That which is considered invalid by the Shi'ah is deducing of the presumed cause of a *hukm* by rational means, which is termed *tanqih ul manat al-zanni* (isolation of the presumed cause).

- (e) The isolation (*tanqih*) of general subjects (*mawdu'ay*) through the triple means of the *Shar'* (canon), '*aql* (reason) and '*urf* (custom).

This tanqih is directed towards two things: (1) content (*muhtawa*), (2) the legal application of the subject isolated to other general heads (*anawin kulliyah*) -- such as the application of the subject of cooperation (*taa'awun*) to the matter of *ithm* and *'udwan* as a primary consideration and its secondary legal application to the use of tobacco (as during the Tobacco Movement), for instance. This kind of application is one of the special functions of the *mujtahid* (that is why we said 'isolation of general subjects', for isolation of particular subjects is not the *mujtahid's* duty).

- (f) The primary laws (*al-'ahkam al-'awwaliyyah*).
- (g) The secondary laws (*al-'ahkam al-thanawiyyah*).
- (h) The provision of legislative assistance to the ruler or *al-wali al-faqih* within the framework of the sources.

If *ijtihad* is exercised in various branches of law in the light. of these conditions, no law pertaining to any subject will remain unidentified nor there will remain any kind of legal inadequacy. Now it is up to the committed *mujtahids* and scholars to exercise *ijtihad* in these fields of law, wherein the way has been prepared for implementation through the establishment of the Islamic Republic, and thus satisfy the needs of Muslim communities.

Some persons, on account of their ignorance, think that in order to meet the diverse needs of changed conditions of life we should either turn to the use of conjectural instruments (such as *qiyas*, *istihsan* and *masalih mursalah*) or to the legal systems of other countries of the east and the west. The above discussion shows the baselessness of such a suggestion.

Unfortunately, there is a group which on its first encounter with an inadequacy in some branch of law

goes to the extreme and proposes such methods of legal deduction' as are neither sanctioned by the Shari'ah nor agree with the rational criteria, and compromise the reputation of Islam in the eyes of non-Muslims.

The Closure of the Gates of Ijtihad, a Conspiracy

The issue of closing the gates of *ijtihad* emerged during the reign of the 'Abbasids, and undoubtedly the enemies of Islam played an effective part in raising it. This was because the giving up of *ijtihad* meant blocking the source of dynamism and perpetual vitality of Islam and its law, which in turn implied the expulsion of Islam from the arena of temporal affairs and, following it, its elimination from the intellectual and spiritual spheres. Evidently, this was what the enemies of Islam aimed at.

The cause of the present inadequacies of Sunni fiqh in most of the branches of law, as well as the issuance of incorrect *fatwas*, is the Sunni belief in the end of *ijtihad*. However, the committed and aware scholars among the Ahl al-Sunnah should endeavour to reopen the gates of '*ijtihad*' and bring Islam out of its current state of isolation and decadence, so that a spirit of vitality and dynamism is infused into Muslim communities.

This is because so long as the *taqlid* of the four Imams is considered binding, and new research, study and expression of views is regarded as impermissible, there appears to be little hope of any effective change.

Difference of Viewpoints, a Bounty

There is no doubt that disagreement in the sense of quarrel and hostility is an undesirable thing which has been prohibited by the sacred Shari'ah. But disagreement in the sense of difference of opinion is, in many cases, good and valuable, because the conflict of ideas leads to greater research and deeper investigation. Some have interpreted the following statement of the Prophet (S) in this sense:

اختلاف أمتي رحمة

The difference of my Ummah is a mercy.¹

In any case, *ijtihad* and undertaking of investigation for identification of Divine laws is considered a desirable thing by the Lawgiver. The tradition:

المصيّب أجران وللمخطيء أجر واحد.

The *mujtahid* who succeeds (in identifying the true law) gets two rewards and the one who errs gets one,

aims to encourage *ijtihad* as it leads to the development of thought and taps the resources of the intellect. This admirable practice has been in vogue in Shi'i academies for ages, and throughout the seven epochs of the history of *ijtihad*, *mujtahidun* welcomed the expression of diverse viewpoints regarding various issues.

This is the reason why Shi'i fiqh has achieved its remarkable development in various fields and preserved the capacity to answer the problems and satisfy the diverse wants of man in every age. Farid alWajdi, writing in *Da'irat al-ma'arif*, III, 197, under *j-h-d*, says:

The Islamic Shari'ah contains sufficient amount of primary principles suitable for legal deduction and which can meet the emergent wants and solve the problems of life. Therefore, in every age there should be *mujtahids* capable of making legal deductions. From the beginning of the Islamic era to the third/ninth century there did exit *mujtahids* who deduced the *hukm* for every event and eventually through *ijtihad* from the primary principles of the Shari'ah.

They were not afraid of divergence of viewpoints, which to them was not only something ordinary and natural but a mercy of God, because diversity is one of the laws of nature and there is no community without divergence in some matters of religion, with the followers on every side defending their own viewpoint.

But when the Muslims became rigid with regard to the understanding of the secrets and subtleties of their law, inadequacy and neglect became their lot. As a result they did not permit themselves to think about new realities. They would say that it was on account of the closure of the gates of *ijtihad*. But the fact is that according to the express texts of the Book and the Sunnah, the gates of *ijtihad* are open for all until the Judgement's Day.

In brief, social stagnation and intellectual decadence cast their shadow on Islamic communities when the road of *ijtihad* and thought was blocked and Muslims did not permit themselves to reflect about new realities and problems. As a consequence, their legal studies remained at the same point that they had reached twelve centuries ago.

Traditional Fiqh or Progressive Fiqh?

Nowadays some persons want to draw a distinction between 'traditional fiqh' and 'progressive fiqh'. However, if we set aside the specific views and objectives of some groups and see things as they really are, we will see that there can be no distinction between 'traditional fiqh' and 'progressive fiqh' in Shi'i context.

This is so because traditional fiqh, when dealt. With on the basis of *ijtihad* with all its conditions and criteria, has the capacity to solve all emergent problems and to march in step with all the manifestations of progress. However, if by 'progressive fiqh' be meant recognition of the right to violate Shari'i norms and

requirements of *ijtihad* and the nonspecialist's right to interfere in this discipline, and the exercise of *ijtihad* through the use of *qiyyas*, *istihsan* and *masalih mursalah*, it cannot be called Islamic firth. For say nothing of its being 'progressive'.

This is so because 'fiqh' means the commands revealed by God to His Apostle, not laws determined by human thought and speculation. So also if traditional fiqh is taken to mean rigid adherence to the literal meanings of the texts (*zawahir al-nusus*) and the fatwas of predecessors and indifference to contemporary realities, such a static '*ijtihad*' cannot answer the diverse problems of life in every age and keep pace with changing times.

Ijtihad, Legislation and Tajdid

Ijtihad from the Shi'i view point is not a kind of legislation or something based solely on human thought, subjective judgement or provincial social, economic, cultural or political perceptions. *Ijtihad* is also not a kind of *taqlid* in the sense of a passive acceptance of *ahkam*, in whose determination the *mujtahid* has no role. *Ijtihad* in Shi'i view means intellectual effort based on the recognition of certain canonical sources and juristic principles and aimed at understanding and discovering the laws of God.

Although a dynamic force in fiqh, *ijtihad* does not diminish the sanctity and stability of the legal content of the Shari'ah. Rather, throughout the seven epochs of its development *ijtihad* has always guarded the principal content of the *ahkam* while at the same time extending its scope and application to the most.

Distant horizons of human life on the basis of its general laws and principles. *Ijtihad*, it may be said, is making intelligent use of God's general grace whereby He has placed the laws of the Shari'ah in the bounteous domain of the intellect.

The first Shi'i faqih to open the gates of *ijtihad* as a comprehensive scientific discipline was Abu Muhammad al-Hasan ibn 'Ali al-'Umiini, known as Ibn Abi 'Aqil. He wrote a book on this subject entitled *al-ustamsik bi habl Al al-Rasul* which is mentioned by al-Najashi as being one of the most famous and well-known Shi'i works.

In this book Ibn Abi 'Aqil examined all the various aspects of the principles of *ahkam* and the rules of *ijtihad* as well as the common elements related to the process of legal deduction.

Although he wrote many books, in almost all the fields of Islamic sciences, his fame rests mostly on his studies of *ijtihad*. He wrote his above-mentioned book during the era of the Minor Occultation of the Twelfth Imam (A). He is considered the pioneer in the field because no one before him had written such a work that treated Shi'i fiqh in such a comprehensive manner with an approach based on *ijtihad*.

We do not know of any legist to have undertaken such a task before Ibn Abi 'Aqil. Before him Shi'i fiqh did not have the ability of entering the phase of *tafri'* (i.e. the application of *usul* for deriving answers to new *furu'* or secondary issues) on account of the absence of an elaborate and scientific method, without

which *ijtihad* as a technique was not possible. This great legist filled this vacuum through his indefatigable efforts.

After Ibn Abi 'Aqil, the next person to set forth fiqh in a scientific perspective based on *ijtihad* was Abu 'Ali Muhammad ibn Ahmad al-Katib al-'Iskafi (d.381=991), known as Ibn Junayd. In his endeavour to establish legal studies on the principles and rules of *ijtihad*, he wrote a number of books on the subject. Two of them are: *Tahdhib al-Shi'ah li ahkam al-Shari'ah* and *al-Mukhtasar al-Ahmadi li al-fiqh al-Muhammadi*.

Abu Ja'far ibn Ma'd al-Musawi, who claims to have seen Ibn Junayd's work, says that he had not seen a better-written book among Shi'i works. He adds that *al-Mukhtasar al-'Ahmadi* was popular as a textbook during the days of the late 'Allamah.

A Clarification

Here it is essential to clarify two points. It appears from the statements of some scholars that Ibn Abi 'Aqil was the first to open the gate of practical *ijtihad* and to lay the foundations of *tafri'*. This is not correct, because he was the founder of *ijtihad* as theory and not as practice.

Secondly, some scholars are of the opinion that Ibn Junayd was the pioneer of the theory and practice of *ijtihad* and Ibn Abi 'Aqil continued his work. This is opposite of what we believe to be the case, because Ibn Abi 'Aqil was a contemporary of al-Kulayni (d.328 or 329/ 940 or 941) and lived during the era of the Minor Occultation.

Although we don't know the exact date of Ibn Abi 'Aqil's death, some indications lead us to believe that—he died before or about the same time as al-Kulayni. Ibn Junayd al-'Isksfi died in the year 381/991, about 52 (lunar) years after Ibn Abi 'Aqil's death.

The Practice of Ijtihad

The first legist to open the gate of practical *ijtihad* was the great legist and the unique scholar of his era Shaykh al-Ta'ifah Muhammad ibn al-Hasan al-Tusi (385–460/995–1068), who applied the general principles of jurisprudence to new and emergent *furu'*.

We don't know of any Shi'i *mujtahid* before him to have practically applied *ijtihad* in his manner to answer the multiplying needs of the Shi'i world of the time. With his work he extended the scope of Islamic fiqh in a remarkable manner, for he fully utilized the theoretical foundations which had been laid by his predecessors in the field, such as Ibn Abi 'Aqil and Ibn Junayd.

Al-Tusi commenced this project in his precious work *al-Mabsut*. In the preface to this work, while explaining his motives for writing it, he says. "Our opponents believe that the Imamiyyah do not have the capacity to refer the *furu'* to *usul*, and they confine themselves to the texts (*nusus*) related by their

traditionists".

Such a view stimulated the Shaykh al-Taifah to rise to prove the Shi'i prowess in the field of *ijtihad* and to fill the existing vacuum. Juristic thought and the theory of *ijtihad* made great advancement during his era, breathing a new life into the body of fiqh. *Al-Mabsut* emancipated the studies of fiqh from their restricted confines – wherein their sole reliance was on the direct, literal interpretation of traditions – and brought them into a wide and open field.

Al-Tusi's *al-Mabsut* represents the point of departure in the expansion of Shi'i fiqh and usul which was made possible by the preliminary work done by Ibn Abi 'Aqil and Ibn Junayd.

The Development of the Theory of Ijtihad

Shi'i *ijtihad* at the outset of the Minor Occultation did not come across the kind of difficulty faced during later eras with regard to the deduction of *ahkam* regarding new issues and problems. This was because, firstly, the Muslims of that time did not face the problems which emerged later.

Secondly, due to the proximity with the era of *nass*, the availability of the Four Hundred Usul (which contained the records of the statements of al-'Imam al-Baqir (A), al-'Imam al-Sadiq (A) and the other Imams made, made by their pupils), and the understanding of the actual context in which those statements were made, the need for *ijtihad* was not felt as acutely as during the later times.

Ijtihad and legal deduction was a simpler affair, free of the later technical complexities, because the legists of that period did not face any great difficulty with regard to the identification of trustworthy traditions, the literal and legal meanings and significance of words used in traditions, and the specific features relating to them.

However, the passage of time and the emergence of new issues with the advancement of civilization, on the one hand, and the obliteration of signs and indications which were instrumental in understanding the import and purpose of traditions as well as the complications arising from changes in general and legal usage of words, on the other – all these together made the task of deduction more difficult for the later *mujtahids* and jurists. To these must be added the difficulty arising from the forgeries and fabrications made by interested persons, which had affected the trustworthiness of many traditions.

Due to these causes, the practice of *ijtihad* for the deduction and discovery of the real *ahkam* was not so simple a matter as before, and it was necessary to study various sciences for the purposes of:

- (1) determining the meanings of words,
- (2) understanding of the literal meanings of the Book and the Sunnah,
- (3) determining the reliability of narrators by studying their biographies for evaluating the *asnad* of

traditions as *sahih*, *da’if*, *muwaththaq*, *mursal* etc.,

(4) determining the traditional and rational criteria for giving precedence to a tradition and the rules for reconciling conflicting traditions (on the basis of ‘amm and khass, mutlaq and muqayyad, mujmal and mubin, zahir and azhar, zahir and nass).

The causes behind the conflict between traditions of legal significance were the following:

1. The loss of certain indications accompanying the texts of hadith, caused at times due to the dismemberment (*taqti’*) of traditions and *asnad*, and at times due to the negligence of narrators.
2. The narration of traditions in reworded form by the narrator, in words different from that of the Imam.
3. The making of statements contrary to the real Shi’i position on account of *taqiyyah*, which the Shi’is were forced to practise as a safety measure to protect the Shari’ah and their lives, property and honour.
4. The graded approach of the Imams in the exposition and communication of the *ahkam* to the people, for the sake of the consideration of specific conditions of a certain inquirer or certain special circumstances.
5. The treacherous interference of some anti-Islamic elements and mercenaries, against whose fabrications the Imams (A) warned their Shi’ah.

Accordingly, anyone who engages in the deduction of Divine *ahkam* from the traditions should have the capacity to reconcile various kinds of contradictions arising from the above-mentioned causes.

1. This interpretation of the tradition is correct if ‘ikhtilaf’ is taken to mean ‘difference of opinion’. However, in some traditions a different meaning is given to the word.

One of these traditions is the following from al-Shaykh al-Saduq’s Ma’ani al-’akhbar, Qumm, 1361 H.Sh., p. 157:

حدثنا علي بن أحمد - رحمة الله - قال: حدثنا محمد بن أبي الخير صالح بن أبي الكوفي عن أبي عبد الله الكوفي عن أبي حماد بن هلال، عن محمد بن أبي عمير عن عبد المؤمن الأنصاري. قال: قلت لأبي عبد الله عليه السلام: إنَّ قوماً يرون عن رسول الله صلى الله عليه وآله قال: «إِنْ اخْتَلَفَ أُمَّتِي رَحْمَةٌ» فقلت: إنَّ كَانَ اخْتَلَافُهُمْ رَحْمَةٌ فاجتَمَعُوهُمْ عذَابٌ؟ فقال: ليس حِيثُ تذهب ونَهْبُوا، إِنَّمَا أَرَادَ قَوْلَ اللَّهِ عَزَّ وَجَلَّ: «فَلَوْلَا نَفَرَ مِنْ كُلِّ فِرْقَةٍ مِّنْهُمْ طَائِفَةٌ لَّيَنْقَطُوا فِي الدِّينِ وَلَيُنَذِّرُوا قَوْمَهُمْ إِذَا رَجَعُوا إِلَيْهِمْ لَكُلُّهُمْ بَحْرُرُونَ» الآية. فَأَمْرَهُمْ أَنْ يَنْفِرُوا إِلَى رَسُولِ اللَّهِ صلى الله عليه وَآله وَيَخْتَلِفُوا إِلَيْهِ فَيَعْلَمُوْهُمْ ثُمَّ تَرْجِعُوا إِلَى قَوْمِهِمْ فَيَعْلَمُوْهُمْ، إِنَّمَا أَرَادَ اخْتَلَافُهُمْ مِّنَ الْبَلَادِنَ لَا اخْتَلَافًا فِي دِينِ اللَّهِ. إِنَّمَا الدِّينُ وَاحِدٌ

...`Abd al-Mu’min al-’Ansari says: "I said to Abu ’Abd Allah: 'The people narrate the Prophet (S) to have said: "The ikhtilaf of my ummah is mercy". (Is that true?)' He replied: 'What they say is true.' I said, If their difference is mercy, then their consensus should be a scourge?!" He said, 'it is not as you or they understand it. Indeed, what the Prophet (S) meant is the import of this utterance of God Almighty:

"...But why should not a party of every section of them go forth, to become learned in the Din, and to warn their people when they return to them, that haply they may beware?"(9:122)

(In this verse) God has commanded them to go forth (yanfiru) towards the Messenger of Allah (S) and to frequent (yukhtalifu) him so that they may learn and then return to their people to teach them. Indeed he (S) meant their departure from their places, not their divergence in the Din of Allah, For, verily, the Din is one."

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