The Exercise *of* Islamic Juristic Reasoning *by* Ascertaining the *Ratio Legis* (*al-ijtihād bi taḥqīq al-manāṭ*)

The Jurisprudence of Contemporary and Future Contexts

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Summary

The Muslim *ummah* stands today at a critical juncture as a result of its unique position and responsibility. Geographically, economically, and culturally, the Muslim world occupies the middle ground—a fact that has led it to bear innumerable challenges and difficulties throughout its history and into the present day. Despite this, it has always stood resolute, proud of its distinctive culture and civilization. But today, the Muslim nation is experiencing a civilizational and intellectual crisis of a sort that makes it appear at odds with both history and the present age. Over the past two centuries, it has come to been seen as incapable of harmonizing between the universal demands of the age and the universality of revelation and faith. The *ummah* stands in dire need to refamiliarize itself with the essential meanings of its Shari'ah, in order to live at ease in the present age: capable of engaging with the requirements of the times as well as with the timeless truths of revelation. For the Lawgiver, in His simple and heartening address to His creation, has apprised them that the final Shari'ah seeks not to afflict them with suffering: hardships are meant to be alleviated; the moral responsibility to observe particulars of the Law is lifted in the face of compelling necessities; and anyone who does not enjoy true freedom of will bears no such moral responsible *ipso facto*. But the question remains: how are we to measure what accounts for as hardship? How do we evaluate what constitutes necessity? And how do we do so with the honest intention of arriving at God's will as regards contemporary matters, without abandoning, out of mere caprice, our own moral vision? The value of the present paper lies in its providing answers to such questions, and in its rooting these responses in the authentic jurisprudential tradition and legal philosophy of Islam.

About the Author

SHAYKH ABDALLAH BIN AL-SHAYKH AL-MAHFUDH BIN BAYYAH (born 1362 AH/1935 CE) is currently one of the highest-ranking scholars of traditional Islam. Born in Mauritania, Shaykh Abdallah mastered the Shari'ah-based disciplines in the scholarly environments of the desert schools of Mauritania, before going on to Tunis to specialize in law. On

returning to Mauritania, he became Minister of Education and later Minister of Justice, holding several other important positions under different administrations, and eventually serving as Vice-President of the first president of Mauritania. Shaykh Bin Bayyah has been involved in the Islamic Fiqh Council of Jeddah, taught at King Abdul Aziz University in Saudi Arabia, and is the founder and president of the Global Center for Renewal and Guidance. His publications include: *Intellectual Opinions*, *A Dialogue on Human Rights in Islam*, *Security Discourse in Islam*, *Terrorism: Diagnosis and Solutions*, *Amālī al-dalālāt* (*uṣūl al-fiqh*), *Financial Transactions*, *The Craft of Fat wa and Fiqh of Minorities*, and the Tabah Research publication *Islamic Discourse: Between the Conclusive and the Variable*. In 2009 Shaykh Bin Bayyah was ranked amongst the 50 most influential Muslims worldwide.

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In the Name of Allah, Most Gracious, Most Merciful
All praise be to Allah, and may He shower His blessings and salutations upon our master Muhammad, his family, and his Companions

Two Ways Out of the Current Crisis: Review (*murājaʿah*) and Authentic Grounding in Principles (*taʾṣīl*)

As it completes the first third of the fifteenth century of the Hijri calendar and enters the second decade of the twenty-first century of the Gregorian calendar, the Muslim community occupies a unique status and responsibility among nations. It is a community that has witnessed and continues to witness on her soil monumental events with wide-ranging and long-lasting effects upon the Muslim world and the world at large.

The Muslim Community is a community of the middle way (*wasaṭ*), akin to the middle jewel (*wāsiṭah*) on a necklace of pearls. Geographically, it is located in the middle region of the earth, connecting it to both the western and eastern thirds of the world, and conferring upon it a perpetual state of engagement and mutual exchange. Economically, it sits on the world's richest and largest energy reserves and is showing signs of diverse and promising development and resurgence. Culturally, it is the cradle of three heavenly religions and the site of numerous sacred places.

All of this has forced our Community to encounter and experience, in the past and present, many violent shocks whether directly, or indirectly as aftershocks. Likewise, throughout history, religious adherents and other groups have been embroiled in bitter struggles on our soil, and the region has witnessed wave upon wave

of colonialism[1]. Yet, the Muslim Community continues to hold out defiantly against all of this with its unique culture and distinct civilization.

However, the Muslim Community is currently living through a civilizational and intellectual crisis, seemingly at loggerheads with history and the age in which we find ourselves. This has taken its toll on the spiritual, mental, human, and economic development of the countries comprising the Muslim Community. This has led to a lessening of the essential harmony that should exist between the religious and moral conscience, and the contemporary human situation. For the past two centuries the Muslim Community has been unable to reconcile between the universal truth pertaining to time and the universal truth pertaining to Divine Law and faith (*īmān*).

The universal truth pertaining to time is the rationality of the age and the prevailing ethos, which, in my view, is manifested today in the veneration and respect accorded to freedom in all its forms and categories: freedom of expression, freedom of action, equality between men and women, demands for human rights, and everything subsumed under a system of human freedom that is all-inclusive and beneficial.

The universal truth pertaining to Divine Law and faith has its basis in the preservation of religion, life, wealth, progeny, and intellect, through fine derivations and order, some of which we will come across in the following pages.

Therefore it follows that our Community today is in a state of dire need—or rather compelling necessity—to revisit and review (*murājaʿah*) the content of its Sacred Law, the universal and particular applications espoused therein, such that it can live in this day and age fully able to manage its affairs and proceed with relative ease by reconciling concern for public interest and the eternally revealed texts.

This review process (*murājaʿah*) is not synonymous with retreating or withdrawing (*tarājuʿ*) just as facilitation (*tashīl*) is not

1. Translator's note: The Arabic word for "colonialism" is *al-istiʿmār*, derived from the word *al-ʿimārah* (building or habitation), antonymous with *al-kharāb* (destruction) from which *al-istikhrāb* is derived. The author suggests that "colonialism" is more appropriately rendered *al-istikhrāb* and not *al-istiʿmār*.

synonymous with indulgence (*tasāhul*), nor contextual application or appropriation (*tanzīl*) with relinquishment (*tanāzul*).

Tanzīl is the systematic and orderly application of legal judgments to the various situations and conditions of those who are addressed thereby. That is to say, those deemed morally responsible (*mukallaf*), whom the Lawgiver addresses universally with glad tidings, for whom He advocates ease and not hardship, and calls attention to the fact that the Shari'ah does not wish to cast them into hardship and affliction, and that this is one of its salient and outstanding features. Allah the Most Gracious and All-Loving states:

> *Allah does not wish to place you in difficulty, but to purify you, and to complete His favor upon you, that you may be grateful)*[2]
>
> *And removes from them their burden and the shackles which are upon them*[3]
>
> *[When] He has explained to you in detail what is forbidden to you—unless you are driven thereto out of necessity?*[4]
>
> *There is no compulsion in religion*[5]
>
> *…save him who is forced thereto and whose heart is still content with true faith*[6]

So, it is through a divinely revealed text that hardship is lifted, while legal obligation stops at the limits of uncommon necessities or urgencies, and a person without the freedom to exercise his will is not legally or morally responsible.

But, how do we measure hardship (*ḥaraj*) and how are compelling necessities (*ḍarūrāt*) weighed? These are states (*aḥwāl*), and the instruments that one uses to measure them are not the same as

2. Q5:6.
3. Q7:157.
4. Q6:119.
5. Q2:256.
6. Q16:106.

those used for material objects and weights. The question, therefore, becomes: how do we measure compelling necessity and hardship when applying a particular legal judgment to a particular situation without sacrificing a core value in the process? And how do we do this through valid Islamic interpretation (*ta'wīl*), and not alteration (*taḥwīl*) and artful deception (*taḥāyul)*, and through ratiocination (*taʿlīl*), and not diversion (*taʿallul*) and pretention (*taʿālul*)?

The approach that I follow in this paper, namely, "Islamic Juristic Reasoning Based on Ascertaining the *Ratio Legis*", aims to address this conundrum, and attempts to provide answers to these questions through reasoning that is firmly rooted in Islamic law and legal theory, spread across the following pivotal themes:

1. What is *taḥqīq al-manāṭ* or ascertaining the *ratio legis*?
2. Why the principle of ascertaining the *ratio legis* in fiqh-based issues?
3. The legal authority of *taḥqīq al-manāṭ*, and who ascertains the *manāṭ*?
4. The relationship between values and legal rulings.
5. The real world context and future expectation (*al-wāqiʿ wa al-tawaqquʿ*).
6. The means for ascertaining the *ratio legis*.

Defining *Taḥqīq al-Manāṭ*

Taḥqīq (ascertaining, establishing, and affirming) comes from the Arabic trilateral root "ḥ-q-q" (to be stable and firm) and the noun *al-ḥaqq* (truth, real) and is "something that is firm and stable, and does not change". One of Allah's Most Beautiful Names is al-Ḥaqq (the Truth, the Real).[7]

Al-manāṭ is the underlying *ratio legis* (rational cause or occasioning factor), and comes from the trilateral root "n-w-ṭ" (to hang or hinge) because the legal judgment (*ḥukm*) is made to hang or hinge thereupon.[8]

Ascertaining the *ratio legis* (*taḥqīq al-manāṭ*) takes two forms:

7. Ibn Manẓūr, *Lisān al-ʿArab* (Beirut: Dār Ṣādir, 1432/2011), 10:49.
8. Ḥasan al-ʿAṭṭār, *Ḥāshiyat al-ʿAṭṭār* (Dār al-Kutub al-ʿIlmiyyah, 1400/1980), 2:237.

The first form involves "applying the general principle to its individual cases", whereby the principle of ascertaining the *ratio legis* is far removed from the principle of *al-qiyās* (juristic analogical reasoning). This is the definition that al-Ghazālī favors when he says:

> As for the legal reasoning (*ijtihād*) involved in ascertaining the *ratio legis* underlying the legal judgment, we do not know of any disagreement in the Muslim Community concerning its permissibility. An example of such reasoning is the legal reasoning involved in appointing the Imam (supreme ruler) through *ijtihād* itself while at the same time the Lawgiver was well capable of pronouncing an explicit textual ruling concerning the first Imam, and likewise the appointment of governors and judges, and so too in the estimation of predetermined values, of sufficiency with respect to family support, compulsory stipulation of the just value concerning the prices of damaged goods and blood money for capital offenses, and seeking the equivalent in value in compensating for game killed while on pilgrimage. The *ratio legis* underlying the legal judgment of support for a family member is sufficiency (*al-kifāyah)*, and that is known through an explicit textual ruling. As for whether a *raṭl* (a unit of measure for goods) is sufficient for this person, that is to be ascertained by *ijtihād* or legal reasoning and speculation. Belonging to this category is the type of *ijtihād* involved in determining the qibla, which is not an instance of *qiyās* (analogical reasoning) at all. In fact, it is compulsory to face the qibla, which is known through an explicit textual ruling. As for determining the direction of qibla, that is known by means of *ijtihād*. Let us therefore call this class *taḥqīq manāṭ al-ḥukm* (the principle of ascertaining the *ratio legis* underlying the legal judgment) because the *ratio legis* is known via explicit textual ruling or scholarly consensus and so there is no need to extrapolate it. However, it is impossible to know it with certainty, and

> is therefore deduced by means of speculative indicators. There is no disagreement on this issue in the Muslim Community; it is a valid type of *ijtihād*. *Al-qiyās* is something on which there is disagreement among scholars, so how can this be *qiyās* and hence by extension something on which there is also disagreement, while it constitutes a necessary component of every system of law? Because to pronounce explicit textual rulings on the moral probity and integrity (*ʿadālah*) of all persons and the value of what is deemed sufficient for each of them is impossible.[9]

He says elsewhere:

> The judgment concerning persons who are finite in number proceeds according to two premises: a universal proposition, like when we say, everything considered food may earn interest, and a particular proposition: 'this plant is considered food or saffron is considered food.' This is similar to our saying: 'every intoxicant is unlawful, and this drink itself is an intoxicant; every just person is believed,' and 'Zayd is a just person; every adulterer is to be stoned—Māʿiz committed adultery, so therefore he is to be stoned.' The particular premise is infinite in its cases, and one is inevitably forced to resort to *ijtihād*, namely, *ijtihād* in ascertaining the *ratio legis* underlying the legal judgment, and that is not *qiyās* (analogical reasoning).
>
> An example of that is the principle of *al-ʿadl* (justice and fairness) in the Qur'anic verse: *Allah commands justice, the doing of good, and liberal giving to kith and kin.*[10]
>
> The appointment of a just and fair ruler is considered an instance of ascertaining the *ratio legis*, because

9. Abū Ḥāmid al-Ghazālī, *al-Mustaṣfā* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1413/1993), 282; see also Muḥammad al-Zarkashī, *al-Baḥr al-muḥīṭ* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1420/2000), 7:327.
10. Q16:90.

> you have applied a general principle, namely, *al-ʿadl*, to its particular cases and instantiations, that is, the appointment of rulers and designation of (legal) judges.[11]

In a similar fashion, with regard to the Qur'anic verse *the compensation is the equivalent of that which he has killed, of domestic cattle*[12], were a person on pilgrimage to kill a wild ass, his penalty would be to pay for a cow since it resembles the wild ass.[13]

This is the application of the general principle in a particular issue.

The second form affirms that a *ratio legis* found in the original case (and agreed upon by scholars) also exists in a new case under examination. This allows for the new case to be brought under the purview of the original case. This is exactly what the author of the *Marāqī al-suʿūd* (a didactic poem on Islamic legal theory) refers to when he says:

تَحْقِيقُ عِلَّةٍ عَلَيْهَا اؤْتُلِفَا فِي الْفَرْعِ تَحْقِيقُ مَنَاطٍ أُلِفَا

> Ascertaining a *ratio legis*—upon which there exists a scholarly agreement—in a new case is known as *taḥqīq manāṭ*.[14]

This definition is more precise than the first because the agreed-upon *ratio legis*, the moment we affirm it in the new case, constitutes *taḥqīq al-manāṭ*.[15]

An example of this is the following: According to Imam Mālik the *ratio legis* of *ribā* (usury) in foodstuff is essential nourishment

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11. al-Ghazālī, *al-Mustaṣfā*, 282; see also Aḥmad al-Qarāfī, *Anwār al-burūq* (Beirut: ʿĀlam al-Kutub, 1400/1980), 2:132.
12. Q5:95.
13. al-Ghazālī, *al-Mustaṣfā*, 282.
14. Muḥammad al-Shinqītī, *Nathr al-wurūd* (Mecca: Dār ʿĀlam al-Fawā'id, 1426/2005), 2:512.
15. al-Qarāfī, *Anwār al-burūq*, 2:133; see also: Ibrāhīm al-Shāṭibī, *al-Muwāfaqāt fi uṣūl al-fiqh* (Beirut: Dār al-Maʿrifah, n.d.), 3:44; Sayf al-Dīn al-Āmidī, *al-Iḥkām fi uṣūl al-aḥkām* (Beirut: Dār al-Kitāb al-ʿArabī, 1404/1983), 3:335; al-Zarkashī, *al-Baḥr al-muḥiṭ*, 7:325; Ibn al-Najjār, *Sharḥ al-Kawkab al-munīr* (Cairo: Maṭbaʿah al-Sunnah al-Muḥammadiyyah, 1373/1953), 532.

(*al-iqtiyāt*) and storability (*al-iddikhār*).[16] Imam Mālik (may Allah have mercy on him) was living in the Hijaz region at the time where figs were not considered essential nourishment nor storable, and for this reason the ruling of *ribā* was not applicable to it. When some of Imam Mālik's students travelled to Andalusia (Muslim Spain) they discovered that figs were viewed by her inhabitants as essential nourishment and stored, and so they affirmed the presence of the *ratio legis*, namely, essential nourishment and storability, in the novel case (in this instance) of figs on the basis of *taḥqīq al-manāṭ*. At the same time, they established the existence of a report by Mālik that confirmed that figs do incur *ribā*.[17]

Khalīl al-Jundī, the famous Maliki jurist, states in a short treatise of his that figs are not eligible for *ribā*—perhaps because figs were not stored in Egypt at that time. These are his words *verbatim*: "Food additives not eligible for *ribā* are…mustard seeds, saffron, green vegetables, medicine, figs, bananas, fruit, even if stored and stocked in a particular location."[18]

Similarly, if we believe that the *ratio legis* (*ʿillah*) in gold and silver is the characteristic of being a measurement of value or valuation (*al-thamaniyyah*),[19] and then find that paper money has become a measurement of value (*thaman*) serving as a medium of

16. Mālik ibn Anas, *al-Muwaṭṭaʾ* (Cairo: Jamʿiyyat al-Maknaz al-Islāmī, 1421/2000), 2:631; see also Abū al-Walīd al-Bājī, *al-Muntaqā sharḥ al-Muwaṭṭaʾ* (Beirut: Dār al-Kitāb al-Islāmī, 1400/1980), 4:240.
17. Muḥammad ʿIllaysh, *Manḥ al-Jalīl* (Beirut: Dār al-Fikr, 1409/1989), 5:15; see also: Muḥammad al-Ḥaṭṭāb, *Mawāhib al-Jalīl* (Beirut: Dār al-Fikr, 1422/2002), 4:346; Muḥammad al-Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl* (Beirut: Dār al-Fikr, n.d.), 5:57, 5:62; Muḥammad al-Dasūqī, *Ḥāshiyat al-Dasūqī* (Cairo: Dār Iḥyāʾ al-Kutub al-ʿArabiyyah, n.d.), 3:51; Aḥmad al-Dardīr, *al-Sharḥ al-kabīr*, printed in the margins of al-Dasūqī, *Ḥāshiyat al-Dasūqī*, 3:47; Aḥmad al-Ṣāwī, *Bulghat al-sālik* (Cairo: Dār al-Maʿārif, 1392/1972), 3:75. For the *ribā* narration reported from Imam Mālik, see Muḥammad al-Mawwāq, *al-Tāj wa al-iklīl* (Beirut: Dār al-Kutub al-ʿIlmiyyah, n.d.), 6:213.
18. Ṣāliḥ al-Azharī, *Jawāhir al-iklīl* (Beirut: al-Maktabah al-Thaqafiyyah, n.d.), 2:19.
19. Ibn Humām, *Fatḥ al-Qadīr* (Cairo: Maṭbaʿah al-Amīriyyah Bulāq, 1317/1900), 5:274; see also: ʿAlī al-ʿAdawī, *Ḥāshiyat al-ʿAdawī* (Beirut: Dār al-Fikr, 1402/1982), 2:140; Taqī al-Dīn al-Subkī, *Takmilat al-Majmūʿ sharḥ al-Muhadhdhab* (Baghdad: Maktabat al-Irshād, n.d.), 10:494; Manṣūr al-Buhūtī, *Kashshāf al-qināʿ* (Beirut: Dār al-Fikr, 1402/1982), 3:252.

exchange for things, then in this situation we use the process of *taḥqīq al-manāṭ* and ascertain that the *ʿillah*, which is present in the original case, is applied to the new case.

In essence, the process of *taḥqīq al-manāṭ* entails identifying problems as they appear in the real world (*al-wāqiʿ*), paying close attention to their real life circumstances, in order to then apply the ruling (*ḥukm*) of the original case. The difference between this process and *al-qiyās* (analogical reasoning) is that in the former one does not join something to an original case (so as to bring it within its purview), but instead one applies the ruling based on the *ʿillah* which has now acquired the status of a universal.[20]

Al-Shāṭibī states that "*al-ijtihād* is of two types: the first of them cannot come to an end unless legal obligation (*al-taklīf*) itself has ended, and that is at the time the Final Hour strikes. The second type can come to an end before the demise of this world. As for the first, it is the type of *al-ijtihād* connected to *taḥqīq al-manāṭ*, wherein there is no disagreement in the Muslim Community. What it means is that the ruling (*ḥukm*) is affirmed through its legal proof, but determining and identifying its locus (i.e. the locus of its application) remains."[21]

So, if al-Shāṭibī is the one who brought *taḥqīq al-manāṭ* to the fore in the area of classes of entities and individual entities by considering it a legal theoretical addition, suggesting that other Islamic legal theorists[22] have already dealt with other types of *ijtihād*, then Shaykh ʿAbd al-Wahhāb al-Shaʿrānī (may Allah have mercy upon him) applied to this type of *ijtihād* his famous *al-Mizān* (The Balance), a work of comparative Islamic jurisprudence. Juristic disagreement, he argues, results from the jurists' seeking a balance between strictness and ease, in light of the disparate conditions of those who are morally responsible to observe the law (*al-mukallafūn*): some people have the competence and strength to withstand the severities and difficulties of strict legal obligation, while others are weak or impoverished and thus require concession and ease. Indeed, al-Shaʿrānī uses this very principle to rebut the

20. For the difference between these two processes see al-Ghazālī, *al-Mustaṣfā*, 282–3, 286.
21. al-Shāṭibī, *al-Muwāfaqāt*, 4:89–90; see also al-Ghazālī, *al-Mustaṣfā*, 282.
22. Ibid., 99.

claim that the hadith of Ṭalq ibn ʿAli, which states "It is no more than a part of your body" had been abrogated by the hadith "Whosoever touches his private part, let him take ablution" as regards the question of whether a man's touching his private parts necessitates ablutions (*wuḍū'*). For al-Shaʿrānī, the first ruling took into consideration that Ṭalq was a desert Arab (*aʿrābī*), simple in his religious practice; while the second ruling was issued to a Companion (*ṣaḥābī*) whose commitment to the religion was unshakeable.

Commenting on this, al-Shaʿrānī (may Allah have mercy on him) states: "And of this is the saying of the Prophet (peace and blessings be upon him) in a hadith compiled by al-Bayhaqī and others: 'If anyone of you touches his private part (*dhakarahu*), let him take ablution'; in another version of the hadith: 'let him not pray ritual prayer until he has taken ablution'; and 'Whosoever touches his privates (*farjahu*), let him not pray the ritual prayer until he has taken ablution'; and in a version compiled by al-Bayhaqī: 'Any woman who touches her privates (*farjahā*), let her take ablution' in conjunction with the hadith of Ṭalq ibn ʿAli that Allah's Messenger (peace and blessings be upon him) said: 'It is no more than a part of your body.' The first hadith, in all its chains, demands rigor and is taken to apply to people able to sustain such stringency, whereas in the hadith of Ṭalq the demands are lessened, and it is taken to apply to those incapable of sustaining this rigor, as evidenced by the fact that Ṭalq was a camel shepherd."[23]

Also of this category is the hadith of ʿAdī ibn Ḥātim concerning the hunting of game when the Messenger (peace and blessings be upon him) answered him: "Eat that which you have shot and has subsequently died within sight, and leave that which you have shot and has died out of sight";[24] and forbade him to eat game if it had been shot, then disappeared from sight, without dying, in conjunction with the hadith of Abū Thaʿlabah al-Khushanī "When you shoot your arrow, and the game disappears from your sight for

23. ʿAbd al-Wahhāb al-Shaʿrānī, *al-Mizān al-kubrā* (Beirut: ʿĀlam al-Kutub, 1409/1989), 1:268.

24. This hadith was compiled by al-Ṭabarānī in his *al-Muʿjam al-awsaṭ* (hadith no. 5543), on the authority of Ibn ʿAbbās; and by al-Bayhaqī in his *al-Sunan al-kubrā* (hadith no. 19374), on the authority of Ibn ʿAbbās, in the chapter Setting Off Trained Dogs on Game.

three days, and you finally catch up with it, then eat so long as it does not emit a foul stench".[25]

Al-Ghazālī provides the rationale in his *Iḥyā' ʿulūm al-dīn* that the particular condition of the former called for a severe ruling, while the particular condition of the latter, who was a poor person in need of food, called for concession. He goes on to say:

> It is thus that the Prophet (peace and blessings be upon him) said to ʿAdī ibn Ḥātim concerning the trained hunting dog: "If it has eaten of the game, then do not eat of it, for I fear that the dog might have caught it for itself [rather than for its owner]"; to maintain a pure state (*li al-tanzīh*) because of the fear that it might have caught it for itself rather than for its owner. Whereas, on the other hand, he said to Abū Thaʿlabah al-Khushanī: "Eat of it," and the latter asked: "Even if it had eaten from it?" He (the Prophet) replied: "Even if it had eaten from it." The reason is that the condition of Abū Thaʿlabah, who was a poor man earning a living, was unable to endure and sustain this level of piety whereas ʿAdī's condition was to the contrary.[26]

Al-Qurṭubī refers to this harmonization between the two hadiths in his Qur'anic commentary (*tafsīr*): "When there is an apparent contradiction between two narrations, our colleagues from the Maliki school and others endeavor to join between them, and take the hadith containing the prohibition of the action to mean maintaining a pure state (*al-tanzīh*) and a high level of piety (*al-waraʿ*), and the hadith containing the sanctioning of the action to mean permissibility. They maintain that ʿAdī was materially well off, and hence the Prophet (peace and blessings be upon him) issued a fatwa

25. This hadith was compiled by Aḥmad, *Musnad* (Beirut: Mu'assasat al-Risālah, 1420/1999), 4:194.17896; and by Muslim in his *Ṣaḥīḥ* (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī, 1374/1955), 3:1532.1931, Book of Game and Slaughtered Animals: when the game disappears out of one's sight, and then one finds it; and compiled by Abū Dāwūd in his *Sunan* (Cairo: Jamʿiyyat al-Maknaz al-Islāmī, 1421/2000), 2:124.2861, chapter on hunting.

26. al-Ghazālī, *Iḥyā' ʿulūm al-dīn* (Cairo: Dār al-Shaʿb, n.d.), 5:816.

directing him to abstain from eating the game out of piety, whereas Abū Thaʿlabah was poor and deprived, and hence he issued a fatwa directing him towards the permissibility of eating it. And Allah knows best."[27]

Imam al-Ḥaramayn al-Juwaynī states the issue in somewhat exaggerated terms, and considers the views of scholars in contemporary, real world situations as akin to abrogation on the tongues of the prophets. Here is what he (may Allah have mercy upon him) says: "The scholarly position that lifts the veil and eliminates obscurity is that the Command belongs to Allah, and the prophet executes it, and should a prophet not exist in a particular period of time, then the scholars are the heirs of the Divine Law and take the place of the prophets in executing it. And amongst the eloquent statements concerning their position and status is that during the time of the messengers it is expected that religious rulings are substituted via abrogation; and so the new opinions that come to the minds of those scholars who issue fatwas as well as the continuous changing of their *ijtihādāt* (views arrived at via independent juristic reasoning) transform the laws of Allah with respect to those who seek fatwas, such that their ruminations and ponderings on the laws of Allah have now taken the place of those propositions of Allah's commands that have been substituted via abrogation."[28]

The difference in definition is one of form and not substantive meaning. The conclusive word on *taḥqīq al-manāṭ* is that it serves as a bridge between a ruling of a known *ʿillah*, a *manāṭ* that is sufficiently described, and a locus (*maḥall*) of application that is definitive and particular for the purpose of ascertaining and affirming the *ʿillah*, that is to say, making the *ʿillah* stable and firm from which follow the rulings that are related to it. The locus could be a physical entity perceptible to the senses such that sense perception is employed to pass a judgment pertaining to ascertaining the *manāṭ* of the ruling and thereafter applying to it the subsequent legal rulings.

It is for this reason that it requires two premises, like water

27. Muḥammad al-Qurṭubī, *al-Jāmiʿ fī aḥkām al-Qurʾān al-karīm* (Beirut: Muʾassasat al-Risālah, 1427/2006), 7:306.
28. Abū al-Maʿālī al-Juwaynī, *Ghiyāth al-umam* (Alexandria: Dār al-Daʿwah, 1399/1979), 246.

being characterized as *muṭlaq* (that is, water *qua* water without qualification) or as *mutaghayyir* (that is, water that has changed in some of its essential properties) so as to apply the ensuing legal rulings that hinge on the *ʿillah* of purification.[29]

This belongs to the category of *taḥqīq al-manāṭ* as it relates to individual entities (*al-aʿyān*) as referred to by Ibn Taymiyyah: "Likewise they also agree on the legal device of *taḥqīq al-manāṭ*, which is when the Lawgiver attaches a legal ruling to a universal import and then the Muslim legal practitioner looks for its affirmation in classes of entities or individual entities, like when the Lawgiver orders facing the direction of the qibla, or when He orders using the testimony of two witnesses from amongst our men folk such as we choose for witnesses, or when He declares wine unlawful."[30]

What is required now—in addition to classes of entities, individual entities, and persons—is that we apply the principle of *taḥqīq al-manāṭ* also to the states of communities and nations and the circumstances occasioned by time and place. The *manāṭ* of a ruling may also be an abstract quality like reliability (*al-ʿadālah*) for ascertaining the presence of reliability in a particular individual and then applying the ensuing legal rulings of presenting testimony and guardianship based on that, except that *taḥqīq al-manāṭ* in this case is really *tanzīl al-ḥukm* (that is to say, applying the legal ruling to the circumstance or context). It is, however, possible for the two processes to be distinct, such that *tanzīl al-ḥukm* is a subsequent stage in the process, while the *manāṭ* is ascertained through the first premise according to al-Shāṭibī,[31] that is, ensuring that the water is *muṭlaq* (i.e. water, without qualification), and then applying the ensuing ruling that purification with that water is permissible.

Taḥqīq al-manāṭ in this context is diagnosing the issue in terms of a real world situation or context (*al-wāqiʿ*). So if it is a contract, for example, then the diagnosis proceeds by becoming familiar with its components, elements, and stipulative conditions. And if the matter concerns a particular entity that requires a legal ruling be passed on it like paper money, then the researcher needs to acquaint

29. See al-Ghazālī, *al-Mustaṣfā*, 286; al-Shāṭibī, *al-Muwāfaqāt*, 4:92–4.
30. Ibn Taymiyyah, *Majmūʿ al-fatāwā* (Mansoura: Dār al-Wafāʾ, 1421/2001), 19:12.
31. al-Shāṭibī, *al-Muwāfaqāt*, 3:45.

himself with the history of currencies and their function in money circulation, dealing, and exchange. Likewise he needs to acquaint himself with the change that affected these currencies throughout the passage of time—change connected to the cash entity itself like the evolution of precious metals into money,[32] or connected to the authority in charge, that is to say, the particular authority issuing the currency, or to goods and services. This is the "stage of adaptation and prescription" (*al-takyīf wa al-tawṣīf)*, which the Islamic legal theorists denote by the term *taḥqīq al-manāṭ* because it is the application of an agreed-upon general principle to a definite real world context or to a particular instance of the individual cases that are subsumed under that principle.

This stage is indispensable for the Muslim jurist and cannot be done without, because issuing a judgment on something is contingent on its conceptualization,[33] and without this conceptualization and representation it is possible that the ruling so issued is not correct because it did not find a locus for its correct application.

The importance of this stage is heightened when we realize that the complexity of modern-day contracts and transactions and their

32. All of the relevant information in this context derives from the science of numismatics, which investigates currencies, their types, and history. It derives from the Arabic *nummī*, that is, balance weights or coins containing led or copper. Amongst the most well-known classical Arabic writings in this field are: Abū al-ʿAbbās al-Sabtī's treatise *Ithbāt mā laysa lahu budd* (Abu Dhabi: al-Majmaʿ al-Thaqafī, 1419/1999); al-Maqrīzī's *al-Nuqūd al-Islāmiyyah* (Najaf: al-Maktabah al-Ḥaydariyyah, 1386/1967); al-Balādhurī's last section in his *Futūḥ al-buldān* (Cairo: Maktabat al-Nahḍah al-Miṣriyyah, 1375/1956); and ʿAlī Mubārak Bāshā's twentieth part on Arab currency in his *al-Khiṭaṭ al-tawfiqiyyah* (Bulaq: al-Maṭbaʿah al-Kubrā al-Amīrīyyah, 1305–06/1888–89). This is in addition to what Anistās al-Karmilī has written in his *al-Nuqūd al-ʿArabiyyah* (Cairo: al-Maṭbaʿah al-ʿAṣriyyah, 1357/1939) and Sheikh Muṣṭafā al-Dhahabī in his *Taḥrīr al-dirham* (Cairo: Maṭbaʿat Muḥammad Shaʿrāwī, 1282/1865).

33. This is one of the well-known methodological principles that permeate the process of rational argument in all sciences and disciplines. See for example its employment with some important and special details in the type of rational argument produced in: Ibn Amīr Ḥājj, *al-Taqrīr wa al-taḥbīr* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1419/1999), 2:83; Aḥmad al-Nafrāwī, *al-Fawākih al-dawānī* (Beirut: Dār al-Fikr, 1420/2000), 1:113; al-ʿAṭṭār, *Ḥāshiyat al-ʿAṭṭār*, 1:296.

composition based on elements that were not present in the contracts and transactions known to the past Muslim jurists like: sales contracts (*al-bayʿ*),[34] forward contracts (*al-salam*),[35] leasing and hiring (*al-ijārah* or *al-kirāʾ*),[36] a silent or speculative partnership (*al-qirāḍ*),[37] loans (*al-qarḍ*),[38] sharecropping arrangements based on irrigation (*al-musāqāh*)[39] or on cultivation (*al-muzāraʿah*),[40]

34. Concerning the definition of *al-bayʿ* al-Ḥaṭṭāb states, "al-Zannātī mentions in the *Sharḥ al-risālah* (Commentary on the Treatise) that the dialect of Quraysh is to use *bāʿa* (to sell, from the trilateral root b-y-ʿ) to mean 'to take out from one's possessions', and *ishtarā* (to buy, from the trilateral root sh-r-y) to mean 'to enter into one's possession'. Furthermore, he says, 'This is lexically more correct and eloquent, and that is what the scholars have concurred on so as to facilitate understanding.'" *Mawāhib al-Jalīl*, 4:222.
35. "*Al-salam* is the designated name for a contract that renders ownership to the selling party of a capital-sum [price] that is paid in advance, and to the buying party of a priced item that is deferred." Muḥammad al-Jurjānī, *Kitāb al-taʿrifāt* (Beirut: Dār al-Kitāb al-ʿArabī, 1405/1984), 160.
36. *Al-ijārah* is a contract over a usufruct in exchange for a compensation that takes the form of money. Transferring ownership of usufruct with compensation (in exchange for the usufruct) constitutes leasing (*ijārah*) and without compensation constitutes lending (*iʿārah*). As for *al-kirāʾ*, according to its lexical sense, it is a rental charge (*ujrah*). According to the Maliki scholars it is different in meaning from *al-ijārah* based on what al-Ḥaṭṭāb transmits in his commentary on Khalīl's short treatise: "Transferring the ownership of usufruct of human beings is the special designation of the term *al-ijārah*, and [transferring the ownership of] usufruct of possessions [other than human beings] is the special designation of the term al-*kirāʾ*." *Mawāhib al-Jalīl*, 7:493.
37. "*Al-qirāḍ* is the same as *al-muḍārabah* and is defined as a [partnership] contract based on the sharing of profits that accrue from the [input of] capital by one person and labor by another." al-Jurjānī, *Kitāb al-taʿrifāt*, 278.
38. "*Al-qarḍ* is transferring the ownership of something on the basis that its equivalent is returned." Muḥammad al-Shirbīnī, *Mughnī al-muḥtāj* (Beirut: Dār al-Fikr, n.d.), 2:117.
39. "*Al-musāqāh* is allowing someone access to trees for the purpose of maintaining them in exchange for a portion of their fruits." al-Jurjānī, *Kitāb al-taʿrifāt*, 271.
40. "*Al-muzāraʿah* is a contract for planting in return for a portion of the produce." Qadi Zādah, *Takmilat Fatḥ al-Qadīr* (Cairo: Maṭbaʿah al-Amīriyyah Bulāq, n.d.), 8:32.

guarantee or surety (*al-kafālah*),[41] agency contracts (*al-wakālah*),[42] and others.

So here the jurist pauses for a moment in order to figure out the constituent components of the contract, and to reduce it to its basic elements so as to establish its nature; might it comprise a condition that contravenes the norm of both agreed-upon and disagreed-upon contracts?

It is clear that the process of diagnosis in large part requires the Muslim jurist to refer to the contexts of these transactions and the principles of interaction that the people followed before he measures them against the Shari'ah standard.

I believe that the disagreement among the members of the fiqh academies on a number of issues returns to a difference in conception and diagnosis among research scholars more than a difference in understanding of the Islamic legal texts. The difference here is one of the relationship of the issue to those texts and the perspective from which the jurist is viewing it, or the quality and accuracy of the research presented to the jurist. Or the difference could be one of observation such as when the object to which the judgment is applied implies two conditions, yet the mufti issues a legal verdict based on one of the two conditions whilst disregarding the other, as stated by al-Bannānī.

Therefore, it is highly important that economists, doctors, politicians, social scientists, as well as other professionals and specialists, exert their utmost in making available to their colleagues in the field of Shari'ah all the elements and components within their expertise, in order for Shari'ah specialists to ascertain the *ratio legis* (*al-manāṭ*) for the purpose of applying judgment to the context surrounding the contracts and the reality of the particular entity involved. This (essentially) is our topic.

41. *Al-kafālah*, *al-ḥimālah*, *al-ḍamānah*, and *al-zaʿāmah* have literally and lexically all the same meaning, and technically they are all used to denote the joining of another liability (in addition to the initial liability) to the original obligation (that is to say, the original debt, resulting in a joint liability). According to the jurists, it is of two types: *al-kafālah bi al-māl* (financial guarantee) and *al-kafālah bi al-badan* (bodily guarantee).

42. "*Al-wakālah*, technically, is for Person A to authorize Person B to act as his agent, during his lifetime, regarding some action which Person A himself is qualified to enact and which permits delegation." al-Shirbīnī, *Mughnī al-muḥtāj*, 2:217.

In short, the ascertainment of the *ratio legis* is the means by which Islamic rulings are applied to real world situations. This is because Islamic rulings post-revelation hinge on particular cases and real world contexts, or the external world (i.e. the world out there) as mentioned by classical logicians. This external world is constructed and arranged according to human existence in terms of its spaciousness and constriction, abundance and scarcity, necessities, and needs.

The absoluteness of legal rulings is qualified by their qualifying constraints, and their generality specified by their specifying characteristics. It is for this reason that the discourse of legal conventions (*khiṭāb al-waḍ*ᶜ)[43] comprises stipulative conditions (*shurūṭ*),[44] causes (*asbāb*),[45] impediments (*mawāni*ᶜ),[46] concessionary laws (*rukhaṣ*),[47] and strict laws (*ᶜazā'im*),[48] so as to forge a relationship between the discourse of defining law and its categories; such as requesting commission, requesting omission and permissibility, on the one hand, and the real world context with its tractability, ease, and coercions, on the other.

Application of legal rulings, in the above sense, requires understanding of both Islamic legal judgments and the particular details of the contemporary situation to which those rulings are

43. The discourse of legal convention (*khiṭāb al-waḍ*ᶜ) is defined "as the establishment of something as a cause, a stipulative condition, or an impediment". ᶜAbd al-Raḥmān al-Isnawī, *al-Tamhīd*, 4th ed. (Beirut: Mu'assasat al-Risālah, 1400/1980), 1:434.

44. "A stipulative condition (*sharṭ*) is that whose absence necessitates absence [of the ruling], and whose presence does not necessitate presence nor absence of the ruling in itself." al-Zarkashī, *al-Baḥr al-muḥīṭ*, 4:437.

45. "A cause (*sabab*) is defined as an attribute that is evident and constant and which the Islamic transmissional tradition (*al-samᶜ*) has identified as an indicator of an Islamic legal ruling, like declaring the declining of the sun as an indicator of the obligation of a particular prayer." Ibid., 1:246.

46. "An impediment (*māniᶜ*) is that whose presence necessitates the absence of the ruling like debt in conjunction with the obligation of zakat, and fatherhood in conjunction with retaliation law (*qiṣāṣ*)." Ibid., 249.

47. "Concessionary law (*rukhṣah*) is that which is legislated due to a valid excuse while the unlawful object [in respect to which the concessionary law has been legislated] still stands had it not been for the excuse." Yaḥyā al-Rahūnī, *Tuḥfat al-mas'ūl* (Dubai: Dār al-Buḥūth li al-Dirāsāt al-Islāmiyyah wa Iḥyā' al-Turāth, 1402/2002), 1:98.

48. "Strict law (*al-ᶜazīmah*) is that which has been legislated for general rulings from its very inception." al-Qarāfī, *Anwār al-burūq*, 1:177.

to be applied, such that no element is neglected that could influence—whether directly or indirectly—the dialectic between the contemporary situation and the legal evidentiary texts; a dialectic that must comprehend the universal and particular aspects of the legal text with the utmost accuracy, and correctly assess contemporary and future contexts, as well as the probable impact of the ruling is judging its appropriateness.

Thus, the ascertainment of the *manāṭ* (*ratio legis*) of a particular judgment is weighed against the balance of benefits and harms sanctioned and endorsed by Divine Law, in both its universal and particular applications, and against the criterion of investigative human reason. This is what forms the subject-matter of the present volume. This is in order to focus attention on its importance and to use the opportunity to review many rulings, which if the general import of their texts were left general and their absolute import left absolute, without resorting to specifying the general in the former case and qualifying the absolute in the latter, and without taking into consideration the contemporary real world context, then benefits sanctioned by the universal principle of the Divine Law and given precedence over the particular in both rank and conventional usage will have been lost. It is in this context that we understand al-Qarāfī's statement: "Rigidity in relation to the transmitted texts inevitably constitutes misguidance in religion and ignorance of the objectives of the learned scholars among the Muslims and the pious predecessors,"[49] and that of Ibn al-Qayyim: "Anyone who issues a legal verdict to people based solely on what is transmitted in books despite the fact that these people differ in their customs, traditions, times, locations, states, and circumstances has gone astray and will cause others to go astray. The abuse which he has inflicted on religion is greater in magnitude than the abuse inflicted by a physician on the bodies of people all of whom he treats from what he finds in a single manual on medicine notwithstanding differences in country, custom, time, or natural disposition. In fact, this ignorant physician and this ignorant mufti constitute the greatest harm to people's religious and physical wellbeing and we seek Allah's help against such people."[50]

49. Ibid.
50. Ibn al-Qayyim al-Jawziyyah, *Iʿlām al-muwaqqiʿīn* (Beirut: Dār al-Jīl, 1393/1973), 3:78.

Why *Taḥqīq al-Manāṭ* in Fiqh-Based Issues?

For Muslims, fiqh issues represent a devotional and legal system that governs the normative and behavioral order in the life of the individual and society. In addressing these issues, there must be constant awareness of contemporary life, which is witnessing huge changes in all fields of knowledge from atoms to galaxies, and mind-boggling developments in all areas from the very bottom of society to the very top in political, social, economic and financial matters, and international relations as a result of the integration of nations, and convergence of cultures to the extent of it exerting influence in the sphere of religious devotion and encroaching upon the sphere of religious belief.

Under the influence of what is called "globalization" or "mondialization" international systems, global declarations, and the systems of exchange and transaction have become part of domestic systems. A great deal of content spreads from these international systems and institutions to constitutions that are considered the foundational documents of the internal and domestic affairs of states and nations. All of this is happening in a time when independent juristic reasoning is retreating, legal extrapolation receding into oblivion, the field of creativity shrinking and diminishing, and a lack of understanding is prevailing—all of which serve to disturb the harmony and balance, and adversely affect the cohesion of society, splitting it into two mutually opposing camps.

The first camp feels dejection and despair towards the Islamic juristic system and has turned its attention away from it, and has become enamored and dazzled by Western enlightenment and modernization. This is the same enlightenment which Kant defined as thinking without a ceiling (limit), thinking that is neither guided by a book nor counseled by a pastor, or thinking for which diet is to be prescribed by a physician.[51]

51. Translator's note: The reference here is to Immanuel Kant's words "Habe ich ein Buch, das für mich Verstand hat, einen Seelsorger, der für mich Gewissen hat, einen Arzt, der für mich die Diät beurteilt u.s.w., so brauche ich mich ja nicht selbst zu bemühen. [If I have a book that thinks for me, a pastor who

And this is the same modernization which, according to Max Weber, refers to "a bundle of processes that are cumulative and mutually reinforcing: to the formation of capital and the mobilization of resources; to the development of the forces of production and the increase in the productivity of labor; to the establishment of centralized political power and the formation of national identities; to the proliferation of rights of political participation, of urban forms of life, and of formal schooling; to the secularization of values and norms".[52]

On the opposite side of this camp is another group that does not comprehend religious texts except some of their external, apparent meanings, and tries to live in the past at the expense of the present and the future, such that its knowledge is little, its understanding narrow, and its capacity for independent juristic reasoning (*ijtihād*) extinguished.

In our estimation there is a unique methodology that combines the guidance of revelation and the precision of reason, authentically rooted (*aṣīlan*) in its premises and remarkably modern (*ḥadīthan*) in its treatment and handling of issues, that fully grasps the principles of interacting with the Qur'an and Prophetic tradition both in their explicit spoken meaning (*manṭūq*) and implicitly understood (*mafhūm*), and in their semantic and rational aspects. Moreover, it expands the circle of independent juristic reasoning in all its three types, especially *taḥqīq al-manāṭ* in order to give prominence to universals and give them preference over a particularized type of reasoning that causes the Muslim Community to forever engage in mutual mudslinging and rivalry around every issue that is of a particular and derivative nature in diverse areas such as the social, economic, legal, organizational, political, and co-existential.

In every area it is possible to enumerate tens of issues that if they were to be investigated from a universal reasoning perspective, it would be possible to find solutions that would alleviate the excessive dissention. They are universals that have three sources:

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acts as my conscience, a physician who prescribes my diet, and so on, I need not exert myself at all.]" Kant, "What is Enlightenment?", in *Kant on History*, ed. Lewis White Beck (New York: Macmillan Publishing Company, 1963), 3.

52. Jürgen Habermas, *The Philosophical Discourse of Modernity*, tr. Frederick Lawrence (Cambridge: MIT Press, 1998), 2.

Divine Law in terms of religious texts (*nuṣūṣ*) and higher objectives (*maqāṣid*), public interest, and time and place. Based on this, these universals are formulated and the particulars rendered manageable in confirmation of al-Shāṭibī's statement "Deficiency in a universal leads to a disruption of the entire system of the world". He further states in his *al-Muwāfaqāt*: "The rule that has been established in its appropriate place is that when there is a conflict between a universal and a particular issue, then the universal is given preference over the particular, since the latter necessitates an interest of particular proportions while the universal an interest of universal proportions. Furthermore, the system of the world does not suffer disruption with the disruption of a particular interest, contrary to when consideration of the particular interest is advanced ahead of the universal interest, for then the universal interest, the whole system of its universality, is disrupted."[53]

So, if the results, as we have seen in the Islamic legal academies, point to an inability to interact with both context and rulings, and occasionally to a lack of rigor in legal inference and extrapolation, then this will serve as an incentive to review the lost and abandoned tools of legal rule production and independent juristic reasoning and revive what has been effaced and obliterated. This is because disregard for the real world context leads to the legislation of rulings outside their appropriate areas of application. Similarly, the negligence in rendering rulings free from their restrictions causes the intended benefits behind these rulings to be forfeited and instead leads to harm from which these rulings are inherently free. This is all because applying commands and prohibitions without looking into the form of the issue and the state of the legally competent person might lead to the total opposite of what was intended by the ruling.

Today we are indeed in need of a new reading to remind us of the universals that represent the building blocks of legal extrapolation by linking together universals and particulars—particulars that await being joined to a universal—or inferring a new universal based on the interactions of time and the coercions forced upon us by time and place, or clarifying the relationship of a universal that

53. al-Shāṭibī, *al-Muwāfaqāt*, 1:324.

was obscure or absent in the debris of times gone by to the particular that our time is bringing to the fore.

In this regard, the Qur'an and Prophetic tradition continue to be an ever-shining lamp by which the gloom of darkness is lit and an ever-gushing spring from which the thirst of the midday heat is quenched through tried and tested legal instruments coupled with insight into the contemporary context.

The classical legal extrapolations were correct in their time, and some continue to be correct. The new and modern extrapolations that are based on a sound foundation as regards ascertaining the *ratio legis* are also correct. To a certain extent they resemble the relationship between classical mathematics, which provided plausible solutions within the epistemic and realist paradigms of their time, and modern mathematics, which provides solutions that are plausible and relevant for the age in which we live.

Is there a way of applying the Shari'ah and belief to the universal of era and time, and of finding commonalities and norms that will put out the flames of discord and dissent while facilitating accord and consent by way of ascertaining a universal *ratio legis* like justice and beneficence? This is what we are striving to achieve by exploring one of the doors of *ijtihād* (independent juristic reasoning) in the area of fiqh, which constitutes a problem for some and a solution for others. It is as though such juristic reasoning were, at once, both the cause and the impediment to the solutions sought!

A CLEAR INSTANCE OF AN ERRONEOUS APPLICATION OF *TAḤQĪQ AL-MANĀṬ*, AND ITS IMPACT

For the purpose of added clarity and lucidity we provide an example of an erroneous application of *taḥqīq al-manāṭ* that has brought upon the Muslim Community the affliction of *takfīr* (declaring or labeling someone an unbeliever). The perpetrators of *takfīr* interpret the Qur'anic verse "Whosoever rules not by that which Allah has revealed: such are the *kāfirūn* (lit. unbelievers)"[54] to mean merely when there is an absence of rule according to Divine Law. This particular point is probably the most dangerous element in

54. Q5:44.

the *takfīrī* thought and ideology on which the claim of declaring Muslim rulers of our time as unbelievers hinges. This issue requires a proper and more accurate treatment that we will conduct in two parts:

Firstly, interpreting the above-cited Qur'anic verse from Surah al-Mā'idah in the same way as Ibn ʿAbbās has interpreted it when he says: "Whosoever rejects rule according to that which Allah has revealed has indeed committed unbelief (*fa qad kafara*) and whosoever affirms it but does not rule by it is a wrongdoer and transgressor (*ẓālim fāsiq*)."[55] This pertains to the semantic signification of the words, and the scholars of the era of the pious predecessors (*al-salaf*) are in unanimous agreement that this verse is not to be interpreted literally, and that *kufr* therein is not of the type that takes one out of the fold of Islam.[56]

Secondly, that failure to apply certain rules could be viewed in opposition to the presence of particular necessities that have entered into the domain of the Muslim leader or head of state (*imām*), who presides over the implementation of the Shari'ah and guards the Muslim territories. The Prophetic way was to refrain from taking to task those who were known and confirmed hypocrites, as the following statement of Imam al-Ḥaramayn points out: "The Prophet (peace and blessings be upon him) used to treat the hypocrites with courtesy while knowing with absolute certainty

55. Ibn Jarīr al-Ṭabarī, *Jāmiʿ al-bayān* (Beirut: Mu'assasat al-Risālah, 1420/2000), 10:357. Also compiled by al-Ḥākim in his *al-Mustadrak* from the chain of Sufyān ibn ʿUyaynah, who reported from Hishām ibn Juḥayr, who reported from Ṭāwus, who reported from Ibn ʿAbbās: "It [i.e. *al-kufr* mentioned in the verse] is not the *kufr* that they assert, nor the *kufr* that takes you out of the fold of Islam: 'Whosoever rules not by that which Allah has revealed: such are the *kāfirūn* (lit. unbelievers).' It is *kufr* that falls short of [true] unbelief." This is his wording. Then he [al-Ḥākim] said: "This is a hadith that has an authentic chain of narrators and which they [al-Bukhārī and Muslim] did not compile [in their respective *Ṣaḥīḥ* collections], and al-Dhahabī says '[it is] authentic'." Muḥammad al-Ḥākim, *al-Mustadrak* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1411/1990), 2:313.

56. al-Ṭabarī, *Jāmiʿ al-bayān*, 10:357; al-Ḥusayn al-Baghawī, *Maʿālim al-tanzīl*, 4th ed. (Riyadh: Dār Tayyibah li al-Nashr wa al-Tawzīʿ, 1417/1997), 3:61; Fakhr al-Dīn al-Rāzī, *Mafātīḥ al-ghayb*, 6:68; Ibn Kathīr, *Tafsīr al-Qur'ān al-ʿAẓīm*, 4th ed. (Riyadh: Dār Tayyibah li al-Nashr wa al-Tawzīʿ, 1420/1999), 3:120; Ibn ʿĀshūr, *al-Taḥrīr wa al-tanwīr* (Tunis: Dār Saḥnūn li al-Nashr wa al-Tawzīʿ, 1417/1997), 1:375.

and undeniable revelation their hypocrisy and animosity towards the Muslims, and he is the exemplar and ideal model of conduct (*al-qudwah al-uswah*)."[57]

These propagators of *takfīr* are not entitled to undertake this type of *taḥqīq al-manāṭ*. Instead, it must be determined by the governing authority just as ʿUmar ibn al-Khaṭṭāb (may Allah be pleased with him) had done when he suspended some of the rulings, acting so in his capacity as the head of state, not as an abrogation of a revealed text, nor as a rejection of something that has been established as being part of religion on the basis of self-evident knowledge. Rather, it was a way of managing the affairs of Muslims in the field of practical application; that is to say, it was a way to regulate and control the relationship between the text and the context based on necessities, exigencies, and coercions, which have the potential to adversely affect Muslim interests in the religious and worldly domains, while at the same time being in harmonious agreement with interests that carry Shariʿah compliance and endorsement and being far removed from whim and fancy and contraventions of the Shariʿah.

The Legal Authority of *Taḥqīq al-Manāṭ*

We may ask: what is the legal authority of this type of *ijtihād*?

It is the Holy Qur'an, the Prophetic Sunnah, and praxis of the Pious Predecessors of this Community. It is stated in the Holy Qur'an:

> *But if anyone fears partiality or wrong-doing on the part of the testator, and makes peace between [the parties concerned], there is no sin for him: For Allah is Oft-forgiving, Most Merciful*[58]

> *If you fear treachery from any group, throw back [their*

57. al-Juwaynī, *Ghiyāth al-umam*, 171.
58. Q2:182.

covenant] to them, [so as to be] on equal terms: for Allah does not love the treacherous[59]

If you fear a breach between them, appoint [two] arbiters, one from his family, and the other from hers[60]

All of these verses—in addition to numerous others—contain a legal grounding and justification for *taḥqīq al-manāṭ* because they all point to future outcomes.

In the Prophetic traditions there are numerous texts of this sort, like the question concerning the sale of fresh dates for dried dates, and the Prophet (peace and blessings be upon him) asked: "Do they diminish in weight if they become dry?", and the reply was "Yes", and he said: "In that case, no!"[61] In another tradition he is reported to have said: "Why do they not ask if they know not, for verily the

59. Q8:58.

60. Q4:35.

61. Mālik, *al-Muwaṭṭaʾ*, 2:624.1293, Book of Sales, chapter on what is detestable of the sale of dates; Abū Dāwūd, *Sunan*, 2:271.3359, Book of Sales, chapter on dates; al-Tirmidhī, *Sunan al-Tirmidhī* (Cairo: Jamʿiyyat al-Maknaz al-Islāmī, 1421/2000), 3:528.1225, Book of Sales, chapter on what has been reported on the prohibition of *al-Muḥāqalah* (sale of grain while still in the process of growing in return for grain harvested) and *al-Muzābanah* (sale of dates while still growing on palm trees in return for dates harvested)—wherein al-Tirmidhī states, "This a hadith which is *ḥasan ṣaḥīḥ* (good-cum-authentic). The current practice is based on this hadith according to the People of Knowledge, and is the view of Imam al-Shāfiʿī and our companions"; al-Nasāʾī, *Sunan*, 4:22.6136, Book of Sales, chapter on selling fresh dates for dried dates. All of the above reported it on the authority of Zayd ibn Abī ʿAyyāsh. Al-Ḥākim compiled it in his *al-Mustadrak*, 2:45.2266, also on the authority of Zayd ibn Abī ʿAyyāsh, saying: "This is an authentic hadith due to (a) the unanimous consensus of the scholars of hadith transmitting on Mālik ibn Anas's [undisputed] authority and Imamate [in this regard], and that he was meticulous and precise in everything that he reported in terms of hadith, since nothing was found in his reports except authentic [narrations], particularly with regard to the hadith of the People of Medina; and (b) these scholars following up [on all the chains] in which Mālik narrated from ʿAbdullāh ibn Yazīd. The Two Shaykhs [al-Bukhārī and Muslim] did not compile this hadith due to their reservation about the unknown identity of Zayd ibn Abī ʿAyyāsh."

cure of ignorance is asking."[62] This he said in connection with the person who issued a legal verdict instructing a wounded person, who had requested the verdict, to take a bath, from which the latter had subsequently died. Likewise, Allah's Messenger (peace and blessings be upon him) said to Aishah: "Have you not seen that when your people built the Kaaba, they fell short of the foundations laid by Abraham." So she said, "O Messenger of Allah, why do you not return it to the foundations laid by Abraham?" He replied, "Were it not that your people had just recently been in a state of unbelief, I would have done so."[63]

Similarly, we find such instances in the practice of the rightly guided caliphs like Abū Bakr al-Siddīq's writing down and compilation of the Qur'an,[64] and his fighting of those who refused to pay the zakat.[65] The same can be said for what ʿUmar did in the case of the *kharāj* (land-tax),[66] when he proscribed the share of

62. Abū Dāwūd, *Sunan*, 1:145.336, Book of Cleanliness, chapter on the wounded person performing dry ablution (*yatayammam*), on the authority of Jābir ibn ʿAbdullāh; Ibn Mājah, *Sunan*, Book of Cleanliness and Its Supererogatory Acts, chapter on the wounded person when he in a state of major ritual impurity (*al-janābah*) who fears for his health were he to take a full bath, on the authority of Ibn ʿAbbās.

63. This hadith has had its veracity agreed upon and attested to (*muttafaqun ʿalayh*) by both al-Bukhārī and Muslim, narrated on the authority of Aishah (may Allah be pleased with her); Mālik, *al-Muwaṭṭa'*, 1:363.807, Book of Hajj, chapter on what has been reported concerning the building of the Kaaba; al-Bukhārī, *Ṣaḥīḥ* (Cairo: Jamʿiyyat al-Maknaz al-Islāmī, 1421/2000), 2:573.1506, Book of Hajj, chapter on the excellence of Mecca and its construction; Muslim, *Ṣaḥīḥ* (Cairo: Jamʿiyyat al-Maknaz al-Islāmī, 1421/2000), 2:179:1333, Book of Hajj, chapter on the demolition of the Kaaba and rebuilding it.

64. al-Bukhārī, *Ṣaḥīḥ* (hadith no. 4968), Book on the Virtues of the Qur'an, chapter on the compilation of the Qur'an; al-Tirmidhī compiled it in his *Sunan*, 5:283.3103, Book of Qur'anic Exegesis [as Received] from the Messenger of Allah (peace and blessings be upon him), chapter on Surah al-Tawbah. He (al-Tirmidhī) said: "[This hadith is] *ḥasan ṣaḥīḥ* (good-authentic)"; Aḥmad [also] narrated it [hadith no. 22269]. All of the aforementioned narrated this hadith on the authority of Zayd ibn Thābit.

65. The incident of fighting those who refused to pay the zakat is *muttafaqun ʿalayh* on the authority of Abū Hurayrah (may Allah be pleased with him). Al-Bukhārī compiled it in his *Ṣaḥīḥ*, 2:507.1335, Book of Zakat, chapter on the obligation of zakat; and Muslim in his *Ṣaḥīḥ*, 1:51.32, Book of Faith, chapter on the order to fight people until they utter "There is no God but Allah (and) Muhammad is the Messenger of Allah".

66. ʿUmar's action concerning the land-tax has been reported by al-Bayhaqī on

those whose hearts had recently been reconciled and to be won over (*al-mu'allafah qulūbuhum*),[67] and when he suspended the punishment for theft;[68] and so too concerning the practice of ʿUthmān when he prayed salat in full during hajj,[69] and instituted the first adhan during the Friday prayer proceedings.[70] The same applies to our master ʿAlī when he made hired craftsmen responsible for people's possessions in their care by way of guaranty, saying, "Nothing serves public interest except this",[71] and when he fought the Kharijites (Secessionists),[72] and so on and so forth. Any prominent practice of the Companions that was at variance with a revealed text or its apparent meaning, by way of procuring a particular benefit or

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the authority of Qays ibn Abī Ḥāzim in his *al-Sunan al-kubrā* (hadith no. 18161), Book of Military Expeditions, chapter on fertile Iraq.

67. See al-Bayhaqī on the authority of ʿUbaydah in his *al-Sunan al-kubrā* (hadith no. 13568), Book of the Division of Alms, chapter on dropping the share of the *Mu'allafah Qulūbuhum*. Al-Ṭabarī relates the incident of the proscription of the share of *al-Mu'allafah Qulūbuhum* in his *Tafsīr,* 4:125–26, on the authority of Ḥibbān ibn Abī Jabalah, as he comments on the Qur'anic verse "Alms are for the poor and the needy, and those employed to administer [the funds]; for those whose hearts have been [recently] reconciled [to Truth]; for those in bondage and in debt; in the cause of Allah; and for the wayfarer: [thus is it] ordained by Allah, and Allah is full of knowledge and wisdom".

68. Suspension of the punishment for theft was reported from ʿUmar as a *mawqūf* narration (i.e. a narration that stopped with him, and which he did not ascribe to Allah's Messenger (peace and blessings be upon him). Ibn Abī Shaybah compiled it in his *al-Muṣannaf* in two places: [first] on the authority of Yaḥyā ibn Abī Kathīr (hadith no. 28586), and [second] on the authority of Ḥusayn ibn Jarīr (hadith no. 28591).

69. See al-Bayhaqī, *al-Sunan al-kubrā* (hadith no. 5593), on the authority of ʿImrān ibn Ḥusayn, Book of Salat, chapter on concession for shortening ritual prayer on every travel that does not involve sinning, even if the traveler is safe [and free from danger]; and Ibn Abī Shaybah in his *al-Muṣannaf*, Book of Who Shortens the Ritual Prayer (hadith no. 8174).

70. The hadith "the one to institute the first adhan during Friday prayers is ʿUthmān" was compiled by Aḥmad in his *al-Musnad*, in the *Musnad* of al-Sā'ib ibn Yazīd (hadith no. 16139). Al-Ṭabrānī compiled it in his *al-Muʿjam al-kabīr* on the authority of al-Sā'ib (hadith no. 6506), and ʿAbd al-Razzāq in his *al-Muṣannaf* on the authority of ʿAmr ibn Dīnār (hadith no. 5341).

71. The hadith in which ʿAlī (may Allah be pleased with him) made craftsmen responsible [for items in their care] was compiled by al-Bayhaqī in his *al-Sunan*, Book of Hiring, chapter on what was said concerning holding [hired] craftsmen responsible, 6:122.11445 and 11446.

72. The hadiths that report ʿAlī's fighting (may Allah be pleased with him) the Kharijites have been compiled by Abū Dāwūd in his *Sunan* (hadith no. 4765), chapter on fighting the Kharijites.

avoiding a particular harm, can be considered as falling within the domain of *taḥqīq al-manāṭ*, whether we call it "*istiḥsān*"[73] (juristic preference or equity), "*istiṣlāḥ*"[74] (consideration of public interest), or "*siyāsah sharʿiyyah*"[75] (administration of justice according to the spirit of Islamic law). Their disagreement might sometimes be in observation (a real disagreement, which leads to mutual irreconcilability) or state (a disagreement based on choice of perspective and granting the adversary his perspective, which leads to mutual reconcilability). Such terms merely express and describe *taḥqīq al-manāṭ* in some of its modes and forms.

Jurists, especially Mālik, have applied *taḥqīq al-manāṭ* for the purpose of avoiding harm in the area of legal means (*al-dharāʾiʿ*), and procuring benefit in the area of public interest (*al-maṣāliḥ*) to the extent that Ibn al-ʿArabī has claimed that Mālik stands alone in affirming these two principles, saying, "And he is in this regard more rightly guided and more accurate in speech."[76]

Our scholars in the Muslim West founded the maxim of *ijrāʾ al-ʿamal* (instituting a weaker legal opinion as the prevailing

73. "*Al-istiḥsān* in the technical legal sense is a designation for a legal principle—from among four legal principles—that stands in conflict to *qiyās jalī* (evident legal analogy) and is acted on when it is deemed stronger than the latter. It is called as such because in most cases it is stronger than *qiyās jalī*, and is therefore a type of *qiyās mustaḥsan* (that is to say, a *qiyās* that is deemed commendable and juristically preferable)." al-Jurjānī, *Kitāb al-taʿrifāt*, 32.

74. *Al-istiṣlāḥ* (public interest) means to act according to public interest (*al-maṣāliḥ*) of the type that is *mursalah* (that is to say, void of being either sanctioned (*muʿtabarah*) or unsanctioned (*mulghah*) by the Shari'ah). Imam al-Zarkashī states, "What is meant be *al-maṣlaḥah* (public interest) is to preserve and safeguard the purpose and intent (*maqṣūd*) of the Shari'ah, by keeping harm away from creation. Imam al-Ghazālī explains it as the existence of a property that informs about the legal ruling and is rationally appropriate to it, without there being a unanimously agreed-upon principle [i.e. Qur'an, Sunnah, and scholarly consensu (*ijmāʿ*)] on which it rests, while the conceived ratiocination is operative therein." *al-Baḥr al-muḥīṭ*, 4:377.

75. Shaykh Ibn al-Qayyim reports from Ibn ʿAqīl the following definition of *al-siyāsah*: "*Al-siyāsah* (administration) constitutes those actions through which people draw nearer to public good and further away from public harm, even if the Messenger (peace and blessings be upon him) did not legislate them nor divine revelation descend with them." al-Jawziyyah, *Iʿlām al-muwaqqiʿīn*, 4:472.

76. Abū Bakr ibn al-ʿArabī, *Aḥkām al-Qur'ān*, on the commentary of the Qur'anic verse "Ask them concerning the town standing close by the sea" (Q7:163).

practice)[77,78] to renew the prevalent legal school (*madhhab*) via continuously emerging public interests, forever changing customs, and necessities and needs that feature in hundreds of questions. So, in Andalusia, Muslim Spain, the building of churches and the creation of gardens in and around mosques constituted a case of ascertaining the *ratio legis* pertaining to location. In many countries the principle of establishing prevailing practices and promoting particular processes continues. There is not a single territory among the territories of the Muslim Community except that our scholars have recorded instances giving preference (*tarjīḥ*) to a view that was previously less preferred (*marjūḥ*), and that was done based on a considered examination of public interests.

77. *Ijraʾ al-ʿamal* or *jarayān al-ʿamal* is to take a weaker view from (the views of) a credible scholar when passing a court judgment or issuing a legal verdict in a certain time or place for the purpose of realizing a particular benefit or preventing a particular harm. See Abdallah bin Bayyah, *Ṣināʿat al-fatwā* (Jeddah: Dār al-Minhāj, 1428/2007), 114.

78. Among the instantiations of this rule are what we find:
   – in the *Mawāhib*, "And debt, if its original existence (*aṣluhu*) is proven, even though there is disagreement around the presumption of continuity of this original existence in the Book of Allegiance of the *Mudawwanah* (while the view of Ibn al-Qāsim is what Ibn Rushd mentions contrary to the views of others), and upon which is the *prevailing practice* of the Muslim judges in this day and age in Tunisia as long as there are no accompanying circumstantial and contextual indicators pointing to payment and settling of the debt notwithstanding the long time-period that has elapsed—then these indicators will be taken into consideration and be acted upon in terms of exoneration from liability, and Allah knows best." *al-Ḥaṭṭāb, Mawāhib al-Jalīl*, 6:228;
   – in al-Dasūqī's supercommentary, where al-Bannānī says, "The *prevailing practice* in Fez and its outskirts concerning the man who utters [to his wife] '[you are] the object that is unlawful for me' in the definite form [and utters it in an oath-like form, e.g. 'If you do such and such, then you are the object that is unlawful for me']—is that when he violates the oath [through her doing such and such], then only one irrevocable divorce becomes incumbent upon him, [both] in the case of someone with whom he has consummated the marriage and in the case of someone with whom he has not." al-Dasūqī, *Ḥāshiyat al-Dasūqī*, 2:383;
   – in Khalīl's statement, cited by al-Khurashī, "'A credible witness is construed as one who does not put down his testimony except on the basis of knowledge and familiarity or otherwise he would be a witness to falsehood, and the assumption is that he is reliable (*ʿadl*), and this is the *prevailing practice* here with us in Gafsa, which is the correct view', and his statement informs us that this is the established view." al-Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 7:208.

WHO IS IT THAT UNDERTAKES AND PERFORMS *TAḤQĪQ AL-MANĀṬ*?

Therefore, *taḥqīq al-manāṭ* is not the private preserve of the absolute *mujtahid*; neither is it like its two sister categories, *takhrīj al-manāṭ* (extracting the *ratio legis*) and *tanqīḥ al-manāṭ* (refining the search for the *ratio legis* through a process of elimination),[79] because of their connection to the concept of the *ratio legis* as already ascertained in the original case and in the process of being ascertained in the novel case; while *taḥqīq al-manāṭ* is connected to verification, that is to say, looking into the identification of the locus—and in the words of al-Shāṭibī[80]—for the purpose of applying the ruling to it. The *ratio legis* is present and the ruling ready but it is suspended until a locus capable of receiving it is identified.

This is why the legal conventions established by the Lawgiver (*khiṭāb al-waḍ*ʿ)[81] keep watch over and regulate His legal obligations (*khiṭāb al-taklīf*)[82]: the conventions qualify what appears unqualified, and render specific what is general. It is not sufficient that legal causes are present without the concomitant absence of legal impediments. The equation comprises the presence of a legal cause and the absence of a legal impediment. Such an equation does not produce soundness or validity of a practice without the fulfillment of legal conditions, and it makes no difference whether they be conditions of obligation (*shurūṭ wujūb*) that take into consideration legal causes in the affirmative sense and legal impediments in the negative sense, or conditions of timely performance and soundness (*shurūṭ adā' wa ṣiḥḥah*). The relationship between cause and effect in the Shari'ah is not one of fixed necessity. Legal necessity is not the same as rational necessity because the original case might be absent and the novel case present like when inheritance (*irth*) occurs without the affirmation of family relationship (*nasab*).

Rukhṣah (concessionary law) in its technical legal sense grants and allows the contravention of a prohibition and exemption from a request notwithstanding the fact that the *ʿillah* of unlawfulness still stands and that which occasions obligation still exists. Were that not the case, then the fasting of a sick person or traveler would

79. al-Ghazālī, *al-Mustaṣfā*, 282–3, 286.
80. al-Shāṭibī, *al-Muwāfaqāt*, 4:90.
81. See note 43 above.
82. That is, the Lawgiver's establishing, by declarative fiat, what legal obligations accrue on a given question of the Divine Law.

not have been valid. *Rukhṣah*, then, is a ruling that has been transformed into ease due to the presence of an attenuating excuse while the original *ʿillah* remains present and operative.[83]

However, of the legal causes and impediments there are those which are implicit and those which are explicit, those which are clear and those which are obscure, so who is charged and entrusted with performing *taḥqīq al-manāṭ*?

Al-Shāṭibī answers the question by asserting that the one who performs *taḥqīq al-manāṭ* is the rationally minded and astute religious scholar who examines every case and circumstance.[84]

It should be remembered though that this answer is not to be taken in the absolute sense, since Islamic revealed discourse comprises levels and degrees with respect to who is being addressed:

- There is a type of revealed discourse that is addressed to the individual with respect to his private self: "Seek a legal verdict (fatwa) from your heart even if they (i.e. the scholars) have issued you a legal verdict" as al-Shāṭibī explains in his *al-Iʿtiṣām*: "And should you find ascertaining the *ratio legis* in a particular instance problematic, then leave it, and beware of occupying yourself with it. This is the meaning of the statement of the Prophet (peace and blessings be upon him)—if authentic in its ascription to him—'Seek a legal verdict (fatwa) from your heart even if they (i.e. the scholars) have issued you a legal verdict', because your ascertainment of the *ratio legis* in the issue that affects you personally is more specific to you than someone else's ascertainment of it who is like you."[85]
- There is also the type of discourse addressed to a person with a specific issue, and it is he who ascertains the *manāṭ* by assessing his own situation, which he of course is more familiar with. An instance of this is Allah's statement concerning the one who fears difficulty or falling into sin were he not to get married: *This [permission] is for the one among you who fears sin*.[86]

83. For a definition of *al-rukhṣah* see n47 above; see also al-Isnawī, *al-Tamhīd*, 71–3.
84. al-Shāṭibī, *al-Muwāfaqāt*, 4:232.
85. al-Shāṭibī, *al-Iʿtiṣām* (Cairo: Maktabat al-Tawḥīd, 1421/2000), 3:113–14.
86. Q4:25.

- Then there is a revealed discourse addressed to a plurality of people (*jamāʿah*) with the individual (*fard*) being the one intended thereby: *But if you [in the plural form] fear that you will not be able to deal justly [with the four wives], then only one [wife]*.[87] At this level, the one who ascertains the *manāṭ* is the one who wants to get married to more than one wife, just as it is also possible for a group—in the form of administrative authorities—to undertake the task of ascertaining the *manāṭ* themselves were they to see a wrong being committed or able to determine that a harm is likely to occur.
- The discourse might also be addressed to the particular administrative authority in the form of judges: *If you fear a breach between them, appoint [two] arbiters, one from his family, and the other from hers*.[88] Appointing two arbiters is the function of the administrative authority, who ascertains the *manāṭ* and no one else, because the matter is complex and complicated, and there might be hidden causes that require precision for applying the ruling of separation or arranging for reconciliation.
- The discourse might even be addressed to the highest authority (i.e. the sovereign power or head of state): *If you fear treachery from any group, throw back [their covenant] to them, [so as to be] on equal terms: for Allah does not love the treacherous*.[89] The one who throws back the covenants, declares wars, signs truces and peace treaties, and issues a ruling based on a future anticipation as indicated by the phrase *you fear*, because fear is the anticipation of something bad happening in the future—that is, the one who ascertains the *manāṭ* for the Muslim community here is the sultanate or governing authority, which is aware of hidden causes and motives and vague impediments and conditions. Ascertaining the *manāṭ* here is not the responsibility of individuals. This is why the Children of Israel requested

87. Q4:3.
88. Q4:35.
89. Q8:58.

> from their prophet—when war was ordained for them—that he appoint for them a king because without a ruler over a kingdom wars would amount to chaos, *They said to a prophet who was among them: "Appoint for us a king, that we may fight in the cause of Allah"*.[90] This is because their prophet did not exercise and execute the functions connected with a kingdom. Here we see also emerging the problem of some sects and groups declaring global war to the detriment of not only the Muslim Ummah but humanity at large not complying with any Islamic legal norms, checks, and regulations, nor with ascertaining the *manāṭ*.

Thus, we find the particular authority performing *taḥqīq al-manāṭ* differs according to the target audiences intended by the Islamic revealed discourse. Imam al-Ḥaramayn mentions in his *Ghiyāth al-umam*, while discussing *ḥudūd* punishments, that no one presides over them except the caliph or his deputy. *Taʿzīr* punishments (discretionary punishments or disciplinary action), on the other hand—as Imam al-Shāfiʿī states, quoted by Imam al-Ḥaramayn—are given over to the discretion of the sovereign ruler or his deputy, such that if he desires, he implements them, and if he desires otherwise, he lifts them, taking into account public interest. Thus, Imam al-Ḥaramayn says, "The *ḥudūd* punishments as a whole are given over to the rulers or those who run the affairs on their behalf." He continues, "Then Imam al-Shāfiʿī (may Allah have mercy on him) maintains that *taʿzīr* punishments do not achieve the decisiveness and incumbency of *ḥudūd* punishments, because, once proven, there is no choice in averting the latter, and no hesitancy in their execution. *Taʿzīr* punishments are given over to the discretion of the ruler. So if he views clemency and pardon as an act of generosity, then he does so, and no one can object to what he has done, and if he views executing the particular discretionary punishment as a way of disciplining and refining character, then his view is what is to be followed."[91]

90. Q2:246.
91. al-Juwaynī, *Ghiyāth al-umam*, 167.

So the one to ascertain the *manāṭ* here is most definitely the head of state, who might have access to information about certain hidden causes or impediments not available to others.

The meaning of "hidden" here is that the general population might not be able to anticipate results and outcomes which the governing authority can because of being privy to high-level information and reports. Hence, ʿUmar (may Allah be pleased with him), when he suspended the punishment for theft during the Year of Famine, regarded punishment as not being appropriate and congruous with the difficulty and hardship in which people were living, and thus blocked the enforcement of *ḥudūd* punishments on the basis of doubt or suspicion. Similarly, when he stopped the exiling of those who perpetrated a lewd crime, it was because he expected the exiled person to leave the fold of Islam in its entirety due to previously having seen cases of this type, and what was brought to his knowledge in that regard. This is what I term "hidden impediments".

Therefore, *taḥqīq al-manāṭ* with respect to the presence of causes and the absence of impediments is only exercised legally and logically by a specialized authority in accordance with the ruling and the level of the one addressed by it. However, the unlawful remains unlawful, and the lawful remains lawful. Taking people's money, committing lewd acts, consuming intoxicating and alcoholic beverages will all continue to be unlawful until the Day of Resurrection. There is no changing the law of Allah Most High. These are akin to core values for Muslims and for all religions with respect to preserving the universals of religion, life, wealth, intellect, and family relation.

Thus, in the correctional domain, the punishment continues to hinge on ascertaining the *manāṭ* by a specialized authority in order to apply the ruling to the appropriate locus. It is for this reason that al-Qurṭubī states: "There exists no disagreement in the Muslim Ummah that it is permissible for the sovereign ruler to delay a *qiṣāṣ* (retributive) punishment if it is going to lead to stirring unrest or division."[92] Imam al-Ḥaramayn says in his *Ghiyāth al-umam*: "The Prophet (peace and blessings be upon him) used to treat the hyp-

92. al-Qurṭubī, *al-Jāmiʿ fi aḥkām al-Qurʾān al-karīm*, 16:267.

ocrites with courtesy while knowing with absolute certainty and undeniable revelation their hypocrisy and animosity towards the Muslims, and he is the exemplar and ideal model of conduct."[93] Thus, he did not take them to task.

Based on that, it is upon the governing authorities to exercise the utmost effort and this is the meaning of exercising *ijtihād* in ascertaining the *manāṭ* with respect to the Islamic legal rulings which the Lawgiver has legislated—to preserve these universals, without failing to protect Shari'ah-countenanced interests or bringing about a greater harm whose prevention is required by the Shari'ah. The reason is that the *manāṭ* that stems from the anticipation of or looking into future outcomes and means revolves around interests and harms, such that sometimes a lawful thing is averted based on a certain outcome, and sometimes a prohibition is overlooked based on a certain outcome. This is a type of juristic preference because it amounts to a deviation in the issue from its original state or the *qiyās* that is specific to it based on public interest.

The Relationship between Values and Legal Rulings

At this juncture we must open up a discussion around the relationship between values and particular rulings, and how they compare to one another.

Rulings are the result of values and virtues. These values do not require that *manāṭ* be ascertained, while the rulings that emanate from them do, because they are surrounded by and enveloped in declarative law discourse. The Shari'ah before it is converted into legal procedures is applied by the sovereign ruler and those bodies in his provincial government. It is the Shari'ah which plants the tree of values that then produces the judgment of good or bad on issues, practices, and various types of behavior, and the judgment of whether they are true or false, valid or invalid, accepted or rejected. For the Shari'ah to create particular systems and rulings which pre-

93. al-Juwaynī, *Ghiyāth al-umam*, 171.

serve and protect it, it needs to arrange the causes, impediments, and conditions. In other words, it needs to pave the way for the application of particular rulings.

There is a huge difference between values and what they produce as regards instilling virtues in the hearts of the believers and aspiring to have them inculcated in their individual and collective lives, and between the organizational and structural rulings that deal with any form of deviation from these values. This is irrespective of whether the matter relates to civil or penal legislation.

Values and virtues are inherently fixed: they do not require a context in which to be applied, nor are they in need of contextualization. This is because it is not possible for values in themselves to be regulated by the categories of legal convention (*khiṭāb al-waḍ*ʿ)[94] save when they become positivized into particular rules, irrespective of whether these be related to the powers of the state (like those values that inform systems of provincial governments and penal legislations) or non-state (like the contracts of transactions and marital unions, with the exception of those marital contracts in which the state serves as a legal guardian, such as in the marriage contracts of minors who are orphans).

For this reason, the method of the Holy Qur'an in this regard is as follows:

In the area of transactions, for example, the Holy Qur'an established the value of protecting wealth and the unlawfulness of infringing on someone else's property (And eat not up your property among yourselves in vanity),[95] (And do not make over your property to those weak of understanding).[96] This was before the Qur'an prohibited usury (Devour not usury, doubled and multiplied),[97] and before the Prophet (peace and blessings be upon him) explained this in detail and extended the prohibition to sales that involve uncertainty, an unknown (*al-gharar*), and price-hiking (*al-najash*), as well as applying it to lived reality (*al-wāqi*ʿ) like sales determined by throwing stones (*bay*ʿ *al-ḥaṣāh*),[98] paying the price for the

94. See page 30 above.
95. Q2:188.
96. Q4:5.
97. Q3:130.
98. It is stated in a hadith that "Allah's Messenger (may peace be upon him)

unborn offspring of a pregnant she-camel or one who is expected to become pregnant (*ḥabal al-ḥabalah*),[99] or for the male camel's sperm (*maḍāmīn*) and the she-camel's eggs (*malāqiḥ*).[100] Each of these transactions comprises legal conditions and causes. Thus, the first thing to be established is the general objective (*al-maqṣid al-ʿāmm*) which is not subject to any form of specification.

Similarly, in the case of penal legislations:

- The Qur'an repeatedly emphasizes the sanctity of human life stating: And do not take the life of a soul, which Allah has made sacred, except by way of justice and law,[101] Nor kill [or destroy] yourselves: for verily Allah is ever merciful unto you!,[102] and That whosoever kills a human being for other than manslaughter or corruption in the earth, it shall be as if he had killed all mankind,[103] before establishing the following injunction: And there is [a saving of] life for you in retaliation, O men of understanding,[104] which is a government ordinance and has its own conditions.
- Likewise, in the preservation of family relations; it is part of a person's honor and integrity that they be of known ancestry and origin. Religions do not disagree on this point.

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forbade sales determined by throwing stones, and the type which involves some uncertainty". This hadith has been recorded by Muslim in his *Ṣaḥīḥ* (hadith no. 1513), on the authority of Abū Hurayrah, Book of Sales, chapter on the invalidity of a sale determined by throwing stones and involving uncertain elements.

99. This hadith, rigorously authenticated by both al-Bukhāri and Muslim, is narrated on the authority of Ibn ʿUmar (may Allah be pleased with him). Al-Bukhārī compiled it in his *Ṣaḥīḥ* (hadith no. 2143), Book of Sales, chapter on *gharar* and *ḥabal al-ḥabalah sales*; Muslim in his *Ṣaḥīḥ* (hadith no. 3882), Book of Sales, chapter on the unlawfulness of *ḥabal al-ḥabalah* sales; and Mālik in his *al-Muwaṭṭa'* (hadith no. 1354), Book of Sales, chapter on animal sales that are not permissible—that Allah's Messenger (peace and blessings be upon him) prohibited the sale of the *ḥabal al-ḥabalah*.
100. Al-Ṭabarānī reports in his *al-Muʿjam al-kabīr* (hadith no. 11415) on the authority of Ibn ʿAbbās that the Allah's Messenger (peace and blessings be upon him) prohibited the sale of the male camel's sperm and the she-camel's eggs, and the *ḥabal al-ḥabalah*.
101. Q6:151.
102. Q4:29.
103. Q5:32.
104. Q2:179.

It is almost as if it is ingrained in human nature. The Qur'an makes use of the word "safeguarding and protecting" (al-muḥāfaẓah) to point this out: And those who safeguard their private parts,[105] And they safeguard their private parts,[106] and Do not come near to lewd acts, [both] that which is manifest thereof and that which is hidden.[107] This does not require government authority. As for the detailed rulings they occur in the Qur'anic verse in Surah al-Nūr.

- The same can be said with regard to preserving the intellect, the importance of which is iterated by the Holy Qur'an in the following verse: Do you not exercise your intellect?.[108] This is especially the case in the context of the consumption of intoxicants: O you who believe! Do not draw near unto prayer when you are intoxicated [with your mind befogged], until you know what it is you are saying.[109] Thereafter, the Holy Qur'an directs itself to the believing Muslims with an address exhorting them to desist from their former preoccupation with intoxicants, gambling, and games of chance: O ye who believe! Intoxicants and gambling, [dedication of] stones, and [divination by] arrows, are an abomination of Satan's handwork: So, leave it aside in order that ye may prosper.[110] Moreover, it makes clear the reason why intoxicants are vile but does not stipulate a particular punishment. After this, the Prophet (peace and blessings be upon him) used to punish the perpetrator of this offense without stipulation and disagreement being reported on the issue.[111] Thereafter, his Companions, during the reign

105. Q23:5.
106. Q24:30.
107. Q6:151.
108. Q2:44.
109. Q4:43.
110. Q5:90.
111. Al-Bukhārī reports in his *Ṣaḥīḥ* (hadith no. 6777), Book of Punishments, chapter on beating with stripped palm branches and sandals, on the authority of Abū Hurayrah (may Allah be pleased with him) that he said: "A man who drank wine was brought to the Prophet (peace and blessings be upon him). The Prophet said, 'Beat him!' So some of us beat him with our hands, and some with their sandals, and some with their garments [twisted like lashes], and then when we finished, someone said to him, 'May Allah disgrace you!'

> of ʿUmar, exercised independent juristic reasoning (ijtihād), and stipulated eighty lashes for the offense of consuming intoxicants, as a way of applying it to the real context of an expanding state and the intermixing of Muslims with adherents of other faiths whose distinctive features Islam respected, and in the process the Companions would seek each other's counsel concerning this offense.[112]

What distinguishes the universal principle—part of which are values and virtues—is that it constitutes strict law (*ʿazīmah*) that will never be abolished. That is to say, it is incumbent on the believing Muslim, irrespective of his or her level and background, to be conscious and aware of this value and feel its importance in their heart—a meaning that resides deep within him- or herself.

As for ordinances pertaining to criminal offenses like meting out Islamic legal punishment—which is specific to government—they have their own conditions, controls, and impediments. Mandatory power with respect to them rests solely with the particular governing authority, and individuals have no power and control over them whatsoever, because they lack the necessary condition of mandatory power. Thus, were an individual, or a group of people that holds no legal authority, to carry this out, he would be committing an offense and contravening the legal bounds.[113] Herein resides the

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But the Prophet replied, 'Do not say so. Do not help Satan to overpower him.'"

112. Mālik reports in his *al-Muwaṭṭa'* (hadith no. 1541), Book of Intoxicating Drinks, chapter on the punishment for wine, on the authority Thawr ibn Zayd al-Dīlī that ʿUmar ibn al-Khaṭṭāb sought counsel concerning the wine which a man had drunk, and ʿAlī ibn Abī Ṭālib said, "We think you should lash him eighty times, because when he drinks he becomes intoxicated, and when he becomes intoxicated, he raves and talks irrationally, and when he raves and talks irrationally he fabricates lies," or words to that effect. So ʿUmar administered eighty lashes for wine.

113. As regards the supreme ruler, he has to take into consideration the conditions, causes, and impediments both open and hidden, in the manner previous examples have served to illustrate such as ʿUmar suspending the punishment of exiling the fornicator [for one year] when he viewed the likelihood of the resultant harm to have been greater, and therefore suspended the punishment, and similarly, his suspension of the punishment for theft during the Year of Famine. We have called it "a hidden impediment" because it is something that does not relate to an individual person such that he is familiar to the judge

importance of *taḥqīq al-manāṭ*.

The difference between values of legality and illegality and practical ordinances is from four aspects:

1. Values are fixed from every angle with respect to definitiveness (*al-qaṭʿiyyah*), whereas in the case of ordinances some are definitive (*qaṭʿī*) and others speculative (*ijtihādī*).
2. Values belong to the category of universals, and not to the category of particulars.
3. To rebel against values is to rebel against the public order of the Ummah.
4. Values constitute strict laws (*ʿazāʾim*) that are not impinged upon by concessionary laws (*rukhaṣ*), and are generalities (*ʿumūmāt*) that cannot be specified via the discourse of legal conventions (*khitāb al-waḍʿ*) or its parameters which encompass only discourse of particular obligations.

It is for this reason that particular (and not universal) discourse, specifically, requires *taḥqīq al-manāṭ* so as to apply it to specific and particular loci in accordance with differing locations, and alternating and fluctuating circumstances.

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or mufti who has jurisdiction over a limited area or group; rather it relates to society, such that the *taḥqīq al-manāṭ* with respect to society is done by the ruling authority—like the grand qadi or grand mufti—who possess knowledge of the conditions and states of the subjects. Therefore, he does not wish to subject them to that which will cause them to become resentful.

The Contemporary Context and Expected Future Outcome

What is meant by this heading is an approach to the application of Islamic legal rulings, in their inclusiveness, generality, and absoluteness, to a specific environment or context, and in a specific temporal and local situation, or what some have offered as a definition for *al-wāqiʿ*: the nexus between time, place, and the event in a specific moment. At the same time, we bear in mind that this moment is the intended time, and that the place is defined and restricted by that time because of their particular and restricted nature. This impacts the general and unrestricted nature of the religious texts. The moment or place of divine revelation must then be examined in order to understand the manifest and hidden causes of revelation (*asbāb al-nuzūl*).

However, *al-wāqiʿ* (real world context) could mean the realities of things or real existence as opposed to fantasy and imagination. Today, real world context carries values that give rise to rulings and systems.

WHAT ARE THE VALUES OF THE CONTEMPORARY CONTEXT?

They are: human rights, individual and collective freedoms—like freedom of speech and conscience—sanctification of the rights of women to the extent of allotting women quotas in parliament, and the rights of minorities, who no longer need to claim that their liberties and rights have been violated, since a minority is considered credible even if it is not necessarily in the right.

Constitutions uphold these rights, and champion these values. This is the standard criterion for a contemporary constitution, the hallmark of democracy, and evidence for modernity and the equality of rights, sometimes at the expense of duties.

The world of technology has changed the way we connect and modified the instruments that we use to communicate with each other. Websites and social media such as Facebook, Twitter, and YouTube have enabled the individual to escape from societal super-

vision and control, and identify with other values. In light of this, opposing these technologies or their implicit and explicit values can be counter-productive. Add to this the rise of biotechnology relating to health and human life such as the decoding of the human genome, which raises potential ethical dilemmas, as some scientists will naturally want to explore biology, natural science, and technology without restriction or impediment. There is the opportunity to interfere with embryonic stem cells, and to decipher and crack the DNA code of sperm, in order to modify the embryo by increasing hormones, as well as issues related to cloning and its repercussions, ramifications, and outcomes that still lie hidden behind the veils of the unseen, which no one knows except He who knows what is hidden in the heavens and the earth.

The fiqh academies are in total disarray with respect to artificial insemination, cross breeding (hybridization), and the admissibility of genetic testing as evidence (for determining paternity) in case of spousal disagreement. The list of issues is long and scholars' minds are exhausted in trying to comprehend an ever-growing and advancing reality, let alone predicting what is to come.

Al-tawaqquᶜ or *fiqh al-tawaqquᶜ* is a new term, though new from the perspective of species, and yet old from the perspective of genus (in the logical sense), since the area covered by *fiqh al-tawaqquᶜ* is an area covered by *al-dharāʾiᶜ* (the means), *al-maʾālāt* (the final outcomes), and also by *al-mutaraqqabāt* (expected events). This latter term is used by al-Maqqarī, and further by al-Zaqqāq in his verses: [114]

وَهَـلْ يُرَاعَى مُتَرَقَّـبٌ وَقَـعْ يَوْمَئِـذٍ أَمْ قَهْقَـرَى إِذاً رَجَـعْ
لِسَـبَبِ الْحُـكْمِ؟ كَمُعْتَـقٍ وَمَـنْ رَبِحَ أَوْ أَمْـضَى لِبَيْـعٍ اعْلَمَـنْ
وَهْيَ الَّـتِي تُـدْعَى بِالاِنْعِطَـافِ عَكْـسُ الَّتِي تُـدْعَى بِالاِنكِشَـافِ
كَطَالِـقٍ يَـوْمَ قُـدُومِ مَـنْ قَصَـدْ وَرَدَّ مُنْفِـقٍ كَمَـالِ مَـنْ فُقِـدْ
وَآخِـرُ الزَّوْجَـاتِ طَالِـقُ ...

Is an expected event that has already transpired to be calculated from that day onwards, or does it return—in that case—all the way

114. For a detailed explanation of these lines, see Aḥmad al-Manjūr, *Sharḥ al-Manhaj al-muntakhab* (n.p.: Dār ʿAbdullāh al-Shanqīṭī, 1424/2003), 281.

To the cause that triggered the (relevant) legal ruling (in the first instance)? Like the one freeing a slave,[115]
making a profit[116], or continuing (something), like a sale (with an option),[117]
And it is termed "retroactive determination",
the opposite of "manifestation",
Like a woman pronounced divorced on the day of the seeker's arrival,[118]
returning the support payment made by someone [to his ex-wife],[119] or like the estate of someone ruled missing,[120]
[Or one who says:] "The last of the wives [that I marry] is divorced" …[121]

115. Meaning someone freeing his slave while on travel, and then on arriving at his destination he denied having done so. However, "arriving" also referred to someone who had been a witness to the event, and the ruling was then given in favor of the "freed" slave. Is the ruling determined as being effective from the day he was first pronounced free or now when it was issued?
116. The one making a profit during a sale, is he to pay zakat on the profit together with the original capital from the beginning of a zakat year that has lapsed, or from the time of the sale?
117. A sale, with the option of being rescinded within a specified time period, when it is continued instead; is such a sale to be considered contracted from the day of the option or the day it was continued?
118. If someone said to his wife: "You are divorced the day Zayd arrives," and then Zayd arrived late in the afternoon. With his arrival it became apparent that the divorce or repudiation had existed from the rise of dawn on that day, but we would not know that except at the time of Zayd's arrival. So if she were to have menstruated in the morning of that day, is that menstruation to be considered in determining whether her womb was free of child?
119. If it is ruled that support payment is to be given by a man to his divorced wife on the belief that she is pregnant, and then later on it is revealed that she is not, is he to be compensated by his heirs?
120. If a man that has been ruled missing turns up alive, and his estate had in the meanwhile been divided amongst his heirs who have spent some of it on themselves, is such an estate to be returned to him, and are the portions spent on themselves to be returned to him?
121. If someone pronounces "the last woman that I marry is divorced", then he is to abstain from each woman that he marries until he marries another woman besides her, and thus becoming free to approach her in order that the validity of the bond be revealed through her not being the last woman (to whom he is married). Then if he dies leaving behind a wife after whom he did not get married (again), the fact that he did not marry after her and that he died serves as a way of revealing that the latter is the last woman that he married. Now, is the (resultant) divorce to be connected to the actual state of when the marital contract with her was concluded, based on a consideration of what has come to fore, or is it to be connected to the time of his death, based on a

It is from this idea of *al-mutaraqqabāt* that the maxims of *al-inʿṭāf* (retroactive determination)[122] and *al-inkishāf* (manifestation)[123] are founded.

The fiqh of *al-tawaqquʿ* means making rulings contingent on the future. A ruling might forego permissibility for a prohibition, or a prohibition for something permissible, or alleviation of a difficulty, depending on what might result from performing the permitted activity or abstaining from the prohibited activity.

The one engaged in *taḥqīq al-manāṭ* must be vigilant, and aware that not every action required by virtue of its primacy or its nature is always required from the perspective of its final outcomes. It is for this reason that it is incumbent upon him to always weigh and compare between the benefit that follows from this action and the harm that might result from it.

This is *Fiqh al-Maʾālāt* (the Jurisprudence of Outcomes), which is to weigh and compare two interests, one of which outweighs the other, one of which is future orientated and the other present orientated, and to weigh and compare two harms, one of which is again future orientated and the other present orientated.

Fiqh al-Maʾālāt is akin to balancing: but, in this context, balancing between the present and the future, and hence its name. It

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consideration of the time it became clear that she is the last woman that he got married to?

122. This controversial maxim, known as "the maxim of retroactive determination", is the opposite of the "maxim of manifestation", which probes into what is to be taken into consideration in rulings—the day they occurred or the day the cause that triggered them occurred? One of the fiqh rules that is based on this maxim includes: Is profit calculated together with the original capital from the beginning of the zakat year or from the day the purchase was made in the case of zakat.

123. This too is a controversial maxim, and it investigates a previously existing ruling whose existence has not been revealed to us except after a period of time, so should we consider the ruling from the time of its existence or the time of its revelation. One of the fiqh rules that falls under this maxim is the following scenario: If someone said to his wife: "You are divorced the day Zayd arrives," and then Zayd arrived late in the afternoon. With his arrival it became apparent and manifest that the divorce or repudiation had existed from the rise of dawn on that day, but we would have not known that except at the time of Zayd's arrival. So if she were to have menstruated in the morning of that day, is that menstruation to be considered in determining whether her womb was free of child?

is incumbent upon the jurist practicing *Fiqh al-Maʾālāt* to utilize the kind of tools that will make it possible for him to uncover this future to a certain extent. Likewise, he must know the current context (*al-wāqiʿ*) in order to know what to expect (*al-mutawaqqaʿ*) because in reality it is an outcome of the current context in one of the directions in which it is moving. Moreover, knowing the current context is a means (*dharīʿah*) to knowing what to anticipate and expect. This is because, lexically, *al-dharīʿah* is a means (*wasīlah*) through which something else is reached (*yutawassalu bihā*) or arrived at (*yutawaṣṣalu bihā*).

The most important aspect of *al-dharīʿah* is the element of "the act of leading to something" (*al-ifḍāʾ*). So when a means definitively and categorically (*qaṭʿan*) leads to something, then the jurists are agreed that such a *wasīlah* is sanctioned. If for the most part it leads to the object it is meant to reach, then here al-Shāfiʿī, who does not attest to *al-dharāʾiʿ* as a legal principle, disagrees with Mālik and Aḥmad, who do attest to it.[124] When that is so in the majority of cases, then Mālik attests to *al-dharāʾiʿ* as a legal principle in the majority of cases, and has based on this principle (as mentioned by al-Qarāfī) a thousand questions in the area of deferred sales (*buyūʿ al-ājāl*). Al-Qarāfī (may Allah have mercy on him) goes on to state that there is a category of *al-dharāʾiʿ* on which scholars disagree as to whether or not it is to be impeded, and of the examples cited for it are deferred sales; and as already mentioned they reach up to a thousand legal questions, like someone selling a commodity for ten dirhams to be paid in a month's time, and then buys it back for five dirhams before the month has ended. Mālik (may Allah have mercy on him) is unique in maintaining that here it is compulsory to block the means since he used the outward form of a commercial transaction as a means to make a loan of five dirhams for ten to be paid at a specified future time. This is because he gave in cash five dirhams immediately and then took ten at the end of the month in this specific issue.[125] It is to this issue that Khalīl refers when he

124. al-Qarāfi, *Anwār al-burūq*, 2:32; al-Zarkashī, *al-Baḥr al-muḥīṭ*, 3:90–1; Ibn al-Najjār, *Sharḥ al-Kawkab al-munīr*, 3:596–7; Ibn al-ʿArabī, *Aḥkām al-Qurʾān*, 2:332, on the commentary of the verse, *Ask them concerning the town standing close by the sea* [Q7:163].

125. *al-Qarāfi, Anwār al-burūq*, 2:32.

states: "And prohibited due to suspicion (on the part of the two parties engaged in a particular financial transaction) is that which is frequently pursued and embarked upon by people."[126]

But the issue here is one of rigorous determination (*al-ḍabṭ*): for us to determine with the utmost rigor the particular religious texts and universal and general principles, and know the real world context with all its ebbs and flows, and possible expected outcomes in order that we may apply to it a ruling that is well balanced, such that it is neither too free and flexible on the one hand nor too strict, stern, and stringent on the other hand, but holds instead a just balance between these two extremes.

Expected outcomes (*al-tawaqquʿāt*) are not fanciful imaginations (*awhām*) nor farfetched presuppositions (*iftirāḍāt*), but rather grounded in plausible data and viable possibilities. Such an outcome could be far-off in the distant future or close-by in the near future. Consequently, *tawaqquʿ* does not mean in any way conjecture and speculation (*al-tawahhum*) or anticipation (*al-istibāq*), even though the latter—like *tawaqquʿ* (expectation)—is not always guessing. Rather, what it means is that we are able to obtain knowledge of directions for the future from information found in the present. It

126. That is to say, prohibited is every transaction that is permissible outwardly but results in something prohibited. This is normally a sale that people frequently pursue and embark upon, like the suspicion of a sale and a loan, and the suspicion of a loan coupled with usufruct, for people's pursuit of this type of transaction is common. The suspicion involved is thus tantamount to a categorical and explicit pronouncement of prohibition. An example of the first is that a person sells two commodities for two dinars to be paid within a month. He then buys one of the two commodities for a dinar in cash. The commodity that left the possession of the seller, and then returned to his possession, is null and void (i.e. it is as though it never left his hand or possession). Two things left the possession of the seller: a commodity and a dinar paid in cash then, for which he has taken at the end of the stipulated period two dinars, one for the commodity, which constitutes a sale, and the other for the dinar paid in cash, which constitutes a loan. An example of the second is that a person sells a commodity for ten dirhams to be paid within a month. He then buys it from him for five dirhams in cash. So the situation for the seller becomes then that something returned to him and he paid five dirhams, taking thereafter ten dirhams for the commodity. The reason for prohibiting the suspicion of a sale and a loan is that it results in a loan that draws usufruct. See al-Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl,* 5:93; al-Mawwāq, *al-Tāj wa al-iklīl*, 6:268.

might be related to economic and financial behavior like market movement, or it might also be related to the behavior of business actors, and so on and so forth, from what has been termed "probability theory" or from various samples that we have looked at or from induction, which itself is authentically rooted in Islamic jurisprudence. *Al-tawaqquᶜ*, thus, has certain tools which are either self-evident (*badīhī*) like the intuition of the mufti who knows these tools, or speculative and reflective (*naẓarī*).

The Methods for Ascertaining the *Ratio Legis*

The methods for ascertaining the *ratio legis* are the means through which we get to know the real world context in order to apply the legal rulings to it. In truth, they actually serve to explain the lived reality. It may also be called *masālik al-taḥqīq* (the ways of ascertaining [the *manāṭ*]), which Abū Ḥāmid al-Ghazālī has termed *al-mawāzīn al-khamsah* (the five criteria), namely: linguistic (*lughawiyyah*), customary (*ᶜurfiyyah*), sensory (*ḥissiyyah*), rational (*ᶜaqliyyah*), and natural (*ṭabīᶜiyyah*).[127]

If we therefore consider benefits and harms—from the perspective of being perceived by the mind—as being within the rational domain, and we consider scientific discoveries to return to naturalism, which comprises the natural sciences or the nature of things, then this criterion would not only entail, but in fact delimit the tools of *taḥqīq al-manāṭ*.

The example of usury in foodstuff with respect to genus and species is that whatever constitutes food in the linguistic sense, then the *manāṭ* of usury has been ascertained by the one who gives "edibility" as the legal cause, as stated by al-Ghazālī,[128] and whatever constitutes dates in the linguistic sense is a single species, the sale of which is not permissible for the same type in excess (*tafāḍulan*), as mentioned by Ibn Qudāmah.[129]

127. The book was published under the title *al-Qisṭas al-mustaqīm* (Damascus: al-Maṭbaᶜah al-ᶜIlmiyyah, 1413/1993).
128. al-Ghazālī, *al-Mustaṣfā*, 320.
129. Ibn Qudāmah, *al-Mughnī* (Beirut: Dār Iḥyāʾ al-Turāth al-ᶜArabī, 1405/1985), 4:32.

The *manāṭ* is also ascertained by sense perception and nature, like the observation of biological signs that distinguish between the age of minority, which serves to prevent the obligation of the commandments of Islamic law as mentioned by the Lawgiver when he says: "And the child until he reaches puberty,"[130] and the age of majority referred to in the previous hadith and the Qur'anic verse *And when the children among you reach puberty*.[131]

Custom serves to ascertain the *manāṭ* in the case where there exists instability in the meaning of a word due to lack of delineation from the point of view of linguistic convention, and delimitation from the point of view of Islamic law. This occurs in the words and expressions of the Lawgiver that are vague and obscure in their precise signification like the maintenance of wives and poverty-stricken relatives, and like describing the type of poverty that necessitates zakat.

Likewise, linguistic customary practice in the occasion of revelation *(nuzūl al-waḥy)* can also serve as a way to ascertain the *manāṭ* in the case of semantic clarity. This applies in case of limiting the meaning of a word to some of the items or members covered by it, like the view that Abū Ḥanīfah holds when he interprets the hadith "food for food like for like"[132] to refer specifically to wheat because that was the customary practice of Quraysh at the time.[133]

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130. This is part of a hadith narrated by ʿUmar and ʿAlī (may Allah be pleased with them): "The Pen is lifted from three persons: the one who is asleep until he wakes up, the child until he attains puberty, and the insane person until he regains his sanity." This hadith has been reported by Aḥmad in the *Musnad ʿAlī* (may Allah be pleased with him), 1:140.1183; Abū Dāwūd, *Sunan*, 5:545.4401, Book of Punishments, chapter on an insane person stealing or facing punishment; *al-Ḥakim*, *al-Mustadrak*, 4:429.8168, Book of Punishments, who said: "This hadith is authentic based on the criterion of the two Shaykhs [al-Bukhārī and Muslim], but they did not compile it, and Shuʿbah narrates it on the authority of al-Aʿmash with an additional wording." Al-Dhahabī commented on his statement in *al-Talkhīṣ*, saying: "[That is to say,] based on the criterion of al-Bukhārī and Muslim."

131. Q24:59.

132. This hadith was compiled by Muslim (hadith no. 1592), chapter on the sale of food, like for like.

133. al-Zarkashī, *al-Baḥr al-muḥīṭ*, 4:521; Fakhr al-Dīn al-Zaylaʿī goes on to say: "Food (*al-ṭaʿām*) is barley (*burr*) based on the evidence that wheat (*al-shaʿīr*) is mentioned in conjunction with it." *Tabyīn al-ḥaqā'iq* (Beirut: Dār al-Kitāb al-Islamī, n.d.), 1:308.

These methods for ascertaining the *manāṭ* are not all on the same level, nor are they all equal in terms of the flexibility and ease with which they are used, the degree of information that they yield, the obtainment of knowledge based on them, and the ease with which they are grasped.

There is a somewhat liberal and metaphorical application of the term *taḥqīq al-manāṭ* in reference to some of these methods. This is because *taḥqīq* (ascertainment) involves a certain amount of effort and pain, and there are no effort and pain involved in grasping sensory objects. Whatever requires sense perception as a way of determining it, and taste or touch as a means of knowing it—like when water changes (in certain of its properties), and like the issue of *nabīdh* (an intoxicating beverage), two thirds of which disappear when it is being cooked—does not require effort and exertion. Some of these methods require an intimate knowledge of the Arabic language, like the meanings of words, while some of them require experience and expertise, as in the case of customary norms and cultural practices and distinguishing between general and specific practices, or the spoken custom in the case of indirect expressions (*kināyāt*) for divorce, and practical custom like a commercial exchange that does not involve a verbal offer and acceptance (*al-muʿāṭah*).[134]

As for the rational methods used in measuring the degrees of benefits and harms that influence explicit transactions, and measuring the needs that are allocated the status of "necessities" for the purpose of rendering permissible unlawful objects, we find that this category of methods for ascertaining the *manāṭ* to be a path that is difficult and a way that is subtle in understanding. Not everyone who engages in this rational activity is able to grasp it even if he is an expert jurist in Islamic legal rulings, unless he is someone like Abū Ḥanīfah in the way he applies and operates with these methods.

134. al-Dasūqī defines *al-muʿāṭah* as: "For the buyer to take the object of sale, and offer to the seller the payment, or for the seller to offer the object of sale, and then the other party [buyer] offers to him his payment without any talk or gesture [taking place between the two parties], even in the case of items that are not inexpensive and worthless." *Ḥāshiyat al-Dasūqī*, 3:3.

On the whole, when genera that show a disproportionate share of a particular quality, and properties that are abstract in meaning serve to ascertain the *manāṭ*, their understanding becomes intricate and their organization difficult such that large-scale speculation becomes the greater portion of their *manāṭ*, and it becomes difficult for the extrapolator to extract thirst-quenching knowledge from its waterholes. This is like public interest (*al-maṣlaḥah*), need (*al-ḥājah*), hardship (*al-mashaqqah*), risk or uncertainty (*al-gharar*), ignorance (*al-jahālah*), means (*al-dharīʿah*), and expected outcome (*al-maʾāl*); and the matter therein is poised between an upper limit that is sanctioned, a lower limit that is lacking in effect, and a middle that is a place of mutual contestation, where existing views are in a state of joint conflict. The result is that Muslim jurists are embroiled in disagreement, and instead experts are needed.

Abū Ḥamid al-Ghazālī states that there is no word that exists except that there is a relation of opposition between two extreme positions and a third position: that which is categorically not included therein, that which categorically is, and that whose inclusion is disputed. He then gives the example of food in the case of usurious items.[135]

It is for this reason that *taḥqīq al-manāṭ* in the majority of cases—whether it is exercised in the areas of government ordinances, social issues, or economic and medical problems—is more appropriately proceeded from a group effort and emanated from academy-based *ijtihād*.

Topics and Illustrations

The areas of Islamic juristic reasoning based on ascertaining the *ratio legis* comprise diverse areas of life such as politics, society, economy. Internally it relates to the domestic affairs of states and the Ummah, and externally or internationally it relates to other nations and our relations with them. In this short excursion, we will shed some light on examples from these areas.

135. al-Ghazālī, *al-Mustaṣfā*, 269.

1. GOVERNMENT OR POLITICAL ORDINANCES

Allah Almighty says:

> *We sent aforetime Our messengers with Clear Signs and sent down with them the Book and the Balance [of Right and Wrong], that people may stand forth in justice; and We sent down iron, in which is [material for] mighty war, as well as many benefits for mankind, that Allah may test who it is that will help, unseen, Him and His messengers: For Allah is Full of Strength, Exalted in Might [and able to enforce His Will].*[136]

How do people stand forth in justice?

The necessity of having a ruler who takes charge of presiding over general tasks and functions which cannot be undertaken by individuals is a matter that is known from religion by necessity (that is to say, it constitutes self-evident knowledge), and is uncontested by all rationally minded people in all religions and faith traditions with the exception of Ibn Kaysān al-Aṣamm and a small band of Muʿtazilites.[137] This political idea that is humanistic in general and Islamic in particular became the settled view across eras up to the present day. The question of the right of the state and supreme leadership of communities to exist has never been a major point of debate except what comes from the remnants of anarchist thought, which flickers now and again when consumed by a stifling and suffocating feeling under the shackles of the state and its repressive shadow.

Imam al-Ḥaramayn sums up the meaning of *imāmah* (supreme leadership) and the obligation of appointing supreme leaders and rulers of the Ummah, saying: "*Imāmah* is total leadership and supreme command, which relates to both the elite and the general

136. Q57:25.

137. Abū al-Ḥasan al-Ashʿarī, *Maqālāt al-Islāmiyyīn* (Cairo: Maktabat al-Nahḍah, 1389/1969), 2:133; al-Juwaynī, *Ghiyāth al-umam*, 13; Abū al-Ḥasan al-Māwardī, *al-Aḥkam al-sulṭāniyyah* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1400/1980), 5; Ibrāhīm al-Tarrasūsī, *Tuḥfat al-Turk* (Beirut: Dār al-Shihāb, 1420/2000), 1:17.

populace in religious and worldly affairs. Its function is to protect and defend the Muslim lands, take care of the subjects, establish *daʿwah* through proof and the sword, prevent fear and injustice, demand justice for the oppressed from their oppressors, and take the rights from those who are not entitled to them and give them to those who are."[138]

He then goes on to distinguish in the same work, *Ghiyāth al-umam*, between *imāmat al-ikhtiyār wa al-saʿah* (assuming sovereign power through pledging allegiance [*bayʿah*] or appointing a successor [*istikhlāf*]) and *imāmat al-iḍṭirār wa al-ghalabah* (assuming sovereign power through force),[139] except that Imam al-Ḥaramayn maintains that most of what pertains to *imāmah* is subject to *ijtihād* because it is void of definitiveness and certainty.[140] However, the principal problem around which the debates in contemporary political thought revolve is the nature of the state, that is to say, its identity and authority, which appears in the Arab-Islamic world under the heading of "Religious or Islamic State" specifically, in contradistinction to other states described as civil, modern, democratic, and perhaps even secular.

Hence, the question of religion and its relation to the state, the question of religious values, and the question of religious laws are not related to each other as if by way of synonymy such that they are necessarily interchangeable in the lives of people in accordance with the constraints of time, place, and societal circumstances.

What then is the concept of religious state?
We are able to understand the concept of religious state on four levels:

- The First Level: total integration, that is to say, that the state system is contingent on religious texts, and is exercised by an authority that has been mandated from a divine deity, and is infallible. This is the meaning of theocracy, and forms the basis of the Western concept of what is meant by religious state. This idea according to the Sunni Muslims is inconceivable in Islam except if an infallible prophet exists.

138. al-Juwaynī, *Ghiyāth al-umam*, 15.
139. Ibid., 231.
140. Ibid., 220.

- The Second Level: a state system that is based on religious texts and in which authority is exercised by scholars of religion (theologians) but do not have a divine mandate. They carry out their state duties in the name of God and not on behalf or as a deputy of God. However, they strive to get as close as possible to the spirit of the divine injunctions. Their state can be characterized by the following statement of ʿUmar (may Allah be pleased with him): "This is the view that ʿUmar holds,"[141] negating in the process the ascription of his view to Almighty God.
- The Third Level: legislation is derived from religious texts, but the ones who exercise authority in this system are not religious scholars or religious people, but civil servants, kings, or presidents while at the same time there is disagreement with respect to the authority of assuming or ascending to power.
- The Fourth Level: a system in which legislation is not derived from religious texts, but there is an acknowledgement of religious authority to the people or state. Some of its laws might derive from Divine Law like interpersonal law, or from the spirit of Divine Law and its higher objectives. At the same time, it sees to the welfare of religious institutions like religious seminaries and houses of worship, and accordingly, it takes upon itself the necessary material expenses for operating these institutions.

In summary, the state in Islam is one of the mechanisms for establishing justice and religion (in the sense of worship of God), and in no way does it constitute a theocratic state, but by the same token it is most definitely not a secular state either. It is a state in which religion has its place and status in merging with public interest, and a wide sphere for interpretation, and is not presided over

141. Reported by al-Bayhaqī in his *al-Sunan al-kubrā* (hadith no. 20845), Book of the Etiquette of the Judge, chapter on that which the judge adjudicates and issues legal verdict, on the authority of Masrūq, who said: "A person wrote to ʿUmar: 'This is the view that Allah has shown the Commander of the Believers, ʿUmar.' He reprimanded him, and said: 'No. Write instead "This is the view that ʿUmar holds, and if it is right then it is from Allah, and if it is wrong then it is from ʿUmar".'"

by religious-oriented people but by civilians in the various ways and means through which rulers are able to rule. Some ways and means might be better and more preferred than others in accordance with the degree of what has been realized in terms of benefit, social peace, and proximity to the spirit of the Divine Law and its texts.

The primary condition in the Islamic system is that it is based on allegiance and mutual consultation. When we unpack these two concepts we find they are not very far from the results reached by secular and democratic political systems, while holding reservations over certain practices that are conducted in the name of religion or democracy.

Democracy, which some have viewed as the end of the road or the end of history, might itself be practiced in a way that is totally undemocratic, and even if it respects and honors the outward form of democracy the content itself might be defective, and sometimes even tragic, for Adolf Hitler came to power through democratic means and the consequences are well known to all.

A democratic result achieved with support from just over half of all voters is not sufficient, and requires another approach to guarantee peace, harmony, and stability, which are the two necessary conditions of investment and prosperity for the good of religious and worldly life.

From another perspective, most Muslim scholars are of the view that there exists no necessary connection between ruler and jurist, even though theoretically someone could impose upon the ruler the condition that he must be a *mujtahid*. However, very quickly a total separation occurred between the two since the time of the Ummayad dynasty after the rule of a righteous caliphate, such that the class of jurists became separate from the class of rulers except that the jurists continued to exercise legislative authority and the power to issue legal verdicts and impart religious knowledge.

The problem in the relationship between religion and state continued to exist and gives legitimacy to Hegel's statement "The precept of religion, 'Give to Caesar what is Caesar's and to God what is God's'. Yet the real question is to settle what is Caesar's or

what belongs to the secular authority".[142]

When there is a problem in the Age of Globalization concerning the relationship between religion and state, then the solution to the problem, in our estimation, is not to cut ourselves off, to instigate impetuous resolutions, or become narrow minded, but rather we should search for creative ways to foster intelligent solutions that will preserve beneficial relationships and establish a harmonious balance between the demands of the contemporary world and its intellectual and material products on the one hand, and spiritual values and the legacy of the prophets and high moral standards on the other. That is to say, to skillfully reconcile between the contradictions that are pulling our lives in all directions. This we strive to achieve on the basis of *taḥqīq al-manāṭ*.

2. ECONOMICS

The following excerpt has been reproduced from my work *The Higher Objectives of Financial Transactions*:

> Dealing in liabilities, sales of nonexistent commodities, profit-sharing (*al-muḍārabah*) based on future expectations, mortgages without possession (hypothetication) to take ownership of properties, the creation of financial instruments that do not reflect real money like bonds and credit cards, in fact, even paper money after its link to gold had been severed, paper money not connected to other money, deposits, or real wealth, resulting in the commodification of cash and the excessive liquidation of fixed assets, compound interest in debt restructuring—it is dealing in these kinds of transactions that created this financial crisis. So, the wheel was turning

142. Georg Hegel, *Philosophy of Mind*, trans. William Wallace (New York: Cosimo Classics, 2008), 160. Here follows the original German passage from *Die Philosophie des Geistes*: "Es ist nicht genug, daß in der Religion geboten ist: Gebt dem Kaiser, was des Kaisers ist, und Gott, was Gottes ist; denn es handelt sich eben darum, zu bestimmen was der Kaiser sei, d. i. was dem weltlichen Regimente gehöre."

in this way, and the real economy that comprised buildings, factories, and agriculture was tied in its financing to this wealth. In fact, people's lives became tied to it as well. When there is a jolt of some sort the investor or speculator turns to his pocket for refuge just to find himself returning empty-handed and to see his interest-based wealth dissipating when the debtors default on their debts. The bank then impounds what few properties and cars they possess, and the investors withdraw with empty hands when the bank loses its liquidity.

And they ask, who is responsible for the crisis? Some answer that America's central bank (the US Federal Reserve), whose former chairman Alan Greenspan left the housing and financial bubbles to develop without any regulatory control. His aim was fast growth at any price by gradually getting people to take out loans, with the result that they became indebted high above their means, and they no longer had any personal savings. Greenspan believed in an inordinately loose monetary policy, which meant absolutely zero interference and intervention from the government. Thus, regulatory authority and control weakened proceeding from the principle that the market will behave rationally in most cases, and as a result will automatically self-regulate through the invisible hand of the market.

The number of brokers grew and the broker industry mushroomed, and they formed lending institutions so that lending was no longer the sole monopoly of banks as is the case in Europe. These brokers were only concerned with the interest they would increase on the loans without considering the financial ability of the borrower to make good on his or her loan.[143] This led

143. Horst Afheldt says: "Theorists of this trend believe that profit enhancement leads to increased investment, and increased investment promotes economic growth, and economic growth ensures prosperity for all. There is no doubt that we are here in the midst of a false dogma." Afheldt, *Wirtschaft, die arm macht* (Munich: Verlag Antje Kunstmann, 2004), 334.

to the emergence of uncontrolled derivative products, some of which only depended on little capital, others on debts, and sometimes they only depended on profit margins and options, which do not reflect any real asset. Hence, the real economy became made up of goods and services that only represented five percent of the wealth.

Banks and brokers started to create "exploding" (unsafe) financial products[144] to sell them to the world in their hunt for profit. The bank collects deposits for the short term to lend them to companies and brokers for the medium or long term. However, it is for the bank to protect a pool of resources that are in agreement with the liabilities made towards the customers and to cover possible loss. That did not happen due to the relaxing of regulatory control on the one hand and an insatiable appetite for easy profits on the other. Therefore, a liquidity shortage or deficit occurred due to the banks not taking precautionary measures in order to face liabilities and customer demands. In order to address this situation, banks started, on the stock market, to extend loans to one another (interbank lending), with some becoming lenders and others borrowers, and so on and so forth. This led to an increase in the losses of some of these banks causing them to go bankrupt.

Confidence started to drop, and Bank A refused to lend to Bank B for fear that it would go bankrupt. Banks no longer extended loans for fear that they would not be paid off or they would extend loans but at a high credit rate to encourage investors, and the borrowers would then abstain. The predicament would be between two parties, both of whose interests hinged on the credit, such that if the credit was low the investor would lose out, and if it was high the borrower would lose out.

144. Translator's note: This phrase was popularized by Harvard Law professor Elizabeth Warren in her article "Unsafe at Any Rate", *Democracy* 2, no. 5 (Summer 2007): 8–19, http://www.democracyjournal.org/5/6528.php?page=all.

> This then started off a domino effect: A bank in America collapses, prompting a bank in Britain to collapse. A corporation in New York goes down, and another goes down in Japan. Markets in the developing world with no character of their own and who follow what is happening without a coherent policy of their own sometimes sail with the winds of bankruptcy and other times with the winds of profit.
>
> In addition to mortgages that did match in value, the debt registered against them. In fact, sometimes they would become nominal due to lack of regulatory control over the relationship between the mortgagor (borrower) and mortgagee (lender), the multiplicity of mortgagees, and the conversion of a mortgage into current financial products.[145]

I have also written a long commentary on this passage detailing the Islamic stance on debt sales, risk sales, and interest.

In this brief study specific to *taḥqīq al-manāṭ*, I refer to the *madhhab* of Mālik on sales that involve risk and uncertainty, and whether a debt sale with respect to liability is like a sale in which great risk is granted due to the possibility of bankruptcy or death.

The Maliki jurists maintain it is an accepted risk if it meets five conditions that somewhat alleviate the risk and negate the danger of interest.[146] Others differ with him on this issue.[147] Similarly, he

145. Bin Bayyah, *Maqāṣid al-muʿāmalāt* (London: Muʾassasah al-Furqān li al-Turāth al-Islāmī, Markaz Dirāsāt Maqāṣid al-Sharīʿah al-Islāmiyyah, 1431/2010), 17–20.

146. Shaykh Muḥammad ʿIllaysh transmits from al-Gharnāṭī these conditions in his commentary on Khalīl's *al-Mukhtaṣar*: "The documents (*wathāʾiq)* of al-Gharnāṭī mention that the sale of debt is not permissible except under five conditions: that it [the debt] is not food, the debtor be present at the transaction, the debtor confirm that it will be sold for a genus different from that of the debt, the sale not be intended to harm the debtor, and that the payment be immediate." *Manḥ al-Jalīl*, 2:564.

147. Ibn ʿĀbidīn, *Ḥāshiyah* (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 1407/1987), 4:166; Yaḥyā al-Nawawī, *al-Majmūʿ sharḥ al-Muhadhdhab* (Beirut: Dār al-Fikr, 1410/1990), 9:275; Ibn Qudāmah, *al-Mughnī*, 4:201–2; al-Buhūtī, *Kashshāf al-qināʿ*, 3:265.

permits the sale of non-food items before taking possession thereof.[148]

Taḥqīq al-manāṭ is thus established in accordance with the estimation of the market dwellers, finance experts, and bureau monitoring indicators. The upshot is that *taḥqīq al-manāṭ* relates to manifesting a hidden quality whose apparentness from the text that is meant to be applied to the issue is not self-evident to the listener. The "hiddenness" might stem from a linguistic relation or due to the necessary existence of an additional factor in determining the meaning of the ratio therein. The prohibition of sales that involve risk and uncertainty is understood linguistically, whereas risk itself is a genus that manifests unequally, that is to say, it manifests to a greater degree in some items than in others. Hence, the sale of fish in water that is not restricted to a particular pond definitely involves risk and uncertainty, such that the scholars are unanimous about its prohibition.[149] As for the sale of an animal that is not present but duly described, it also involves risk and uncertainty but not to a great degree. Thus, the descriptive information given about the animal might be sufficient to dispense with having to observe it with the actual eye. It is for this reason that Mālik maintains this view in contrast to other scholars.[150]

It is therefore important, in order to diagnose and ascertain the *manāṭ*, to go back to the origin of these contracts that were produced and developed in the West. This is why the capitalist system has its fingerprints all over hire purchase transactions (also called closed-end leasing, rent-to-own, or rental purchase) where the capitalist system largely favors the owner who is the stronger party over the buyer-lessor who is the weaker party, namely, the consumer.

148. Mālik, *al-Mudawwanah al-kubrā* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1414/1994), 3:134.

149. "The evidentiary basis for this is the Prophet's prohibition (peace and blessings be upon him) of sales that involve risk and uncertainty. In explaining the Prophetic saying, it has been stated that it is the sale of a bird in the sky, and fish in the water, and we do not know of any disagreement on this issue." Ibn Qudāmah, *al-Mughnī*, 4:3080.

150. Shaykh al-Dardīr states in express terms that "the sale of an animal before taking possession of [or capturing it] is permissible". al-Dasūqī, *Ḥāshiyat al-Dasūqī*, 3:220.

How do we ascertain the manāṭ in modern-day contracts?
The Islamic fiqh academies have been grappling very hard in this area, and their differences have often been the result of a lack of understanding of the nature and description of the contract. The situation was such that some of the Muslim jurists serving on these academies even travelled to Western countries where these contracts had originated in order to ascertain the *manāṭ* and attempt to understand the relationship of the parties involved in credit cards.

Perhaps Mālik's *madhhab* is helpful in this regard since it is less strict in the rules that it applies to informational and descriptive aspects of a sales transaction. In this way it makes it possible for mere reported information of a commodity to take the place of actual observation in the case of a sale of an object that is not present at the time of the contract. Similarly, the existence of a commodity in someone's protective care and safekeeping is equivalent to its existence in clear view. Also, it does not make immediate receipt of the object inclusive in the actual sales transaction, as stated by al-Māzirī and others. All of this while the essential components, like specifying the object of sale in the first case, and the ability to hand it over in the second case, are retained. Likewise, deferment of both payment and delivery is not always prohibited as in: the purchasing from an artisan work on a continuous basis (*al-ishtirā' min dā'im al-ʿamal*),[151]

151. Commenting on the statement of Khalīl in his *al-Mukhtaṣar* "[And permitted is] the purchasing from an artisan work on a continuous and consistent basis (*al-shirā' min dā'im al-ʿamal*) like a baker, which constitutes a normal sale, and if the work is not continuous and consistent [such that period of no work is equal to or outweighs the period of work] then it is a *salam* (forward sale)", al-Ḥaṭṭāb notes in *Mawāhib al-Jalīl* (6:516): "This is called the Sale of the Inhabitants of Medina, because of its popularity amongst them. This issue occurs in the Book of Commerce to the Land of War from the *Mudawwanah* in the initial parts of the forward sale, where Imam Mālik says: 'People used to buy and sell meat at a stipulated price, taking a fixed portion every day. They would start taking the fixed daily portions and defer payment until the entitlements were given by the Islamic Treasury to their recipients. Likewise, everything that is sold in the marketplaces and is for a fixed number of days, what is taken every day is stipulated. The entitlements from the Islamic Treasury were on time. They did not view this as a sale of one debt for another in disguise.'" See also Aḥmad ibn Muḥammad al-Amīn al-Shinqīṭī, *Iʿdād al-muhaj li al-istfādah min al-Manhaj*, ed. ʿAbdullāh Ibrāhīm al-Anṣārī (Qatar: Idārat Iḥyā' al-Turāth al-Islāmī, 1403/1983), 98–9.

commissioning to manufacture (*al-istiṣnāʿ*),[152] and forward sale (*al-salam*) in case of deferred payment for three days even with stipulation of deferment in the initial contract, or deferment until the time of delivery without stipulation (based on one legal position). All these distinctive features in Mālik's *madhhab* (legal school) could serve to help organize the stock market and look into issues pertaining to the future.

This is a broad and sweeping claim but it deserves to be tested and especially in our universal-centered research—research into universal principles—for ascertaining the *manāṭ* in the area of economics, which in general is governed by the two theories of Adam Smith and John Maynard Keynes: the one theory allows space for the other in accordance with practical results, and thereby forms a type of mutualism or interdependence between positive and negative, so as to almost become a third law and practical balance, were it not for the greed of capitalism leading it to explore all avenues and pathways.

Perhaps one day we will realize if we perfect the principle of *taḥqīq al-manāṭ* that it will be possible for the Islamic Standard—which forbids interest, in the sense of cash generating cash or increased value in compensation for time, the sale of non-existent commodities,[153]

152. This issue is mentioned by Khalīl in his *al-Mukhtaṣar* in the section on forward sale: "Like commissioning the manufacturing of a sword or saddle, and which is rendered defective should the material from which the item is to be made or the person making it be specified"; that is to say, of the transactions given the ruling of a forward sale (*al-salam*) is someone paying money to a person such that the former wants the latter to manufacture for him a sword or a saddle, for example. The issue is permissible if the normal conditions of a forward sale are satisfied, such as stipulating the work, setting a time period, paying the money in advance, in addition to two other conditions, namely: not specifying the material from which the manufactured item is to be made nor specifying the manufacturer. Therefore, it is not permissible to say: "Make it from this exact iron or I want so-and-so specifically to manufacture it for me," because of the risk and uncertainty involved. See al-Dasūqī, *Ḥāshiyat al-Dasūqī*, 3:217; al-ʿIllaysh, *Manḥ al-Jalīl*, 5:385.

153. Al-Shirāzī in his *al-Muhadhdhab*, 1:261, al-Nawawī in his *al-Majmūʿ*, 9:245, and Ibn Qudāmah in his *al-Kāfī* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1414/1994), 2:10, all cite as an example of this the sale of fruit that has not been produced. Ibn Qudāmah states: "The sale of a non-existent commodity is not permissible (a) due to Abū Hurayrah reporting that the Messenger of Allah (peace and blessings be upon him) prohibited *bayʿ al-gharar* (the sale

dealing in liabilities[154] and high risk[155] in conjunction with the flexibility afforded by Mālik's *madhhab*—to contribute to solving the global financial crises, a part of which I have explained in my work *The Higher Objectives of Financial Transactions*.[156]

In a section of the book under discussion there are several other questions that are in need of *taḥqīq al-manāṭ*, and which pose new questions emanating from the reality of recent developments in terms of changed circumstances, new events, and what next to expect, such as:

- the question of "guarantee for a fee (i.e. in return for compensation or a reward)" (*al-ḍamān bi al-juʿl*)[157] on which

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that involves risk and uncertainty) as narrated by Muslim, and *bayʿ al-maʿdūm* (the sale of a non-existent commodity), which is a sale that involves *gharar* (risk and uncertainty), and (b) due to the fact that the unlawfulness of the sale of fruit before it ripens indicates that its sale before it even exists is [necessarily] unlawful. Therefore, the sale of fruit before it is produced is not permissible."

154. What is meant here perhaps is the sale of one debt for another which is prohibited by the hadith wherein the Prophet (peace and blessings be upon him) prohibited the exchange of a delayed counter value for another (*al-kāliʾ bi al-kāliʾ*) [that is to say, sales in which both legs of the transaction are deferred], and which the jurists divided into three varying categories in regard to prohibition: *faskh al-dayn fī al-dayn* (annulment of one debt for another), *bayʿ al-dayn bi al-dayn* (the sale of one debt for another), and *ibtidāʾ al-dayn* (deferment of both counter values). Among the things that are based on this latter category, which is the least prohibitive of the three, is the deferment of the *salam* payment for more than three days. It is prohibited due to what it leads to in terms of occupying both (the buyer) the one making the *salam* payment (*muslim*) and (the vendor) the one to whom it is made (*muslam ilayh*) with liabilities, the former with the payment of capital and the latter with the commodity purchased on a *salam* basis.

155. Al-Qarāfī says: "*Al-Gharar* (risk and uncertainty) is of three types: (a) that which people all agree is prohibited, like a bird in the sky or a fish in the water; (b) that which people all agree is permitted like the cotton used in a *jubbah* (a long outer garment), or the foundation of a house; and (c) that which people disagree on like the sale of an article in *abstentia* based on a detailed description." *al-Dhakhīrah* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1422/2001), 5:191.

156. See n145 above.

157. *Al-Ḍamān* is where one person takes it upon himself to pay the debt of another if the debtor does not pay it, or to have the debtor present at the time of the settlement of the debt. It is not permissible to take a fee or reward for it, just as it is not permissible to take a reward or fee in return for a loan or a person's reputation. In *Mawāhib al-Jalīl* it is stated: "There is no disagreement as to the prohibition of guarantee for a fee, because the Shari'ah has made

scholarly consensus has been cited as being prohibited;[158] is the type of guarantee for a fee practiced in today's financial institutions the same as the one practiced in the past?

- the question of paying off the increase that accrues in a debt liability during inflation—is it a case of an increase in debt when the currency was in gold and silver? And so on and so forth till the end of the list of contracts that are all searching for a *taḥqiq manāṭ* for their respective applications, while the Islamic fiqh academies still maintain vis-à-vis these contracts the original view of prohibition.

3. SOCIAL LIFE

The issue of the family is a huge area of importance for all revealed religions. It is not just something that is valued but also a law of the Cosmos, and one of the practices (*sunan*) of Allah not subject to change at all: (No change will you find in the Way of Allah).[159] It is a sign from among the signs of Allah, and a blessing from among His blessings: (And among His signs is this, that He created for you spouses from among yourselves, that you may dwell in tranquility with them, and He has put love and mercy between your hearts).[160]

The family—male and female—is the establishment of life, and the joy and pleasure of this world when the spirit of love, mercy, compassion, and affection is made to spread throughout it. These are the grand purposes and higher values behind the family institution. The Divine Law came to provide a detailed account of the rules that safeguard and protect this family structure: firstly, in the relationship between the two spouses, how it begins and how it ends,

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it such that guarantee, lending, and a person's reputation are not to be done except for the sake of Allah and not in return for compensation. Taking or accepting compensation for guarantee is considered forbidden by law (*suḥt*). Taking a fee or wage (*ujrah*) for guarantee is what they term *al-ḍamān bi al-juʿl*." 4:391.

158. "All those from among the people of sacred knowledge whose statements we have preserved have unanimously concurred (*ijmāʿ*) that guarantee for a fee (*al-ḥimālah bi juʿl*) which the guarantor takes is not lawful and not permissible." Ibn al-Mundhir, *al-Ishrāf* (Ras al-Khaimah: Maktabat Makkah al-Thaqāfiyyah, 1428/2007), 6:230.

159. Q33:62.

160. Q30:21.

how profits increase and losses decrease, how benefits are secured and harms prevented while giving attention to a third party, namely the child, and secondly, in the relationship with society. As such, it came with a system that gives due consideration to the dimensions of this central value from every angle.

Perhaps the most important issue that the age in which we live raises in this regard, for which it is possible to have a sort of dialogue between the texts and the times, is the problem of equality. This is with the aim of effecting mutual proximity between some of its components by using certain Qur'anic verses that are decisive in this regard as our point of departure:

> *And women shall have rights similar to the rights against them, in accordance with equity (al-maʿrūf)*[161]
>
> *The believing men and believing women are protectors of one of another*[162]
>
> *Whoever performs righteousness, whether male or female, and is a believer…*[163]

By looking at the word "equity" (*al-maʿrūf*) as referred to in the noble verse and giving it special attention, we see the manifestation of the protective and nurturing space that envelopes these values in Islam. Al-Shāṭibī states: "Men and women are equal at the basic level of religious obligation (*al-taklīf*) on the whole, but are distinct from one another through the particular religious obligation that befits and is specific to each of them. …Special distinction (*ikhtiṣāṣ*) in this is not problematic."[164]

The contemporary social context contains things that do not agree with the values of any religion on the question of forming a family.

So what about a woman's guardianship over herself in marriage as viewed by Abū Ḥanīfah?[165] And is every woman that is described

161. Q2:228.
162. Q9:71.
163. Q16:97.
164. al-Shāṭibī, *al-Muwāfaqāt*, 3:302–3.
165. Muḥammad al-Sarakhsī, *al-Mabsūṭ* (Beirut: Dār al-Maʿrifah, 1398/1978),

as a *barzah* (that is to say, someone who mixes with people and is informed about their conditions and circumstances)[166] considered for certifying witnesses, like the viewpoint of the Hanafi scholars?[167] The list of legal rulings that points to equality is a long one. Thereupon, is it possible for us to arrive at a universal (*kullī*) in this regard using the two juristic principles of induction and temporal custom as our point of departure? This is *taḥqīq al-manāṭ*.

4. MUSLIM MINORITIES IN NON-ISLAMIC COUNTRIES

This topic requires that *taḥqīq al-manāṭ* be carried out with rigor in order to create an environment of openness and a climate of facilitation and ease. The particularities of a minority are sometimes religious or a type of "ethnic" relativism. For this reason, the ruling majority tends largely to disregard the rights of this minority, if not make life difficult for them materially and mentally because they feel uneasy and are unable to bear the values and ideals that the minority represents. This is perhaps the most important problem that minorities generally face in having to harmonize between holding on to their own values and adapting and fitting in with their surrounding environment.

5:10–12; Masʿūd al-Kasānī, *Badāʾiʿ al-ṣanāʾiʿ* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1418/1997), 2:247.

166. ʿAlāʾ al-Dīn al-Ṭarābulusī states: "A woman's attestation to the credibility and character assessment (*taʿdīl*) of her husband and others is accepted in an Islamic court of law if she is a woman who is a *barzah*, who mixes and deals with people, because she has experience in their affairs, and questioning her is therefore useful. *Al-taʿdīl* is from among the matters of religion, and both men and women are equal in that respect such as narrating reports and sighting the crescent moon for Ramadan, specifically in the accreditation of a woman's waiting period, because the states of women in their homes cannot really be known except by women. Therefore, if a woman is not exposing herself to the public eye (that is to say, she is kept at home out of the public eye such that she does not leave the house not even to see to her daily needs), and she does not have experience (that is to say, she is not schooled in the ways of the world) then her accreditation is not considered." *Muʿīn al-ḥukkām* (Beirut: Dār al-Fikr, 1410/1990), 1:366. Amīr Bādishāh mentions something similar in his *Taysīr al-taḥrīr* (Beirut: Dār al-Kutub al-ʿIlmiyyah, n.d.), 3:59.

167. See a committee of Muslim scholars headed by Niẓām al-Dīn al-Balkhī, *al-Fatāwā al-Hindiyyah* (Beirut: Dār al-Fikr, n.d.), 3:529; al-Ṭarābulusī, *Muʿīn al-ḥukkām*, 87; Ibn Amīr Ḥājj, *al-Taqrīr wa al-taḥbīr*, 2:257–8, for an excellent detailed explanation.

History has witnessed and recorded numerous tragedies that minorities have suffered due to disputes between minorities and the ruling majority. We are not going to provide a historical count of all the massacres of minorities that the world has had to live through and continues to live through in the twenty-first century, except, however, that in the modern age an important development has taken place in the world. This development is the fact that the system of human rights has become the means that enables minorities to live amidst the ruling majority, and especially in Western countries that have adopted such a system. Originally, it was a way to ensure the mutual co-existence between the adherents of the Protestant Church and the adherents of the Catholic Church, except that with time it allowed for the existence of African and Asian minorities, who emerged due to several causes—the primary cause being the colonial connection that led to many workers indentured from the colonies migrating to the colonizing countries.

At one point in time, the Islamic civilization was the only one amongst human civilizations that organized human rights for minorities in terms of how they practiced their religious rites and in taking one another to court for legal decisions. That is why the Coptic minority could live in Egypt for fourteen centuries under the protection of Islam, and is also the case with the Jewish minority living in Morocco up to this very day.

Several international declarations, charters, and treaties after World War I were concerned with the protection of minorities, and likewise the question of minorities became one of the biggest problems that the United Nations faced.

The conditions of Muslim minorities in Western countries might be described as "conditions of necessity and exigency" with *ḍarūrah* (necessity) being used here in the general sense, which includes "need" (*ḥājah*), as well as *ḍarūrah* in the specific sense. It therefore requires a special fiqh—and this does not mean creating a new fiqh that operates outside the framework of traditional Islamic jurisprudence—the authority of which is the Book (Qur'an), Prophetic Sunnah, and what is based on them in terms of secondary sources like scholar consensus (*ijmāʿ*), analogical reasoning (*qiyās*), juristic preference (*isitiḥsān*), public interest (*maṣāliḥ mursalah*), blocking the means (*sadd dharā'iʿ*), customary practice (*ʿurf*), and presumption of continuity (*istiṣḥāb*), and so on and so forth until

the end of the list of the legal principles that the Muslim Imams have accepted and appropriated in their numerous and diverse statements and views, which constitute and represent a rich fortune and vast reserve.

The issues affecting minorities are old in terms of genus but new in terms of type, and require *taḥqīq al-manāt* based on place, time, and changing conditions.

- A woman embraces Islam, and her husband is non-Muslim; is she to be separated from him based on the view of the majority, or does she remain with him based on what has been reported with authentic chains on the authority of some of the Prophet's Companions?[168]
- The question of purchasing houses with interest loans in the West.[169]
- The question of abode (i.e. Muslims residing in non-Muslim abodes or territories).[170]

168. ʿAbd al-Razzāq al-Ṣanʿānī narrates on the authority of ʿAbdullāh ibn Yazīd al-Khaṭmī, "A woman from the inhabitants of al-Ḥīrah embraced Islam, but her husband did not, and so ʿUmar wrote concerning her that she must be given a choice. If she wants, she separates from her husband, and if she wants she stays with him." He also narrates [immediately after this hadith] on the authority of al-Shaʿbī that ʿAlī said: "He is more entitled to her, as long as he does not expel her from her homeland." al-Ṣanʿānī, *Muṣannaf ʿAbd al-Razzāq* (Beirut: al-Maktab al-Islāmī, 1403/1983), 6:84, Book of the People of the Book, chapter on a Christian couple where the wife embraces Islam before the husband.

169. Ibn Bayyah, *Ṣināʿat al-fatwā*, 232, discusses this issue and states that the European Council for Fatwa and Research permits it with certain conditions: (a) that there is a need for a home for him and his family, not for business and other purposes, (b) that he does not have another house which renders the other house dispensable, (c) that it be his principle residence, (d) that he not have surplus money that enables him to purchase a house without resorting to this method.

170. Ibid., 280, mentions the difference of opinion concerning the definition of *Dār al-Islām* (Abode of Islam). After stating the various opinions of the jurists of the different Islamic schools of thought, the author goes on to say: "Perhaps I should spare the reader the effort of having to engage this long and drawn out controversy in which there exists no definitive and conclusive proof by asserting that the *Dār al-Islām* or Abode of Islam is every state in which the Muslims constitute the majority of the population, and whose rulers are Muslim, even if they do not implement Shari'ah law, and the Abode of Non-Muslims is every state in which the non-Muslims constitute the majority, and whose rulers are non-Muslim."

- The question of citizenship.[171] And other issues that are all in need of *taḥqīq al-manāṭ*.

Conclusion

We have attempted, in this short excursion, to detail the principles of *taḥqīq al-manāṭ*, and to ascend the stairs of legal extrapolation (*al-istinbāṭ*). We have attempted to walk you through the walkways of application (*al-taṭbīq*) in order to effect congruency between the texts of the Shari'ah and its higher objectives (*maqāṣid al-Sharī'ah*)—texts which are eternal and which no falsehood has entered into, whether from in front of them or from behind. All this while doing so in conjunction with an ever-changing world and expected future scenario, in all its values, fields, and purposes, a world in which everything is strange, a world whose corners are far-reaching, whose borders distant, a world in which accidental qualities have turned into permanent essences, and in which every assumption has changed into an undisputed fact. True are the words of the one who said:

> They are the days all of which have *themselves*
> Turned into strange objects that there are no more
> strange objects to see in them.

We have attempted to present an approach that gives precedence to the universal over the particular through the methods of *ijtihād* in all its forms, and although our method of choice in this approach has fallen onto *taḥqīq al-manāṭ*, it has not ignored its two sister types (*takhrīj al-manāṭ* and *tanqīḥ al-manāṭ*). It is an approach through which we have attempted to review particular cases in light of universal principles by regarding the universal alone (and not the particular) capable of engaging with the current crises.

171. Ibid. defines citizenship in the following way: "A mutual relationship between individuals of a community that inhabit a single piece of land, and it is not necessary that they all share a common ancestor, nor a common historical memory, nor a common religion. Its framework is the constitution, systems, and laws that define the rights and duties of citizens."

Thus, we have, in the area of application, paused to ponder over

1. the area of politics: the fields of government and rule with Imam al-Ḥaramayn, and we identified the conceptions of the relation between state and religion;
2. the area of economics: we highlighted the root causes of the financial crisis, and proposed the Maliki approach in handling and engaging with debt, sale of a commodity not present (in the contract session), deferring payment before taking possession of the commodity to be paid for;
3. the area of social life: we called attention to the importance of the family institution, identifying the challenges it is facing in the present age;
4. the area of the fiqh or jurisprudence pertaining to minorities: we showed the areas of necessity and exigency where the majority holds the reigns of government and feels uneasy about the particularities of minorities (that make them distinct and different); the latter might complain, and the former would not listen to and give them an hear.

We have attempted to talk about the *wāqiʿ* (world) as something that is visible and appears in full view, and that the one who engages with it might find it agreeable or otherwise. We talked about a *wāqiʿ* that is not imaginary but constitutes values, systems, events, and transactions of which the Muslim Community has become part and parcel—a crisis-ridden and problem-filled world wherein we try to let our fiqh constitute a solution to its problems instead of being one of its problems.

We contended that this will never be available and possible for us except through reviving *ijtihād* (independent juristic reasoning) and *tajdīd* (renewal) in the life of the Ummah, and through delving into the various types of *ijtihād* and methods of *istinbāṭ* (legal extrapolation).

Consequently, we found that the closest of these in terms of resource (*mawrid*) and the soundest of them in terms of means (*wasīlah*) and end (*maqṣid*) is the third of the three types of *ijtihād* and which is not specific to the *mujtahid* so as to exclude the *muqallid* (non-*mujtahid*). At the same time, it does not seek to distance itself from the two other types of *ijtihād*: *ijtihād* with respect to linguistically determined meanings of words, and *ijtihād* with respect to rationally inferred meanings

of texts through the various types of *ratio legis* (*anwāʿ al-ʿilal*) and methods of ratiocination (*taʿlīl*). In fact, *taḥqīq al-manāṭ* is closely interwoven with the other two types of *ijtihād*.

We have attempted through this work to revisit and review the particulars in light of the universals, by regarding the universal alone as the protective guardian to engage and contend with the current crises.

I would like to note here that what I have said now does in no way construe an attempt to rival and compete with the invaluable research papers and studies that a wonderful group of researchers and scholars of the Ummah are presiding over, nor an assault on their brilliant views, nor does it serve to limit and restrict the discussions and debates that have been conducted in this regard. In fact, it is to remind and stimulate, and constitutes something small in terms of laying down a framework as well as seeking to illuminate. It is from the abundant down-pouring of the knowledge of those who possess it that we have our thirst quenched, and it is on the staircase of the rising steps of their scholarly eruditions that we ascend—hoping to lay down for this Ummah a brick in the palace of reform (*iṣlāḥ*), and may Allah make us and you from among the righteous (*ṣāliḥīn*).

May Allah bless and give peace to our master Muhammad, his folk, and Companions, one and all, and all praise belongs to Allah alone, Lord of the Worlds.

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In God's final Shari'ah, hardships are meant to be alleviated, and the moral responsibility to observe particulars of the Law is lifted in the face of compelling necessities. But how are we to measure what accounts for as hardship? How do we evaluate what constitutes necessity? And how do we do so with the honest intention of arriving at God's will without abandoning our own moral vision? The value of the present paper lies in its providing answers to such questions, and in its rooting these responses in the authentic jurisprudential tradition and legal philosophy of Islam.

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