# The Concept of Madhhab and the Question of Its Boundary

*A. Qodri A. Azizy*

**Abstrak**

**Konsep Tentang Madhhab dan Persoalan Batas-batasnya**

Apakah suatu *madhhab* itu bagaikan sebuah Kumpulan hukum Islam seperti Kitab Undang-undang Hukum Pidana (Perdata), sehingga pengikut *madhhab* tersebut tinggal mengambil hukum tertentu dari Kumpulan hukum Islam tersebut sesuai dengan yang diperlukan? Tentu jawabnya, pada mulanya atau pada dasarnya tidak demikian. Sejak awal - katakanlah sejak masa *ṣaḥāba* - ulama ber*ijtihād* (berpikir bebas). Hasil *ijtihād* itulah yang kemudian kita kenal dengan nama hukum Islam. Sudah barang tentu di sana ada (dalam jumlah yang tidak begitu banyak) ketentuan-ketentuan yang rinci tentang hukum Islam yang sudah disebutkan di dalam al-Qur'ān maupun Ḥadīth. Pada masa *ṣaḥāba* dan *tābi'ūn* simbul kedaerahan untuk menyebutkan suatu *madhhab* belumlah muncul. Pemikiran hukum Islam selalu dinisbatkan kepada nama pribadi dari para tokoh itu. Umpamanya, pendapat 'Umar b. al-Khaṭṭāb, 'Ā'ishā, Zayd b. Thābit, Ibn 'Umar, Sa'īd b. al-Musayyab, dll. Baru pada zaman *tābi'ūn* kecil, terutama sekali generasi Abu Ḥanīfa, Ibn Abī Laylā, Mālik, dan al-Awzā'ī, nama *madhhab* yang dinisbatkan pada daerah itu terwujud; yakni madhab yang disebut oleh Joseph Schacht dengan nama *ancient schools of law*, dan oleh Aḥmad Ḥasan dengan sebutan *early schools of law*. Maka muncullah nama *ahl al-'Irāq, ahl al-Madīna*, dan *ahl-Shām*. Pada masa ini juga terbiasa mengunggulkan sebagai ulama melebihi yang lainnya. Sebutan *madhhab* kedaerahan ini dipakai oleh al-Shaybānī di dalam beberapa tulisannya, antara lain *al-Siyar al-Kabīr* dan *Kitāb al-Ḥujja 'alā Ahl al-Madīna*, dan oleh al-Shāfi'ī di dalam *al-Umm*nya, disamping yang lainnya. Sejak gerakan yang dilancarkan oleh al-Syāfi'ī, nama kedaerahan mulai memudar dan berganti dengan nama perorangan. Maka pada waktu *madhhab* muncul dalam bentuknya yang baru, kini nama perorangan menjadi sebutan *madhhab* tersebut, seperti *madhhab*

Ḥanafī yang dinisbatkan kepada Abū Ḥanīfa, *madhhab* Mālikī yang dinisbatkan kepada Mālik b. Anas, *madhhab* Shāfi'ī yang dinisbatkan kepada Muḥammad b. Idrīs al-Shāfi'ī, dan *madhhab* Ḥanbalī yang dinisbatkan kepada Aḥmad b. Ḥanbal.

Baik di dalam *madhhab* atas dasar nama kedaerahan atau nama perorangan, pendapat pribadi tetap muncul dan berkembang. Akibatnya, perbedaan pendapat di kalangan ahli *fiqh (ikhtilāf al-fuqahā')*, baik intern *madhhab* maupun antara satu *madhhab* dengan *madhhab* yang lain sangat subur. Bahkan perbedaan dengan Imam "pendiri" *madhhab*nyapun bisa diterima. Murid-murid besar dari imam *madhhab* tersebut banyak yang mempunyai perbedaan pendapat dengan imam mereka. Contohnya, Abū Yūsuf dan Muḥammad b. al-Ḥasan al-Shaybānī banyak mempunyai perbedaan pendapat dengan Abū Ḥanīfa. Beberapa murid al-Shāfi'ī, seperti al-Muzanī dan al-Buwayṭī, mempunyai perbedaan pendapat dengan imam al-Shāfi'ī. Dan begitu pula yang lain. Bahkan ulama generasi berikutnyapun mempunyai hak untuk berbeda pendapat dengan gurunya dan dengan imam pendiri *madhhab* mereka. Abu Ja'far al-Ṭaḥāwī mempunyai perbedaan pendapat dengan Abū Ḥanīfa; al-Juwaynī dan juga al-Ghazālī bukan saja berbeda satu sama lain untuk beberapa kasus, namun mereka juga mempunyai perbedaan pendapat dengan imam al-Shāfi'ī. Perbedaan pendapat tersebut tidak hanya di dalam wilayah *fiqh*, namun juga di dalam wilayah *uṣūl al-fiqh*. Dalam waktu bersamaan, konsep *eclecticism* (mengambil pendapat dari pengikut *madhhab* lain, bisa disebut sebagai *talfīq* dengan cara landasan pemikiran yang mendalam) berjalan di hampir semua pengikut *madhhab*. Lebih dari itu, istilah *mujtahid muṭlaq* juga terkadang diklaim oleh ulama yang jauh masanya dengan pendiri *madhhab*, seperti al-Suyuṭi yang wafat tahun 911/1505 juga mengklaim dirinya sebagai *mujtahid muṭlaq*. Sementara itu, al-Shāfi'ī dikenal melarang murid-muridnya untuk menisbatkan ilmu yang diberikan kepada mereka sebagai ilmu milik al-Shāfi'ī. Dan al-Shāfi'ī juga melarang murid-muridnya untuk *bertaqlīd* kepadanya atau kepada orang lain, sebagaimana ditegaskan jelas sekali oleh al-Muzanī di dalam pendahuluan kitab *Mukhtaṣar*nya.

Oleh karena itu wajar kalau masih saja dimunculkan pertanyaan tentang konsep *madhhab* dan batas-batasnya, yang pada hakikatnya tidak seperti yang digambarkan kebanyakan orang sebagai hal kaku dan tanpa

kompromi. Namun dalam kenyataannya selalu berkembang dan eclecticism. Atau bisa dikatakan bahwa konsep *madhhab* seperti yang selama ini dipahami oleh umum perlu diredifinisi.

---

**ملخص**

## مفهوم المذهب ومسألة حدوده

هل المذهب الفقهي عبارة عن مدونة للأحكام الشرعية كما هي الحالة بالنسبة للتقنين الجنائي أو التقنين المدني بحيث أن أتباعه لم يبق لهم إلا أن يأخذوا منها نصوصا تشريعية معينة طبقا لما دعت إليه الحاجة؟ بالطبع يكون الجواب، من البداية أو من الناحية المبدئية، بالنفي.

كان هناك منذ صدر الإسلام – أو قل منذ عصر الصحابة – علماء مجتهدون أي الذين يمارسون التفكير الحر، وكانت حصيلة اجتهاداتهم هي التي تعرف فيما بعد بالفقه الإسلامي. ومما لاشك فيه أن هناك (في عدد غير كثير أحكاما تشريعية مفصلة سواء ما ورد منها في القرآن أو في السنة. وفي عصر الصحابة والتابعين لم يظهر إلى حيز الوجود رمز إقليمي للإشارة إلى مذهب فلقد كانت الآراء الفقهية في ذلك العهد منسوبة دائما إلى رجال بالذات كأمثال آراء عمر ابن الخطاب، وعائشة، وزيد بن ثابت، وابن عمر، وسعيد بن المسيب، وغيرهم، وإنما ظهرت أسماء المذاهب المنتمية إلى الأقاليم في زمن صغار التابعين وعلى وجه الخصوص في جيل أبي حنيفة وابن أبي ليلى ومالك والأوزاعي، وهذه المذاهب سماها يوسف شاخف (Joseph Schacht) بالمذاهب القديمة (Ancient

(Early Schools of Law) ، وسماها أحمد حسن بمذاهب الأوائل (schools of Law)، فظهرت في هذا الزمن العبارات كأهل العراق، وأهل المدينة، وأهل الشام كما أصبح من المعتاد تفضيل بعض العلماء على البعض الآخر.

واستخدم العبارة الدالة على المذهب الإقليمي محمد الشيباني في بعض كتاباته منها السير الكبير وكتاب الحجة على أهل المدينة، كما استخدمها أيضا الشافعي في كتابه الأم إلى جانب كتبه الأخرى. على أن هذا الاسم الإقليمي اخذ ينقرض واستبدل به اسم شخصي منذ قيام الحركة التي شنها الشافعي حتى نشأ شكل جديد للمذهب بحيث لم يعد ينسب إلى إقليم بل إلى اسم شخص كالمذهب الحنفي المنسوب إلى أبي حنيفة، والمذهب المالكي المنسوب إلى مالك بن أنس، والمذهب الشافعي المنسوب إلى محمد بن إدريس الشافعي، والمذهب الحنبلي المنسوب إلى أحمد بن حنبل.

سواء في المذاهب المنسوبة إلى الأقاليم أو المنسوبة إلى الشخصيات فإن الآراء الشخصية ظلت ناشئة و منتشرة مما جعل اختلافات الفقهاء جد خصبة سواء كانت في مذهب بعينه أو فيما بين المذاهب المختلفة حتى لتعتبر مخالفة أحد لإمامه أمرا مقبولا. كثير من كبار أصحاب أئمة المذاهب خالفوا أئمتهم، كأبي يوسف ومحمد بن الحسن فإنهما خالفا أبا حنيفة في كثير من آرائه، وأصحاب الشافعي كالمزني والبويتي، اختلفوا معه في بعض آرائه. كذلك الأمر بنسبة للآخرين وحتى علماء الجيل اللاحق لم يقل حقهم في مخالفة شيوخهم وإمام مذهبهم. فالطحاوي كان له آراء تخالف آراء أبي حنيفة. كذلك الجويني والغزالي لم يختلف كل منهما مع الآخرين فقط في بعض الحالات بل ويختلف كلاهما مع

الإمام الشافعي، كما لم تكن هذه الإختلافات واردة في مجال الفقه فحسب بل وترد كذلك في أصول الفقه، وفي الوقت ذاته كان مفهوم "الانتقائية" (electicism) – وهي التخير من آراء المذاهب الأخرى والتي تعرف بالتلفيق وتقوم على أساس التفكير العميق – أعدل الأشياء قسمة بين جميع أتباع المذاهب تقريبا. وأكثر من ذلك فبعض العلماء الذين يبعد عصرهم عن عصر الأئمة المؤسسين للمذاهب ادعوا لأنفسهم أحيانا الإجتهاد المطلق، كالسيوطي (المتوفى عام ٩١١ هـ/ ١٥٠٥ م. ) الذى زعم نفسه كمجتهد مطلق. وفي هذا الصدد عرف من الشافعي نهيه لأصحابه عن نسبة العلم الذى تلقوه منه إلى نفسه، وكذلك نهاهم عن تقليده أو تقليد غيره كما صرح به المزني بوضوح في مقدمة مختصره.

بناء على ذلك كان طبيعيا أن تطرح دائما مسألة مفهوم المذهب وحدوده الذى لم يكن في الواقع كما يتصوره الكثيرون مفهوما صارما غير قابل للتوفيق، بل بالعكس من ذلك كان مفهوما دائم التطور ومفهوما انتقائيا، أو يمكن أن يقال إن مفهوم المذهب كما كان يفهم عند العامة بحاجة إلى إعادة التحديد.

How far is the difference between one *madhhab* (school of Islamic law) and another *madhhab*? The answer may be assumed that *madhhab* strictly differ from each other in *uṣūl al-fiqh* and other foundations of theory. However, the true is that they are not only "eclectic," but also, at the same time, within a single *madhhab*, the jurists still keep their differences, even to their masters. Therefore, here I shall examine the concept of *madhhab* and the question of its boundary.

**The Birth of Islamic Law**

Joseph Schacht starts his analysis of the ancient schools of law from Ibrāhīm al-Nakhā'ī for the Iraqis and from the "seven jurists of Medina" for the Medinese. He claims that "recent historical research, however, has shown that Islamic jurisprudence came into being towards the end of the first century of the hidjra (early 8th century A.D.). During the greater part of the 1st/7th century, Islamic law, in the technical meaning of the term, and therefore Islamic jurisprudence, did not as yet exist,[1] "According to Schacht, Islamic legal thought started from late Umayyad administrative and popular practice, and "the evidence of legal traditions carries us back to about 100 A.H. only."[2]

Furthermore, Schacht says that the Umayyads and their governors were "responsible for developing a number of the essential features of Islamic worship and ritual ... Islamic religious ideals and Umayyad administration cooperated in creating a new framework for Arab Muslim society."[3] Consequently, "the popular and administrative practice of the late Umayyad period was transformed into Islamic law."[4] Schacht's thesis that legal traditions carry us back to about 100 A. H. is, of course, rejected not only by Muslim scholars, but also by other Western scholars, like Noel J. Coulson, because "the notion of such a vacuum for a century is difficult to accept."[5] For Coulson, Islamic law "was the result of a speculative attempt by pious scholars, working during the first three centuries of Islam, to define the will of Allah ... they produced a comprehensive system of rules, largely in opposition to existing legal practice, which expressed the religious ideal."[6] Most Muslim scholars[7] believe that there was activity in legal thought right from the beginning of Islam: there were the judicial activities at the time of the Prophet, the legal judgments of the rightly guided caliphs, the *fatwās* of the Companions, and

the legal literature of the first century. The making of *fatwā* was fully practiced by the Companions down to the Successors and had never come to an end; even the Qur'an itself contains many cases related to the practice of asking and giving *fatwās*.[8] The role of iftā' in the Qur'an suggests that the regulations based on the Qur'an or the Qur'anic laws were anchored firmly during the Prophet's time.

**The Ancient Schools of Law**

Muslim scholars start their discussion of Islamic law with the time of the Prophet. even though most of them are aware that its formal shape as an independent subject of study began at a later time. According to them, the residence of the Companions in different cities cannot be neglected as roots of the ancient schools of law, and the scholars of the ancient schools of law were the heirs of those Companions. Thus, the root of the Iraqi school was Ibn Mas'ūd and Alī b. Abī Ṭālib, that of the Meccan school was Ibn 'Abbās, and that of the Medinese school was 'Umar, 'A'isha, Ibn 'Umar, and others. Muslim scholars, like Aḥmad Ḥasan, believe that the formation of Islamic law was in the hands of the Successors[9] because they exercised *ijtihād* freely; they were not afraid of giving preference to the opinions of one Companion over those of another, and even the opinions of a Successor over those of a Companion. Islamic law during the time of the Prophet and the Companions was not systematized, Ḥasan argues. In this respect, differences of opinion among the Successors were "due to local and regional factors."[10] Schacht writes that the ancient schools of law" accepted geographical differences of doctrines as natural; [but] they voiced strong objections to disagreement within each school."[11] What Ḥasan calls "the early schools of law" is "more or less definite and identifiable traditions prevalent in different regions before al-Shāfi'ī and against which al-Shāfi'ī argues".[12] thus, Ḥasan includes Abū Ḥanīfa, Mālik and al-Awzā'ī in the ancient schools of law.

For the formation of these schools, every important city had its own leaders who contributed to the development of legal thought in that region. In Medina, there were Sa'īd b. al-Musayyab, 'Urwa b. al-Zubayr, Abū Bakr b. 'Abd al-Raḥmān, 'Ubaydallāh b. 'Abdallāh Khārija b. Zayd, Sulaymān b. Yasār, and al-Qāsim b. Muḥammad. These Successors were usually called the "seven jurists of Medina." We also find other celebrated names in Medina, such as Sālim b. 'Abdallāh b. 'Umar, Ibn Shihāb al-Zuhri, and Yaḥyā b. Sa'īd. Mālik and his contemporaneous jurists were the last exponents of the Medinese

school. In Kūfa, the famous Successors were 'Alqama b. Qays, Masrūq b. al-Ajda', al-Aswad b. Yazīd, Shurayḥ b. al-Ḥārith, Ibrāhīm al-Nakha'ī, al-Sha'bī, Ḥammād b. Abī Sulaymān al-Ash'arī, and the last exponents there were Abū Ḥanīfa and his disciples. In Syria, there were Qabīṣa b. Dhuway b. 'Umar b. 'Abd al-'Azīz, Makḥūl, and the last exponent there was al-Awzā'ī. There were also a number of celebrated names of the Succewwors in Mecca and Baṣra. At the time of the late Successors (*tābi'u tābi'īn*), three schools of law emerged, which then were called "the ancient schools of law" or "the early schools of law": the 'Iraqi, especially the Kufian school, the Ḥijāzī, especially the Medinese school, and the Syrian school. In his *al-Siyar al-Kabīr*, Muhammad b. al-Hasan al-Shaybāni mentions three schools based on a region: *ahl al-'Irāq* (the school of Iraq), *ahl al-Shām* (the school of Syria), and *ahl al-Madīna* (the school of Medina). He says in one place:

> When a martyr is killed on the battlefield, he should not be purified; but he still needs to be prayed for. This is the opinion of the school of Iraq and the school of Syria. We have chosen this opinion. On the other hand, according to the school of Medina, the martyr should not be prayed for. *Mālik b. Anas is of this opinion.*[13]

Al-Shaybānī also entitles one of his books "al-Ḥujja 'alā Ahl al-Madīna", proof against the school of Medina.

Islamic law as the result of independent *ijtihād* came into being after the death of the Prophet, since at the time of the Prophet there was no really independent *ijtihād* by the Companions, since everything had to be brought back to the Prophet, whose judgments were final. It is true that there were some disagreements among the Companions, but the final decision to accept or to reject was for the Prophet alone. After the death of the Prophet, no final decisions were made, so that real independent *ijtihād* came to exist; thus *ikhtilāf* among the great Companions, 'Umar b. al-Khaṭṭāb, Ibn 'Umar, 'Uthmān, 'Alī, Ibn Thābit, and others was recognized, even though some Companions were caliphs. This attitude became clear in the region where some of them lived. They gave some *fatwās* and opinions in which they often disagreed among themselves, whether they lived in different regions or in the same city. They gave *fatwās* and injunctions based on individual thinking to the questions or problems they received, and they were not associated with the names of regions. The regional symbols did not emerge during the generation of the Companions or even in the next generation,[14] the generation of the great Successors; only at the time of the late Successors, at the time of Abu

Ḥanīfa, Ibn Abī Laylā, Mālik, and al-Awzā'ī, did the names of the schools which were associated with the names of regions come into existence. But the use of geographical names for the scholars was preceded by the fact that the people gave preference to the permanent residents of the same regions over scholars from other regions. From the generation of the late Successors until the middle of the second century of the Hijra, the regional names of the schools emerged. This development reached its peak at the time of three great scholars, Abū Ḥanīfa together with his two intimate disciples, Abū Yūsuf and al-Shaybānī, Mālik, and al-Awzā'ī. This phase ended at the rise of al-Shāfi'ī, who tried not only to go against the schools based on the regions, but also to systematize legal thinking universally. Unfortunately, the result was to establish a new school, his own school, and the schools were then named according to their masters rather than according to regions. Consequently, schools were no longer called Iraqi, Ḥijāzī, or Syrian, but rather Ḥanafī, Mālikī, and Awzā'ī. It is interesting to note that while al-Shaybānī mentions the name of the regional schools, *ahl al-'Irāq*, *ahl al-Madīna*, and *ahl al-Shām*, *al-Taḥāwī, in his Ikhtilāf al-Fuqahā'*, mentions the individual names of the great jurists. He also often mentions the collective group, not the regional name, for his own school, i.e., *aṣḥābunā* (our authorities).[15] For other schools he mentions only the name of the masters, al-Awzā'ī, Mālik and al-Shāfi'ī.

Most scholars cite two influences to explain differences among the ancient schools of law: that the local elements were very powerful, which implies that Islamic law was flexible at that time, and was the exercise of personal opinion. In order to protect the community from disintegration caused by the differences among the scholars, the concept of *ijmā'*,the consensus of the scholars in a given region, was established. The scholars, then, established the concept of *sunna*, the practice of the community in that region, i.e., more or less the customary law, whether or not it had its root in the practice of the Prophet or the Companions. Schacht says that the ancient Arab concept of *sunna* became one of the central concepts of Islamic law.[16] In reality, consensus was hardly reached in single regions because scholars still had *ikhtilāf* among themselves, as al-Shāfi'ī both proved and criticized. Al-Shāfi'ī says,

> I have known the people of a city disunited among themselves, then between those in one city and those in different cities. [For example,] we have known that almost none of the people of Mecca departed from the opinion of 'Aṭā' b.Abī Rabāh, so that Muslim b. Khālid al-Zanjī *gave fatwās* based on the opinion of 'Aṭā'. But we also find other people with different opinions;

> these people chose the opinions of Sa'īd b. Sālim instead that of al-Zanjī. Each of the supporters of al-Zanjī and of Sa'īd b. Sālim differed among themselves and weakened each other. I have known that the people of Medina preferred Sa'īd b. al-Musayyab, but also rejected some of his opinions. In our time, we have Mālik b. Anas, whom the people of Medina prefer. On the other hand, there are some other people who exaggerate in order to weaken the opinion of Mālik. I find that Ibn Abī 'l-Zinād criticizes Mālik. I find that some of the people of Kūfa favor the opinion of Ibn Abī Laylā and criticize the opinion of Abū Yūsuf; some of them favor Abū Yūsuf and criticize Ibn Abī Laylā; others favor Sufyān al-Thawrī; still others favor al-Ḥasan b. Ṣāliḥ. I also receive some information about the disunion of the people of cities other than those I have mentioned. I have also known that the people of Mecca preferred 'Aṭā' over other Successors, while the people of 'Irāq preferred Ibrāhīm al-Nakha'ī over other successors[17]

The ancient schools of law, which had been founded mainly on the teachings in one geographic location, transformed themselves into schools based upon allegiance to individual masters. In the second century, many individuals began to follow the teaching of a recognized authority, while still claiming the right to differ from their master on points of detail. Thus some scholars of Kūfa, including Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī, followed Abū Ḥanīfa; but Abū Yūsuf had his own followers; and some Kufans followed Ibn Abī Laylā. In the schools of Medina and Egypt, there were scholars who followed Mālik and regarded the book of Mālik, *al-Muwaṭṭa'*, as their authoritative work. Furthermore, the scholars criticized each other.[18] Thus the ancient school of 'Irāq survived only in the followers of Abū Ḥanīfa, and the ancient school of Ḥijāz survived only in the followers of Mālik. This transformation of the ancient schools of law into "personal" schools was completed by the middle of the third century.

## The Formation of *Madhhab* and the Question of Its Boundary

The formative period of Islamic law was the first two and a half centuries of Islam. As I described above, it started from the time of the Companions on the basis of individual authorities, was continued on the basis of regional authorities, and then returned to individual authorities, even though the authorities kept the local consensus or picked some of the opinions of their predecessors, more specifically of the Companions. In this period, there was never any question of denying to any scholar the right to solve legal problems by his own independent *ijtihād*. Most scholars believe that after this period came to an end, the question of *ijtihād* and of who was qualified to

exercise it was raised. From about the middle of the third century of the Hijra, the idea began to gain ground that only the great scholars of the past had the right to exercise independent *ijtihād*, an *ijtihād* that was defined differently from the old free use of personal opinion (ra'y), and that wasrestricted to deriving valid conclusions from the Qur'an, the *sunna*, and consensus, by analogy (*qiyās*) or systematic reasoning.[19] Therefore, by the beginning of the fourth century of the Hijra, Muslim jurists of all schools felt that every essential legal problem had been thoroughly discussed and solved by previous grand jurists, and a consensus gradually established itself that no one might have the neccessary qualifications to exercise independent *ijtihād*. It meant that "all future activities would have to be confined to the explanation, application, and, at most, interpretation of the doctrine as it had been laid down once for all, "which" meant 'the closing of the door of *ijtihād*' or *taqlīd*."[20]

The movement from the so-called formative period of Islamic law into the so-called closing of the gate of *ijtihād*, however, was not dramatic. Independent thinking continued to exist. We still find some scholars who were considered fully independent *mujtahids* between the middle of the third until the beginning of the fourth centuries of the Hijra, such as Dāwūd b. Khalaf al-Ẓahirī and al-Ṭabarī. Al-Ṭaḥāwī, al-Ṭabarī, and al-Marwazī lived at that time and they still exescised *ijtihād* independently, in the sense that they did not always follow their masters, and al-Ṭabarī even considered himself an independent *mujtahid*. The main difference between al-Ṭaḥāwī and al-Ṭabarī is that al-Ṭaḥāwī associated himself with an established school, the Shāfi'ī, and later moved to the Ḥanafī. Al-Ṭabarī, on the other hand, moved from the Shāfi'ī school to become an independent *mujtahid* and founded his own school, the Jarīrī school. Furthermore, it can be assumed that most of the problems which emerged at that time had already been discussed by the earlier jurists, and the results of the *ijtihād* of the great scholars were still acceptable and workable and new ones were not urgently needed. In addition, it seems that most scholars of the time were more eager to develop the established opinions of the great scholars of the past than to invent new opinions which were not in great demand. This attitude, I believe, was mostly their personal choice, even though they still developed their own opinions which sometimes disagread with those of their masters. Although al-Ṭaḥāwī, for example, had many differences with the masters of his original school, Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī, he still attached himself to the Ḥanafī school and he advanced its theoretical development.

The closing of the gate of *ijtihād* means the practice of *taqlīd*. This is a term which "had originally denoted the kind of reference to Companions of the Prophet that had been customary in the ancient schools of law, and which now came to mean the unquestioning acceptance of the doctrines of established schools and authorities." [21] It means that "the doctrine must not be derived independently from the Qur'an, *sunna* and *ijmā'*, but it must be accepted as it is being taught by one of the recognized schools, which are themselves covered by consensus." [22] The era of the *taqlīd* by this definition needs to be re-examined, since stagnation of original thought among the scholars from the middle of the third century of the Hijra onwards never really came into existence: the scholars from within and among different schools competed and influenced one another and eclecticism occurred among the scholars within schools or between different schools. "The activity of the later scholars, after the 'closing of the door of *ijtihād*,' was no less creative, within the limits set to it by the nature of the *sharī'a*, than that of their predecessors."[23] Some evidence also shows that one scholar easily disagreed with the master of his school, even though he committed himself to be bound by that school, and at the same time he had no difficulty in agreeing with other masters from different schools. Therefore, the boundary of the concept of *madhhab* should also be re-examined. Concerning *taqlīd*, Wael Hallaq writes:

> I shall try to show that the gate of ijtihad was not closed in theory nor in practice . . By chronologically analyzing the relevant literature on the subject from the fourth/tenth century onwards, it will become clear that (1) jurists who were capable of ijtihad existed at nearly all times, (2) ijtihad was used in developing positive law after the formation of the schools; (3) up to ca. 500 A. H. there was no mention whatsoever of the phrase 'insidad bab al-ijtihad' or of any expression that may have allude to the notion of the closure; (4) the controversy about the closure of the gate and the extinction of mujtahids prevented jurists from reaching a consensus to that effect."[24]

Hallaq also writes, "It has also been shown that the controversy about ijtihad and the existence of mujtahids started, in its primitive form, only in the beginning of the sixth/twelfth century." It means that Hallaq puts the date of the closure of the gate of *ijtihād* in this century and he believes that "Throughout the following centuries, differences among jurists, encouraged by ambiguities in legal terminology, made any consensus on the nonexistence of mujtahids and on the closure of the gate of ijtihad impossible to reach."[25]

Theorizing the tradition of ***Mukhtaṣar***, in his dissertation, Mohammad Fadel criticizes Schacht on judging ***Mukhtaṣars***, saying, "Schacht's observa-

tion [that *Mukhtaṣars* 'are not in the nature of codes'] is problematic for it fails to explain why, in the case of the Maliki school for example, no new *Mukhtaṣars* of any importance were produced after Khalīl,"[26] Furthermore, Fadel argues that "In order to make *taqlīd* more effective, the genre of *Mukhtaṣar* was popularized beginning in the seventh/thirteenth century with the *Jāmi' al-ummahāt* of Ibn al-Ḥājib, which was follwed the eight/fourteenth century by *Mukhtaṣar Khalīl*." Fadel convinces us to believe that " The basic aim of these two works was to present the rules of school as well as representative cases illustrating their application."[27] He himself believes that *Mukhtaṣar Khalīl* "was able to construct a text which in many ways resembled a legal code." Furthermore, he explains,

> Because his work (*i.e.,Mukhtasar Khalil*) did not bind all jurists, however, it cannot be considered a full-fledged code. Nevertheless, it would be accurate to describe Islamic law, if the Māliki school is taken as representative, as having undergone a long-term evolution from one resembling a case-law system in which legal officials possessed great discretionary powers, to one resembling civil law in which the vast majority of legal officials became bound to a pre-existing rule, with the qualification that upper level jurists always succeeded in retaining their *right* to override rules of the school in situations that demanded it."[28]

Fadel's theory of *Mukhtaṣar* cannot be applied fully to the Shāfi'ī school, since the *Mukhtaṣar* of al-Muzanī was written in a very early time and *ijtihād* was also practiced by the Shāfi'ī jurists after al-Muzanī. On the introduction of his *Mukhtaṣar*, he writes, "I composed this book as an extract from the doctrine of al-Shāfi'ī and from the implication of his opinions for the benefit of those who may desire it, even though al-Shāfi'ī himself prohibited anybody to follow him or anybody else."[29] The true is that the exercise of *ijtihād* still practiced by the jurists after al-Muzanī wrote his *Mukhtaṣar*.

**Conclusion**

The boundary of *madhhab* has in fact, many ambiguities. That is not only because the jurists from different *madhhab*, practiced eclecticism, but also because they keep practicing differences among themselves within a single *madhhab* by exercising their independent thinking *(ijtihād)*. These jurist also often developed the *uṣūl al-fiqh* and sometimes even contradicted their masters. We sometimes find that a few of them proclaimed themselves as *mujtahid*; however, they were still considered as the followers of a certain *madhhab*. For example, in his autobiography, al-Suyūṭī (d. 911/1505) pro-

claimed himself as a *mujtahid muṭlaq*.[30] In understanding the concept of *madhhab* or "following a certain school of Islamic law," we may compare to the concept of school in philosophical tradition. When Warner Wick discusses Aristotelianism, he writes that "doctrinal formulas may be preserved while their fundamental concepts are altered by reinterpretation in the light of new circumstances or by use in the service of new interests or methods." Wick also says that "Aristotelianism is not the philosophy of Aristotle himself." [31]

The development of the concept of *madhhab* - if we commit to accept - should be brought to the masters' ideas, theories, and methods which are accessible to the development and change; instead of being bound by the results of *ijtihād* of the masters which are usually considered as religious dogmas. ●

**End Notes:**

[1] Joseph Schacht, "Fikh," *Encyclopaedia of Islam (new ed.)*, II: 887b

[2] Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1953), 5. On the other hand, Schacht also writes on another occasion that the first three generations after the death of the Prophet are "in many respect the most important," in which "many distinctive features of Islam came into being and the nascent Islamic society created its own legal institutions." Schacht, "Pre-Islamic Background and Early Development of Jurisprudence," in Majid Khadduri and Herbert J. Liebesny, *Law in the Middle East* (Washington, D.C.: the Middle East Institute, 1955), 1:33.

[3] Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1984), 23. These statements seem to contradict his other statement that "Islamic law represents an extreme case of a 'jurists' law'; it was created and developed by private specialists; legal science and not the state plays the part of a legislator, and scholarly handbooks have the force of law." *Ibid.*, 5.

[4] Joseph Schacht, "Pre-Islamic," 1: 40. Schacht also writes that "during the whole of the first century of Islam, the administrative and legislative activities of the Islamic government cannot be separated." Schacht, "Fikh", 888a. This mostly differs from what I am discussing. It is true that there was no separation between the government and Islamic activities, including Islamic law, at the time of the rightly guided caliphs (*khulafā' rāshidūn*); however, independent *ijtihād* of the Companions had never been discouraged. Only matters requiring general public attention were taken over completely by the caliphs. Moreover, after the first four caliphs there was separation between government administration and the development of Islamic law by pious scholars. This was why the main propaganda of the Abbasids to replace the Umayyad caliphate was to revive Islamic law, although, as Schacht acknowledges, the result of the Abbasid caliphate was "that Islamic law became more and more removed from the practice," while he also writes," but in the long run [Islamic law] gained more in power over the minds than it lost in control over the bodies of the Muslims." Schacht, *Introduction*, 56. It is clear that the development of Islamic law is basically separated from the practice of the government.

[5] Noel j. Coulson, A history of Islamic Law (Edinburgh: Edinburgh University Press,

1964),64-65.

[6] Noel J. Coulson,"The State and Individual in Islamic Law ," *International and Comparative Law Quarterly*, 6(1957): 75.

[7] Many Muslim scholars also believe that Islamic law "was not systematised during the time of the Prophet and the companions. Since the successors' time it began to take its formal shape and to develop into a body and an independent subject of study." Ahmad Hasan, *The Early Development of Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1988), 29. The point here is about the activity of Islamic law. My concern is to show the continuation of independent *ijtihād* based on almost every individual scholar since the death of the Prophet.

[8] In the Qur'an, we find about eleven times the words derived from *f-t-w*, as noted by Muhammad Fu'ād 'Abd al-Bāqi in his *al-Mu'jam al-Mufahras li-Alfāẓ al-Qur'an al-Karim* (Beirut: Dar al-Fikr, n.d.), 512. In his study *fatwās*, Wael Hallaq finally writes: "In Sum, our inquiry suggests that the juridical genre of the *fatwā* was chiefly responsible for the growth and change of legal doctrine in the schools, and that our current perception of Islamic law as a jurists' law must now be further defined as a *muftis'* law. Any inquiry into the historical evolution and later development of substantive legal doctrine must take account of the *muftī* and his *fatwā*. *Wa-Allāh a'lam*." Wael B. Hallaq, "From *Fatwās* to *Furū'*: Growth and Change in Islamic Substantive law," *Islamic Law and Society*, 1 (April 1994): 65.

[9] Aḥmad Ḥasan, *Early*, 19 and 29.

[10] *Ibid.*, 19.

[11] Schacht, "Ikhtilāf," *E.I. (new ed.)*, III: 1061b.

[12] Ḥasan, *Early*,31 (note 28).

[13] Al-Shaybānī, *al-Siyar al-Kabīr* (Cairo: Shirka Musāhama, 1958), I:230. Al-Shāfi'ī, *too, in his al-Umm* often mentions different school based on a region.

[14] Al-Shāfi'ī, *al-Umm*, edited by Maḥmūd Maṭrajī (Beirut Dār al-'Ilmiyya, 1993),VII: 470-71.

[15] Al-Ṭaḥāwī mentions *al-madaniyyūn* only once in the chapter "al-Qada' wa 'l-Shahadāt." Al-Ṭaḥāwī, *Ikhtilāf al-Fuqahā'*, edited by Muḥammad Ṣaghīr Ḥasan Ma'ṣūmī (Islamabad: Islamic Research Institute, 1971), 218.

[16] Schacht, *Introduction*, 8 and 17.

[17] Al-Shāfi'ī, *al-umm*, VII: 469-71.

[18] *Ibid.*, VII: 470. In 'Iraq, there were still some scholars who accepted al-Shafi'i's idea, and later, some of them, such as Aḥmad b. Ḥanbal and Dāwūd b. Khalaf, were extreme traditionists.

[19] Schacht, *Introduction*, 70.

[20] *Ibid.*, 70-71.

[21] *Ibid.*, 71.

[22] *Ibid.*

[23] *Ibid.*, 73.

[24] Wael Hallaq, "Was the Gate of *Ijtihād* Closed?," *International Journal of Middle East Studies* 16(1984), 4.

[25] *Ibid.*, 33.

[26] Mohammad Fadel,"Adjudication in the Mālikī *Madhhab*: A Study of Legal Process in Medieval Islamic Law" (Ph. D. diss., the University of Chicago, 1995),I: 265.

[27] *Ibid.*, I: 283.

[28] *Ibid.*, I: 284.

[29] Al-Muzanī, *Mukhtaṣar*, in al-Shāfi'ī, *al-Umm*, IX: 3.

[30] Al-Suyūṭī, *Husn al-Muḥāḍara fī Ta'rīkh Miṣr wa 'l-Qāhira* (Kairo: 'Īsā 'l-Bābi 'l-Ḥalabī, 1967), I: 335-44.

[31] Warner Wick, "Aristotelianism, "*Encyclopaedia of Philosophy*, I-II: 148.