



A Sober Second Thought: When and How Should Changes in Islamic Law be Made?

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It is common for us to hear talk about the need for change and adaptability in Islamic law. The unprecedented developments that human society has gone through since industrialization have made dramatic change the rule, not an exception. This is true even since the advent of the smartphone and social media. Managing such change has challenged all legal, religious, and philosophical traditions. It's no surprise that the issue of change in Islamic law has been a major topic of debate among Muslims. Sometimes the call for change is rooted in a desire to completely abandon the Islamic legal tradition. Other times, however, it is rooted in a well-intentioned desire to see Islamic law provide answers to the technological, economic, and demographic changes that are undeniable realities in today's world. At the heart of such discussions is the question of how much Islamic law is supposed to change with changing circumstances. Another related and perhaps even more important question is how much its wisdom should lead Muslims to push back against those changes.

Since many of these conversations are driven by sincere emotions, many young Muslims may hastily make comments or adopt beliefs without a "sober second thought." As the title of this paper suggests, I hope it will serve that purpose.

A young Muslim in today's world is likely to encounter speech that characterizes Islamic law as outdated or as nothing more than the amalgamated subjective opinions of ancient scholars. Often there are calls to change Islamic law because "times have changed" and we are no longer living in the same world in which scholars of the past lived. This is not entirely wrong, but neither is it entirely correct. Such conversations, if not framed with the right principles, may spiral into a complete denunciation of the Islamic legal tradition. Some may (wrongly, in my opinion) think that this is a price worth paying, that Muslims should move into a 'post-legal' understanding of their religion. But, considering the failure of modernized or progressive worldviews to answer fundamental questions ranging from the metaphysical to the mundane, it seems too drastic and wasteful to cast out the inherited wisdom of the past for a complete reliance on the untested present.

Therefore, the aim of this paper is to lay down basic parameters: a framework for a conversation about Islamic law.

This paper will first describe the nature of Islamic law. Namely, that it is the product of a rational attempt at discovering God's law for humanity, that Muslims are bound by God's commandments, and that subjective beliefs of what is good or evil cannot override scripture.¹ Second, the paper will address the common claim that Islamic law is nothing more than the subjective interpretation of scholars who lived in a certain time and place and that we are, consequently, not bound by the rulings they developed. Third, the paper will explain some of the ways Islamic law is able to change and accommodate new realities while at the same time remaining loyal to the divine text.

Before proceeding any further, it is important to define what is meant by "Islamic law." The term is often used synonymously with the word *Shariah*. Although this is correct to a certain extent, it runs the risk of giving the impression that Islamic law is a collection or code of ready-made laws found directly in the Qur'an and Sunnah. This understanding betrays the fact that many substantive rulings involve juristic reasoning (to varying degrees); these rulings are the output of the enterprise known as *fiqh*. For the purposes of this paper, the term "Islamic law" refers to the corpus of substantive rulings *found in* or *derived from* the Qur'an and Sunnah. These substantive rulings in some cases are self-evident and require no juristic reasoning, such as the obligation of the five daily prayers. In other cases, they involve a degree of juristic reasoning and legal analysis on the part of jurists. This distinction, and the features of each type of ruling, will be further explained below. At this point, however, the reader should keep in mind that "Islamic law," in this paper, refers to the collection of all substantive rulings existing along the spectrum; from requiring no juristic reasoning, to involving rigorous *fiqhī* activity (also known as *ijtihād*).

¹ By *rational* I mean that the attempt is guided by and consistent with the dictates of the human cognitive faculties, which are the subject of acceptance and approval of humanity across time and space and that manifest themselves in the form of principles of logic and reason.

Islamic law is rooted in divine scripture

One of the basic and unique features of Islamic law is its commitment and fidelity to divine text. Muslim jurists, in deducing laws for new legal questions, had the task of delving into divine text in order to discover God's law on those matters. This should be of little surprise to anyone with rudimentary knowledge of what it means to be a Muslim. Believers are commanded in the Qur'an to obey God and live their lives in compliance with the message He revealed to the Prophet Muhammed ﷺ :

It is not for a believing man or a believing woman, when Allah and His Messenger have decided a matter, that they should [thereafter] have any choice about their affair. And whoever disobeys Allah and His Messenger has certainly strayed into clear error. (Qur'an 33:36)

But no, by your Lord, they will not [truly] believe until they make you, [O Muhammad], judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and submit in [full, willing] submission. (Qur'an 4:65)

O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result. (Qur'an 4:59)

Naturally, a person who believes in these verses and embraces their meaning will seek to navigate the world and its problems in accordance with the commandments of God. God's law is discoverable by examining the text revealed by Him (i.e., the Qur'an), and the divinely inspired precedent, sayings, and rulings of the Prophet Muhammed ﷺ, collectively known as the Sunnah. These are the textual sources of Islamic law that are joined by extra-textual sources (which nonetheless find their legitimacy in the Qur'an and Sunnah): consensus (*ijmā'*) and methods of analogical reasoning (*qiyās*) based on the Qur'an and Sunnah. These are the

agreed-upon sources (lit. *uṣūl*) of Islamic law.² The point of enumerating these sources is to ensure that the law Muslims follow in their daily lives is God’s law. Otherwise, and in the absence of a recognized list of sources from which God’s law can be derived, Muslims run the risk of following something other than God’s law. Moreover, they would be inappropriately valorizing those foreign sources with divine sanction.

This strong grounding in these sources is primarily what differentiates Islamic law from other legal systems. A Muslim must recognize that their intellect and ability to discover universal right and wrong—without the guidance of scripture—is severely limited.³ The only way they can compensate for this deficiency is by seeking guidance in the scripture. Any law that purports to be a part of the corpus of “Islamic law” must in some way or another be rationally rooted in and justified by the recognized sources of Islamic law. Anyone looking for change in Islamic law, especially those who may not be familiar with its technicalities, should always keep in mind that Islamic law is based on this commitment and fidelity to the revealed message of God. The job of the Muslim jurist is to look for what the sources of Islamic law dictate, and not to achieve a certain substantive outcome based on what they subjectively believe to be appropriate. Certainly, humans have a sense of justice and morality and Islamic law gives that sense an appropriate role in many instances. But this sense is a tool empowered by Qur’an and Sunnah; it does not rule over them. Whenever we speak of change or adaptability in the context of Islamic law, we must be cautious so as to not ultimately replace the revelation of God with our own views, which even a cursory glance at how different societies view basic issues such as sexuality or family reveals to be subjective and arbitrary. Too often even our deeply held moral sentiments are merely products of our own customs or culture, not any more authoritative or grounded than those of another society. Empowering such limited views at the

² Other schools of law, such as the Ḥanafī and Mālikī schools, include other “secondary” sources such as *istiḥsān*, *urf*, and *maṣlaḥah mursalah*, all of which will be explained later in the paper.

³ Wael Hallaq, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press, 2009), 15.

expense of abiding by God's law results in what the Qur'an refers to as the following of *hawā* (lit. desire).

Then We put you, [O Muhammad], on an ordained way concerning the matter [of religion]; so follow it and do not follow the desires of those who do not know. (Qur'an 45:18)

And We have revealed to you, [O Muhammad], the Book in truth, confirming that which preceded it of the Scripture and as a criterion over it. So judge between them by what Allah has revealed and do not follow their desires away from what has come to you of the truth. (Qur'an 5:48)

Following *hawā*' is the opposite of following God's law. This happens when we as human beings follow our own emotions and our subjective desires instead of searching for what God's ruling is on a matter. From the Islamic perspective, this is nothing other than the following of arbitrary whims and desires, which is inferior to following the superior commandments of God.

Islamic law is not the arbitrary rule of scholars

It is important at this point to address a common claim, which is that Islamic law is the product of human effort and is consequently infested with bias and cultural influences such that we are not bound by the laws developed by the jurists of the past. Essentially, this is a claim that Islamic law, or at least the corpus that we inherited from previous centuries, is nothing more than a subjective reading of what the law should be. As such, the argument goes, we are not bound by such subjective rulings and—since our social norms and view of the world have significantly changed—we should be free to give Islamic law a modern makeover.

Firstly, we must establish the fact that not everything is up for a subjective reading. For example, no rational individual can read the Qur'an and claim that it allows for murder. There are clear verses that, on their face, and when approached rationally,

clearly lead to the conclusion that murder is prohibited. This is a certain matter (lit. *qaṭʿī*). There are rulings that are directly derived from the text and/or are the result of an unchallenged 1400-year-old consensus, such as the prohibitions of usury, the consumption of swine, and fornication, as well as the obligations of praying five times a day and fasting in Ramadan. Matters of this nature involve little to no juristic reasoning in terms of knowing the presence of the commands. They are self-evident to anyone who approaches the Qurʾan and Sunnah faithfully. This is what was alluded to earlier in the paper in defining “Islamic law.”

Second, and notwithstanding the above, no one can deny that there will always be a degree of subjectivity in reading and interpreting these source texts. No text can be read without the participation of the interpreter, so a certain degree of pluralism is inevitable. Hence, we have different schools of law in Islam, all of which agree on certain rulings while disagreeing on others. For example, all agree that a Muslim can eat a prohibited food if starving,⁴ but schools of law disagree on whether they can just eat enough to survive or eat their fill. When rulings are not as certain or apparent as they are in the examples above, we enter the realm in which juristic reasoning plays an important role and where the resulting rulings are described as probable (lit. *ẓannī*). However, such rulings are not arbitrary rulings that are soaked in cultural biases. If anything, the supremacy granted to the sources of law, and the degree by which the jurists were bound by those sources, minimized the effect of cultural or personal biases and the output of arbitrary rulings.

The qualified jurist must justify his or her legal conclusion by rooting it in scripture (either directly or through consensus and modes of analogical reasoning as mentioned earlier). Any legal opinion that is detached from scripture, or is the result of a dubious connection to scripture, is the result of arbitrary whims and therefore holds no weight. The legal opinions of past Muslim jurists are not mere opinions or arbitrary views. Rather, they are the result of their efforts at rationally interacting with the Qurʾan and Sunnah in order to discover how God wants us to

⁴ Qurʾan 2:173.

act in certain situations. It is not up for the jurist to come up with a legal opinion because they think it is good or to displace a dominant opinion because it seems bad; their mere opinion is irrelevant. What is relevant is God's command, and God's command is only discoverable through a rational examination of the Qur'an and Sunnah.

It is worth repeating that there will always be a degree of subjectivity. This is a widely recognized reality in the field of Islamic law. However, the presence of a degree of subjectivity that is inherently present in any human intellectual effort does not mean that that intellectual effort can be cast aside as being purely subjective and arbitrary. Legal opinions carry weight to the extent that they are rationally connected to the recognized sources of law.⁵ This minimizes the number of legal opinions that can be developed because there is only so much that can be rationally justified with scripture. For example, again, no one can rationally make the argument that Islam allows murder. No rational reading of the Qur'an and Sunnah will lead to this conclusion. The number of legal opinions that can be derived on any legal question is, therefore, quite limited. If Islamic law was purely arbitrary and had no commitment to a rational reading of the Qur'an and Sunnah, we would certainly have had many more arbitrary legal opinions floating around and certainly more than four main schools of law (or six if we include Shiah and Ibadiyya). Many of the legal opinions of Muslim jurists are simply the logical result of a certain legal methodology that relies on evidence from the Qur'an and Sunnah. One who wishes to challenge such an opinion cannot simply claim that it is purely subjective. Rather, one will have to bring stronger evidence and prove that the 'new' opinion is weightier and is better substantiated by the sources of Islamic law.

⁵ There is no contradiction between recognizing that human rationality is deficient and not completely able to independently know right from wrong and the assertion that rationality must be used in approaching the divine text. Rationality is not able to replace God's revelation or render it unnecessary, but it is able to recognize the truth of God's revelation and seek its guidance. One can say that human rationality has the ability to recognize truth when it sees it but not the ability to fully replicate it without seeing it. See: Carl Sharif El-Tobgui, *Ibn Taymiyya on Reason and Revelation* (Boston: Brill, 2020).

In fact, and based on the previous paragraph, we can say that the work of classical Muslim jurists enjoys a level of objectivity that is far superior to that enjoyed by the work of those who call for a modern makeover for Islamic law. The former is based on a rational process with clearly outlined legal parameters that aims to deduce law from an identifiable source (i.e., revealed text); the latter is simply an arbitrary and subjective belief that certain things are good and certain things are bad without any reference to a textual source or the use of a well-defined process of legal reasoning.

This is not to say that time- and context-specific factors did not play a role in shaping some (but not all) legal opinions by Muslim jurists. To the extent that those time-specific factors played a role, changes in those factors may lead to a change in the ruling (as we will see later in the paper). However, one has to be careful to differentiate between those rulings that are based on time-specific factors and those that are not, as well as paying due care and attention to the parameters and restraints on effecting change in the law.

All of the above culminates in the following: 1) Muslims are bound by the recognized sources of Islamic law; 2) In order to carry any weight, a legal opinion or a proposed change to a previous opinion or even a textual ruling, must be justified through a rational process that ties the ruling to the sources of Islamic law; 3) An opinion that fails to do so has no weight and, as an opinion that is not rationally justified by the sources of Islamic law, is no more than an arbitrary opinion; 4) This reality limits the subjectivity involved in Islamic law and significantly reduces the influence of personal biases and subjective views; 5) This makes the work of Muslim jurists, who are ironically accused of being relative and subjective, much more objective and more reliable than that of those who call for change in Islamic law simply because modern views and sensibilities dictate such change.

There are ways for law to adapt while abiding by scripture

The above emphasis on the supremacy of the sources of Islamic law should not leave the reader thinking Islamic law is entirely set in stone and is completely unresponsive to changing circumstances. Whether we are talking about clear textual rulings or legal opinions deduced by scholars, these laws all have a way of adapting that is organic to Islamic law. It is an adaptability that allows for accommodation of new realities while remaining loyal to the Qur'an and Sunnah. Before going further, it is important to say that what the reader is about to confront does not contradict what was said above about the necessity of being committed to the law of God as it is discovered by jurists. The 'adaptability' and 'change' in the law that will be described below is sanctioned by the sources of Islamic law, and it is thus an application of, rather than a deviation from, the law of God.

The legal avenues for change that will be discussed are: a) the *'illah* (lit. *ratio legis*) analysis; b) custom and its relation to general rulings and judicial proceedings; c) *maṣlaḥah* (lit. common good) as it relates to *ḍarūrah* (lit. necessity), and; d) *maṣlaḥah* as it relates to *istiḥsān* (lit. juristic preference) and *istiṣlāḥ* (lit. to deem proper).

a. The *'illah* analysis

Consider the following example: I explicitly instruct you to not leave the house after 7:00 pm, and I explicitly say that this is because it gets dark after 7:00 pm and your presence in the darkness poses a danger to your safety. Let us further assume that this instruction was given in the winter when the days are short and the nights are long. When the summer arrives, and it gets dark at 9:00 pm, you decide that it is permissible for you to leave the house at 7:00 pm because the cause for my instructions is no longer present: i.e., it is no longer dark at 7:00 pm, and I explicitly said that this was the reason for my instructions. Can one claim that your decision to leave the house at 7:00 pm in the summer contradicts the text of my

instruction? Certainly not. My instruction explicitly tied the ruling to the presence of darkness, not to the timing of 7:00 pm. As such, if you shorten the curfew in the summer months (and conversely extend it in the winter months) you are following my instructions, not violating them.

At play in the above scenario is something jurists call *'illah* (lit. *ratio legis*). When the ratio legis is present, the ruling is present, and when it is absent, so is the ruling.⁶ It is an attribute that triggers the ruling (lit. *ḥukm*). Pinpointing the ratio legis is a complicated process on its own and is outside the scope of this paper. The point here is that jurists have always known and recognized that non-ritual rulings have a ratio legis that can be identified through rational and textual examination. This is one of the main mechanisms that allows for adaptability in Islamic law. A very basic example is the use of the *'illah* of intoxication that is present in the ruling on the consumption of alcohol. That is, jurists have determined through textual and rational investigation that the ratio legis of the ruling on alcohol is the fact that it is intoxicating. Any consumable substance, therefore, that has this ratio legis attracts the same ruling, and any substance that is not intoxicating, or whose intoxicating feature is removed, is not subject to the prohibition (subject to other grounds of prohibition). The use of the *'illah* to extend the ruling to a new situation is called *qiyās* (lit. analogical reasoning). Prohibiting the consumption of narcotics, for example, is based on *qiyās* since the *'illah* that triggered the prohibition on the consumption of alcohol is present in those substances.

Note that in the above example the ruling has not changed. The change in circumstances simply affects whether the ruling is triggered or not. The ruling itself, however, remains untouched. A clear ruling from the Qur'an and Sunnah is not subject to suspension, for that would be tantamount to abrogating the clear commandments of God.⁷

⁶ 'Ali Aḥmed al-Nadwi, *al-Qawā'id al-fiqhiyya* (Damascus: Dār al-Qalam, 1987), 227.

⁷ Aḥmad ibn 'Abd al-Ḥalīm ibn Taymiyyah, *Majmū' al-fatāwā* (Riyadh: Ministry of Islamic Affairs, 2004), 33:93–94.

This is something that the companions of the Prophet Muhammed ﷺ understood and applied after his death. For example, the Prophet Muhammed ﷺ clearly instructed that a stray camel be left alone and not be seized and explicitly stated that is because the camel has the ability to survive alone until its owner finds it.⁸ This was in contrast to his ruling regarding stray sheep. After the Prophet's death ﷺ, the third Caliph, 'Uthmān Ibn 'Affān, ordered that the stray camel be seized and sold (and its proceeds given to the camel's owner). That is because people had become more willing to falsely claim "abandoned" property as their own.⁹ Although it may seem that Caliph 'Uthmān contradicted the Prophet's ruling, he had a correct understanding of the *'illah* for the Prophet's ruling. The Prophet ﷺ clearly issued the ruling based on the fact that stray camels were likely, as opposed to other animals, to be reunited with their owners without any intervention. This was the *'illah* of the ruling. When the *'illah* was no longer present (i.e., it no longer became likely that a stray camel would be reunited with its owner without intervention), the ruling was no longer applicable.¹⁰ One can also start to appreciate how the ruling can also be extended (through *qiyās*) to capture stray animals that enjoy the same *'illah* as the stray camels during the time of the Prophet ﷺ.

The paper will discuss custom (lit. *'urf*) under a separate heading, but this concept permeates the *'illah* analysis in important ways. According to the 20th-century scholar Shaykh Muṣṭafā al-Zarqā', there are two ways in which custom may be a decisive factor when determining whether a ruling applies or not. The first is when a custom itself serves as the *'illah*. In other words, the event that triggers the ruling is the presence of a certain custom. The second case is when a new custom vitiates the existence of the *'illah*, thus preventing the ruling from being triggered.¹¹ With

⁸ *Ṣaḥīḥ al-Bukhārī, kitāb al-ghaḍab fī al-maw'izah*, no. 91.

⁹ Mālik ibn Anas, *al-Muwatta'* (Beirut: Iḥyā' al-Turāth al-'Arabī, 1985), 2:759.

¹⁰ Alternatively, the Prophet's ruling can be understood as a public policy decision (lit. *ṭaṣarruf bil- 'imāma*) that is not binding upon his successors. In that case, there is no need to search for the *'illah* and a succeeding leader (lit. *imam*) is free to adopt any policy he sees fit. The reason I characterize this ruling as a legal one rather than a political one is Caliph Uthman's decision is often cited as an example of a changing *ḥukm* (lit. legal ruling) due to changing times—which means the Prophet ﷺ issued his ruling in the form of a binding *fatwa*/prophetic legislation rather than an administrative/public policy decision.

¹¹ Muṣṭafā al-Zarqā', *al-Madkhal al-fiqhī al- 'āmm* (Damascus: Dār al-Qalam, 2004), 2:922–23.

regards to the former, Shaykh al-Zarqā' cites the opinion of Abū Yūsuf (d. 798), the student of Abū Hanīfah, regarding what constitutes a trade involving usury (lit. *ribā*). According to the hadith of the Prophet ﷺ, certain commodities must be traded in equal weight (lit. *wazn*) and others in equal volume (lit. *kayl*).¹² Otherwise, the transaction would be prohibited for involving what is known as *ribā al-faḍl*.¹³ Wheat, according to the hadith, is one of those commodities that must be traded in equal weight. In other words, one who exchanges 5 kg of wheat for 10 kg of wheat would be engaging in a prohibited transaction. According to Abū Yūsuf, however, the *'illah* for prohibiting the trade of unequal weights (rather than unequal volumes) is based on commercial custom; that is, if wheat was customarily measured by volume during the time of the Prophet Muhammed ﷺ, he would have prohibited its trade in unequal volume.¹⁴ His view is that the *'illah* is not inequality in weight or volume per se, but inequality based on the measurement customarily used at any given time for that certain commodity.¹⁵ Therefore, when wheat becomes customarily measured in volume rather than weight, inequality in weight does not render the transaction prohibited; rather, it is inequality in volume that triggers the prohibition. As such, even though the hadith explicitly prohibits trading unequal weights of wheat, this prohibition may no longer apply if wheat becomes customarily traded in volume (rather than weight); in which case, the prohibition would be on trading unequal volumes of wheat, not weights.

Another example deals with a female virgin's consent to marriage. According to the hadith of the Prophet ﷺ, when a female virgin's consent is sought by her male guardian, who acts as her agent in marrying her to a specific man, her silence is tantamount to giving consent.¹⁶ This is in contrast to the requirement for verbal

¹² al-Zarqā', *al-Madkhal al-fiqhī al-ʿāmm*, 909.

¹³ *Ribā al-faḍl* is a transaction in which unequal quantities of a homogenous good are immediately traded. It can be roughly translated as the *ribā* of surplus or excess.

¹⁴ This should not be confused with the *'illah* of prohibiting *ribā al-faḍl*. That is, the *'illah* Abū Yūsuf is referring to is the one for relying on one measure as opposed to the other. Abū Yūsuf is not referring to the *'illah* of the prohibition on trading unequal amounts of a commodity (whether by weight or volume).

¹⁵ Burhān al-Dīn al-Marghaynānī, *al-Hidāyah* (Karachi: Idārat al-Qurān wa al-ʿUlūm al-Islāmīyah, 1996), 5:185. This opinion is an isolated opinion and does not represent the Ḥanafī stance. However, it is nonetheless meritorious.

¹⁶ See: *Ṣaḥīḥ Muslim, kitāb al-nikāḥ*, nos. 63–68.

consent with respect to a previously married woman. The *'illah* for allowing silence to serve as a valid indicator of consent is a matter of local custom. That is, it was customary, during the time of the Prophet ﷺ for unmarried women to shy away from showing desire for a specific man; and their consent was consequently indicated through bashful silence. However, in a society where women do not customarily shy away from showing such a desire (as is the case in most societies today, arguably), silence no longer serves as a reliable indicator of consent and verbal consent becomes required.¹⁷ In other words, the local custom, which is the *'illah* for allowing the Prophet's ruling on silence and its validity, no longer exists.

The above two examples are cases in which the *'illah* was a custom. Recall that there is another role that custom plays in the *'illah* analysis, which is when a custom vitiates the *'illah*. A transaction involving an unacceptable degree of uncertainty (*gharar*) is prohibited. In the past, when different currencies or forms of payments were used (e.g., the *dīnār* and the *dirham*) in the same market, a contract had to specify the currency in which the payment would be made. Otherwise, an essential element of the contract would be left undefined, leading to the presence of *gharar*, which is the *'illah* for prohibiting such contracts. The uncertainty will likely result in a dispute between the parties as the buyer will insist on a currency of lower value while the vendor will insist on a currency of a higher value; and this is precisely the scenario that the ruling against *gharar* is designed to avoid. However, it is possible for a contract to leave the currency unspecified without attracting prohibition. This will happen when the relevant market customarily uses a certain currency. As a result of commercial custom, knowledge of the currency to be used in performing the contract is imputed to the parties, and the *'illah* for prohibiting the contract (i.e., *gharar*) no longer existst.¹⁸

b. Points of clarification on the above analysis

¹⁷ al-Zarqā, *al-Madkhal al-fiqhī al-‘āmm*, 2:911.

¹⁸ al-Zarqā, *al-Madkhal al-fiqhī al-‘āmm*, 891.

There are important points of clarification that need to be mentioned at this point. First, as mentioned earlier, the *'illah* analysis is strictly concerned with whether the facts at hand trigger a certain ruling or not. It is not concerned with whether a ruling should be changed or removed 'from the books.' It, therefore, applies to *qaṭ'ī* rulings and, a fortiori, to *ẓannī* rulings that are the product of juristic reasoning and subject to differing opinions amongst the schools of law.

Second, there is an important difference between the *'illah* and the *ḥikmah* (lit. wisdom) behind a ruling. The *'illah* must be an apparent (lit. *ẓāhir*) characteristic such that it is discoverable through the senses; it also must be concrete or measurable (lit. *muḍabbiṭ*) such that it is not abstract or subject to subjective assessment.¹⁹ The *ḥikmah*, however, is more of an abstract explanation of why the ruling is the way it is and the benefits it aims to achieve.²⁰ Going back to the simple example of alcohol, the *'illah* is the fact that the drink is an intoxicant. This is a concrete, apparent, ascertainable characteristic. The *ḥikmah*, one can strongly and rightfully argue, is that intoxicants compromise the intellect and may lead to harmful actions such as violence as well as substance abuse (with all its accompanying issues). When assessing whether a consumable item should be prohibited or not we simply look to see whether it is an intoxicant or not, and not whether its prohibition would achieve the same *ḥikmah* as the prohibition on alcohol. It may be that this approach will lead to the prohibition applying to cases where the *ḥikmah* will not necessarily be achieved.²¹ However, the few instances where this happens is the tax we as Muslims pay to enjoy the protection and the benefit that this law offers us in the aggregate.

¹⁹ 'Abd al-Wahhāb Khallāf, *Ilm uṣūl al-fiqh* (Cairo: Maktabat al-Da'wa, 1947), 68.

²⁰ Khallāf, 69

²¹ Indeed, scholars of *uṣūl* affirm that reliance on the *'illah* is placed on the presumption (lit. *maẓanna*) that it triggers the ruling, and not on certainty that it does so. See: Khallāf, *Ilm uṣūl al-fiqh*, 66–67. This applies to an *'illah* that is not specified by text or an *'illah* that serves as the best indicator of the true *'illah* (such as the case with a contract serving the *'illah* in place of the subjective state of mind of the contracting parties). An *'illah* that is identified by text, such as the *'illah* of intoxication, enjoys the status of being definitive (*qaṭ'ī*).

The reason for relying on the ascertainable *‘illah* rather than the more abstract *ḥikmah* is that relying on the *ḥikmah* is too subjective and does not allow for consistency in applying the law.²² For example, if we are to apply a *ḥikmah*-based approach to the ruling on alcohol, how will we know—for each individual—whether the prohibition achieves the *ḥikmah* or not. Some people have a greater tolerance for alcohol than others. Is the law to be tailored to every individual? Further, there is no way to ascertain whether the law is applicable or not. In addition, a *ḥikmah*-based approach opens the door for people to claim, on dubious grounds, that certain rulings no longer apply. One may, for example, claim that the *ḥikmah* for the prohibition on *zinā* (lit. fornication) was to ensure that the lineage of every child is known and that since we now have the technology to know who is the child of whom, this prohibition no longer applies. However, when we say that the prohibition on *zinā* is triggered by a concrete fact (i.e., the absence of a valid marital contract between the man and the woman), then the *ḥikmah*-based reasoning becomes futile. This restriction (i.e., that the *‘illah* is what triggers the ruling and that it must be an apparent and concrete characteristic) is probably why textual rulings that some people want to see suspended or changed remain as they are. And although this reality may displease some, it does preserve the religion from arbitrary and ill-intentioned change like in the *zinā* example mentioned above.

At the same time, one should not assume that jurists robotically and mindlessly engage in this analysis. The following example is illustrative: the *‘illah* that allows the transfer of property from one person to another is consent (lit. *riḍā*). However, the subjective state of mind of the parties is something that is unknown to the jurist, as he is not a mind reader; here, the subjective state of mind is something that is not apparent (*ẓāhir*) and, therefore, cannot tell us if the *‘illah* (i.e., consent) is present or not. As a result, jurists will presumptively rely on the presence of a contract as the *‘illah* for allowing the transfer of property. In other words, since we have no mind-reading machine, we will simply have to rely on the best indicator of

²² Khallāf, *Ilm uṣūl al-fiqh*, 64–65.

consent: the presence of a contract—and this will serve as the presumptive *‘illah*. However, jurists are cognizant of the fact that there may be evidence that rebuts the presumption of consent. Evidence of duress (lit. *ikrāh*) will obviously rebut the presumption and will be sufficient to establish that the *‘illah* of consent is not present, even in the presence of an apparent contract. All this is to say that the insistence of the jurists on an apparent and measurable fact is not mindless. Even if the apparent/measurable fact is present, but there is clear evidence that clearly rebuts the presence of the *‘illah*, then the ruling will not be triggered.

c. Custom in general rulings and judicial proceedings

The above examples centered around the concept of *‘illah*. There are, however, rulings that change for reasons not related to the *‘illah*. That often happens when an Islamic ruling is phrased generally and consequently relies on juristic discretion, which itself tends to rely on custom, to fill the ruling with substance. For example, Islamic law requires that a witness in court be of upright moral character (lit. *‘adl*). This is an undisputed ruling. However, in determining what constitutes moral uprightness, custom plays an important role. Ibrahim ibn Mūsa Al-Shāṭibī (d. 1388), in discussing this question, cites the example of head covering for men. He says, “This is a matter that depends on the place, in reality. For this [i.e., men uncovering their heads] is distasteful to those of morally upright character in the eastern lands, but not distasteful in the western lands [i.e., the *maghrib*]. And the religious ruling will differ on that basis. For the people of the east, it [uncovering the head] is impugning, and will not be impugning for the people of the west.”²³ The Islamic ruling, as derived from textual sources of Islamic law, did not change. The requirement of moral uprightness is still met. However, what constitutes moral uprightness is subject to change such that someone who is considered upright in one time/place may not be considered so in another. This explains the legal principle laid down by Muslim jurists that says “custom is determinative”

²³ Ibrāhīm ibn Musā al-Shāṭibī, *al-Muwāfaqāt* (Cairo: Dār Ibn Affān, 1997), 2:283–84. This example should not be confused with the ruling regarding—what is today colloquially called—*ḥijāb* for Muslim women.

(*al-‘ādah muḥakkamah*).²⁴ Another legal principle that branches out of this is even more explicit, stating, “There is no objection to the changing of rulings with changing times” (*lā yunkar taghayyur al-aḥkām ma‘a taghayyur al-azmān*).²⁵

Similarly, when a jurist aims to determine what is equitable, just, or reasonable in a given situation, custom will often play an important role. For example, Ḥanafī jurists determine an equitable quantum of spousal support (lit. *nafaqah*) that is owed by a man to his wife by looking to the customary practice of the social class of which the couple is a part. A man would, consequently, be obligated to provide a standard of living that is customarily offered by other similarly-situated men.²⁶ Custom plays a similar role in determining the substance of a contract. In a contract for the lease of a home that does not explicitly state the ends for which the property may be used or the activities that can be carried out within it, jurists will look to what is customary in such a transaction. In the absence of explicit permission from the landlord, a lessee will not be permitted to use the property in a manner that harms the property, such as using it for metalwork. That is because it is customary for such activities to be prohibited unless the parties agree to the contrary.²⁷

Rulings of this nature that are based on custom have the same force and effect as a specific textual ruling. Imam al-Sarakhsī (d. 1090) states, “That which is established by custom is like that which is established by text.”²⁸ A similarly worded precept states, “Specification by custom is like specification by text.”²⁹ This is not intended to mean that the custom and divine text are of the same stature. Rather, what is meant is that when a jurist relies on custom to determine the

²⁴ Muṣṭafā al-Zarqā’, *Sharḥ al-qawā‘id al-fiqhīyah* (Damascus: Dār al-Qalam, 1989), 219–22.

²⁵ al-Zarqā’, *Sharḥ al-qawā‘id*, 227–29.

²⁶ al-Zarqā’, *al-Madkhal al-fiqhī al-‘āmm*, 2:885.

²⁷ This is quite similar to the common law’s reliance on the concept of “reasonableness.” In contract law, and other areas of law, the common law will often rely on what is “reasonable” or that which is expected of “the reasonable person” to reach a just result.

²⁸ Muḥammad ibn Aḥmad al-Sarakhsī, *Kitāb al-mabsūṭ* (Beirut: Dār Al-Ma‘rifa, 1986), 30:220.

²⁹ al-Zarqā’, *Sharḥ al-qawā‘id*, 241.

appropriate ruling, it is as if he relied on divine text, provided that the Qur'an or Sunnah has empowered custom on that point of law.

Another important role for custom is serving as *prima facie* evidence (lit. *ẓāhir al-qawl*) in judicial proceedings. An example of this is when a married woman complained to a judge, after the consummation of the marriage, that her husband had not given her the dowry to which she was entitled. In Madina, it was customary for consummation to occur only after the dowry had been paid to the wife. Muslim judges, therefore, relied on this custom as *prima facie* evidence for the unreliability of this specific claim. However, when it later became customary for consummation to occur before the payment of the dowry, judges accepted the claim of a woman on a *prima facie* basis.³⁰ Similarly, when a divorced couple seek judicial injunction for the separation of property upon divorce, a judge may rely on custom, on a *prima facie* basis, to determine which property belongs to which spouse. For example, a sword, in the absence of any other evidence, will be granted to the husband since it is customary for such property to be owned by the man rather than the woman. Property that is customarily owned by a woman will also, in the absence of other evidence, be granted to the woman. Since these judicial determinations are rooted in custom, they will naturally change to the extent that the relevant custom changes.

d. Putting custom in its correct place

It is important to neither overstate nor understate the role of custom in Islamic law. The fact that a custom may serve as the *'illah* for some rulings does not mean that we have the green light to assume that the rulings in the Qur'an and Sunnah are rooted in the customs of Prophet Muhammed's time, and that they consequently are not applicable today. In order for a custom to serve as the *'illah* for a certain ruling, there must be evidence that points to custom as the *'illah* for that specific

³⁰ 'Āmir ibn 'Isā al-Lahu, *Dawr al-ijtihād fī taghayyur al-fatwá*, https://khutabaa.com/media_observer/292505, 16.

ruling.³¹ With the ruling relating to the consent of a female virgin, the fact that the Prophet ﷺ differentiated between the virgin and the previously married woman indicates that custom was the *‘illah* for allowing silence to serve as a female virgin’s consent. Without such a requirement, most rulings in the Qur’an and Sunnah can be explained away as responses to Arab custom that no longer prevail today—which would virtually entirely displace the Shariah.

In addition, the reason custom plays an important role in applying generally-worded rulings is precisely because the words upon which the ruling hinges are left undefined by the Qur’an or Sunnah. As such, custom is empowered in such questions of law. It is only when custom is empowered on a point of law that the ruling can change with the change in custom.³² Therefore, a new custom cannot be used to override a clear and specific injunction in the Qur’an or Sunnah.³³ For example, the waiting period for a widowed or divorced woman is defined in the Qur’an. The legal question of “How long is the waiting period?” is specifically answered in the Qur’an. As such, custom is not empowered to play a role in answering this legal question. One cannot claim that today’s custom dictates a longer or shorter waiting period. If, hypothetically speaking, the Qur’anic ruling simply stated that the waiting period is a “reasonable” or “just” amount of time, then one could have resorted to custom in giving effect to the general ruling.

There is also an important difference between custom being used to give effect to a general rule and custom being used to create an exception to a general rule. As has been clearly established above, a change in custom will change the application of a general rule that is based on that custom. However, a new custom cannot be used to carve out an exception to a general rule.³⁴ If a general prohibition, for example,

³¹ Muhammed Sa’id Ramaḍān al-Būṭī, *Ḍawābit al-maṣlaḥah fī al-sharī‘ah al-Islāmīyah* (Beirut: Mu’assasat al-Risālah, 1973), 290.

³² ‘Alī Ḥaydar, *Durar al-hukkām fī sharḥ majallat al-aḥkām* (Riyadh: Dār ‘Ālam al-Kutub, 2003), 1:47.

³³ Muhammed Amīn Afandī, *Majmū‘at rasā’il Ibn ‘Abidīn*, 2:116.

³⁴ Ahmad Fahmī Abū Sinnah, *al-‘Urf wa-al-‘ādah fī ra’y al-fuqahā’* (Cairo: Maṭba‘at Al-Azhar, 1947), 95. Some may contend that jurists have in the past carved out exceptions to general rules due to a new custom. For example, the Ḥanafī school of law allows for a conditional sale (which is generally prohibited) when the condition in question is customary in such a transaction. However, one who looks closely at this *fatwā* realizes that custom is not being

encompasses actions X, Y, and Z, all those actions are prohibited. If it becomes customary over time to engage in action Z, that action remains prohibited no matter how prevalent it becomes and no exception can be carved out.

It is also worth noting that since the Qur'an and Sunnah have empowered custom on certain points of law, the change of a ruling due to a change in the relevant custom is not a change in the law of God. In the words of Imam al-Shāṭibī:

Differences in rulings due to differences in custom are not, in reality, differences in the content of the [divine] command. That is because the law is laid down on the basis that it is eternal... rather, the difference [in rulings] means that when customs differ, each custom is traced back to a legal principle that rules over that custom.³⁵

At the same time, the power of custom and its place in Islamic law should not be understated. Classical scholars have emphasized the power custom has in Islamic law. In his chapter on “The Change in a Fatwa In Accordance With Change in Places, Times, Conditions, Intentions, and Customs,” Ibn al-Qayyim states:

This is a chapter of great benefit, ignorance of which has caused great error against the Shariah, which has imposed difficulties, hardships, and obligations that cannot be fulfilled, all of which are known to be things that cannot be brought about by the marvelous Shariah which is the highest rank of benefits.³⁶

Shihāb al-Dīn al-Qarāfī (d. 1285) described the practice of dispensing a custom-based ruling after the custom upon which the ruling depends has changed

used to carve out an exception to the general prohibition. Rather, the custom of placing such a condition vitiates the *'illah* of prohibiting such a transaction (see: al-Zarqā, *al-Madkhal al-fiqhī al-āmm*, 2:925n1). Similarly, there are *fatwas* where a customary practice renders that practice a “necessity” such that it justifies the carving out of an exception. In this case, it is not custom that is leading to the creation of an exception; rather it is “necessity.” One may, therefore, say that a custom can only justify the creation of an exception to a general ruling if it raises to the level of “necessity”—while being aware that this is technically an exception due to necessity rather than custom. This would lead it to fall under the category of *istiḥsān*, which will be explained later.

³⁵ al-Shāṭibī, *al-Muwāfaqāt*, 2:197–99.

³⁶ Muhammad ibn Abī Bakr, *I'lām al-muwaqqi 'n 'an Rabb al-Ālamīn* (Jeddah: Dār Ibn Al-Jawzī, 2002), 3:11.

as being “contrary to [scholarly] consensus” (*khilāf al-ijmāʿ*) and “ignorance in religion” (*jahālah fī al-dīn*).³⁷ He continued to say, “Rather, the revealed law that is derived from customs and usages changes when the customs and usages underlying such rules change so that the rule is made to conform with the new custom and usage.” This was part of al-Qarāfī’s response to those who say, in the face of a changing custom:

We practice deference to the teachings of the master jurists, and we lack the authority to introduce a new rule on account of the fact that we do not have the capacity to engage in independent legal interpretation[.] Should we then give legal opinions in accordance with what is in the books containing the transmitted views of the master jurists?³⁸

al-Qarāfī clarifies that since the ruling is one that is based on custom, a jurist does not have to be a *mujtahid* in order to change the law to accommodate for a new custom. Consequently, the door to change remains open, thus giving Islamic law a flexibility that allows it to adapt to and accommodate changes in custom.

In his main work on custom and its role in Islamic jurisprudence, the Damascene scholar, Ibn ‘Ābidīn stated that many of the rulings developed by a master jurist (known as a *mujtahid*) are based on:

the custom of his time, such that if he was present at the time of the newly-emerging custom he would have ruled in a manner contrary to his original ruling. That is why it has been said that among the conditions for [attaining the rank of] *ijtihād* is knowledge of the customs of people. For many of the rulings differ in accordance with differences in time due to changes in the custom of the people, or the emergence of a necessity, or the

³⁷ Mohamed Fadel, trans., *The Criterion for Distinguishing Legal Opinions from Judicial Rulings and Administrative Acts of Judges and Rulers* (New Haven and London: Yale University Press, 2017), 226. The original Arabic text can be found in: Shihāb al-Dīn Ahmad ibn Idrīs al-Qarāfī, *al-Ihkām fī tamyīz al-fatāwā ‘an al-aḥkām wa ṭasarrufāt al-qāḍī wa al-imām*, ed. ‘Abd al-Fattāh Abū-Ghuddah (Beirut: Dār al-Bashā’ir al-Islāmīyah, 1995), 218–19.

³⁸ al-Qarāfī. In this book, al-Qarāfī starts each chapter with a question posed by a hypothetical interlocutor and then presents his argument in the form of an answer to that question. This quoted statement is part of the question posed by al-Qarāfī’s hypothetical interlocutor.

corruption of people, such that if the ruling remained in its original form it would have necessarily brought about hardship and harm to the people; and it would have contravened the principles of the Shariah that are based on decreasing hardship, facilitating ease, and removing harm and damage so that the world may run in accordance with the most perfect system and the best of laws. This is why you see many scholars of the *madhhab* [i.e., the Ḥanafī school of law] have contradicted what has been stated by the *mujtahid* [i.e., Abū Ḥanīfah] on many points [of law] which he based on what existed during his time—due to their knowledge that if he existed during their time he would have ruled as they did in accordance with the principles of his own *madhhab*.³⁹

e. Maximizing benefit and minimizing harm (*maṣlaḥah*) and *ḍarūrah*

It is a widely accepted proposition that the Shariah has been revealed by God to maximize benefit (lit. *maṣlaḥah*) and avoid harm (lit. *mafsadah*).⁴⁰ For simplicity, we can say that the Shariah aims to maximize net benefit.⁴¹ Benefit and harm, however, are to be defined by the Shariah, rather than an independently determined definition to which the Shariah must conform.⁴² By canvassing the Qur'an and Sunnah, and examining the rulings provided therein, Muslim scholars have settled on a list of five basic benefits that are necessary for human life known as the *maqāṣid* (lit. purposes) of the Shariah: religion, life, intellect, progeny, and

³⁹ Muḥammad Amīn Afandī, *Majmū'at rasā'il Ibn 'Abidīn*, 2:125.

⁴⁰ 'Izz al-Dīn ibn 'Abd al-Salām, *Qawā'id al-aḥkām fī maṣāliḥ al-anām* (Cairo: Maktabat al-Kulliyāt al-Azharīyah, 1991), 1:11; Muḥammad Ibn Abī Bakr, *I'lām al-muwaqqi'īn 'an Rabb al-'Ālamīn*, 4:337–38.

⁴¹ This is to say that Islamic law is not concerned with completely eliminating harm. Rather, it is concerned with maximizing benefit. See: Ibn 'Abd al-Salām, *Qawā'id al-aḥkām*, 1:14–17. An example used by Ibn 'Abd al-Salām is that of an ill person who must tolerate the harm of medication in order to be cured. Similarly, Islamic law tolerates certain harms as the cost of achieving a greater benefit.

⁴² al-Ghazālī, *al-Mustasfā min 'ilm al-uṣūl* (Medina: Sharikat al-Madīnah al-Munawarah lil-Ṭibā'ah, 2008), 2:482.

property; we may call these the “five necessities.” Every Islamic ruling has been laid down to maximize net benefit in the form of one of these five necessities.⁴³

There are many ways in which this principle of maximizing net benefit may affect the application of the law, with some ways being more controversial than others. One basic and uncontroversial example is rooted in the concept of necessity (lit. *ḍarūrah*). Jurists have laid down the legal principle which essentially says that the impermissible can become permissible when one of the five necessities is at stake (*al-ḍarūrāt tubīḥ al-maḥẓūrāt*).⁴⁴ We find precedent for this in the fact that a Muslim is allowed to consume carrion (i.e., the flesh of a naturally dead animal, which is prohibited) in the face of life-threatening hunger.⁴⁵ Violating the prohibition on consuming carrion brings with it harm in that it is a violation of God’s command. However, this harm is tolerated when it is the only way to avoid the greater and more severe harm of death. The harm of consuming carrion is tolerated to the extent that is necessary to remove the harm to life. Similarly, the harm to intellect caused by consuming wine is tolerated to the extent it is necessary to protect a Muslim from death. Effectively, this is a weighing of one harm against another and favoring the lesser of two evils, which is an Islamic legal principle (*yukhtār ahwan al-sharrayn*).⁴⁶

On the basis of the above, whenever circumstances arise that endanger one of the five necessities, a non-permissible act may become permissible if it is the only means of preserving the necessity that is at stake, so long as the harm being tolerated is not greater than the one being avoided. This is a use of *maṣlaḥah* that all Islamic schools of law accept. Imam Abū Hāmid al-Ghazālī, a Shāfi‘ī jurist,

⁴³ The rulings have been categorized by the extent to which they are needed to preserve one of the *maqāsid*. The three ranks are: necessities (lit. *darūrīyāt*), needs (lit. *ḥājīyāt*), and improvements (lit. *taḥsīnāt*). Islamic rulings fall into one of these three ranks. See al-Ghazālī, *al-Mustasfā*, 2:482.

⁴⁴ al-Zarqā, *Sharḥ al-qawā‘id*, 185.

⁴⁵ This precedent is explicitly provided for in 2:173 of the Qur’an, which says, “He has only forbidden to you dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah. But whoever is forced [by necessity], neither desiring [it] nor transgressing [its limit], there is no sin upon him. Indeed, Allah is Forgiving and Merciful.”

⁴⁶ al-Zarqā, *Sharḥ al-qawā‘id*, 203.

uses the example of an enemy army that uses Muslim prisoners as human shields.⁴⁷ He accepts that it is permissible to fire at the opposing army even though that will inevitably cause death to the fellow Muslim prisoners (which is impermissible). The act, however, is justified since it is the only way to protect against a greater harm, which is the defeat of the Muslim army and a greater number of Muslim casualties.⁴⁸ Unlike the previous examples, the two competing harms relate to the same basic necessity (i.e., life). What determines the analysis here is the breadth of each harm; one of them falls on a select few (i.e., the Muslim prisoners) while the other falls on a great number of people (i.e., the entirety of the Muslim army and, potentially, the Muslims of the city being attacked). In light of the Islamic legal principle that states that a specific harm is to be tolerated in order to repel a universal harm (*yutaḥammal al-ḍarar al-khāṣṣ liḍaḍ al-ḍarar al-‘āmm*), firing at the enemy that uses Muslim prisoners as human shields becomes permissible.⁴⁹ And, once again, this is an application of the principle that states, “necessities render the impermissible permissible” (*al-ḍarūrāt tubīḥ al-maḥẓūrāt*).

f. *Maṣlaḥah* as it relates to *istiḥsān* and *istiṣlāḥ*

As stated, the use of *maṣlaḥah* in the cases of *ḍarūrah* is agreed upon. However, there are other ways in which this concept is used to accommodate new circumstances—ways that do not attract the same level of unanimity as in the case of *ḍarūrah*.⁵⁰ One such use of *maṣlaḥah* comes in the form of a legal concept widely used in the Ḥanafī school of law known as *istiḥsān* (lit. juristic preference).

⁴⁷ This example used by al-Ghazālī is often cited in the context of *maṣlaḥah mursalah* (lit. unattested *maṣlaḥah*). However, this example is more correctly and accurately one of *rukḥṣah*, where an action that is impermissible due to the presence of a legal impediment is, on an exceptional basis, made permissible. See: Muhammad Abū Zahrah, *Uṣūl al-Fiqh* (Cairo: Dār al-Fikr al-‘Arabi, n.d.), 285, where Abū Zahrah asserts that al-Ghazālī’s human shield example has nothing to do with *maṣlaḥa mursala*.

⁴⁸ al-Ghazālī, *al-Mustasfā*, 487–488.

⁴⁹ al-Zarqā’, *Sharḥ al-qawā’id*, 197.

⁵⁰ Even this proposition is itself a matter of debate. It is generally believed that the Mālikī school of law takes the most expansive approach to *maṣlaḥa*, while the Shāfi‘ī is the most restrictive. This, however, has been discredited by a number of scholars, and there are strong grounds to assert that all schools of law accept the use of *maṣlaḥah* even beyond the high threshold of necessity.

⁵¹ *Istiḥsān* is an umbrella term for different legal tools.⁵² The legal tool that is relevant to this paper is *al-istiḥsān lil-ḍarūrah* (juristic preference due to necessity). *Istiḥsān lil-ḍarūrah* is what happens when a jurist abandons the use of analogical reasoning due to an undue hardship (lit. *ḥaraj*) or harm (lit. *ḍarar*) that results from such reasoning.⁵³ It is also described as a specific (lit. *juzʿī*) exception (lit. *istithnāʾ*) to a general principle (lit. *qāʿidah*) or indicant (lit. *dalīl*), such that some parts of the general principle or indicant remain applicable to all other relevant scenarios.⁵⁴ One should not be confused by the use of the word *ḍarūrah*. The *ḍarūrah* relied on in the case of *istiḥsān* is a lower threshold than the one described above.

Although the word *maṣlahah* is sometimes not explicitly used in this reasoning, it is effectively the concept doing the work.⁵⁵ To say that the analogically-determined ruling to a legal question should be abandoned for the sake of avoiding harm or hardship is essentially to say that the benefit of abandoning analogy is greater than the benefit of relying on it. An example of *istiḥsān lil-ḍarūrah* is the exception to the accepted principle that stipulates that a person holding an item in trust for another is only liable for damage caused by him/her intentionally or recklessly. This general principle would capture a service provider who provides a service that requires them to keep the item of their customer in trust (such as one who dyes or sews clothing). Despite the existence of this analogical ruling that applies here, the Ḥanafī jurists carved out an exception for the non-exclusive service provider (lit.

⁵¹ The Mālikī school of law accepts the use of *istiḥsān* as well but places it under the broader category of *istiṣlāḥ*. As such, the Mālikī school is not associated with *istiḥsān* as much as it is associated with *istiṣlāḥ* and as much as the Ḥanafī school is associated with *istiḥsān*.

⁵² The other forms of *istiḥsān* are based on the Sunnah, consensus (lit. *ijmāʿ*), and analogy (lit. *qiyās*). These other forms are not relevant to this discussion because they are simply a direct application of the agreed-upon sources of law and do not involve the concepts of necessity, harm, or common good.

⁵³ Muhammad Abū Zahrah, *Abū Ḥanīfah* (Cairo: Dār al-Fikr al-ʿArabī, n.d.), 389–93. It is not clear, however, whether this applies to all analogically determined rulings equally. For example, the analogical reasoning that renders the consumption of all intoxicants prohibited is based on a definitive *illa*. It seems unlikely that such analogical reasoning could be subject to *istiḥsān*. This is in contrast to analogical reasoning that is based on an *illah* that is only probable.

⁵⁴ Muhammad Abū Zahrah, *Mālik* (Cairo: Dār Al-Fikr Al-ʿArabī, n.d.), 381–82.

⁵⁵ Ahmad ʿAbd al-Wahhāb al-Shinqītī, *al-Waṣf al-munāsib li-sharʿ al-ḥukm* (Medina: Markaz al-Baḥṭh al-ʿIlmī wa-l-Ihyāʾ al-ʿIlm al-Islāmī, 1994), 327.

ajīr ʿāmm) (i.e., one who offers the service to any customer and not just to one) and made them strictly liable for any damage caused to the property of their customers (i.e., they are liable regardless of whether they were reckless/intentional).⁵⁶ That is because, in the absence of such a rule, the service providers have little incentive to take due care of their customer's property; and if the customer's property is ever damaged, the service provider can simply claim that the damage was caused naturally or due to events beyond their control, and the customer will tend to have no way to satisfy the burden of proof in making their claim. Therefore, and in order to prevent damage to or destruction of people's property, strict liability was imposed. The result is that the service provider is liable for any damage or destruction and can only escape such liability by proving that the damage or destruction was beyond their control (essentially, this is a reversal of the burden of proof).⁵⁷

Similarly, Ḥanafī jurists also carved out exceptions (a practice known as *takhṣīs*) when undue hardship would be caused by a strict application of general rulings. For example, there is a hadith of the Prophet Muhammed ﷺ in which he instructs one of his companions to only testify (in judicial proceedings) with respect to a matter that he saw with his eyes as he sees the sun.⁵⁸ This is essentially a prohibition on tendering hearsay evidence (lit. *shahādat al-tasāmu*). This general rule, however, was later narrowed down by Ḥanafī scholars in cases where its strict application would cause undue hardship by not admitting evidence that would be otherwise unattainable, thus leading to a loss of rights.⁵⁹ Ḥanafī jurists

⁵⁶ It is not entirely clear that this is an example of an exception to analogical reasoning. This looks more like an example of an exception to a general ruling. The confusion comes from the fact that scholars will often speak of exceptions to general rulings as being "contrary to analogy" (lit. *khilāfan lil-qiyās*), even though the fact scenario that is being exempt from the original ruling is not captured by means of analogy; it is rather captured by the fact that it is one of the many fact scenarios to which the generally phrased ruling applies. For example, when we look at a hadith that says that the person entrusted with property is not strictly liable for damage to the entrusted property, the hadith covers the *ajīr* (service provider) not by means of analogy but due to the fact that an *ajīr* is a subtype of a broad class (i.e., people entrusted with property) to whom the hadith applies. This is different from a ruling that originally applied to a specific fact scenario and then was extended to a new and specific fact scenario due to the presence of the *'illah*.

⁵⁷ al-Shinqītī, *al-Waṣf al-munāsib*, 332.

⁵⁸ al-Zarqā, *al-Madkhal al-fiqhī al-ʿāmm*, 1:132.

⁵⁹ Badr al-Dīn al-Aynī, *al-Bināyah fī sharḥ al-hidāyah* (Beirut: Dār al-Kutub al-ʿIlmiyah, 2000), 8:150–52.

consequently accepted hearsay evidence in ten scenarios, including to prove the status of an old charitable endowment (lit. *waqf*), the consummation of a marriage, death, and lineage.⁶⁰

Importantly, the threshold of hardship or necessity being employed in *istiḥsān* is lower than the one used in the first example of *ḍarūrah*, which all jurists from all schools of law accept. In the latter, the necessity has to be pressing such that the preservation of one of the five purposes is at stake. With *istiḥsān*, we see a lower bar. The hardship or harm being avoided is one that makes the attainment of the five purposes difficult or highly costly, but not impossible.⁶¹ One can see how the concept of *istiḥsān* can be really helpful in facilitating change in Islamic law when a legitimate need arises. This concept, however, is not to be seen as a deviation from divine text. Rather, and as its proponents emphasize, it is based on the Qur’anic and Sunnaic tendency and command to facilitate ease and prevent undue hardship.⁶²

Mālikī jurists use similar reasoning but under the title of *istiṣlāḥ*. The Mālikī concept of *istiṣlāḥ* is broader than the Ḥanafī concept of *istiḥsān lil-ḍarūrah*. However, the two concepts overlap such that *istiḥsān lil-ḍarūrah* (from the Mālikī perspective) is but one form or subset of *istiṣlāḥ*. The other form is the use of *maṣlaḥah* as an independent source of legislation (lit. *aṣl mustaqill*) when there is no text addressing the matter at hand; as opposed to carving out an exception to a textual ruling.⁶³ One of the most basic examples cited by Mālikī jurists to justify use of *maṣlaḥah mursalah* (lit. unattested *maṣlaḥah*) in this manner is the decision by the companions of the Prophet Muhammed ﷺ to collect the Qur’an in one book.⁶⁴ The decision initially encountered objection since the Prophet Muhammed

⁶⁰ al-‘Aynī, 8:150–52.

⁶¹ This is on the basis that needs (lit. *ḥājīyāt*) that are not as absolutely necessary for human life are treated identically to necessities (lit. *ḍarūrāt*) (*al-ḥājah tanzil manzilat al-ḍarūrah*). See: Zayn al-Dīn ibn Ibrāhīm ibn Muḥammad ibn Nujaym, *al-Ashbāh wa-al-naẓā’ir* (Beirut: Dār al-Kutub al-‘Ilmiyah, 1999), 78.

⁶² See for example the Qur’anic verse that states, “God intends ease for you, and does not intend for you hardship.” 2:185.

⁶³ al-Shāṭibī, *al-I’tisām* (n.p.: Maktabat al-Tawhīd, n.d.), 3:69.

⁶⁴ al-Shāṭibī, *al-I’tisām*, 3:69.

never clearly commanded that such a thing be done (but neither did he prohibit it). Eventually, the decision was accepted and it became evident that this course of action was necessary to preserve the religion. The *maṣlahah* being achieved in such cases is known as *maṣlahah mursalah*. That is, it is a *maṣlahah* that has not been specifically attested by the Qur'an and Sunnah, but has not been invalidated either.⁶⁵

One can see how this concept of *istiṣlāḥ* can become useful as changing circumstances create a need for new laws that protect certain Islamically-recognized interests. *Istiṣlāḥ* is particularly useful in the realm of public administration, and it is consequently an important tool for regulation as societies change and become much more complex. For example, there is no clear text that states that judges are to hear every case that comes before them (nor is there clear text that limits what cases judges can hear). One would assume, however, that the natural and default state of affairs is that judges are to hear all cases that come before them. Using *istiṣlāḥ*, one can justify the imposition of a statute of limitations (lit. *qanūn al-taqādum*; this was first imposed in the Muslim world by the Ottoman Empire) as there is no text that forces an Islamic court to hear every case that comes before it nor is there text that prevents authorities from limiting what a court may or may not hear.⁶⁶ One can start to see how *istiṣlāḥ* can be very useful in maintaining the relevance of Islamic law in new areas of modern life.

g. Caveats to the use of *maṣlahah*

It may occur to some that *istiḥsān* and *istiṣlāḥ*, along with the concept of *maṣlahah* that underlies them, serve as a golden ticket for a modern makeover for Islamic law. There are, therefore, points of clarification and caveats that are due at this juncture.

⁶⁵ al-Ghazālī, *al-Mustasfā*, 481.

⁶⁶ al-Zarqā', *al-Madkhal al-fiqhī al-'āmm*, 1:116.

The first caveat is that the *maṣlaḥah* (whether used in *istiḥsān* to carve out an exception to a general ruling or in *istiṣlāḥ* to develop a new ruling where no clear textual ruling exists) cannot be in direct violation of a clear or specific textual ruling. In the above examples of *istiḥsān*, *maṣlaḥah* was being used legitimately because it did not abrogate the ruling; it rather narrowed down its application as God intended (at least according to the proponents of *istiḥsān*). In the examples of *istiṣlāḥ*, no specific or clear command from the Qur'an or Sunnah was being violated based on *maṣlaḥah*. It is hardly a controversial statement to say that it is not acceptable, even from the perspective of those who 'expansively' use *maṣlaḥah*, to directly violate a clear injunction from the Qur'an or Sunnah; such a *maṣlaḥah* is simply one that is invalid and is known as "*maṣlaḥah mulghāh*" (lit. invalidated *maṣlaḥah*).⁶⁷ In other words, if the Qur'an clearly and definitively says X on a specific matter, one cannot say Y on the basis of *maṣlaḥah* alone. A famous example of an invalid *maṣlaḥah* is that of a *fatwā* whereby a king or sultan is prevented from compensating for violating his Ramadan fast (due to sexual intercourse) by freeing a slave; his only options under this *fatwā* would be to feed the poor or fast two consecutive months. Since the king is in possession of many slaves, his violation of the Ramadan fast does not cost him much and, so the argument goes, the goal of deterrence will not be achieved. This *fatwā* that prevents him from freeing a slave based on the proposition that there is a *maṣlaḥah* in restricting him to feeding the poor or fasting two consecutive months is an invalid one because it clearly and directly violates an unequivocal Prophetic teaching.⁶⁸

Further, the Mālikī jurist, Imam al-Shāṭibī, enumerated three conditions for a valid *maṣlaḥah mursalah* (which is the basis for *istiḥsān* and *istiṣlāḥ*): 1) that it be suitable (*mulā'im*) with respect to the *maqāṣid* of the Shariah such that it does not

⁶⁷ See the various definitions for *maṣlaḥah mursalah* provided by different scholars from different schools of law; there is near, if not complete, agreement that a valid *maṣlaḥah* cannot be one that has been invalidated by the Shariah and that such an invalid *maṣlaḥah* bears no weight in legal analysis. al-Shinqīṭī, *al-Waṣf al-munāsib*, 249–57.

⁶⁸ al-Ghazālī, *al-Mustasfā*, 1:286.

contradict a definitive text; 2) that it deal with a rational issue (as opposed to pure ritual acts); and 3) that it be necessary or alleviate an undue difficulty (lit. *ḥaraj*).⁶⁹ The third condition enumerated by al-Shāṭibī is very important as it highly restricts the use of *maṣlaḥah mursalah*. The example of consolidating the Qur'an into one book is a perfect example of this third condition. That course of action was necessary in order to preserve that which the Shariah seeks to preserve (i.e., religion). At play here is a legal principle that states, “that which is necessary for the performance of an obligation is itself an obligation” (*mā lā yatimmu al-wājibu illā bihi fahuwa wājib*).⁷⁰ The (first) condition requiring the *maṣlaḥah* be suitable is also important. al-Shāṭibī clarifies that this means that the *maṣlaḥah*, although not attested by a specific text, is part of a genus of *maṣālih* that has been attested by text. Consolidating the Qur'an, in and of itself, finds no attestation in the Qur'an and Sunnah. However, the Qur'an and Sunnah certainly attest to the broader *maṣlaḥah* of preserving religion and religious knowledge. ‘Preserving religion’ is, therefore, a broad *genus* that encompasses a number of *maṣālih*, including consolidating the Qur'an. A *maṣlaḥah* that does not fit under any recognized genus of *maṣālih* is categorized as “*gharīb*” (lit. extraordinary) and is not even accepted by the Mālikī school of law (which is known to be to the flag-bearer of *maṣlaḥah*), even if it is not clearly invalidated.⁷¹

Of course, the threshold is not always this high. *Maṣlaḥah mursalah* can be used to alleviate difficulty (rather than satisfy a necessity) in a manner that is suitable with respect to the objectives of the Shariah. Once again, suitability is another way of saying that the Shariah must have recognized this type of *maṣlaḥah* generally. al-Shāṭibī uses the example of the Rāshidūn Caliphs imposing a standard of strict liability on tradesmen who have the property of others in their possession.⁷² That

⁶⁹ al-Shāṭibī, *al-I'tiṣām*, 3:49–57.

⁷⁰ al-Shāṭibī, *al-I'tiṣām*, 3:56. It is worth asking, however, whether the first condition is relevant when the third condition is satisfied by the presence of a necessity. Presumably, something that is necessary for the performance of a religious command is already “suitable.” The condition of suitability, therefore, is probably mainly at play in instances of “alleviating difficulty.”

⁷¹ al-Shanqītī, *al-Waṣf al-munāsib*, 267.

⁷² al-Shāṭibī, *al-I'tiṣām*, 3:19.

is, such tradesmen will be liable for damage to their customers' property whether such damage was caused intentionally, negligently, or by causes beyond their control, unless they can prove that they did not cause the damage intentionally or negligently (this is effectively a reversal of the burden of proof). The reason for this is that such tradesmen tend to leave the property unattended and tend to not act diligently with respect to their customers' property (due to the fact that they can easily claim it was not their fault and the customer has little means to prove their case). Since this sort of business arrangement is necessary for people to carry on their lives, the absence of strict liability is likely to result in loss of property for many people who rely on such tradesmen. To prevent such loss of property on such a large scale, strict liability was imposed on tradesmen who hold the property of customers in their possession. How is this a 'suitable' *maṣlaḥah* and from where does it get its legitimacy? al-Shāṭibī states this *maṣlaḥah* falls under the general approach found in Islamic rulings where lesser/private harms are tolerated in order to achieve a greater/public benefit. He cites the example of Prophet Muhammed's صلى الله عليه وسلم command that Bedouin merchants sell directly to the consumers in a city rather than have the merchants of the city purchase their goods and then sell them to the consumers in the city.⁷³ This Prophetic command was made in order to allow the public to have the benefit of the lower prices offered by the Bedouin merchants. By preventing the city's merchants from purchasing the goods from the incoming Bedouin merchants, the merchants were forced to accept a loss that they otherwise would have not suffered (in fact, they would have enjoyed profits). However, this loss to the merchants is offset by the greater benefit of lower prices enjoyed by the

⁷³ The full text of the hadith is as follows, "The townsman should not sell for a man from the desert, leave the people alone, Allah will give them provision from one another." *Ṣaḥīḥ Muslim, kitāb al-buyūʿ, bāb taḥrīm bayʿ al-hāḍir lil-bādī*, para. 20, no. 1522. This Prophetic ruling heads in the direction of promoting a free market. The Prophet صلى الله عليه وسلم was concerned that city merchants were preventing Bedouin merchants from reaching the consumers in the city. This is made clear by the fact that he prevented city merchants from meeting Bedouin merchants at the outskirts of the city (See: *Ṣaḥīḥ Muslim, kitāb al-buyūʿ, bāb taḥrīm bayʿ al-hāḍir lil-bādī*). All of this indicates a concern for the lack of competition that may result if Bedouin merchants are prevented from accessing the market due to city merchants meeting them at the outskirts of the city and offering them attractive prices so that they then can sell to the consumers of the city without any competition from the Bedouins. This is precisely the concern of modern-day antitrust laws that seek to protect competition in the market.

consumers.⁷⁴ Al-Shātibī uses this as precedent for potentially forcing tradesmen to accept a loss (by being held liable for damage they had no role in causing) in order to achieve the greater public benefit of preserving the property of consumers. Since this *maṣlahah* finds precedent (albeit in the general, not the specific, sense), it is a ‘suitable’ one that can form the basis of a ruling.

How can this be applied in the modern context? The modern example of the limitations period is helpful here. Such a law is certainly not absolutely necessary. However, in the absence of such a law, and as societies become more complex, the administration of justice will face great difficulty in the absence of such a law to the extent that the judiciary’s ability to adjudicate cases in a timely and efficient manner will be highly compromised. Admittedly, there will be people with legitimate claims that will be prevented from having their rights vindicated simply because they did not make a claim within the limitations period. However, one can argue that this is an appropriate tax for society to pay in order to ensure that the administration of justice is not backlogged or stifled. If ensuring the courts are able to adjudicate cases efficiently and as they arise means compromising the potential legal claim of persons who were injured a few years ago and failed to bring a claim, then that is, one can argue, an appropriate cost; just like how imposing strict liability was an appropriate cost to ensuring a public benefit. And to the extent that the court system is involved in preserving and promoting the *maqāṣid* of Shariah, such a law would be ultimately preserving and promoting the *maqāṣid*.

Finally, and to be clear, one must realize that *istiḥsān* and *istiṣlāḥ* are not used arbitrarily. They are not based on a desire to escape the law of God. Rather, and from the view of the proponent, they are an application of God’s law in that they are designed to remove harm and undue hardship—two goals to which the Qur’a and Sunnah clearly attest. This is a key point. These legal tools cannot be used to narrow down or abrogate rulings because those rulings no longer conform with a new and emerging norm. Nor can one disregard a ruling because the ruling is

⁷⁴ In economic terms, the loss in producer surplus is more than offset by the increase in consumer surplus, creating a net increase in utility.

incompatible with a dominant “ism” of the day. *Istiḥsān* and *istiṣlāḥ* are legal concepts, not ideological ones. They are used in the context of a legal and principled approach, employed by qualified jurists, that aims to facilitate ease for the believers as defined by the divine text.

Aren’t there other avenues for change?

Those who may be more familiar with this topic may be quick to point out that there are also other avenues for change. For example, the “corruption of morals” (lit. *fasād al-akhlāq*) or the “corruption of the times” (lit. *fasād al-zamān*) may sometimes be described as a driver of change in Islamic law. The reason this has not been included is because it is an impetus for change, rather than the legal doctrine that functions as the mechanism that brings about the change in the law. For example, it was the opinion of Ḥanafī scholars that an indebted individual, despite his or her indebtedness, may still transfer their assets by means of a gift or the establishment of a charitable endowment. However, as people became more willing to abuse their power and started diverting their assets with the intention of absolving themselves from the obligation to pay their debts, Ḥanafī scholars no longer gave legal effect to the granting of a gift or the establishment of a charitable endowment by an indebted person except to the extent that the value of the transferred assets exceeds the value of the debt.⁷⁵ The impetus for the change in the ruling was the corruption of morals that has occurred over time. However, the legal tool that allows for this change is *istiḥsān*. That is because this new ruling is nothing other than an exception—made due to a necessity—to a general rule which gives legal effect to such transactions.

Another example that some may point to is “changing means” (lit. *taghayyur al-wasā’il*). One such case relates to the validity of a contract for the sale of real property when the venue (lit. *majlis*) in which the contract is made is not the real property that is the subject of the contract. Originally, in order for such a contract

⁷⁵ al-Zarqā, *al-Madkhal al-fiqhī al-‘āmm*, 2:945.

to be valid, the contract had to specify the borders of the property so that the property, which is the subject of the transaction, is clearly known to both parties.⁷⁶ Otherwise, there is an unacceptable amount of uncertainty (*gharar*) in the transaction, which renders it invalid. Now, however, records of real property and its borders are kept in centralized registries that attach an identification number to each property. As a result, it suffices for the parties to refer to the identification number in the contract rather than waste their time in clarifying the borders of the property.⁷⁷ This, however, is not different from the examples we saw above which allow for change in applying or satisfying general rulings due to changes in custom. Just as the satisfaction of the requirement of “moral uprightness” can change with changes in custom; here, the satisfaction of the requirement that both parties have “knowledge” of the subject of the transaction is changing with changes in commercial custom. It used to be that sufficient knowledge could only be attained by delineating the borders of the property in the contract. Today, commercial custom dictates that referring to the identification number of the property offers the same amount of knowledge. The requirement of the existence of sufficient certainty (and the absence of unacceptable uncertainty) is satisfied.

These examples were not used as separate and distinct avenues for legal change in this paper, even though they may—on their face—seem different than the examples cited earlier. That is because they are simply other manifestations of how change can occur in Islamic law under the headings listed above.

What does all of this mean for change in Islamic law?

Putting all of the above together, what does this mean for how Islamic law can change in today’s world? Can we do anything to change rulings that have been accused of being outdated, such as Islamic inheritance law, family law, or the prohibition on usury?

⁷⁶ al-Zarqā, *al-Madkhal al-fiqhī al-‘āmm*, 2:953–54.

⁷⁷ al-Zarqā, *al-Madkhal al-fiqhī al-‘āmm*, 2:953–54.

We must first remind ourselves that we are people who submit to God and His commandments. We are not in a position to decide, *a priori*, that change is needed and then embark on legal reasoning to reach the outcome that we have already determined to be desirable. Rather, our job as people who submit to God is to approach His Book and the Sunnah of His Prophet ﷺ faithfully and discover the nature of the commandment and its intended applicability. Whether a ruling can be changed or not, or is applicable or not, is not something that we humans decide but is rather something we discover by rationally examining the divine text. Wherever the text leads us, we, as Muslims, willingly and happily submit to God's will. If a ruling is definitive (*qaṭʿī*), one cannot claim that it is time-specific and that it no longer applies in today's world. The only way such a ruling would no longer apply is if the *'illah* that triggers the ruling is absent or if a necessity (*darūrah*) exists.

We have also seen that there are Islamic rulings that are tied to local custom. That is either because local custom is the *'illah* for a ruling or vitiates the *'illah*. In addition, some rulings may be given meaning through local custom, such as the case of moral uprightness. This is common in Islamic law when the textual ruling is general but relies on local custom when it comes to the details. To the extent that custom plays a legitimate role in those rulings, change in local custom can cause a change in the ruling. There are also circumstances that leave Muslims no choice but to choose compliance with one ruling at the expense of another due to necessity. In such cases, necessity justifies the toleration of harm that ensues from violating certain rulings provided that the resulting harm is not greater than the harm being avoided. This is something universally accepted by all schools of law and applies to definitive rulings.

Some schools of law have equipped themselves with valuable legal tools that allow them to adapt to changing circumstances to the extent that this can be justified by the Qur'an and Sunnah. We have seen how the Ḥanafī and Mālikī schools of law use *istiḥsān* and *istiṣlāḥ*, respectively, to carve out exceptions when the need arises.

The Mālikī school goes a step further by using *maṣlahah mursalah* as an independent source of legislation, but within clear parameters and only when no other source of legislation speaks to the issue at hand. And in all cases, no clear ruling from the Qur'an or Sunnah is abandoned or effectively abrogated.

Many of the objections being made today are against non-negotiable rulings. The prohibition of usury and certain forms of financial transactions; the clear laws of marriage, divorce, and inheritance; the requirement of the *ḥijāb*; all such rulings are *qaṭ'ī*. They cannot be abandoned. As mentioned earlier, the only two scenarios in which a *qaṭ'ī* ruling would not apply are 1) the absence of the *'illah* (as mentioned earlier; and this is not in any way an abrogation or abandonment of the ruling) or 2) in the face of necessity (*darūrah*).

Even the *'illah* analysis is a delicate and regulated one. One cannot make dubious claims about the cultural context in which the Prophet ﷺ lived and argue that since we live in a different cultural context the ruling should no longer apply. Opening such a door would inevitably lead to a complete displacement of the Shariah as we know it. Anyone can claim that a certain ruling was laid down for a certain reason (by making some dubious connection between the two) and on that basis argue that the law is no longer applicable. We have seen some absurd claims being made about the reasons behind certain Islamic laws; one of which was the claim that the *ḥijāb* was a way to protect women when they left their homes at night to relieve themselves (i.e., use the “restroom”).⁷⁸ Since we have modern plumbing and such night trips are no longer needed, the *ḥijāb*, apparently, is no longer needed.

What would we say of a person who runs a red light on the grounds that the intersection was completely empty at the dead of night and so the initial purpose of the ruling was no longer at play and that he consequently was no longer bound to stop at the red light? If we are to allow such reasoning, we will end up with laws

⁷⁸ Samina Ali, “What Does the Quran Really Say About a Muslim Woman’s Hijab,” TEDxUniversityofNevada, February 10, 2017, YouTube video, https://www.youtube.com/watch?v=_J5bDhMP9lQ.

being violated left, right, and center, as everyone gives themselves the right to investigate the purpose of the law and its applicability. In this example, the driver would indeed be forced to wait for the light to turn green even though running the light poses no immediate danger to the public. However, this is the tax that we must pay for having a coherent set of laws that can achieve their intended result. If everyone had the right to make a judgment call on whether they should stop at a red light, we would certainly see an increase in the number of accidents and harm done to the public—which is what the law was initially intended to prevent. Islamic law is no different in this respect. If its laws are to achieve their purposes, and if the laws are to be meaningful in any way, they must not be subject to the discretion of every individual person and their subjective assessment of whether the law applies or not. This is precisely why scholars differentiated between the *'illah* and the *hikmah*. If the *'illah* is present, then so is the ruling.

Many readers may be interested in simply getting an answer to the following question: can we, in light of the recent changes in human life, change the laws that have been developed by scholars over the past centuries? The answer to this question is as follows: To the extent that a law is not definitive and is based on time-specific factors, it can change—albeit through the proper legal avenues and by qualified scholars. If a law is definitive, it applies so long as the *'illah* exists. The laws that are not definitive, but are not based on time-specific factors and are rather purely based on textual evidence, can only change if stronger textual evidence can be produced to justify the change; this would be a change that is due to stronger textual evidence (*ikhtilāf dalīl wa burhān*) rather than to changing circumstances (*ikhtilāf waqt wa zamān*).

Conclusion

What we see is a balance between two desirable, yet competing, values. On one end, law must be saved from the dangers of arbitrariness and subjectivity. More importantly, Islamic law, which aims to bring the believer closer to God, must be

rationally rooted and legitimized by revealed text and the recognized sources of law through a systematic process applied by qualified scholars—otherwise, it would defeat its own purpose. On the other hand, and to the extent that law is viewed as a just response to unjust circumstances, the law will have to change and adapt whenever the relevant circumstances change. The Islamic legal tradition has shown an ability to balance these two considerations. This ability was not despite the commitment to the Qur'an and Sunnah, but *because* of it.

If Muslims are to preserve their legal tradition in a meaningful way, and maintain their commitment to the commandments of God, then they must not be hasty in making calls for change. Change is needed, no doubt. However, the change that some people have in mind is different than the change that Islamic law allows. Hopefully, this paper can serve as a sober second thought and help direct the conversation in a direction that brings solutions to the new problems of today while also maintaining loyalty to the law of God.