

CRITICAL THINKING IN ISLAMIC LAW: THE SEARCH FOR STRATEGIES

Sayed Sikandar Shah Haneef*
Mek Wok Mahmud**

ABSTRACT

Critical thinking is an intellectual process where it plays a dynamic role in the reconstruction of human thoughts. In Islamic legal thought, this intellectual tool was pivotal in building a full-fledged system of jurisprudence during the glorious days of Islamic civilization. With the solidification of the science of Islamic legal theory and the entrenchment of classical Islamic jurisprudence, this process was somewhat neglected. Recent Islamic revival movements propelled a great zeal for reinstating this process once again. However, the current debate surrounding this concept is not only locked in theoretical intellectualization but also is yet to yield a universally acceptable strategic framework for materializing it in jurisprudential work. This article, therefore, attempts to briefly delineate the concept, unveil the reality on ground and identify some strategies for the application of critical thinking in Islamic law.

Keywords: *critical thinking, Islamic law, ijtihād, strategies, controlling rule*

* Assoc. Prof., Department of Fiqh and Usul al-Fiqh, International Islamic University Malaysia, Kuala Lumpur, zahids1@hotmail.com.

** Head at Department of Fiqh and Usul al-Fiqh, International Islamic University Malaysia, Kuala Lumpur, drmekwok@gmail.com.

INTRODUCTION

Critical thinking as a process of constructing thoughts, views and legal stands via evaluation, comparison, analysis and synthesis of the available source materials, is essential for making Islamic law keep pace with the race of development. As a method of thinking/exertion of mind, critical thinking is a variant kind of advanced *ijtihad* as it does not only involve formulating of rules for new legal questions which requires creative thinking; it also involve reconstructing, reviewing and updating of the old issues which have taken a new dimension. It therefore, finds its place in the contemporary legal discourse under the framework of *ijtihad*. Nevertheless, it as a methodology of developing *fiqh* by undertaking a revisionist, evaluative and examining the orthodox approaches to *ijtihad* has not been fully considered. Muslim jurists, by and large, still cling onto the traditional culture of production and reproduction of the past heritage (*turāth*) to discuss and construct laws for use and application in our time. Legal researchers as well, debate issues and write researches through the same process of reproduction with or without minimal questioning. Some Muslim states as well embark on the codification of classical *fiqh* with minimum or no updating effort for its implementation today. The question now is how to approach the task? Retrospectively, in spite of some degree of consensus among reform minded thinkers on the necessity of critical thinking, the perspectives for its operational framework have not been uniformed among the champions of reform movements (*ḥarakat islāḥiyyah*). Some have advocated a return to scriptural literalism;¹ others have called for a holistic rationalism beyond legalistic;² for others, the way out was an escape from bigotry and factionalism of the legal schools (*madhāhib*) and liberation from the obscurantism of *taqlīd*'s patrons (*'ulamā*).³ While opting to be unconstrained by such perspectives, the paper is designed to be an attempt to point to some practical measures by which critical thinking can be effectively revived and resuscitated.

¹ This has been preached by conservative Salafīyyah in the Middle East and their counterpart *Ahl al-Hadīth* in the Indian sub-continent. For details see, Muneer Ghulam Fareed (1996), *Legal Reform in the Muslim World*, London: Austin & Winfield, pp. 51-104.

² This was the trend with modernists such as Sayyid Jamāl al-Dīn Afghānī, `Abduh and Iqbal. See Sayyid Jamāl al-Dīn al-Afghānī (1878), *Ta`līmāt al-Bayān*, Beirut: Dār al-Ma`rifah, p. 2; Muḥammad `Abduh (1963), *al-Muslimūn wa al-Islām*, Kuwait: Dār al-Hilāl, p. 7; Mohammad Iqbal (1951), *The Reconstruction of Religious Thought in Islam*, Lahore: Sh.Muhammad Ashraf, p. 34.

³ This is the call by *Ahl al-Hadīth* and Wahabi movements. Fareed (1996), *op.cit.*

WHAT IS CRITICAL THINKING?

Critical thinking has been variously defined by western authorities. Two most prolific are:

1. Critical thinking is an intellectually disciplined process of actively and skillfully conceptualizing, applying, analyzing, synthesizing, and/or evaluating information gathered from, or generated by, observation, experience, reflection, reasoning, or communication, as a guide to belief and action.⁴
2. Critical thinking is an intentional application of rational, higher order thinking skills, such as analysis, synthesis, problem recognition and problem solving, inference, and evaluation.⁵

As part of a thinking process, it involves asking questions, defining a problem, examining evidence, analyzing assumptions and biases, avoiding emotional reasoning, avoiding oversimplification, considering other interpretations, and not tolerating ambiguity.⁶

For critical thinking to be valid, it must meet some standard criteria including: "... an assertion must be based on relevant and accurate facts, based on credible sources, precise, unbiased, free from logical fallacies, logically consistent, and strongly reasoned."⁷ At the operational level, critical thinking involves identifying, evaluating, and constructing arguments and the ability to infer a conclusion from one or multiple premises. To do so, it requires one to examine logical relationships among statements or data. Ambiguity and doubt serve a critical-thinking function and deemed necessary and productive part of the process, urging one to continue their search until they reach the correct conclusion.⁸

Hence, a critical thinker is one who is skeptical and open-minded. He values fair-mindedness, respects evidence and reasoning, respects clarity and precision, looks at different points of view, and will change positions when there are reasons that lead him to do so.⁹

⁴ Adopted from http://crescentlife.com/articles/education/critical_thinking.htm, accessed on 13 March 2009.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

ISLAMIC PERSPECTIVE

In the Islamic parlance, critical thinking is understood from the perspective of its antonym/antipode, namely *taqlīd* (uncritical adoption and blind acceptance). *Taqlīd* means unquestioning acceptance of the doctrine of the established schools and authorities.¹⁰ To be more specific, by critical thinking we mean *taqwīm al-turāth* (evaluating the juristic legacy), *al-naqd al-fiqhī* (critiquing the Islamic jurisprudence) or its critical adoption (*naqd al-turāth*). This is an exercise which signifies a reasoned, objective, evidence based and rational approach in learning, constructing and articulating Islamic law and implementing it in a given situation.

Critical thinking as such and not *taqlīd* is a divinely sanctioned intellectual culture. This we gather from anecdotes of the Qur'an about Prophet Abraham who questioned the existence of the sun and moon as Gods, reaching the conclusion that whatever sets and disappears cannot be all-powerful, that the Creator of all these created things was the One God.¹¹

Again the Qur'an times and again, emphasizes and demands that Muslims observe, think, ponder, reflect and question creation,¹² including the wonders of the universe and what is within us to recognize God's existence. Some noted verses among them are:

"Do they not ponder/reflect on the Quran?" (Sūrah al-Nisā'; 4:82)

"... the signs in detail for those who reflect." (Sūrah Yūnus; 10:24)

"Do they not reflect in their own minds?" (Sūrah al-Rūm; 30:8)

"...and contemplate the wonders of creation." (Sūrah Āli `Imrān; 3:191)

"... in order that you may consider." (Sūrah al-Baqarah; 2: 219 & 226)

In Islamic jurisprudence, the vehicle for critical thinking is the intellectual tool of *ijtihād*¹³ - a serious intellectual enterprise which sustains the dynamics of

¹⁰ Wael Bahjat Hallaq (1983), *The Gate of Ijtihād: A Study in Islamic Legal History*, University of Washington: N.P.P., p. 2. It is also held to signify surrendering legislative authority to famous men, an authority that God granted to no man. Also see Fareed (1996), *op.cit.*, p. 136.

¹¹ Al-Qur`ān, Sūrah al-An`ām, 6:74-81.

¹² For details see, Faṭimah Ismā`īl Muḥammad Ismā`īl (1993), *al-Qur`ān wa al-Nazar al-`Aqlī*, Virginia: al-Ma`had al-`Alami li al-Fikr al-Islāmī, pp. 63-75. Also see, Muḥammad `Abd al-Wahīd Hijāzī (1993), *al-Qur`ān wa Manhaj al-Tafkīr*, Cairo: al-Zahra, pp. 94-162.

¹³ Jamal Badi & Muṣṭapha Tajdin (2004), *Creative Thinking: An Islamic Perspective*, Kuala Lumpur: International Islamic University Malaysia, p. 2.

Muslim mind and ensures the enlightened, informed and rational construction and application of Islamic law. This was inaugurated in the famous *ḥadīth* of Mu‘ādh Ibn Jabal¹⁴ and as an essential tool accounted for the flowering state of development in Islamic law in the course of history.

Unfortunately, through time and with the weakening of the Muslim states and consolidation of legal schools, towards the end of the 4th century after *hijrah*, this creative spirit is lost and unthinking outlook/backward approach (*taqlīdic*)¹⁵ to *fiqh* became a norm. For instance, al-Sawī of Mālikīyah, stated:

*“ No deviation from the fiqh of four Sunni madhhab is allowed even if that be in harmony with the opinions of a companion or a sound ḥadīth or a legal provision from the Qur`an. Going outside the legal parameter of the four Sunnī schools is tantamount to being misguided and misleading others.... ”*¹⁶

This kind of approach was vociferously pursued and defended by the supporters of *taqlīd*, who among others, argued:

1. The present scholars are not adequately qualified to exercise *ijtihād* and extract rulings from the texts both in terms of knowledge as well as personal piety.

¹⁴ The Prophet sent Mu`adh to Yamen to serve as a governor. Before his departure to assume the job, the Prophet asked him as to how he would make his ruling? He said, “in accordance with the Qur`an, then in line with the Prophet’s tradition,” and upon further questioning, (if the above sources contained no legislation on the point), he replied: “*ajtahidu ra`yī wa lā `alū*- I exert my mind to the utmost to arrive at my own opinion.” The utmost exertion of mind required by *ijtihād* is also the characteristic feature of critical thinking – as it is the highest level of thinking. See, Aḥmad ibn Ḥusayn al-Bayhaqī (n.d.), *al-Sunan al-Kubrā*, Beirut: Dār al-Fikr, vol.10, p. 114.

¹⁵ *Taqīd* of the previous legal authorities (*mujtahidūn*), for the present *mujtahidūn* is *ḥarām*, ordinary citizen not instructed in law may depend on the opinion of the jurist-counsel (*mufī*) as part of his/her education in religion. For details see, Imran Ahsan Khan Nyazee (2003), *Islamic Jurisprudence*, Petaling Jaya: The Other Press, pp. 330-332. This state of mind, namely *taqlīd*, crippled creativity not only among the Sunnis, it equally constrained the movement for *ijtihād* among the Shi`ah- as among them also there are people who are conservative and segments who are rational as maintained by Tabataba`i., quoted in Fareed (1996) *op.cit.*, p. 85.

¹⁶ Al-Sawī from his treatise, *Ḥashīyāt al-Sawī `alā al-Jalālayn*, see, Yūsuf al-Qaraḏāwī (2004), *Kayfa Nata`amal ma`ā al-Turāth wa al-Tamadhub wa al-Ikhtilāf*, Cairo: Maktabah Wahbah, p. 63.

2. The distinguished leading *mujtahidūn* have virtually exhausted all arguments in establishing the authenticity of their rulings and it is thus unnecessary to reopen the issues again (by questioning).
3. The Prophet has emphasized the superiority of the first three generations over all others.
4. The *ʿulamā* are the heirs of the Prophets as established by a statement from the Sunnah.¹⁷

The above arguments, however, can be questioned in various ways: First, the founding leaders of the *madhāhib* themselves have never made such a tall claim. For instance, once Abu Ḥanīfah was asked about the conclusiveness of his finding/ruling by way of *ijtihād*:

*“Is it a final/true position beyond any doubt?” He replied: “I swear in the name of Allah that I am not positively sure, maybe it is untrue/false position without any shred of doubt.”*¹⁸

Similarly Imam Malik has stated:

*“I am verily not but a human, I may err or may be right. Then you should probe into my opinion anything of which if proved to be in consonance with the imperatives/spirit of the Qur`ān and the Sunnah, you take it, and if it be on the contrary, you must discard it.”*¹⁹

Imam Ahmad used to say:

*“You should not imitate me or Mālik or Shāfi`ī or Awza`ī or Thawrī, and extract the ruling from where they have extracted.”*²⁰

And finally, al-Qarāfī summed up the position by saying:

*“Perennial stagnation/clinging onto quoted opinions/legal heritage is tantamount to a misguided position in religion and ignorance about the stated goals of the Sharī`ah that was anticipated by the early scholars and our predecessor.”*²¹

¹⁷ Fareed (1996), *op.cit.*, pp. 138-140.

¹⁸ Quoted from Muḥammad Salīm al-`Awwā, *Tajdīd al-Fiqhī*, in <http://www.albayan.ae.com>, accessed on 12 March 2009.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Quoted in Jamal `Atiyah & Wahbah al-Zuḥaylī (2000), *Tajdīd al-Fiqh al-Islāmī*, Damascus: Dār al-Fikr, p. 181.

Secondly, the close generations to the time of revelation were best in the sense of being privileged with having easy access to pure teaching of Islam and not in the sense that they were infallible. Stressing this, Hassan al-Banna held:

*“Everyone else’s opinion could be taken or abandoned except that of the Prophet. All the body of opinions originating from our predecessors if consistent with the Qur`ān and the Prophet’s Sunnah could be accepted otherwise the Qur`ān and the Sunnah prevail over human speculations. Nevertheless, in this process, we should refrain from personal attack against those whose ijtihād that deviates from the textual rulings of the evidences of the Qur`ān and the Sunnah.”*²²

In matters of Islamic law, no human construction to the law is conclusive and final; except those founded on unimpeachable evidences from the Qur`ān and the Sunnah. That is explanation to al-Qaraḏāwī who explicated this point by maintaining that the reason we cannot question the textual rulings embedded in the Qur`ān and Sunnah is that they are protected against the humanly error (*ma`ṣūm*)²³ but such immunity against pitfalls cannot be attributed to human creative construction (*ijtihād*). This fact was fully appreciated by Righteous Caliphs, such as Abu Bakar and ‘Umar. For instance, Abu Bakar, the first Caliph, said:

*“If you see me uphold the truth then assist me; but when you observe that I astray to falsehood then straighten me...”*²⁴

‘Umar, the second Caliph, similarly affirmed by saying:

*“O people ! Any one of you who sees any deviation on my part, he/she should put me on the right path.”*²⁵

He also reminded people by saying that:

*“O people! The opinion issued by the Prophet was conclusive as he was guided by God, but ours is one of the conjecture and speculation.”*²⁶

²² Haṣan al-Bannā (1990), *al-Uṣūl al-`Ishrīn*, Cairo: Dār al-Da`wah, p. 5.

²³ Al-Qaraḏāwī supports his stand by marshalling numerous verses from the Qur`ān to this effect. See al-Qaraḏāwī (2004), *op.cit.*, p. 13.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid*, p. 28.

Thirdly, the *'ulamā* being the heirs of the Prophet, encompass all the *'ulamā* and not only the scholars of a particular epoch or brand type. Another implication is that *'ulamā* of all ages are responsible to guide people in legislation matters as realistically as the Prophet accomplished his. This *ḥadīth* indeed lends more support to serious intellectualism than stagnancy.

The rationale in adopting the Islamic legacy is a matter not only legally sanctioned, it is also common sense. The former Prime Minister of Malaysia, Tun Dr. Mahathir Mohamad said:

*"...is it heretical to question the interpretation of the Islamic jurists? Are they prophets that we cannot question them even..."*²⁷

In explaining this phenomenon, we need a revisionist approach to the imitation of the interpretation made by the past scholars, he maintained:

*"Naturally these Muslim jurists were influenced by the stage and circumstances, in the evolution of Muslims society. They were living in the period of glory. Under such circumstances the Muslims were in a position to impose whatever they consider to be laws in accordance to Islam... But those days of glory and power are over. Today, even in countries where Muslims form majority or make up the entire population, they cannot ignore opinions, pressures and powers outside their countries."*²⁸

The Indian reformer, Sayed Ahmad Khan stressed the necessity of critical thinking (the antipode of *ijtihād*) long ago, also said:

*"...we should be aware of the time changes and that again and again we are confronted with new questions and new needs..."*²⁹

Rida also maintained:

*"Whosoever impedes the function of ijtihād in construed as impeding the ḥujjāt Allah (arguments expressed in the Qur`ān and the Sunnah). Thus, he does not only destroy the infrastructure of the law but can potentially contribute to the betterment of the Muslim community in the modern times."*³⁰

²⁷ The speech by the Prime Minister Y.A.B Dato Sri Dr.Mahathir bin Mohamad at the International Seminar on the Administration of Islamic Laws. See Ahmad Mohamed Ibrahim & Abdul Monir Yaacob (eds.) (1997), *The Administration of Islamic Laws*, Kuala Lumpur: Institute of Islamic Understanding Malaysia, p. ix.

²⁸ *Ibid*, pp. xii-xiii.

²⁹ Syed Ahmed Khan (1860), *Tabyīn al-Kalām*, Delhi: Idāra-Abādiyyāt-i. Delhi, p. 16.

³⁰ Rashīd Riḍā (n.d.), *Majallat al-Manār*, Beirut: Dar al-Ma`rifah, vol. 8, p. 731.

THE SITUATION TODAY

Uncritical theorization of *fiqh* makes the mind blunt, uncreative and dull. Although at present time our jurists no longer believe in the ascendancy of *taqlīd* and heresy of innovation, renewal, fresh thought, questioning, and creative thinking, in practice, they de-emphasize *ijtihād* (intellectual creativity), revisions and critical thought (*al-fikr al-naqdi*) in articulating *fiqh* and its exposition in numerous ways. A perusal of the state of academic activities, from teaching, to text book writing and researches, carried in Islamic law schools point to the continued stagnation of legal thought, dubbed as the crisis of *fiqh* by al-`Alwani³¹ and assigned description by Shaltut as follows:

1. Loss of the spirit for impartial academic inquiry - blind adherence to a particular words of the author or his interpretation;
2. Unquestioned acceptance of the past body of laws;
3. Renunciation of practical approach to *fiqh* – researching issues of theoretical importance only;
4. Engrossment to create legal loopholes to dodge legal responsibilities (*ḥiyal* and *makhārij*);
5. Sectarian based construction and reconstruction of ideas and opinions resulting in the exclusion of a vast body of legal scholarship from our legal discourse not only due to Sunni-Shi`ah divide but also regarding the ideas of some other great Sunni thinkers, such as al-Ṭabarī, al-Thawrī, al-Zahīrī, etc, as antagonistic to one`s professed school.

Another aspect is requiring *ijtihād* to be attempted in accordance with traditional methods, i.e., calling for the revival of the *ijtihād muṭlaq* and undertaking inter-textual inference of laws without recourse to their historical contexts, a tendency that plagued even some great reformers` approach such as Rashīd Ridā.³²

Diagnosing this, Ghāzī, the editor of *al-Ṭuruq al-Ḥukmiyyah fī al-Siyāsah al-Shar`iyyah*, also lamented:

“Today Islamic jurisprudence (fiqh) suffers crisis, external and internal. External takes the form of onslaughts from its enemies and people having prejudice against it. The internal crisis, on the other hand, plagues it on behest of its own unthinking proponents.

³¹ Taha Jabir al-`Alwani (1998), “The Crisis in Fiqh and the Methodology of Ijtihād”, *The American Journal of Islamic Social Sciences*, vol. 8, no. 2, p. 327.

³² Fareed (1996), *op.cit.*, p. 70.

The most crippling of the two is the internal part. In lieu of these people (though mala fide) who restricted their role at closely guarding the Islamic legal heritage without investing any effort towards its further development, revision and contextualization (relating it to contemporary needs of the ummah). This is such a glaring laxity that neither receives the approval from God nor from people.”³³

The above concerns are not mere assertions. The reality in the ground clearly indicates this. For instance, any person with some basic/ working knowledge of the Arabic language, the primary language of Islamic law, is able to detect them at many levels: First, some of our text books on Islamic law still delve with subject matters which are out of touch with today's realities, mostly without any or minimal attempt for updating them.³⁴ Secondly, the same outlook pre-dominantly perverts the dissertations and theses written by the graduating students in Islamic law schools.³⁵ Next, codification of Islamic law in the Muslim states, though a progressive step towards implementation of

³³ Ibn Qayyim al-Jawziyyah (n.d.), *al-Ṭuruq al-Ḥukmiyyah fi al-Siyāsah al-Shar'iyyah*, Muḥammad Jamīl Ghāzī (ed.), Cairo: Dār al-Madani, p. 2.

³⁴ By way of example, some contemporary books on Islamic international relations (law) still present the picture of world's political map as existed during glorious days of Islam - covering concepts like *jizyah*, *dār al-ḥarb*, *dār al-Islām* and so on. See for example, Ṣubḥi Maḥmaṣṣānī (1982), *al-Qānūn wa al-'Alāqāt al-Dawliyyah fī al-Islām*, Beirut: Dār al-'Ilm li al-Malā'in. Nevertheless our aim is to present to you the mainstream position among the modern juristic works on *siyār*. This observations, therefore, cannot hold true on more recent researches written by thinking scholars and particularly, some pioneer innovative works on the subject, such as the one by Dr. Hamidullah, see Muhammad Hamidullah (1977), *Muslim Conduct of State*, Lahore: Sh. Muhammad Ahraf.

³⁵ For instance, the title of MA theses and Ph.D dissertations on Islamic law if surveyed, majority of them indicates the symptoms of *taqlīd* in many ways: school-bound, involve more of a reproduction of the legal heritage in the form of writing glosses and commentaries on the previous works, such as the concept of such a topic according to so and so, contains hazy comparison with civil law, for instance, a *fiqh* topic was compared with some corresponding concepts in statutory law – an exercise which methodologically is seriously objectionable, as anyone with legal education knows that statutory laws cannot be understood without reading it with the case laws, a skill which is not expected of *fiqh* student, to name a few. See also the observation made by Ibn al-Shilī, who lamented this state of intellectual stagnancy on the part of our young jurist researchers. See Abū Amāmah Nawwār ibn al-Shilī (2008), *al-'Aql al-Fiqhī: Ma`ālim wa Ḍawābiṭ*, al-Iskandariyyah: Dār al-Salām, pp. 133-137.

Islamic tenets in contemporary Muslim societies, shows glaring symptom of *taqlīd* in many ways,³⁶ just to enumerate a few.

STRATEGIC MECHANISMS

The era of sectarianism has long ago ended and the spirit of *takhayyur* and even *taḥfīq* from our legal heritage have been hailed.³⁷ These developments, therefore, should have served as precursors to march in the path of critical adoption of the credible opinion from among the legal views and interpretations of the jurists (embracing the whole array of school-bound, independent, defunct and current legal thoughts). This is due to it neither scholarly nor has it been made obligatory to imprison one's horizon of thinking within the parameter of a particular school or to that of a scholar's legal thought. Realizing this malaise among some *fuqahā*, Shaltūt said:

³⁶ Modern Islamic law codes, among others, suffer from the following aspects of *taqlīd*: 1) Are school bound (though) they define *ḥukm shar'ī* as rules according to recognized schools; 2) silent on contemporary issues (no speedily updated); 3) embody bad eclectic (*takhayyūr*) or choice of opinion from across the legal schools. For instance, an example of eclectic code is Selangore Islamic Family Law Enactment, 1984 which in s.2 defines *hukum syarak* as Islamic law according to any recognized Mazhab, and also in s.47(2) it requires the divorce to be pronounced before the court. It also provides in s.47(3) that if the court is satisfied that the marriage has irretrievably broken down, the court shall advise the husband to pronounce one *ṭalāq* before the court. This is a very progressive legislation at least on this point. But what about triple divorce pronounced at will outside the court? The law is not explicit on this but it says that the party (husband) will be committing an offence which carries a fine not exceeding one thousand ringgit or imprisonment not exceeding six months. Therefore, the divorce still will be valid. This law and the choice of ruling about the occurrence of triple divorce in such away, invoked public outcry in Malaysia when the court endorsed Shamsudin's triple divorce of his wife Fazlina, via S.M.S. For a brief coverage of this case see, <http://www.deccanherald.com/deccanherald/sep06/she4.asp>, accessed 12 May 2009.

³⁷ *Talḥīq* implies the idea of patching the more flexible legal stand from across the schools and *takhayyūr* implies the idea of critical choice from the available juridical interpretations. These two methods were rejected by the regimen of *taqlīd*. Nevertheless some courageous thinkers long ago broke up with this trend. For instance, Sayyid Sabiq wrote *Fiqh al-Sunnah* and al-Qaraḍāwī has classified such conscious choice of interpretations as a sub-variety of *ijtihād* (*ijtihād intiqā'ī*).

“The findings of a mujtahid is binding only on himself, no matter how eminent he may be; moreover it is inadvisable for anyone to accept a mujtahid’s opinion without understanding its underlying reasoning.”³⁸

Adopting a liberal approach in dealing with human extrapolation of the Qur`ān and Sunnah termed as “search for new model” must be allowed to continue particularly in our time as the conditions prevailing in the early period, in the nature of things, never to be reproduced sustaining the classical model.³⁹ This, therefore, calls for a genuine, sincere and disciplined critical thinking on the part of both the students and scholars of Islamic law (*fuqahā wa al-mutafaqqihūn*).

We believe, for critical thinking to practically take off and serious scholarship to emerge and flourish among others, we can start by:

1. Questioning the logical assumption of some jurists` understanding of certain issues (by unveiling its fallacies) and dismissing it in favor of the position which is more logically sound and intellectually sensible.

For instance, majority of the jurists` position on non-implementation of *qisās* on a father who happens to murder his son (child), among others, was based on some logical assumptions that contain obvious fallacies. The rationale reads “since the father is the cause of the son`s existence, it is inappropriate that the son should then become the cause of his father`s annihilation.”⁴⁰ This logic opens to many questions: What if the same father rapes his son or daughter? And what about the irrefutable *raison d`etre* of *qisās*, “bringing equivalence” which *ipso facto* aimed at repudiating the pre-Islamic practice of inequality, once and for all?⁴¹

2. Reviewing the previous conclusion in the light of empirical knowledge. On this note, al-Qaraḏāwī maintains:

“In our time, one of the most effective factor and sure criterion in the study of comparative fiqh which helps the students of jurisprudence to come out of disputed points /conflicting positions among the jurists and confidently opt for the preferred

³⁸ Maḥmūd Shaltūt (n.d.), *al-Islām: `Aqīdah wa Sharī`ah*, Cairo: Dār al-Qalam, p. 78.

³⁹ *Ibid.*

⁴⁰ For the weakness of other arguments also see, Sayed Sikandar Shah Haneef (2000), *Homicide in Islam*, Kuala Lumpur: A.S Noordeen, pp. 94-97.

⁴¹ Shaltūt (n.d), *op.cit.*,p. 112.

position; is the availability of scientific findings, drawn from a variety of disciplines, such as astronomy, physics, biology, chemistry, medicine and physiology. These bodies of knowledge were unknown to our predecessors. Therefore, some of their assumptions may be refuted by these findings and dismissed as weak and unacceptable ijtihād on a given question of fiqh.”⁴²

Al-Qaraḍāwī further held when he stated:

“When referring to the exegesis and commentaries on the divine textual proofs, one must search for their messages and meaning and not false assumptions and outdated cultural based speculations appended to them. The reason is that juristic commentaries, rationalizations of the rationalists and exegeses of the past scholars were made in the light of the available state of knowledge about the universe, life, human, history and were further constrained by factors of time, space, social environment and customs. For instance, when commenting on the verse, ‘And among His signs is the creation of the heavens and the earth and the living creatures that He scattered through them’..., (Surāh al-Shūrā; 42: 29); the classical commentators held that the purported existence of livening creatures in the Heaven is figurative as they are only found on Earth. Hence, this assumption cannot hold true anymore, as in recent discovery suggests possibility of life in other planets as well.”⁴³

Al-Afghānī, the pioneer of reform (*tajdīd*) through *ijtihād*, called not only for the pressing needs for new hermeneutic paradigm in the interpretation of the scriptural texts (*nuṣūṣ*) but also underlined the paramount significance of learning from other legacies. He said to the effect:

“Muslims must take guidance for the Qur`an and authentic traditions, or to strive earnestly in order to broaden their intellectual horizons thereby, and to derive, by way of analogy from the contemporary sciences – keeping in view the needs of the time – that which does not contradict the explicit texts.”⁴⁴

For instance, the juristic criterion for ascertaining murderous intent is the method of killing or weapon of the offence. Abū Ḥanīfah stipulates that the

⁴² Al-Qaraḍāwī, Yūsuf (1998), *al-Ijtihād al-Mu`āṣir Bayn al-Inḍibāt wa al-Ifrāt*, Beirut: al-Maktab al-Islāmī, pp. 33-34.

⁴³ Al-Qaraḍāwī (2004), *op.cit.*, p. 29.

⁴⁴ Al-Afghānī (1978), *op.cit.*, p. 17.

weapon used must be one which is capable of actually cutting or piercing. Today, we have better means of ascertaining criminal intent (*mens rea*) as the modes and means of causing death can be numerous and vary according to time and place and new methods that are constantly devised by criminals.⁴⁵

Thus, upholding a more rationalistic outlook, as supported by scientific findings, on these issues is in line with the ideal of social equality and protection of human rights. Otherwise, criminals cunningly can take advantage of such weaknesses in the law and continue to wreak havoc and still get away with the fitting punishment that they deserve.

There are many other issues that forensic science yields more positive knowledge about the reality of things than the criteria devised by the jurists can offer, such as determination of paternity,⁴⁶ justifications/grounds for abortion, proving *zinā*, etc.⁴⁷

3. Modifying or repudiating some previous archaic juristic opinions in view of change in social condition.

An opinion based on *maṣlaḥah* or social custom (*al-`urf*) can be discarded and reviewed in the light of new situations if they no longer serve such objectives. `Umar, the second caliph, modified many previous laws on the basis of changing social objectives. For instance, he discontinued the practice of distributing *zakaat* to *mu`allafat al-qulūb* (aimed at canvassing the support of its recipients to the Islamic cause), contending that today, unlike before, Muslims have established themselves as sovereign state which is capable of defending itself on its own, thus is no longer in need of winning alliances through financial incentives.⁴⁸

⁴⁵ Haneef (2000), *op.cit.*, p. 93.

⁴⁶ For instance, the understanding of some jurists about the maximum gestation period cannot be sustained in the light of scientific knowledge today. For instance, Ḥanāfiyyah held it to be two years; Shāfi`iyyah and Ḥanābilah and Mālikiyyah held it to be four years. Nevertheless, the legal stand by Zāhiriyyah and Shi`, who held it to be nine months and never exceeding one lunar year is in line with scientific finding. For details see, Usāmah `Umar Sulaymān al-Ashqar (2000), *Mustajiddāt al-Fiqhiyah fī Qaḍāyā al-Zawāj wa al-Ṭalāq*, Jordan: Dār al-Nafā`is, pp. 192-193.

⁴⁷ For details see, Sayed Sikandar Shah Haneef (2005), "Forensic Evidence: A Rethinking About its Use and Evidential Weight in Islamic Jurisprudence", *Journal of Islam in Asia*, Kuala Lumpur: International Islamic University Malaysia, Vol.2, No 1, pp. 127-140.

⁴⁸ `Atiyah & al-Zuḥaylī (2000), *op.cit.*, p. 218.

Subsequently, the *fuqahā* ruled: “The adjustment of laws (based on custom and *maṣlahah*) is an irrefutable principle in view of the change in time.”⁴⁹ For instance, al-Qarāfī observed:

*“Whenever the tradition/custom of people changes, you must take that into account, and whenever it passes, repudiate it. You should not stagnate on what has been written in the books throughout your career, instead whenever a person from other locality asks your opinion on a matter, do not advise him according to the prevailing custom in your locality nor in line with what is written in the book, inquire about what is customary in his place and rule accordingly. Hence, this is the right course in advising (obvious truth).”*⁵⁰

An example⁵¹ of juristic ruling of this kind pertained to the status of a missing person’s wife. The jurists differed regarding the length of time that should elapse before she can be considered as widow; four years, ninety, seventy years, for a duration equivalent to the natural life span of his contemporaries.⁵² They ruled according to the circumstances that then obtained. Now, with human access to improved means of communications, to ask the wife of a missing person to wait indefinitely may prejudice her many rights.

Another instance is the admissibility of non-Muslim’s testimony. Majority except the Mālikiyyah do not regard it as reliable other than a case where a dying person, while in journey, executes a will.⁵³ This was reflective of the hostile environment and the situation of mistrust that prevailed between Muslims and non-Muslims in the time of our jurists in the past.⁵⁴ This does not hold true in our situation where our world is no longer divided on the basis of continuous state of hostility between two warring centers of power, namely *dār al-ḥarb* and *dār al-Islām* but has become an abode of

⁴⁹ See article 39 in C.R.Tyser (1967), *The Mejlle* (trans). Lahore: Law Publishing Company.

⁵⁰ Aḥmad ibn Idrīs al-Qarāfī (1992), *al-Furūq*, Beirut: Dār al-Gharb al-Islāmī, vol.1, p. 178.

⁵¹ For more examples see, ‘Aṭīyah & al-Zuḥaylī (2000), *op.cit.*, pp. 180-183.

⁵² The jurists differed on this. Ḥanafīyyah and Shāfī’īyyah held it to be 90 years, Mālikiyyah said it to be 70 years and Ḥanābilah ruled it to be 4 years. See, Muḥammad ‘Alī al-Ṣābunī (1985), *al-Mawāriṭh fī al-Sharī‘ah al-Islāmiyyah*, Beirut: ‘Alam al-Kutub, pp. 192-193.

⁵³ Haneef (2000), *op.cit.*, p. 159.

⁵⁴ *Ibid.*, pp. 159- 165.

coexistence, intertwined fate and inter-dependency via various international instruments.

4. Improving the legal education. Its course structure must contain comparative perspective of the *fiqhī* issues. The required reading must incorporate perspectives from non-Arabic literatures with the view of building sufficient *malakāt al-fiqhiyyah* (juristic aptitude). The teaching of topics must be preceded with a thorough familiarity of the students with the goal-ends of the lawgiver about them (*maqāṣid* oriented approach). In line to give students a good grounding about the practical side of the law and its sophistication, a multi-disciplinary approach should be attempted; particularly parallel position in civil law.
5. Avoiding superficial, naive and simplistic approach to understanding contemporary issues and giving solutions. There are various examples where the modern jurists' approach to provide solution for many pressing social problems, such as overcoming the high rate of divorce among Muslims, child abuse, teen age pregnancies, terrorism ,etc, has been segmental, superficial and even emotional.
6. Undertaking intelligent and serious critical comparative studies of Islamic jurisprudence (not half-cooked and haphazardly) *vis-a-vis* western legal systems⁵⁵ particularly in the domain of constitutional, international and procedural laws.
7. Envisioning the correct areas of prioritization for research and intellectual discourses.⁵⁶
8. Relating the juristic thoughts and interpretations into contemporary setting bound only by definitive injunctions of the Qur'ān and authentic legislative Sunnah. For instance, some of our *fuqahā'*, when dealing with the issue of citizenship (one issue in the domain of *al-niẓām al-siyāsī*) still talk about *dhimmi*, *musta'man* and *mu'ahid*; being oblivious of the fact that with the demise of the last caliphate system (the Ottoman) in 1924 C.E, Muslims have become nation states, living in a different socio-political context. Consequently, deliberating on such issues would be theorizing on matters associated with a political set which no longer exist in reality today.

⁵⁵ Muhammad Farūq al-Nabhan (n.d.), *al-Madkhal li al-Tashrī' al-Islāmī*, Beirut : Dār al-Qalam, p. 373.

⁵⁶ Fazlur Rahman (1982), *Transformation of an Intellectual Tradition*, London: The University of Chicago, p.139.

Nevertheless, such a change in the pattern of human interactions has been captured by some thinking jurists and they have proposed a reconstructed view of such private international law matters like *dhimmah* etc.⁵⁷ Being conscious of the changes that has taken place in our backyards, they freed themselves from the yoke of *taqlīd*. They, among others, argued that the classical grouping being mutable *fiqh* cannot override the immutable principles of the Qur`an: “equality of mankind on the basis of undisputed human brotherhood” and the model of the Prophet who designated the inhabitants of Madinah as one Ummah irrespective of their religious denominations.⁵⁸ For instance, al-`Awwa maintains:

*“The various grades of citizenship as anticipated by our predecessors were valid in the old world order where the hegemony of the world belonged to Muslims. Later on Muslims were subjugated and colonized. In order to attain independence, all residents in the colonies took part in the struggle for one. The post-independence sovereign states, therefore, accord equal status to all, irrespective of their religious denomination.”*⁵⁹

Again on the issue of *dhimmī*, he says:

*“The contract of protection (dhimmah) that was accorded to the vanquished citizens of Islamic states, after the conquest of their territory, like any other contracts was bound by a time-frame. Its time line has long before elapsed with the collapse of the Caliphate system that gave continuity to it as the inheritors of the first Caliphs who created it.”*⁶⁰

The need to adjust to changes in tandem with the dynamics of development in political life occurred centuries ago acknowledged by reputed thinker, Ibn Taymiyyah. After reviewing the work of al-Māwardī on constitutional organization (*Aḥkām al-Sultāniyah*) on the chapter of caliphate, he observed:

⁵⁷ Some voices such as Fahmī Hawaydī, who articulates this perspective must be supported by more serious researches by *fuqahā`*. See Fahmī Hawaydī (1985), *Muwāṭinūn lā Dhimmīyūn*, Beirut: Dār al-Shuruq, pp. 177-188. See also, Muḥammad Salīm al-`Awwā (1998), *al-Fiqh al-Islāmī fī Tarīq al-Tajdīd*, Qaṭar: Jam`iyyat Qaṭar, pp. 57-58.

⁵⁸ Hawaydī (1985), *op.cit.*, pp. 183-184.

⁵⁹ Al-`Awwā (1998), *op.cit.*, p. 57.

⁶⁰ *Ibid.*

“With the demise of the last of the righteous caliphs, Ali in 666 CE, had occurred the demise of the ideal government but not of a valid government. Valid government as such does not require the title of caliphate as the underpinning of its legitimacy. Legitimacy has to do with the function and performance not the form and nomenclature.”⁶¹

THE CONTROLLING RULES (*DAWĀBĪṬ*)

It is to be noted that for productive and Islamic-compliant critical approach to Islamic law, its construction and implementation, bearing the following rules:

1. Drawing distinction between questionable and unquestionable

We must remember that in our quest to question and criticize; we must do it within the framework of Islamic paradigm and never follow the path of sheer rationality as propounded by Western philosophy. Sensing this, `Abduh said:

“...Muslim intellectuals have become deeply divided by two conflicting systems of education that were in vogue in Egypt at that time. The old religious school system represented by the Azhar and the modern missionary established by the British and the French Colonial Powers. The former was reluctant to change its ancient philosophies and methodologies while the latter, with its focus on European rationalism, created an outlook that was spiritually and intellectually alien to Muslim society. I am afraid that society would eventually be destroyed by its restless spirit of individual reason - always questioning, always doubting.”⁶²

As a result, it would be *ultra vires* for human questioning thought to be employed in the area of unanimously agreed unequivocal texts (*nusus qat`iyyah mujma`alayh*).⁶³

⁶¹ Aḥmad ibn `Abd al-Ḥalim ibn Taymiyyah (1951), *al-Siyāsah al-Shar`iyyah fī Iṣlāḥ al-Ra`y wa al-Ra`iyyah*, Cairo: Dār al-Kitāb al-`Arabī, p. 10.

⁶² `Abduh (1963), *op.cit.*, p. 42.

⁶³ This is a unanimous stand by the jurists and is rational as every law must have some stable part from which it should draw and upon which it could sustain. `Abduh echoed this after the aforementioned observation. *Ibid*, p. 43.

Being aware of this unique nature of Islamic legal thought, Iqbal also maintained: “Nobody can afford to reject their past entirely. For it is their past that formed their personal identity.”⁶⁴ When it comes to Islamic rules, he said:

*“Each one of these rules are endowed with a life value of its own, and as much as it tends to give such society a specific inwardness and further secures that external and internal uniformity. This in return counteracts the forces of heterogeneity that always latent in a society of a composite character.”*⁶⁵

Abul Kalam Azad, cautions us that in our zeal for fresh-thinking and crusade against *taqlīd*, we must be careful not to be trapped by the unfettered liberalism of the Western thoughts. The reason being is:

*“...The purveyors of the philosophy of enlightened thought and modern research have dressed up atheism and free thought in the disguise of wisdom and ijtihād.”*⁶⁶

2. Awareness regarding the pitfalls in scientific finding

It is also important that the scientific knowledge predominantly originating from non-Muslim cultures may be imbued by Western philosophical world views that are antagonistic to Islam or they are merely hypothesis. As a result, it cannot be accepted as all and sundry criteria for judging the validity or otherwise of all *fiqhī* rulings. For instance, the Darwin’s view of the origin of the species has been refuted by many scientists as a mere hypothesis.

3. Knowing the risk of liberal use of social sciences

This kind of approach that involves the re-evaluation of Islamic law by distinguishing between its religious and social elements does not only excludes a vast body of laws as historical, it also confuses as what remains as purely religious elements. While advocating the use of social sciences as a methodology of knowing the reality of things in the process of *ijtihād*, Iqbal warns us of its overuse by saying:

*“A purely sociological approach to ijtihād is bound to destroy the broad human outlook that Muslim people have imbibed from the religion. This kind of exertion is exceeding the limits for reform.”*⁶⁷

⁶⁴ Iqbal (1951), *op.cit.*, p. 21

⁶⁵ *Ibid*, p. 24.

⁶⁶ Abul Kalam Azad (1968), *Tadhkirah*, Delhi: Sahitya Academy, p. 8.

⁶⁷ He said this when refuting Zia Gokalp’s, the Turkish thinker’s sociological approach to Islamic reform. See Iqbal (1951), *op.cit.*, p.37.

When dealing with *turāth*, one must also bear in mind the following juridical protocols (*adab*):

- Every *faqīh* and *mujtahid* is entitled to his/her own *ijtihād* and even a mistaken *ijtihād* is also rewarded on account of juristic exertion that one employs
- Acknowledge the fact that past scholars have performed their task of expounding the law in good faith and sincerity but if they have erred in the process, their account is with Allah
- Our criticism and rejection today might have served well the time-space in which they were enunciated
- No human is perfect, hence neither the criticized and nor the critic should claim that the truth entirely vests with his/her legal verdict on issues⁶⁸
- We have to be just and constructive in our criticisms towards our review and repudiate. `Umar refused to review a verdict that was handed down by `Ali and Zayd by saying:

*“Had I wanted to reject their views on account of their contradiction with the Qur’an and the Sunnah, I would have done so. Nevertheless, in matters of juridical deduction, we are all the same.”*⁶⁹

CONCLUSION

The main trend of thought emerging from above analysis is that, critical thinking as a serious process/endeavor to construct *fiqh*, beyond the polemics of supporting *taqlīd* or *ijtihād*, or adhering to Sunni or Shi`i legal thoughts, is inevitable. If the need to reconstruct Islamic law was a part of Muslim struggle in the early post-independence period,⁷⁰ the age of globalization must serve as a more vociferous wake up call for Muslims to think afresh towards the same objective. Nevertheless, this time around, given the intimidating size of the challenges confronting Muslims, the search for critical thought must continue with more rigor and without being entangled with polemics over the sanctity

⁶⁸ The Qur’an explicitly states that human can have only little knowledge of things which they extrapolate. Surāh al-Isrā’, 17:85.

⁶⁹ Al-Qaraḍāwī (2004), *op.cit.*, p. 55.

⁷⁰ *Ibid*, p. 4.

of *taqlīd* and heresy of *tajdīd* (renewal and reform).⁷¹ Thus, what is needed is a holistic approach – by looking critically backward and forward, i.e., critical adoption of past interpretation (*turāth*) if still relevant /viable and recreating or reconstructing new laws suitable for contemporary applications. Cultivating such a culture and resuscitating the spirit of critical thinking and questioning and reasoned argumentation, requires us to embark upon a gigantic program of reforming the way we study, teach, research and articulate *fiqh* and *fiqhī* issues.

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⁷¹ The divided intellectual perspectives on the approaches to reinstate Muslims Laws not only hampered the restoration of Islamic law in most countries, it also led to misapplication of Islamic laws in the case of those countries which attempted its reinstatement.

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