LEGAL REASONING IN THE POSTCLASSICAL PERIOD: ABŪ SAᶜĪD AL-KHĀDIMĪ'S (d. 1176/1762) JUSTIFICATION REGARDING THE PROHIBITION OF SMOKING

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Abstract

This article analyzes the manner of legal reasoning of the Ottoman scholar Abū Saᶜīd al-Khādimī (d. 1176/1762) in his two treatises on the prohibition of smoking (*Risālatān ᶜan ḥaẓriyyat al-dukhān*) to determine the nature of the justification of a postclassical scholar relating to an individual juristic case. Since tobacco was introduced to the Muslim world in the 17th century, many jurists formed responses about smoking. Although some scholars such as ᶜAbd al-Ghanī al-Nāblusī (d. 1143/1731) –especially when smoking later became a social issue– pronounced tobacco consumption as permissible, the majority considered it forbidden (*ḥarām*) or at least to be discouraged (*makrūh*). Al-Khādimī also expressed his opinion on this issue in two

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short treatises, which he wrote after discussion with some scholars in Damascus, who were most likely students of al-Nāblusī. As the title of the epistles indicates, al-Khādimī considers smoking forbidden. However, the wording is softened, and his reasoning is intersubjective and balanced, making his answer nuanced and justified with many different methodical and legal arguments. This approach illustrates how al-Khādimī makes Islamic law responsive and relevant to a case of his time, which is still applicable to present contexts. As the treatise is only available in the manuscript or in an old collection that is difficult to access, I have attached the text in the original language to this article.

Key Words: Islamic law, legal norm of smoking, Abū Saʿīd al-Khādimī, legal reasoning

Introduction

When al-Khādimī wrote his treatises on the case of the legal norm of tobacco consumption, smoking was already popular and had become commonplace. As Grehan noted, tobacco use was a key factor in the breakdown of old moral barriers and contributed to the emergence of a distinctly early modern culture in which the pursuit of pleasure became increasingly public, routine, and uninhibited.[1]

Since the early 17th century, smoking has been a prevalent issue in Muslim society and a subject among various disciplines, such as law and even poetry.[2] Smoking from this time onward also became a subject of social and political disputes in the Middle East and Ottoman Anatolia. As a result, some sultans even banned smoking by an edict. Aḥmed I (r. 1603-1617), for example, outlawed the tobacco trade. However, this political decision is said to have had little effect and was quickly forgotten. Approximately two decades later, when the riots over smoking were reignited by adherents of a strict interpretation of religion, namely, the Qāḍīzādahlīs, the policy under the reign of Murad IV (r. 1623-1640) took a harder line against tobacco consumption.

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1 James Grehan, “Smoking and ‘Early Modern’ Sociability: The Great Tobacco Debate in the Ottoman Middle East (Seventeenth to Eighteenth Centuries)”, *The American Historical Review* 111/5 (December 2006), 1356.

2 Simon Leese, “Connoisseurs of the Senses: Tobacco Smoking, Poetic Pleasures, and Homoerotic Masculinity in Ottoman Damascus”, *The Senses and Society* 17/1 (February 2022), 91-106.

Smokers on public streets were severely punished by the vice squad, and therefore, few dared to smoke outside.[3]

In this tense discussion climate, it was unthinkable that the scholars would have remained silent. Many scholars responded in the form of dedicated treatises (*rasāʾil*) in which they expressed different positions on the harms of smoking or even its benefits as the basis for their normative decisions.

Rasāʾil are relatively short texts that address specific individual cases and are usually directed by scholars to scholars or to society. For Ayoub, the *Rasāʾil* enjoyed an enormously important role, especially among Ottoman scholars of the 16th-19th centuries, because on the one hand, it dealt with highly topical issues of the time, and on the other hand, it provided a platform for the actualization and adaptation of legal opinion.[4]

Many scholars have dealt with the subject and communicated their views in the form of treatises. The views expressed in the relevant treatises on the normative determination of smoking can be generally divided into three groups, namely, those that consider it permissible (*mubāḥ*), discouraged (*makrūh*), or prohibited (*ḥarām*). Although there were representatives for all three categories of norms, the number of those who considered smoking to be forbidden predominated.[5]

One of the very first treatises containing a positive statement was written by the Egyptian scholar ʿAbd al-Raḥmān al-Ujhūrī (d. 1066/1656). In principle, al-Ujhūrī is against prohibiting smoking, in part because it is not intoxicating, as others would claim. However, he also recognized that under certain circumstances, the normative rule

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3 Grehan, "Smoking and 'Early Modern' Sociability", 1363; Eugenia Kermeli, "The Tobacco Controversy in Early Modern Ottoman Christian and Muslim Discourse", *Hacettepe Üniversitesi Türkiyat Araştırmaları (HÜTAD)* 21/21 (December 2014),129-130.

4 Samy Ayoub, "Creativity in Continuity: Legal Treatises (*al-Rasāʾil al-Fiqhiyya*) in Islamic Law", *Journal of Islamic Studies* 34/3 (September 2023), 1-3.

5 Aydemir, who examined a total of 12 treatises in his unpublished master's thesis, found that two of the respective authors argued against the ban on smoking and seven in favor of it. While one author abstained, the last two treatises dealt with other aspects of smoking or tobacco. See Bilal Aydemir, *Sigara ile İlgili Yazılmış Risâlelerin İslam Hukuku Açısından Değerlendirilmesi* (Kastamonu: Kastamonu University, Institute for Social Sciences, Master's Thesis, 2018), 16.

can be changed into a prohibition if, for example, an experienced physician deems it harmful to the individual patient.[6]

In the relevant section of his work, *Mīzān al-ḥaqq fī ikhtiyār al-aḥaqq*, the Ottoman polymath Ḥājī Khalīfah (d. 1067/1657), also known as Kātib Chalabī, reflects on possible conclusions about how to think about smoking in terms of Islamic law. Known for his balanced and tolerant attitude, Ḥājī Khalīfah states that smoking cannot be banned definitively simply because it is widespread in society, even if it were legally possible. For him, such a ban would result in marking the many smokers as permanent sinners, which would be irresponsible. Even though he would prefer permissibility to outright prohibition, there is no question in his mind that smoking is a disliked act, especially for those who are addicted to the act, simply because it leaves an unpleasant odor on the body and clothing.[7]

The treatise on the permissibility of tobacco consumption by the Syrian scholar ʿAbd al-Ghanī al-Nāblusī (d. 1143/1731) is probably better known and more detailed. In *al-Ṣulḥ bayna l-ikhwān fī ḥukm ibāḥat al-dukhān,* he argues that tobacco consumption is generally permissible and supports this view with various arguments. At the very beginning of his treatise, he talks about the benefits of tobacco for the human body, such as its ability to remove phlegm or facilitate the digestion of heavy food.[8] For al-Nāblusī, tobacco is not forbidden per se, but only for those who experience personal harm from smoking.[9] However, this principle applies to all permitted actions, such as the ban on overeating, even though eating is permitted in itself.[10] From an argumentative point of view, al-Nāblusī addresses the arguments of his opponents in dialectical form and tries to refute them with counterarguments. Notably, the range of his arguments is diverse and

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6 Abū l-Irshād Nūr al-Dīn ʿAlī ibn Muḥammad ibn ʿAbd al-Raḥmān al-Ujhūrī, *Ghāyat al-bayān li-ḥill shurb mā lā yughayyib al-ʿaql min al-dukhān*, "Ghāyat al-bayān li-ḥill shurb mā lā yughayyib al-ʿaql min al-dukhān: dirāsah wa-taḥqīq", ed. Muḥammad ʿAbd Allāh Salmān, *Majallat al-Jāmiʿah al-ʿIrāqiyyah* 3/42 (2018), 340-344.

7 Ḥājī Khalīfah Muṣṭafá ibn ʿAbd Allāh Kātib Chalabī, *Mīzān al-ḥaqq fī ikhtiyār al-aḥaqq* (İstanbul: Taswīr-i Afkār Ghazatahkhānasi, 1280 AH), 33-45.

8 ʿAbd al-Ghanī ibn Ismāʿīl ibn ʿAbd al-Ghanī ibn Ismāʿīl al-Nāblusī, *al-Ṣulḥ bayna l-ikhwān fī ḥukm ibāḥat al-dukhān* (London: British Library, Nr. 19547), 1a-b.

9 Al-Nāblusī, *al-Ṣulḥ bayna l-ikhwān* (British Library Nr. 19547), 1b.

10 Al-Nāblusī, *al-Ṣulḥ bayna l-ikhwān* (British Library Nr. 19547), 7b.

extends from scientific matters to those on Islamic law from various schools of law.[11]

Aḥmad al-Rūmī al-Āqḥiṣārī (d. 1041/1632) is an important scholar who was vehemently against smoking and wrote a relatively detailed treatise on the subject, in which he put forward a variety of arguments to support his opinion. In the introduction to *al-Risālah al-dukhāniyyah*, al-Āqḥīṣārī openly advocates for the prohibition of smoking. For him, actions resulting from human free will must have either worldly or afterlife-related benefits. Useless (*ʿabath*), frivolous (*lahw*), and distracting (*laʿib*) actions are forbidden and always abhorred in the Qurʾān. Moreover, the consensus among doctors is that smoking is harmful. The fact that it has sometimes been used as a remedy does not in any way support its general acceptance.[12] Like most treatises, al-Āqḥiṣārī's essay is mostly in dialogical form, typically presenting his arguments in response to the assertions of his opponents. For example, he counters the claim that no *ijtihād* can be made regarding the norm of smoking because there is no *mujtahid* by arguing that an *ijtihād* is always possible in individual cases either by analogical comparison or by extrapolation (*takhrīj*).[13]

Another scholar who classifies smoking as a forbidden act is Abū Saʿīd al-Khādimī. As mentioned above, al-Khādimī participated in the vital debate on the Islamic norm of smoking through two short treatises. Despite their brevity, they contain many arguments on the basis of which the author justifies his opinion on the subject. In the following, the arguments are discussed and analyzed to determine how the postclassical Ḥanafī scholar of the eighteenth century substantiates his view on an individual case in which the primary sources of the school of law are silent. Before doing so, it seems appropriate to give a brief overview of the intellectual biography of our scholar to contextualize his approach in the mentioned individual case in his legal thought.

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[11] Al-Nāblusī, *al-Ṣulḥ bayna l-ikhwān* (British Library Nr. 19547), 42b-117a.

[12] Aḥmad al-Rūmī al-Āqḥiṣārī, "al-Risālah al-dukhāniyyah", *Tütün İçmek Haram mıdır? Bir Osmanlı Risalesi*, ed. with an introduction Yahya Michot, trans. Ayşen Anadol (İstanbul: Kitap Yayınevi, 2015), 95-96.

[13] Al-Āqḥiṣārī, "al-Risālah al-dukhāniyyah", 86-87.

There are, of course, many recent treatises that, on the one hand, provide detailed information on discussions between scholars on the legal norm of tobacco consumption and, on the other hand, pursue a similar aim, namely, the legal argumentation of a particular scholar on the basis of a corresponding treatise on the aforementioned subject.[14] However, I will merely refer to some of these works, as the primary aim of this article is to present and analyze the arguments regarding the norm of smoking in al-Khādimī, and this topic has not yet been addressed. The list of classical treatises on the subject is also much longer.[15] I have, however, limited myself above to two representatives of each of the three categories mentioned because I believe that this provides a sufficient basis for understanding the various positions on the legal norm of smoking among the scholars who preceded or were contemporaries of our author.

1. A Brief Overview of al-Khādimī's Intellectual Biography and His Legal Thinking

Abū Saʿīd Muḥammad ibn Muṣṭafá ibn ʿUthmān al-Ḥusaynī al-Ḥanafī al-Khādimī was a versatile provincial Ottoman scholar of the 18th century, a Ḥanafī jurist, mufti, teacher, and Sufi of the Naqshbandiyyah order. He first studied in Khādim, a district of Konya Province, with his father, then traveled to Konya to study at the Karatay Madrasah with Ibrāhīm Efendī. After several years of study, on the recommendation of his teacher Ibrāhīm Efendī, he moved to Istanbul to complete his studies in Islamic science with Aḥmad al-Qāzābādī (d. 1163/1750).[16]

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14 Here are some examples: Kaşif Hamdi Okur, "17. Yüzyıl Osmanlı Fıkıhçılarının Nevazile Yönelik Fıkhî Argümantasyonu (Mehmed Fıkhî el-Aynî ve *Risâletü'd-Duhân ve'l-Kahve* Örneği)", *Sahn-ı Semân'dan Dârülfünûn'a Osmanlı'da İlim ve Fikir Dünyası: Âlimler, Müesseseler ve Fikrî Eserler - XVII. Yüzyıl*, ed. Hidayet Aydar - Ali Fikri Yavuz (İstanbul: Zeytinburnu Belediyesi Yayınları, 2017), 381-393; Taha Yasin Tan, "Osmanlı'da Afyon, Kahve ve Tütün Hakkında Bir Usul Tartışması: Câbîzâde Halil Fâiz Efendi ve *el-Kelimâtü'l-Usûliyye*'si", *İslam Araştırmaları Dergisi* 48 (2022), 111-146; Şükrü Özen, "Tütün", *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (İstanbul: TDV Yayınları, 2012), 42/5-9; Said Nuri Akgündüz, "Osmanlı Mısır'ında Hanbelî Bir Âlim: Mer'î b. Yûsuf ve Duhân Risalesi", *İslam Hukuku Araştırmaları Dergisi* 40 (December 2022), 211-241.

15 See Aydemir, *Sigara ile İlgili Yazılmış Risâlelerin İslam Hukuku Açısından Değerlendirilmesi*, 16-62; Özen, "Tütün", 5-7.

16 Mehmet Önder, *Büyük Âlim Hz. Hadimî (Hayatı ve Eserleri)* (Ankara: Güven Matbaası, 1969), 7; Yaşar Sarıkaya, *Abū Saʿīd Muḥammad al-Ḫādimī (1701-*

In 1725, he returned home to spend the rest of his life there to teach in the madrasah he had built with his father.[17] Except for two trips, he never left his hometown. One such trip was the pilgrimage he made in 1743, and the other was his second trip to Istanbul, to which he was invited by the Sultan (Mahmud I, r. 1730-1754).[18] These are two important journeys as concerns his intellectual biography. Then, al-Khādimī met Ḥayāh al-Sindī in Medina and asked him a number of questions about various cases, which he recorded in two treatises, namely, *Risālat shubuhāt ʿāriḍah fī tarīq al-ḥajj* and *Risālat al-shubuhāt al-mūradah ʿalá l-Shaykh Muḥammad Ḥayātī al-Sindī al-Madanī*.[19] While he went to Mecca or while he returned to Khādim, he met some scholars in Damascus. According to his own account, he had a discussion with some of them about the legality of smoking. He stated that these discussions were the reason for composing his two treatises on the subject of smoking.[20]

Al-Khādimī lived in the eighteenth century, an era in which Islamic theology was not yet practiced under the conditions of colonial societies but rather in a sovereign manner. In this context, this era is also considered to be the last stage in the development of classical theology, which is why it is ascribed a key function in understanding the previous stages. On the other hand, this century has also been described as "an age of intellectual, political, and social ferment and reform movements". It thus represents a vital period during which, in addition to processes of change in politics and education, new approaches in religion and Islamic disciplines were introduced, the

1762): Netzwerke, Karriere und Einfluss eines osmanischen Provinzgelehrten (Hamburg: Verlag Dr. Kovac, 2005), 82.

17 Yusuf Küçükdağ, "Hadimî Medresesine Dair Bir Vakfiye", *Vakıflar Dergisi* 27/79 (1998), 79-94.

18 Sarıkaya, *Abū Saʿīd Muḥammad al-Ḫādimī*, 147, 156.

19 Abū Saʿīd Muḥammad ibn Muṣṭafá al-Khādimī, "Risālat shubuhāt ʿāriḍah fī ṭarīq al-ḥajj al-sharīf wa-maʿrūḍah ʿalá l-ʿālim al-ʿāmil al-Shaykh Muḥammad al-Ḥayātī al-Sindī", *Majmūʿat al-rasāʾil*, ed. Qūnawī ʿAbd al-Baṣīr Efendī (İstanbul: Dār al-Ṭibāʿah al-ʿĀmirah, 1302 AH), 211-214; Id., "Risālat al-shubuhāt al-mūradah ʿalá l-Shaykh Muḥammad Ḥayātī al-Sindī al-Madanī", *Majmūʿat al-rasāʾil*, ed. Qūnawī ʿAbd al-Baṣīr Efendī (İstanbul: Dār al-Ṭibāʿah al-ʿĀmirah, 1302 AH), 220-224.

20 Al-Khādimī, "Risālatān ʿalá ḥaẓriyyat al-dukhān", *Majmūʿat al-rasāʾil*, ed. Qūnawī ʿAbd al-Baṣīr Efendī (İstanbul: Dār al-Ṭibāʿah al-ʿĀmirah, 1302 AH), 233-234.

consequences of which are increasingly visible and continue to the present day, especially since the second half of the 19th century.[21]

Although the reformist measures of the eighteenth century were essentially carried out in the industrial, military, and economic fields, and the tradition of knowledge in general remained little affected by the changes –especially outside the Anatolian part of the Ottoman Empire– some pioneers of reformist thinking should be noted. The approaches of some of al-Khādimī's contemporaries are important here and should be highlighted as reformist ideas, including those of Muḥammad ibn ʿAbd al-Wahhāb (d. 1206/1792), who advocated a text-based understanding of law that was detached from the tradition of the juridical school, or that of Shāh Walī Allāh al-Dihlawī (d. 1176/1762), who advocated a ḥadīth-based and cross-legal-school approach (*talfīq*).[22]

On the other hand, al-Khādimī can be characterized as a more traditional scholar with an orientation toward the school of law. He adheres to tradition and, in principle, provides for the establishment of law within the framework of the associated school of law. Al-Khādimī vehemently rejects recourse to primary sources and ignoring the legacy of the school of jurisprudence. This claim is stated in the following paragraph from his *uṣūl*-work *Majāmiʿ al-ḥaqāʾiq*:

> The task of the laymen is to adhere to the opinions of the jurists and not to the Qurʾān and Sunnah. It is also not for them to choose between the opinions of earlier scholars, but from those of the trustworthy ones of his time. The laymen also do not weigh up the opinions of the Prophet's companions. Any verse or Ḥadīth that contradicts the opinion of our jurists is either considered abrogated, reinterpreted, specified or weighed, and is not interpreted as

[21] Jens Bakker, *Normative Grundstrukturen der Theologie des sunnitischen Islam im 12./18. Jahrhundert* (Berlin: EB-Verlag, 2012), 31, 849.

[22] For a more detailed assessment of the beginnings and subsequent impact of the reform movements in the various countries of the Islamic world, see Rudolph Peters, "Erneuerungsbewegungen im Islam vom 18. bis zum 20. Jahrhundert und die Rolle des Islams in der neueren Geschichte: Antikolonialismus und Nationalismus", *Der Islam in der Gegenwart*, ed. Werner Ende - Udo Steinbach (München: C. H. Beck, 2005), 90-127.

> not having reached them. Therefore, the opinion of the jurists is preferable to the source texts.[23]

This view illustrates al-Khādimī's tradition-bound stance. He also rejects the discourse that favors recourse to the primary sources, the Qurʾān and Sunnah, and the statements of the Prophet's Companions. On the other hand, al-Khādimī strongly favors orientation toward the opinion of the school of law or the opinion of a contemporary scholar who enjoys a certain degree of recognition. The latter is important from the point of view of updating and dynamically engaging with the tradition of the school of law.

For our scholar, tradition is not static; it contains dynamic elements. He was also interested not only in preserving tradition but also in perpetuating it through certain elements that promoted the dynamization of the law; this is an aspect that gives the impression that al-Khādimī, unlike his contemporaries mentioned above and others who also argued against the traditional doctrine of sources and methods and/or the paradigm of the schools of jurisprudence, emphasized dynamic elements from classical jurisprudence that met the challenges of the time.

In this context, it is particularly striking and, when compared with his predecessors, almost exceptional that in the mentioned *uṣūl* work, he cites a relatively large number of derivative sources alongside the usual primary sources such as the Qurʾān, Sunnah, scholarly consensus (*ijmāʿ*), and analogy (*qiyās*). Thus, he lists an additional seventeen legal sources of a secondary nature. These are *sharʿ man qablanā* (the law of previous religions), *taḥarrī* (seeking the true answer,), *ʿurf* and *taʿāmul* (custom), *istiṣḥāb* (assumption of continuity), *al-ʿamal bi-l-ẓāhir aw al-aẓhar* (acting according to the outward or the more obvious), *al-akhdh bi-l-iḥtiyāṭ* (to act with prudence), *al-qurʿah* (to draw lots', *madhhab al-ṣaḥābī wa-madhhab kibār al-tābiʿīn* (according to the opinion of the Prophet's Companions or the opinion of the great ones of the following generation, i.e. the Successors), *istiḥsān* (juristic preference), *al-ʿamal bi-l-aṣl* (act according to the considered opinion), *al-qāʿidah al-kulliyyah* (universal principle), *maʿqūl al-naṣṣ* (argumentation with the implication of the text),

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[23] Al-Khādimī, *Majāmiʿ al-ḥaqāʾiq wa-l-qawāʿid* (İstanbul: Dār al-Ṭibāʿah al-ʿĀmirah, 1308 AH), 44.

shahādat al-qalb (conviction of conscience), *taḥkīm al-ḥāl* (arbitration according to a given state), and *ʿumūm al-balwá* (comprehensiveness/universality of necessity).[24]

It is remarkable that al-Khādimī mentions a relatively large number of derivative sources of law and refers to others with *wa-naḥwihā* (meaning "et cetera"),[25] an enumeration that is rather unusual in previous works and especially in those of Ḥanafī methodology. Al-Khādimī extends the list of legal sources, which, as mentioned above, were not present to this extent[26] on classical legal methodology until modern times, probably to substantiate these functional secondary sources in legal practice in terms of legal methodology.[27]

Despite his close ties to the Ḥanafī school of law and the fact that he was a follower of this doctrine, al-Khādimī is by no means a mere imitator or deliverer of the legal material produced before him; rather, he was also a *faqīh* who independently argued, weighed opinions, criticized and even presented his own opinion, especially on current issues of his time. He considered an independent judgment on individual cases (*ijtihād fī l-masʾalah*) possible at any time. Based on the principles of legal scholars or methods such as the implication of the text (*dalālat al-naṣṣ*), cases to which no reference was made in the previous literature could be solved.[28]

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24 Al-Khādimī, *Majāmiʿ al-ḥaqāʾiq*, 2.

25 For a further list see Muṣṭafá Khulūṣī al-Güzelḥiṣārī, *Manāfiʿ al-daqāʾiq fī sharḥ Majāmiʿ al-ḥaqāʾiq* (İstanbul: Dār al-Ṭibāʿah al-ʿĀmirah, 1856), 16.

26 See Mürteza Bedir, "Geleneğin Son Halkası: Hâdimî'nin *Mecâmi'ü'l-Hakâ'ik* Adlı Eseri ve Usul'de Güncel Bilgi Meselesi ya da Bugün Fıkıh Usulünü Hangi Eserlerden Okumalıyız?", *Sahn-ı Semân'dan Dârülfünûn'a Osmanlı'da İlim ve Fikir Dünyası: Âlimler, Müesseseler ve Fikrî Eserler - XVIII. Yüzyıl*, ed. Ahmet Hamdi Furat - Nilüfer Kalkan Yorulmaz - Osman Sacid Arı (İstanbul: Zeytinburnu Belediyesi Yayınları, 2018), 1/152-154.

27 For a similar evaluation see Murat Şimşek, "Ebû Said Muhammed Hâdimî (1113/1701-1176/1762)", *Şehir ve Alimleri*, ed. Ramazan Altıntaş et al. (Konya: Necmettin Erbakan Üniversitesi Kültür Yayınları, 2017), 417-418.

28 Al-Khādimī, *al-Barīqah al-Maḥmūdiyyah sharḥ al-Ṭarīqah al-Muḥammadiyyah*, ed. Aḥmad Fatḥī ʿAbd al-Raḥmān Ḥijāzī (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2019), 5/80; id., "Risālatān ʿalá ḥaẓriyyat al-dukhān", 234. For a detailed elaboration of al-Khādimī's legal thinking, see Kaşif Hamdi Okur, *Osmanlılarda Fıkıh Usûlü Çalışmaları: Hâdimî Örneği* (İstanbul: Mizan Yayınevi, 2011).

In the following, the extent to which our author realizes the claim to the *ijtihād fī l-masʾalah* will be explained via the example of his normative assessment of smoking.

2. Al-Khādimī's Legal Argumentation for the Smoking Ban

As explained in the introduction, this article addresses al-Khādimī's legal justification for banning smoking. For this purpose, the two aforementioned treatises (*Risālatān ʿalā ḥaẓriyyat al-dukhān*) will be used and evaluated. First, the context of their origin will be explained, and then the content will be analyzed.

The treatises of al-Khādimī are two short writings, each one page in length. Even though both are similar in content and complementary to each other, there is no evidence to explain the reason for writing two treatises on the same issue. Compared with the texts of al-Āqḥiṣārī or al-Nābulusī, they are relatively compact. He wrote them when he met some local scholars in Damascus during his pilgrimage to Mecca and Medina. At the end of the second treatise, he mentions the year in which this case was discussed, namely, 1156 (1743). In a marginal note, we learn that they were Shaykh Ismaʿīl al-Ujduwānī, a ḥadīth scholar, and Aḥmad al-Manīnī (d. 1172/1759), the chief preacher of the Banū Umayyah Mosque, both of whom were students of al-Nābulusī.[29]

Like some of his predecessors, al-Khādimī writes in the form of a dialog, first presenting the opponent's argument and then his own. His stated position consists of either independent arguments or a response to the opposing opinion. Thus, the content consists of pro- and contra-arguments and the responses of al-Khādimī.

He starts by subordinating smoking to the general texts related to wastage (*isrāf*), distribution (*adhá*), malignancy (*khubth*), and rejected innovation (*bidʿah mardūdah*). These aspects make it possible for the author to argue for the prohibition of smoking. At this point, he recounts an anecdote, which takes place in passing, in which one of the scholars of Damascus, with whom he was debating this issue, was inclined to abstain because this issue was a duty of *ijtihād* and there was nothing in the texts about smoking. Al-Khādimī replied that even though the *mujtahidūn* had disappeared, their principles (*qawāʿiduhum*) had not. The opposing scholar then went on to say

[29] Al-Khādimī, "Risālatān ʿalá ḥaẓriyyat al-dukhān", 234.

that his teacher had said that the forbidden innovation in religion (*bidʿah mamnūʿah*) was that which was contrary to the Sunnah and religious wisdom (*ḥikmah*). Al-Khādimī answers him at this point by saying that according to religious wisdom, it is appropriate to clean the mouth and to use the *siwāk* and to remove bad odors, and all of these are aspects of smoking. He ends by noting that the scholar present at the meeting welcomed al-Khādimī's answers and asked him to record them.[30]

Furthermore, al-Khādimī uses an argument that can be understood as deductive reasoning. As explained above, there have been disagreements among scholars about this case. While some considered it permitted, smoking was frowned upon or forbidden for the majority. In this context, al-Khādimī argues that the differences of opinion suggest that, at the very least, classifying smoking as a doubtful issue and a doubt (*shubhah*) has an impact on prohibitions.[31] He supports and justifies this deductive conclusion with the following principles: "Prohibitions are determined by doubts" (*al-ḥurumāt tathbut bi-l-shubuhāt*) and "Whoever falls in a doubt, falls in prohibition" (*man waqaʿa fī l-shubhah waqaʿa fī l-ḥarām*)".[32]

The principles put forward by al-Khādimī aim to prevent actions whose normative purpose is not obvious but are likely to be frowned upon or forbidden. From other texts, we know that al-Khādimī always advised against dubious things (*shubuhāt*) and referred to them as if they were forbidden. He also argued that one should follow the more prudent action or opinion. However, prudence lies in consistency (*al-iḥtiyāṭ fī l-ittifāq*).[33]

Although he himself believes that smoking should be banned, to counter the arguments of his opponents, he first states that smoking should at least be classified as dubious because of the differences in opinion among scientists. Following this statement, he concludes, based on the principles mentioned, that smoking should at least be classified as being discouraged (*makrūh*). Our author is evidently

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30 Al-Khādimī, "Risālatān ʿalá ḥaẓriyyat al-dukhān", 233.
31 Al-Khādimī, "Risālatān ʿalá ḥaẓriyyat al-dukhān", 233.
32 Al-Khādimī, "Risālatān ʿalá ḥaẓriyyat al-dukhān", 233.
33 Al-Khādimī, "Risālat al-naṣāʾiḥ wa-l-waṣāyā", *Majmūʿat al-rasāʾil*, ed. Qūnawī ʿAbd al-Baṣīr Efendī (İstanbul: Dār al-Ṭibāʿah al-ʿĀmirah, 1302 AH), 125.

trying to persuade by refuting the counterarguments rather than asserting his own position.

Regarding the objection that an action may not be declared forbidden unless it is explicitly described as such, or some subjective judgments such as the action being a cure for some diseases or a source of energy that gives one strength for further worship, al-Khādimī responds with a similar argument that, in the case of probability, prohibition is, in principle, preferable to permissibility (*tarjīḥ al-ḥaẓr ʿalá l-ibāḥah*). He supports his indirect response to the above counterarguments with a rule from *al-Ṭarīqah al-Muḥammadiyyah* of al-Birgiwī (d. 981/1573), according to which the opinion of a righteous (*al-ṣāliḥ*) and pious (*al-wariʿ*) scholar should be preferred.[34]

Our scholar's arguments are not always purely scientific. Some of them can be described as polemical in nature or as a kind of argumentum ad populum and argument from authority. For example, he refers his readers to observe who the smokers are and who is against smoking. For him, those who are more righteous and pious are those who forbit smoking. In addition, most of those who allow smoking would commit to a smoking ban.

For al-Khādimī, the issue of banning smoking seems clear-cut. He relies on the conscience of society, which, if it is judged correctly, would also consider smoking to be forbidden. The fact that the majority of scholars favor prohibition has been confirmed above. What is not so easily confirmed is whether those scholars who say it is permissible are less pious and righteous. This explanation seems to be subjective and emotional.

One of the strongest arguments, and the one most often used by opponents, is the principle of permissibility (*al-ibāḥah al-aṣliyyah*). According to this principle, all actions are considered permissible unless there is a textual source (*naṣṣ*) or reference (*dalīl*) to the contrary. Therefore, smoking cannot be declared illegal because there is no explicit evidence for such a decision.[35]

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[34] Al-Khādimī, "Risālatān ʿalá ḥaẓriyyat al-dukhān", 233. I could not find the passage in Birqiwī's work.

[35] See for example, al-Nāblusī, *al-Ṣulḥ bayna l-ikhwān*, 7b.

Our research shows that al-Khādimī's approach to this principle is twofold, rejecting it in principle but not in all of his views. In *Majāmiʿ al-ḥaqāʾiq,* we see that he not only opposes the principle but also asserts the exact opposite, namely, the principle that all actions are initially declared forbidden until their permissibility is proven.[36] In this context, he gives the example that the disposal of someone else's property is forbidden by law but is permitted only if the owner authorizes it.[37] In response to the question of how one can know which of the two relevant textual sources is the abrogating and which is the abrogated, al-Khādimī answers that the abrogating reference is the one that introduces a prohibition. Since it is the rule that actions are initially permissible, the abrogated reference must be the one that presents a permissible action.[38]

In the two treatises, however, the tone is somewhat more cautious; instead of criticizing or rejecting the principle, al-Khādimī deviates in the first treatise to the point that even if this principle were to be accepted, insisting on permissible actions would lead to minor sins. Al-Khādimī sees this as opportunism and judges this approach of insisting on unresolved actions as calculation (*ḥisāb*), which would cause destruction (*wa-l-ḥisāb halāk*).[39] It seems that at this point, our author is not arguing as an ordinary jurist, but he is expressing his Sufi perspective, guided by the principle of prudence.

Relatively early in the second treatise, al-Khādimī assesses this principle as the strongest argument of those who declare smoking permissible. However, it is not entirely correct for al-Khādimī that there are no obvious indications that would point to a prohibition or that there is no *mujtahid*, no authority that can set the norm. For those who declare smoking prohibited, they argue either based on the principles of malignancy (*adhá*) or viciousness (*khubth*) or that common sense says that smoking is unhealthy, whereas others argue based on the principle of waste (*isrāf*), contending that smoking represents

[36] With this assumption he differs from al-ʿAynī, who advocates the principle according to which abstinence (*tawaqquf*) applies in matters in which it is not clear whether it is permissible or forbidden. See Okur, "17. Yüzyıl Osmanlı Fıkıhçılarının Nevazile Yönelik Fıkhî Argümantasyonu", 384.

[37] Al-Khādimī, *Majāmiʿ al-ḥaqāʾiq*, 37.

[38] Al-Khādimī, *al-Barīqah al-Maḥmūdiyyah*, 2/189.

[39] Al-Khādimī, "Risālatān ʿalá ḥaẓriyyat al-dukhān", 233.

spending money on something that humankind does not need. All these arguments should be understood as specific implications of the relevant textual references (*naṣṣ*) that prohibit torment, harm, and waste. Smoking also goes against the wisdom of using the *siwāk*, or performing mouth cleansing. Al-Khādimī, who shares the view of prohibitive jurisdiction, considers partial *ijtihād* possible, as we have already seen in the context of his legal thinking. It is perfectly legitimate to make individual decisions at any time based on the principles of jurisprudence.[40]

Here, we have a line of reasoning based on the factors of harm and disruption. Like al-Āqḥīṣārī[41] and al-ʿAynī,[42] al-Khādimī incorporates into his argument the legal conclusion that harmful substances are generally prohibited by the text (*naṣṣ*) and that smoking, which is also harmful, should therefore be avoided. As with almost all justifications, he does not elaborate on this argument and avoids justifying it based on tradition. Therefore, this argument can be understood as an independent analogy based on relevant texts.

The next argument is one of political law (*al-siyāsah al-sharʿiyyah*). For al-Khādimī, the prohibition emanating from the state authority has decisive validity. This normative or authoritative decision of the Sultan banning smoking is binding for our scholar, and this binding force does not expire with his death (*lā yunsakh bi-mawtihī*) but continues to apply. He explains the binding nature of following the Sultan's order by saying that it is related to public concerns (*manūṭ bi-maṣāliḥ al-anām*) because it represents the prevention of destruction of property (*itlāf al-māl*) and from spending on something that neither nourishes nor helps against hunger and thirst; furthermore, it also prevents one from wasting time on useless things.[43]

In classical Islamic jurisprudence, the political authority, by virtue of his position as the representative of and responsible for society, is assigned the central task of enforcing Islamic law and thus ensuring social order. In this context, the jurists (*fuqahāʾ*) ascribed special

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40 Al-Khādimī, "Risālatān ʿalá ḥaẓriyyat al-dukhān", 234.
41 See al-Āqḥiṣārī, "al-Risālah al-dukhāniyyah", 95-96.
42 See Okur, "17. Yüzyıl Osmanlı Fıkıhçılarının Nevazile Yönelik Fıkhî Argümantasyonu", 385-386.
43 Al-Khādimī, "Risālatān ʿalá ḥaẓriyyat al-dukhān", 234.

prerogatives to the position of leadership, giving it greater authority than others to implement the law and promote the common good (*maṣlaḥah*).[44] Al-Khādimī, who shared this view,[45] maintains that the decision of the political authority is particularly valid in regard to exempted acts, i.e., those matters that have not been decided upon or prohibited by the Shariah.[46]

Unlike al-ʿAynī, for example, the political ban is binding for al-Khādimī, and this would not be abolished with the death of the sultan who issued the ban. Interestingly, al-ʿAynī, who actually recognizes the aforementioned principle,[47] considers the political ban to be nonbinding. However, it seems that he neither rejects the principle nor ignores the political authority per se but recognizes a discrepancy between the political decision and real policy, which involves taxes on tobacco, which is why he refrains from making a political argument in this case. Al-Khādimī, on the other hand, incorporates the political decision into his arguments against smoking, which seems consistent with his point of view.

The aforementioned generally represent al-Khādimī's arguments, which he usually presented in dialog form to consolidate his position as an opponent of smoking. We observed a variety of statements that were either introduced independently or were counterarguments aimed at refuting the opposing position. Another approach was for al-Khādimī to take up his opponents' arguments and develop them

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[44] Abū l-ʿAbbās Shihāb al-Dīn Aḥmad ibn Idrīs al-Qarāfī, *al-Iḥkām fī tamyīz al-fatāwá ʿan al-aḥkām wa-taṣarrufāt al-qāḍī wa-l-imām*, ed. ʿAbd al-Fattāḥ Abū Ghuddah (Beirut: Dār al-Bashāʾir al-Islāmiyyah, 2009), 46. For specific individual cases in which decisions are made according to this principle in the Ḥanafī literature, see Zayn al-Dīn ibn Ibrāhīm ibn Muḥammad Ibn Nujaym al-Miṣrī, *al-Ashbāh wa-l-naẓāʾir ʿalá madhhab Abī Ḥanīfah al-Nuʿmān*, ed. Zakariyyā ʿUmayrāt (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2010), 104-105; Aḥmad ibn Muḥammad al-Zarqā, *Sharḥ al-qawāʿid al-fiqhiyyah*, ed. ʿAbd al-Fattāḥ Abū Ghuddah - Muṣṭafá Aḥmad al-Zarqā (Damascus: Dār al-Qalam, 2012), 309-310. For a detailed discussion of *al-siyāsah al-sharʿiyyah* among Ḥanafī-Ottoman scholars, see Asım Cüneyd Köksal, *Fıkıh ve Siyaset: Osmanlılarda Siyâset-i Şer'iyye* (İstanbul: Klasik Yayınları, 2016), 141-294.

[45] The aforementioned principle, which grants prerogatives to the political authority in connection with the general interest, can be found in the collection of principles contained in his *uṣūl*-work. See al-Khādimī, *Majāmiʿ al-ḥaqāʾiq*, 45.

[46] Al-Khādimī, *al-Barīqah al-Maḥmūdiyyah*, 5/365.

[47] See Abū l-Fayḍ Muḥammad Fiqhī al-ʿAynī, *Risālah fī adab al-muftī*, ed. Osman Şahin (İstanbul - Beirut: TDV İslam Araştırmaları Merkezi Yayınları, 2018), 57.

further to draw attention to the consequences that worked against them.

Conclusion

Like many of his predecessors and contemporaries, al-Khādimī wrote treatises on the Islamic legal assessment of smoking and contributed two relatively short treatises to the lively debate on the norm of tobacco consumption that had been ongoing for more than a century. He himself was involved in a discussion with two Damascene scholars during his Hajj journey, which also served as the reason for writing the aforementioned treatises. In addition to his argumentation, which will be discussed below, I believe that this factor makes al-Khādimī's treatise special. Al-Khādimī's interest in the subject was not based on a theoretical interest in the discussion of smoking but rather on a personal exchange with the disciples of al-Nāblusī, who, like their master, considered smoking to be permissible.

Most likely because the topic had already been dealt with extensively before him, his writing was relatively brief. Despite its brevity, he first sets out various positions and takes up what are probably the most widespread arguments; this shows that al-Khādimī was aware of relevant treatises.

Clearly, al-Khādimī is against smoking. However, he is cautious when it comes to saying that smoking is *ḥarām*. It must be said that his discourse is dominated by the language of Sufism as well as the language of *fiqh*. Al-Khādimī advised his readers to protect themselves from dubious things (*shubuhāt*) as if they were forbidden. He also argues that one should be guided by more prudent action or opinions and that prudence lies in consistency. Nevertheless, al-Khādimī cites a variety of legal-hermeneutical arguments. For him, the argument that there are no indications in the primary sources of Islamic law that speak against smoking is untenable; this is because the prohibition of smoking can be subsumed under the implications of the verses and ḥadīths that prohibit waste, distribution, and malignancy. Furthermore, smoking is to be regarded as an innovation in religion that should be rejected, as it contradicts, among other things, the command of oral hygiene and the use of the *siwāk*, which occupies a special place in the Prophetic tradition.

The assertion that there are no *mujtahid*s and therefore that a normative decision on smoking is not possible is also untenable for our scholar. Al-Khādimī advocates *ijtihād* to an individual case (*ijtihād fī l-masʾalah*) based on the principles of the school of law or the eponyms.

Another strong argument in favor of al-Khādimī is the political decision, i.e., that the legal prohibition regarding an indeterminate act has a binding character from the perspective of Islamic law; this is because it is aimed at the general interest (*maṣlaḥah*), which is also one of the objectives of Shariah law.

Finally, al-Khādimī does not accept the argument that smoking should be declared legal because there is no evidence against it. On the one hand, one could derive the prohibition from the implications of the implied indications; on the other hand, one could argue that fundamentally, actions are not permitted but either their permissibility is unclear or they are even prohibited. Therefore, an act can be declared permissible only if there are corresponding indications. What is beyond question, however, is that in any case, smoking is not an exempted act and should therefore at least be labeled as being discouraged. As it stands, smoking is definitely not recommended.

Although treatises (*rasāʾil*) are not classical *fatwá*-writings, they demonstrate how a scholar positions himself or herself in a specific case. The aim of this article is to show how a scholar from the postclassical period justifies his view on the prohibition of smoking. Al-Khādimī, who firmly adheres to the Ḥanafī tradition, believes that new cases can be overcome with the tools that the tradition has to offer, which have dynamic elements. He is also a defender of the specific *ijtihād* that is conducted based on school principles. In the course of this, he undertakes an argumentative position on the aforementioned case. He puts forward various arguments that support his position on the one hand and invalidate the arguments of his opponents on the other hand. Interestingly, as a law school-oriented scholar, he makes few references to classical Ḥanafī legal opinions and draws no analogy to judgments on intoxicating, drug-like substances. Instead, he presents various independent arguments, including no direct reference to classical literature or legal school opinions. Nevertheless, al-Khādimī's treatise is an important document on how

"new" individual cases can be approached argumentatively from the perspective of Islamic law.

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Appendix: Al-Khādimī’s Two Treatises on the Prohibition of Smoking

رِسالتان على حَظرِيّة الدُّخان لأَبي سَعيد محمد الخادِمي

بسم الله الرحمن الرحيم

بِاسِمِه سُبحانه ونسأله إحسانَه. اِعلم أَنَّه مما يمكن أن يُستَدَلَّ على حَظرية الدُّخان أنه داخل تحَت عُموم نُصوص التَّبذير والأذى والخَبائِث والبِدْعَة المردودة[48] وأنّ اختلافَ العلماء لا يكون أَقلّ مِن اِيراث الشُّبهةِ ولا شَكَّ أنَّ اِنكارَه سفسطة والشبهة مؤثِّرة في باب المحَرَّمات. قال في *التلويح* و*المَنح*: "الحُرُمات تَثْبُت بالشُّبُهات". وفي *شرح المجمع*: "مَن وَقَع في الشبهة وَقَع في الحَرام". كما وقع في الحديث. ولو سُلِّم أن اِيجاب الاختلاف الوهم في المنع من أَجْلى البديهيات يكاد أن يَفْهم الصبيان والمجانين. وقد قال في *المنح* أيضا عن بعض المعتبرات الوهميات تكون حجة في الحُرمات. فإن قيل إنَّ له ما يَدُلُّ على إباحته كَدخوله تحت قوله تعالى: "خَلَقَ لَكُم ما في الأرض جميعا"، وكون الأصل في الأشياء الإباحة، وكونه شِفاء لبعض الأمراض وموجباً لِلنَّشاط الذي يتقوى به العِبادة، ولو سُلِّم صلاحية ما ذكر كله أو

48 ومن لطائف ذلك أنه لما بحثنا في ذلك مع واحد من علماء الشام أيضا مال إلى التوقف قائلا إن ذلك وظيفة الاجتهاد ولم يصل الى الآن شيء في حق الدُّخان منهم فَقلتُ إن انقرض أنفُس المجتهدين لم ينقرض قواعدهم. ولو سلم أن أدلة النافين ليست براجحة فلا شك أنه لا أقلّ من إيراث الشك والوهم وهما حجتان في الحظر وغيره من جنس ما ذكر في الأصل ثم قال حاكيا عن أستاذه إن البدعة الممنوعة ما يكون مخالفا لِسُنَّة أو حِكمة مشروعية السنّة فقلت حكمة مشروعية السواك تطهير الفم وإزالة الرائحة الكريهة ورفع الأذى وكل ذلك موجود في الدخان. فاستحسن ذلك من في المجلس من العلماء فالتمسوا مني ضبطه وتحريره ولكون ذلك أمراً حسناً جيداً في نفسه ساعدت التماسهم وحرّرته هنا (منه)

بعضه المطلوب هنا بعد تسليم ذواته يعارض بمثل الأدلة السابقة وقد قُرِّرَ في الأصول ترجيح الحظر على الإباحة، وفي *الطَّريقة المحمدية*: "ترجيحُ قَوْلِ العالِمِ الصالِح الوَرِع على غيره". وأنت إن أنْصَفْتَ عَلِمْتَ أنَّ المانِعين أورعون وأصلحون من المبِيحين بل أكثر الشاربين مقِرُّون بحظريته. ولو سلم الإباحة الأصلية فإصرار المباح صغيرة كما قُرِّر في محله. والأصح أن في المباح حسابا، والحساب هلك كما في *المصابيح*. وان استعماله في أهل الفسق والفجور أكثر وأدور. فَاسْتِعمالُ غَيرِهِ تَشَبُّهٌ لهَم ومُتشَبِّه القوم منهم. وقد قرن به نَهي السلطان اللازم إطاعته[49] ولا ينسخ بموته وإنما الاحتياط هو العمل بالاتفاق. هذا إجمال غاية الإجمال فالعارف يكفيه الإشارة وفيما أبقى دليل على ما ألقى لصاحب الإنصاف وإلا فلا يفيده الأسفار فضلا عن التفصيل هذا ما حررناه في دمشق الشام لإصرار أهلهم على الإباحة مع مناظرة سبقت لبعض[50] عُلَمائهم والله تعالى أعلم بالصَّواب.

بسم الله الرحمن الرحيم

الحمد لِوَلِيِّه والصلاة على نَبَيِّه وآله. وبعد فإنَّ أمر الدُّخان كَثُر فيه الفتاوى والقيل والقال وأُلِّف فيه الرسائل القِصار والطِّوال. فافْتتن فَيد الأنام وتحير الخواص والعوام إذ ذَهب بعض إلى إباحته وبعض إلى حظريته. فتبين الحق إنما يكون ببيان أدلة الفريقين ثم ترجيح الطرف الذي تقتضي القاعدة ترجيحه. فأقوى أَدِلّة الفِرقة الأُولى الحظر حُكم شَرعي وذا إمّا معلوم بالبَداهة أو بالنَّظر. والأوَّل مُنتَف بالضرورة وكذا الثاني إذ النظر إما من مجتهد أو من غيره. الأوَّل مُنتَف لأنَّه لَمْ يَثبُت منه رِواية ولا دِراية وقد انْقَرض وكذا الثاني إذ لا اعتبار لنظر الغير في الشرعيات فَبَقي على الإباحة الأصلِيَّة ويُقر به طَبع مَن دَفع أدلة النَّافين أولا، ثُمَّ حُكم بِبقائه على الإباحة. وأما الفِرقَة الثانِية فَبعضهم اِحتَجَّ بالأَذى وبعض بالخُبث لِتَنفُّر الطبع السليم وبعض بالإسراف لكونه إضاعة مالٍ فيما لا يُحتاج إليه وبعض بالبدعة الممنوعة لمخالفته بِحِكمَة مشروعية السِّواك مِن دَفع الأذى وإزالة الرائحة الكريهة وتطهير الفَم وبعض

49 لكونه منوطا بمصالح الأنام دينية كما ذكر في الأصل أو دنيوية لكونه منعاً عن إتلاف الأموال عن الصرف إلى مالا يسمن ولا يغني من جوع وعطش وحفظاً عن صرف أوقاته بما لا يعنيه وغيره (منه)

50 الشيخ إسماعيل العُجْلُواني مُحَدِّث الشَّام في هذا اليوم له تصنيفات كثيرة منها شرحه على *البخاري* وأحمد المنيني قطب [خطيب؟] جامع بني أمية (منه)

بالإسكار كما في الابتداء ولو لبعض وقد يستدل بغيرها. ثم أقول لعل الحق مع الفرقة الثانية إذ الظّاهر أنّ المطلب ظَنّي فَلو فُرِض ورود المنع على أفراد هذه الأدلة فالظاهر أنَّه لا يخرجها عن الظنية.[51] ولو سُلِّم ذلك فلا شَكّ في إفادة مجموعها قُوَّة صالحة[52] لِلمقام. وأَمر اِنقِراض المجتهد خِلافي بل المجتهد في المسألة ممكن في عصرِما ولو سُلِّم ذلك فلا نُسَلَّم عدم ثُبوتِه من المجتهد مطلقا إذ يجوز دخوله في بعض قواعِده وأنَّ لِنظر العلماء العامي مدخلا في بعض النظريات الشرعية كَدلالةِ النَّص. ثم نقول لا شَكَّ في إيراث هذه الإختلافات شُبهة فيه وفي *المَنح والتلويح* "الحُرمات تَثبُت بالشُّبهات" وفي الحديث "مَن وَقع في الشُّبْهة وَقع في الحَرام". وأيضاً يُرَجَّح الحَظر[53] على الإباحة ويُقَدَّم قَول الورِع والأعلم عند تعارض أقوال العلماء والإستقراء شاهد على أنها في جانب المانعين وأيضا قالوا الإصرار على المباح صغيرة[54] والأصَحّ أنَّ في المباح حِسابا والحسابُ هَلَك وأيضاً لا يخفى في قُوَّتِه كَثْرَتَه في الفَسَقَة فاستِعمال غَيرهم تَشَبُّهٌ بهم وأيضاً قد قرن به نَهي سلطاني وهو فيما يتعلق بالمصْلَحة[55] ولا شَكَّ أنَّ الإحتياط في الإتفاق وأمّا ما في بعض المواضع مِن رِواية الحديث عن بعض التفاسير فالظّاهِر أنه مما لا يَعول عليه.[56] نعم, لَو لَمَ يُقْطَع بِوَضْعِه ووَقع في إحتيِاط شيء مِن الأحْكام فَيُرَجَّح بالحديث الضَّعيف وإن لم يوجِب كما نُقِل عن *أَذكار النَّووي*.

تَمّ مِن قَلم محمد الخادمي هذا تَلْخيص مُناظرتِنا في دِمَشق الشام مع[57] بَعض عُلمائِه في سَنَة سِت وخمسين ومِائة وألف.

51 إذ الظّاهر أنَّ أكثر أسانيد المنوع على مُجرد الإحتمال العَقلي والجواز الأصلي (منه)

52 إذ يحصل في الإجتماع مالا يحصل في الإنفراد من القوة الى رُتبة القَطع كما في مواضع *المقاصد والتلويح وشرح العقائد* تَأمَّل (منه)

53 عِند التعارض كما في الأصول (منه)

54 بل يُحتَمل أن يكون كبيرة عند قصد التَّلَهّي (منه)

55 دِينيَّة وهو الظّاهِر أو دنيويَّة لِكَونِه مَنْعاً عن اِتلافِ مالٍ فيما لا يُغني شيئاً وحِفْظاً عن صَرفِ الأوقات إلى ما لا يَعْنيه (منه)

56 لا يَعول عليه أي لا يُعتَمَد عليه (منه)

57 الشيخ إسماعيل العجدواني مُحَدِّث الشَّام (منه)