

Islamic Legal Theory: Usúl vs. Furú`

Generally, scholars of Islamic studies have treated the subject of law as a mere component and a single element of a civilization that was believed to have built its successes through the social and political specifications. Law, consequently, occupied in their writings a limited number of paragraphs compared to the extensive coverage of other issues. This has been the case not only in the writings of oriental scholarship but also in the works of Muslim authors of the classical period as well as the modern times¹. Interestingly, even scholars who wrote exclusively on the subject of Islamic law had the tendency to reduce it to a single unit ignoring the fact that historically Islamic law does in fact include topics that must be dealt with distinctly. A case in point can be made discussing the development of *Usúl al-Fiqh* and *Fiqh* and how Western scholarship exaggerated the overlap between the two fields to the point that it is hard—if not impossible—for the reader to figure the boundaries of each of these two subjects.

It is my opinion that Islamic law in particular was endowed with extreme power and authority that extended to influence all aspects of human life². The Islamic law I have in mind is not restricted to the corpus of legal materials generated by the prominent Muslim jurists like Sháfi`í and Abu `anáfah, rather, it includes the simplest Fatwá uttered by rulers and ruled as well as the legal philosophical debates that ranged from the discussion of ritual to the characteristics of the form of government. The complex relationship between the secular and the religious in the Muslim way of life blurred the boundaries between God's dominion and human sphere of influence. This characteristic is more obvious in the domain of law and governance where jurists and rulers seem to claim mundane authority but also—and most importantly—divine mandate. It should be granted that when one lays the claim that he rules in the name of God, or that the legal opinion one is issuing is expressive of the will of God, that would leave little room for dissent and opens the doors to despotism and absolutism.

If Islamic law--in its "Fiqh" form-- is simply the explicit command issued by God, it is my belief that "the Science of Usúl al-Fiqh" is—to the greater extent--an attempt to reinforce and restate the divine nature of legal rulings expressed in the Qur'án and the Sunnah and to extend that claim to opinions that were in reality a product of human intellect. Hence Usúl is a means by which jurists incorporated the divine (Samáwí) decree and the mundane (Wa`í) rules.

As stated earlier, there are few—if any at all—works that made a point out of treating Islamic law as a field that incorporated two distinct disciplines: Fiqh and Usúl al-Fiqh. In this brief survey, I intend to pursue this subject and attempt to analyze the

¹ Example of works that I consider have marginalized Islamic Law include Hodgson who had a limited treatment of legal issues in his extensive three volume work titled *The Venture of Islam* and historical and exegetical writings of Muslim figures like `abarí and Ibn Kathír among many others.

² I cannot emphasize enough the importance and the role of Islamic law in shaping the private as well as the public lives of Muslims, but it would suffice to remind the reader that traditional schools of Islamic law moved beyond the guiding and organizing role typical of other legal systems, to become an identifying feature and an extension of the social being. A good example in support of this conclusion is the use of Ma-hab as an entry in the Personal Identification Cards Muslim individuals from Pakistan, India, Bangladesh and even Lebanon carry. Further more, it is common practice nowadays that when two persons from different parts of the Muslim world meet, they generally ask one another if he is a follower of the Sháfi`í, Málíkí, `anbalí, or `anafí Ma-hab. Communities as well are identified as predominantly Shí`í or Sunni. In short, Islamic law has been transformed from an interpretive collection of God's wish concerning what ought and ought not be practiced and said, to a personal and collective Identity.

various writings in order to see how Islamic scholarship viewed this issue. In doing so, I would start by first; defining each of *Usúl al-Fiqh* and *Fiqh* as understood by Muslim scholars throughout history and trace their evolution until the stage of full differentiation. Secondly, I shall introduce the theories of modern scholarship concerning this subject matter. Lastly, I shall present an assessment and critic of the latest findings.

Definitions

In one of the latest definitions provided by a Shí'í traditionalist, *Usúl*³ is signified as "the knowledge (*ʿIlm*) of rules that permeates the extraction of the secondary legal rulings in manner of affirmation and refutation."⁴ This definition obviously does not establish a categorization of *Usúl* independently; rather the author maintains this historical connection of *Usúl* with "legal rulings" which must be understood as the product of *fiqh*. Aware of this delicacy, the author then goes on to define *Fiqh*.

Fiqh, he adds, "is knowledge of the same legal rules and the practical objectives, not the knowledge of the rules that permeates the discovery of itself."⁵

This non-binary construct of *Usúl* and *Furúʿ* is inherent in the subject matter and seems to have been reinforced as early as the period of differentiation of the various Islamic sciences. During the seventh Islamic century⁶ for instance, we find 'Ámidí (631 H.) defines *Usúl al-Fiqh* as "the legal proofs, and the manner it induces the legal rulings, and the means by which it is used in general not on the case-by-case basis. The sources of *Usúl* is then *Kalám*, Arabic grammar, and legal rules."⁷ 'Ámidí provides a descriptive rather than a normative definition for *Usúl* by his use of comparison and determination of the topic of *Usúl*; a topic that is clearly more inclusive than that limited by modern scholarship. It is my observation that the further we go back in time, the less independent *Usúl* becomes as a field of studies. For instance we find Baghdádí (429 H.)—Who wrote on the subject nearly two centuries before 'Ámidí—eager to address the *Usúl* issues in a broader field namely "*Usúl al-Dín*" in which he addresses both theological issues as well as legal theory questions⁸ including the question of *Imámah*. Similarly, *Imám al-ʿAramayn al-Juwaynî* (478 H.) writes about *Usúl al-Akám* in a more inclusive work where he sub-divides his book into two major chapters: one dubbed *Kitáb al-Tawáid* which deals with theological matters, and the other named *Kitáb al-ʿIlal* and deals with legal issues.⁹ What makes this subordination of *Usúl al-Fiqh* to other disciplines more evident is the explicit relationship between these various fields as expressed in the writings of Muslim scholarship even in modern times. A classic example is this attempt by Badwí to define *Kalám* where he argues that "*ʿIlm al-Kalám*, also known as "*Usúl al-*

³ Jamál al-Dine al-'Asnawí (d. 772 H.) says on *Usúl* as a discipline that the first book on *Usúl* to reach us is *Risálat al-Sháfi'í*. It is believed that Sháfi'í is the founder of the science of *Usúl* based on the information in his books "*Jma' al-ʿIlm*" and "*ibtal al-Istihsan*". However some have argued that Shafi'i simply collected and organized the topics covered by this discipline that was in fact started before his time. Abu hanifa and Mohammed Ibn al-Hasan al-Shaybani had written in this subject. For further discussion see: al-Asnawí, Jamal al-Din, al-Kawkab al-Durri, (Jordan, 1985).

⁴ Mishkini, Ali, *istilahat al-Usul*, (Iran: matba'at al-Hadi, 1413 H.), pp. 62: the author defines *Usul* as: "*al-ʿilm bilqwa'id al-mumahhida liri'ayat al-ahkam al-shar'iyya al-far'iyya ithbatan wa isqatan.*"

⁵ Mishkini, Ali, *istilahat al-Usul*, (Iran: matba'at al-Hadi, 1413 H.), pp. 62. *Fiqh* of the other hand is defined as: "*ʿIm binafs al-ahkam al-shar'iyya wa al-waza'if al-amaliyya la bilqawa'id al-mu'idda likashf halih.*"

⁶ See attached Addendum on Muslim Calendar

⁷ Amidi, Saif al-Din Abi al-Hasan Ali Ibn Abi Ali Ibn Mohammed, *al-Ihkam fi Usul al-Ahkam*, pp. 5

⁸ Al-Baghdadi, Abu Mansur ʿAbd al-Qahir Ibn Tahir al-Tamimi, *Usul al-Din*, (Beirut, 1981), pp. 1-2

⁹ al-Juwaini, al-Shamil fi Usul al-Din, (Egypt: al-Ma'arif, 1969)

Dīn", was first named *al-Fiqh al-'Akbar* by Imam Abū 'Anīfah. It was also known as "*ʿIlm al-Na-ar wa al-'Istidlāl*" and "*ʿIlm al-Tawā'id wa al-ʿifāt*."¹⁰

This opinion seems to suggest that all the above mentioned names refer to the same discipline, whereas the evidence points to the fact that these subjects might have been actually an evolutionary path that established precedence and content of fields that were in one way or another related to *Usūl al-Fiqh*. Even Taftāzānī who is known for his works on *Usūl al-Fiqh* did not see it as an independent discipline separate from the broader *Usūl al-Dīn*:

The branch dealing with secondary rules—that is the practical ones—are known as *ʿIlm al-Sharā'i wa al-'Aḵām*. As for the primary rules—that is matters of creed, they are known as *ʿIlm al-Tawā'id wa al-ʿifāt*.¹¹

Usūl al-Dīn on the other hand had been—and still is (according to some)—perceived as a synonym to "*Kalām*". In fact there is the argument that the various connotations are simply descriptive and do not reflect a fundamental difference in substance and method. Badwī, for instance argues that the reason *Usūl al-Dīn* was called *Kalām*, is because its practitioners generally inherit a great ability to "*talk*" on the matters of law, or because the chapters of books in this field started with the common header "*al-Kalām fī*."¹² As for the reason it being dubbed "*ʿUsūl al-Dīn*", he adds that it is because this discipline—meaning *Usūl al-Dīn*, is the foundation of all legal studies.¹³

From the above citations, there remains no doubt that a great number of Muslim scholars have considered *Usūl al-Fiqh* to be a branch of—if not the same as—*Usūl al-Dīn*, and that *Usūl al-Dīn* was nothing other than the broader and older discipline known as *Kalām*. Hence attempting to trace the origins of *Usūl al-Fiqh* would require us to devote some time and space to *Kalām* in order to have a better understanding of the matter at hand. While some scholars place the origins of *Kalām* in the period of the selection of Abu Bakr as a Caliph (or the demise of the Prophet Mohammed), I am more inclined to situate the merge of serious theological tendencies to the murder of *ʿUthmān* and to the first civil war between Mu'āwiyah and Ali. This is not to say that there were no theological activities prior to this date, rather it simply means that we have more evidence for this time period than for any earlier time. Similarly, I would argue that the groups that propelled the theological debate may be more than one would like to account for, but the Islamic tendencies known as Al-Mu'tazilah, al-'Ashā'irah, al-Shī'ah, al-Khawārij, al-Murji'ah, and al-Bāṭiniyyah ought to be recognized as the most influential groups that branched out due to theological differences as well as to the changing political and social realities.

Al-Mu'tazilah¹⁴, which means the neutral group, was initially a group that did not want to take side concerning the question of "*Fāsiq*" whether he be considered a non-

¹⁰ Badwi, Abd al-Rahman, madhahib al-Islamiyin, (Egypt: Dar al-'Ilm limalayin: 1996), pp. 7

¹¹ See Sharh al-'Aqaid by al-Taftazani where he states: 'I lam anna al-'ahkam al-shar'iya minha ma yata'allaqu bikayfiyati al-'amali wa tusammā far'iyyah wa 'amaliyyah, wa minha ma yata'allaqu bil-'itqadi wa tusamma asliya wa l-'itqadiya. Wa al-'ilmu al-muta'alliqu bilula yusamma 'ilmu al-shara' l' l' wa al-'ahkami lima annaha la tustafadu illa min jihati al-shar' l' wa yasbiqu al-fahmu 'inda itlaqi al-'ahkami illa ilayha. Wa bi al-thaniya: 'ilmu al-tawhidi wa al-sifati, lima 'anna thalika 'ashharu mabahithihi wa ashrafu maqasidihi. (See the same quote cited and commented upon by Badwi, Abd al-Rahman, madhahib al-Islamiyin, (Egypt: Dar al-'Ilm limalayin: 1996), pp. 28)

¹² Badwi, Abd al-Rahman, madhahib al-Islamiyin, (Egypt: Dar al-'Ilm limalayin: 1996), pp. 12

¹³ Badwi, Abd al-Rahman, madhahib al-Islamiyin, (Egypt: Dar al-'Ilm limalayin: 1996), pp. 12

¹⁴ Within the Mu'tazilite tendency, there are two major schools: The basra school made of: al-hasan al-basri, 'Amr Ibn 'Ubaid (143 H), Wasil Ibn 'Ata' (131 H); then, Ibrahim Ibn Yahya al-Madani, Khalid Ibn

believer or a believer who simply would be punished for the sin. The latter was the opinion of the main stream Muslims, while the Kharijites held the former opinion. In a later development, the Mu` tazilites argued for the *Intermediate Status (al-Manzilah bayna al-Manzilatayn)*.

The name of the group was taken from the political vocabulary but their views encompassed other subjects like the question of predetermination and free will. However their views in this early stage (the first tier of the second Islamic century) did not differ from the opinions of mainstream thinkers.¹⁵

During the first two decades of the Islamic centuries, Mu` tazilites seem to have contributed greatly especially in matters that can now be classified as purely theological. Their renowned views can be summarized in the following abbreviated list:

- (1) God is *Qadím*, and nothing is as old as He is (God is Eternal).
- (2) God's words were created in a particular time.
- (3) Will, Hearing, and Seeing are not attributes that describe God in reality (*al-Sifát majáziyyah*).
- (4) God cannot be seen.
- (5) Man is the creator of his own deeds, good and evil.
- (6) Probity of the Wise
- (7) *Wa`d wa wa`íd* in case of the believer who commits a major sin.
- (8) Good and evil can be recognized by reason.
- (9) *Imámah* was mandated in the legal sources but it is optional.

It goes without saying that when this school reached power through their alliance with the Abbasid Caliphs, their input expended to deal with matters of law and administration. In fact many prominent Mu` tazilites moved up to serve as judges and governors. Their prominence came to a halt under to protest movements lead by the traditionalist Ahmad Ibn `anbal and culminating in the establishment of the Ash` arite trend as the official theology of the orthodoxy.

Ash` arites is clearly a reactionary movement that built its strength on the weaknesses of the Mu` tazilites on the one hand, and on the excessive systemization of Mu` tazilite's theology on the other hand. In order to illustrate this state of affairs, let's take a look at this anecdote:

Al-Ash` arí asked *Abu Ali al-Jubá'í*: "*Sheikh*, what do you say concerning three individuals: a believer, a non-believer, and a boy; what is the status of each?" Al-Jubá'í replied: "The believer is in the higher status (*ahl al-Daraját*), the non-believer is in the losers (*ahl al-Halakat*), and the boy among the saved ones (*ahl al-Naját*)." Al-'Ash` arí continued: "Can the boy move up to the higher status, if he wanted to do so?" al Jubá'í replied: "No. He will be told: 'the believer earned that status through his obedience, and you have not done so.'" Al-Ash` arí then adds: "if the boy says that it is not his fault that he died younger, If God allowed him to live longer, he would have done what the believer did." Al-Jubá'í retorts: "God would say: 'I knew

Safwan (133 H), al-Hasan Ibn Zakwan, Hafs Ibn Salim, `Uthman al-Tawil; then, M` ammar Ibn `Ubad (220 H), Abu Bakr al-'Asamm, Abu al-Hudhail (235 H); then, Bishr Ibn al-Mu` tamir (210 H), al-Shahham (233 H), al-'Aswari (200), al-Nazzam (231 H); then, Abu Ali al-Juba'í (303 H), al-Jahidh (256 H); then, Abu Hashim al-Juba'í (321 H), Abu al-Hasan al-Ash` arí (330 H). The School of Baghdad made of: Bishr Ibn al-Mu` tamir (210 H); then, Thumama Ibn al-'Ashras (234 H), Ahmad Ibn Abi Du`ad (240 H), Abu Musa al-Murdar (226 H); then, Ja`far Ibn Mubasshshir (234 H), Ibn Harb (236 H), Abu al-Hasan al-Khayyat (290 H), Abu al-Qasim al-Balkhi al-Kalbi (319 H), and al-Iskafi (240 H).

¹⁵ Badwi, Abd al-Rahman, *madhahib al-Islamiyin*, (Egypt: Dar al-` Ilm limalayin: 1996), pp. 38

that if you lived longer, you would not have obeyed Me, so I took mercy on you and caused you to die before you reach the age of legal responsibility (*taklīf*).” Al-Ash`arī then said: “What if the non-believer says: ‘O. God you knew his future just like you knew mine. Why haven’t You considered your mercy on me?’” Jubá’í then said to al-Ash`arī: “You are a madman.” and he stopped talking.¹⁶

This example shows that although the case was purely hypothetical, it nonetheless, expresses legal presumption on the fate of individuals and their status in the hereafter. But the fused religious and civil law make it a critical subject especially for the government and the office of the Caliph.

With the beginning of the first half of the Islamic century, Kalám started to fade as a discipline while Usúl al-Fiqh started to take shape and gain momentum as an independent field of knowledge. It must be acknowledged however, that even prior to that, many jurists avoided articulating matters that were classified as Kalám and argued that it is neither in the interest of religion nor in the interest of the Ummah to waste time debating purely *theoretical* questions. This view found currency among the larger segment of the society and the scholars of jurisprudence seem to have limited their theoretical opinions to matters related to practical laws (*al-`A^lkám al-`Amaliyyah*).

Abú `anifah (80-150 H.) who lived 52 years of his 70 lifetime under Umayyad rule tried to set himself apart from those active in Kalám. He characterizes his stance on the discipline by saying that “[Kalám] is the discourse of philosophers, it is better to apply Qur`án and Tradition of the “Ancestors” (*salaf*). Be aware of innovation, indeed it is not part of religion.”¹⁷ He believed that legal rules must be extracted from their legal sources in the following order: (1) Qur`án, (2) The Sunnah of the Prophet, (3) fatwa al-Sa`ábah, Ijmá`, (4) Qiyás (5) Isti`sán, then (6) `Urf.

Imam Málik (93-179 H.) also was reported to have disliked Kalám because it was theoretical and did not relate to action, as opposed to the Fiqh where fuqahá’ discuss practical legal rules.¹⁸ He also limited his theoretical discussion to the sources of law which are in his opinion the Qur`án, (2) Sunnah, (3) Sayings of the Companions, (4) Ijmá` and the Practice of ahl al-Madínah, (5) Qiyás, (6) Istihsán, then (7) al-Ma`áli^l al-Mursalah.

Again like most traditionalists, he seems to have rejected Kalám not only for the nature of its topic, but also because it is a new invention. He was reported to have said: “Be aware of innovation.” He then was asked: “ what innovation is that?” he continued: “the innovators are those who talk (*yatakallamúna*) about the names of God, His attributes, His knowledge, His will, and they do not refrain from talking about issues that the Companions and their Followers avoided talking about.”¹⁹

Al-Sháfi`í (150-204 H.), who is considered by many as the founder of Usúl al-Fiqh, says on Kalám: “ I have learned from ahl al-Kalám some thing I could have never imagined. It is better for one to be tested (*balá’*) by committing any other sin besides

¹⁶ See al-Subki’s *Tabaqat al-Shafi`iyya*, vol. 2, pp. 250-1; and Ibn Khalkan’s, vol. 3, pp.398

¹⁷ al-Taymi, Ismail Ibn Mohammed Ibn al-Fadhl al-Isbahani, *al-Hujja fi bayan al-Mahajja*, (al-Riadh: Dar al-Raya, 1990), pp. 105

¹⁸ Ibn ` Abd al-barr, *Mukhtasar Jami` Bayan al-` Ilm wa Fadhlhi*, pp. 268

¹⁹ al-Taymi, Ismail Ibn Mohammed Ibn al-Fadhl al-Isbahani, *al-Hujja fi bayan al-Mahajja*, (al-Riadh: Dar al-Raya, 1990), pp. 104

shirk than to be tested by Kalám.”²⁰ He then goes on to build on the previous arguments concerning the sources of law and seem to simply modify the existing ideas to establish a system by which one ought to extract legal rules. He argues that *ʿIlm al-Usúl* is layered just like the sources of law are. Hence for him these sources are five:

1. Qur’án and the Sunnah of the Prophet,
2. *Ijmáʿ* in matters not covered by the Qur’án and the Sunnah,
3. The saying of the Companions which was not objected to,
4. Sayings of the Companions that fell short of their consensus (*ikhtiláf al-Sahábah*)
5. Qiyás

Again, it is evident that there is no originality as far as the concepts are concerned. His genius lays in the fact that he had built a system—an orderly one—that is supposed to satisfy the jurists’ needs if properly followed. The layered model he suggested does not permit a scholar for instance to apply Qiyás unless the legal question is not covered in any of the four previous sources.

Kalám finally would retrocede as a dominant discipline during the first half of the third Islamic century. The *Miḥnah* depicted in history books was indeed the deciding period. Ahmad Ibn Ḥanbal (164-241 H.) was known for his opposition not only to Muṭazilite theories but to Kalám in general. In a debate with *Ibn Abí Duʿád* before the Caliph al-Muṭaʿim he invoked on more than one occasion the phrases: “I am not a *Mutakallim* (theologian), my *Madhhab* (Method) is in fact *al-Hadīth* (Tradition).”²¹ The polarization of Hadīth and Kalám had led to further debates and resulted in “conversion” of Abu al-Hasan al-Ashʿarí who was before that a prominent Muṭazilite and who became the figurehead of the orthodox theology. Nonetheless, theology had become no longer the foundation and the “mother of all Islamic sciences”, “tradition” had. Theology thus had been transformed into an apologetic tool in service of tradition. The rise of the new movement later known as “*ahl al-Hadīth*” had simplified religious and legal discourse. Hanbalís thus, had restricted the sources of law to three: The Qur’án, (2) the Sunnah of the Prophet, (3) the opinions of the Companions. It seems however, that Ibn Hanbal originally was never enthusiastic in adopting any source of law that relied on reason as we can gather from the following saying:

“Religion (*al-Dīn*) is nothing other than the Book of God, and the authentic traditions (*āthār*) and ways (*sunan*) that has been transmitted by men of probity... We do not apply Qiyás nor raʿy, because Qiyás is not permitted in matters of religion. (from *ʿAbaqát al-Ḥanābilah*, vol. I, pp. 31)²²

Thus far, I have discussed the historical background where Usúl evolved and developed, I have demonstrated that theology had chronological as well as normative precedence on *Usúl al-Fiqh*. The reaction of the scholarship to this discipline may have altered the way it was presented as well as its content. As a field of studies however, Kalám persisted first in the form of philosophical debate, then under the umbrella of Usúl al-Dīn, and finally as an independent field known as *ʿIlm al-Tawḥíd* or *al-ʿAqaʿid*. Ibn Ḥazm,²³ for instance, wrote extensively on the topic of Usúl but in a broader framework. For example, he discussed issues like the validity of human reasoning, the

²⁰ al-Taymī, Ismail Ibn Mohammed Ibn al-Fadhl al-Isbahani, *al-Hujja fi bayan al-Mahajja*, (al-Riadh: Dar al-Raya, 1990), pp. 104

²¹ See: Ahmad Ibn Yahya al-Murtada, *Tabaqat al-Muṭazila*, (Beirut, 1961), pp. 125

²² Shaʿa, Mustafa, *al-ʿayimma al-ʿarbaʿa*, (Egypt: Dar al-Kitab al-Masri, 1979), pp. 895

²³ He is the renowned representative of the Zahiri School, born in 383 H. in Spain.

history and development of language, the Qur'án as a legal proof, *naskh*, *Ijmá'*, *istiḥáb*, *taqlíd*, *Qiyás*, and *ijtihád*.²⁴

Throughout this process, Islamic legal theory have maintained a subordinate status only to merge by the third century as an independent discipline with its own method, its own topic, and its own practitioners. Having said all this, I shall proceed to determine the boundaries between Usúl al-Fiqh and Fiqh, a task that I intend to give it full attention in the following paragraphs. In order to do so I would rely on a number of examples to make my case clearer given the very close relation between the two fields.

We have arrived to the conclusion that *Usúl al-Fiqh* branched out of *Usúl al-Dín* to become an independent discipline that focuses exclusively on matters related to legal rules like its sources, methodology, and conditions. The important question is then, where does Fiqh end and where does Usúl begin? In order to illustrate, let's take a closer look at few examples.

The statement "*al-#alát wájiba*" is Fiqh case: the topic is obligatory prayers, its content is the legal rule "*wujúb*", and the legal proof is the Qur'ánic command "*'aqímú al-@alá*". In answering the question whether the imperative mood (*'amr*) implies "*wujúb*", one becomes involved in an Usúl case. The topic for this new case is the positive and negative imperative (*'amr wa nahy*), and the content is the implication of the imperative mood. So what are the differences between a Fiqh case and an Usúl case?

- (1) The Fiqh case presupposes the Usúl case. In other words, the Usúl case precedes the Fiqh case. For instance we say that God commanded prayers, hence the command implies that prayer is obligatory, thus prayers become *wájibah*.
- (2) The Fiqh case is obligatory upon both the *Mujtahid* as well as the *Muqallid*. As for the Usúl case, it only concerns the *Mujtahid* who must be qualified to determine the legal proof (*dalíl*) and the way it implies the legal rule (*al- \ukm*).
- (3) The Usúl case may expand to cover all or most of the topics of Fiqh. The Fiqh case on the other hand, is limited to one topic. For example "eating pork is prohibited" is a legal rule limited to the category of "food". *Al-Nahy* however, which implies the prohibition is an Usúl rule and may cover all Fiqh cases. In other words, whenever one encounters *Nahy*, regardless of the topic—foods, clothing, market dealings, prayers, fasting etc.—the *nahy* shall always imply the prohibition (*Tahrim*). It is safe then to conclude that the result of the Usúl case is *whole (kulliyah)*, whereas the result of fiqh case is *partial (juz'iyah)*.

Stated differently, Usúl al-Fiqh is only related to the Fiqh in as much as both fields share an area of intersection from which one extracts its legitimacy while the other interprets it in order to justify this legitimacy. This area of intersection is the sources of Islamic law. To clarify further, let's consider an example and see how it would be approached by an Usúlí contrasted with a Faqíh.

Cite the verse "*yá 'ayuha al-ladhína 'ámanú 'idhá qumtum 'ilá al-@aláti faghsilú wujúhakum wa 'aydiyakum...*"²⁵ A Faqíh would rule that washing the face and the hands—among other things—is obligatory. An Usúlí on the other hand would use the same verse and conclude that the imperative (used with the verb to wash) expresses *wujúb*. Thus while the former specified the rule to washing the face before prayer, the Usúlí on the other hand, generalizes that imperative implies *wujúb*, not only in this case,

²⁴ Ibn Hazm, Ali, *al-Ihkam fi usul al-ahkam*, (Egypt, 1978)

²⁵ Qur'án, 5: 6 (al-Ma'ida, verse six)

but any time imperative is used, one must conclude that the content (*ma<muʿl*) of the verb is *wujúb*. This becomes more complicated when one takes into consideration the remainder of the so called *al-ʿadillah al-Sharʿiyyah* (Legal Proofs) which are categorized into two major groups:

- (1) *Taklifiyyah*: which includes (a) *al-Wujúb* (obligatory), (b) *al-hurmah* (Prohibition), (c) *al-Isti<báb/mandúb* (recommended), (d) *al-Karáhah* (repugnancy), and (e) *al-Ibáhah* (Permissibility)
- (2) *Wa`iyah*: which includes (a) *al-Si<<ah* and (b) *al-Fasád*.

The next logical question that must follow this demonstration is why and how *Usúl al-Fiqh* is considered to have precedence over *Fiqh*? For it is apparent that both disciplines use the same legal text but each produces its own conclusion, so why should one conclusion be placed first on the expense of the other?

In answering these two inquiries, I shall make note of the fact that Muslim jurists are on the opinion that figuring the implication of a legal text ought to precede the formulation of the legal rule. Hence, the first activity to be undertaken is therefore of an *Usúl* nature. But this is simply an assumption. For the question remains: Who determines the fact that the imperative (*ʿamr*) implies *wujúb*? At this point we are brought back to the same point we started with, and that is the dependence and close relation of *Usúl* with *Kalám*, philosophy, grammar etc. On the risk of sounding redundant, I shall emphasize that although *Usúl* may appear to be an independent field, historically however, *Usúl al-Fiqh* evolved parallel --if not tangential—to *Kalám* and earlier disciplines. If one was to say that *ʿamr* implies *wujúb* because of the divine nature of the Qurʾanic speech, then he falls into *Kalám*ic debate that would extend to cover the attributes of God, the creation or eternity of the Qurʾán, and the meaning of *ʿadálah*, *<ikmah* etc. Similarly, if one is to argue that *ʿamr* implies *wujúb* because the Arabs understand it to be so, then he finds himself in the field of linguistics and he will be using Arabic grammar in service of *Usúl*. Finally, if one is to assert that *ʿamr* implies *wujúb* simply because the Prophet and the Companions responded to it as such, then he is arguing from the traditionalists perspective. In other words, if after the revelation of the verse above mentioned, the Prophet and his Companions made it a custom to wash their faces before the performance of prayers, that ought to be indicative that *ʿamr* implies *wujúb*. This last illustration should bring to the forefront the reason behind the successes of traditionalist movements.

It is clear that the analysis of the evolution of *Usúl al-Fiqh* and *Fiqh* is too complex—if taken within the natural context—as we arrived to the inescapable conclusion that Islamic law ought not be treated in isolation from the rest of the disciplines that contributed directly or indirectly to its formation. In this last section, I will focus on the modern scholarship treatment of Islamic law and jurisprudence and see how they see—or not see, as it may be the case—the limits and boundaries of these two fields.

Modern scholarship was more critical in dealing with the issue of authenticity of legal texts. The Western Orientalist Ignaz Goldziher whose work grew to become the anchor and precursor of all later works in the field of Islamic jurisprudence launched this new seemingly objective approach. It must be said nonetheless that his critical evaluation of sources of Islamic law focused on Prophetic Traditions (*Hadíth*) with minimal reference to Qurʾanic references. He believed that *Hadíth*—as he understood it—was merely the reflection of the community’s aspiration and this body of legal literature was in fact an accumulative process:

Since our concern here is with the evolution of religion, our interest is claimed by the growth of Hadīth, rather than by the final form of Hadīth as a fixed text. Questions of authenticity and age pale in significance when we realize that Hadīth is a direct reflection of the aspirations of the Islamic community, and furnishes us with an invaluable document for the development of Islamic religious goals beyond the Qur'án. For not only law and custom, but theology and political doctrine also took the form of Hadīth. Whatever Islam produced on its own or borrowed from the outside was dressed up as Hadīth. In such form alien, borrowed matter was assimilated until its origin was unrecognizable.²⁶

Goldziher was more inclined to stipulate that "the growth of a dogmatic theology in Islam took place along with the growth of speculation about the religious law."²⁷ A religious law that expressed itself first and foremost in the form of Hadīth that unfolds before us as a picture of "this intellectual movement in the community, as of every other aspect of the internal history of Islam." Most original is his controversial assertion that the Hadīth tradition was in fact "projected back into the time of the Prophet... In fact, this intellectual trend does not antedate the period in which theological thought began to germinate."²⁸

Evidently, as noted by Calder, in the study of early Islam, scholarship, unsurprisingly, has been concerned to break the hermeneutical nexus, and to separate history from theological construct. Goldziher was thus the first to separate the Hadīth from the lifetime of the Prophet.²⁹ Wansbrough continued the trend to conclude that the Qur'án itself also ought to be disjointed from the time of the Prophet Mohammed.

Briefly put, Goldziher's argument can be summarized as follows: since the corpus of the Hadīth continued to swell in each succeeding generation, and since, in each generation, the materials run parallel to and reflect various and often contradictory doctrines of Muslim theological and legal schools, the final recorded products of the Hadīth, which date from the third/ninth must be regarded as being on the whole unreliable as a source for the Prophet's own teaching and conduct.³⁰ Later scholars argued that Goldziher have committed a methodological error making most of his conclusions flawed. More importantly, as pointed out by Fazlur Rahmán, Goldziher had a confused understanding of what the Sunnah is and what the Hadīth is. "Goldziher thinks they are the same, and that puts him in a dilemma: How could the Sunnah be both normative (Sunnah in Goldziher's view) and actual (Hadīth) when the normative and actual conflict?"³¹

In spite of its shortcomings, Goldziher's findings were instrumental in giving new direction and momentum to new research in the field of Islamic studies. The impact of his contribution can be felt in the later scholars' works. Joseph Schacht for example continued on the same premise to reaffirm the same results through—what he believed a more sophisticated—methodology.

²⁶ Goldziher, Ignaz, *Introduction to Islamic Theology and Law*, (Princeton: Princeton University Press, 1981), pp. 40

²⁷ Goldziher, Ignaz, *Introduction to Islamic Theology and Law*, (Princeton: Princeton University Press, 1981), pp. 68

²⁸ Goldziher, Ignaz, *Introduction to Islamic Theology and Law*, (Princeton: Princeton University Press, 1981), pp. 68-69

²⁹ Calder, Norman, *Studies in early Muslim Jurisprudence*, (Oxford: Clarendon Press, 1993), vii

³⁰ Rahmán, Fazlur, *Islam*, (Chicago: University of Chicago Press, 1979), pp. 3

³¹ Rahmán, Fazlur, *Islam*, (Chicago: University of Chicago Press, 1979), pp. 45

Schacht claims that his inquiry fundamentally confirms what his predecessors, Goldziher and Margoliouth, had concluded concerning the concepts of Hadíth and Sunnah in the first century and a half of the Islamic era. He goes beyond them only in finding that when for the first time the traditions began to find currency they were referred not to the Prophet but, in the first instance, to the successors, then in the next stage, to the Companions and finally, after a time, to the Prophet himself.³²

It can be said thus, that Goldziher had wished to draw a gap between Hadíth and its alleged author, namely the Prophet Mohammed, Schacht, in his study of early Muslim Jurisprudence, broke the historical link between Hadíth and Fiqh. The real origins of Fiqh, for him, lay in the "living tradition" of the local schools i.e. in a juristic adaptation of real social norms.³³ Since his research stands to link the earlier works with the latest studies, it ought to be fruitful to devote more space to a close analysis of Schacht's work.

In his book "The Origins of Muhammadan Jurisprudence," Schacht concentrates on the traditions in the broader sense. That is to include the tradition of the Prophet as well as that of the Companions and the Followers. He relied on the attitude of scholars towards these traditions to draw his theory on the origins and relationship of Fiqh with tradition. It is thus obvious that Usúl and Fiqh for him are overlapping if not the same. In fact one finds very limited reference to the legal theory. In establishing prominence to his concept of "the living tradition" he remarks that the "attitude of the Iraqians and the Medinese to legal traditions is essentially the same, and differs fundamentally from that of the Sháfi'í... Both the Iraqians and the Medinese neglect traditions from the Prophet in favor of the systematic conclusions from general rules, or of opinions of the Companions."³⁴ He then continues to say that "the striking fact is that the traditions from the Prophet are greatly outnumbered by those from the Companions and Successors... After the work of Goldziher, there remained no doubt that the conventional picture concealed rather than revealed the truth; and I trust that the sketch by which I have tried to replace it comes nearer to reality."³⁵ As for the observations regarding the increase in number of traditions, which was first suggested by Goldziher before, and which seem to be essential to their conclusions, I would like to take a closer look at it and see how solid of an argument it is:

	Muwaḡḡa' Málik	Muwatta' al-Shaybání	Kitáb al-'Athár (Abu Yúsof)	Kitáb al-'Athár (Shaybani)
Tradition from the Prophet	822	429	189	131
Tradition from the Companions	613	628	372	284
Tradition from the Successors	285	112	549	550
Tradition from later authorities	--	10	--	6

Table was compiled using data provided or cited by Schacht.³⁶

Schacht provided these figures in order to make the point that traditions from the Prophet were less important at the time of Shaybání than at the time of Málik³⁷, who died

³² Rahmán, Fazlur, *Islam*, (Chicago: University of Chicago Press, 1979), pp. 46

³³ Calder, Norman, *Studies in early Muslim Jurisprudence*, (Oxford: Clarendon Press, 1993), vii

³⁴ Schacht, Joseph, *The Origins of Muhammadan Jurisprudence*, (Oxford: Clarendon Press, 1979), pp.21

³⁵ Schacht, Joseph, *The Origins of Muhammadan Jurisprudence*, (Oxford: Clarendon Press, 1979), pp.329

³⁶ Schacht, Joseph, *The Origins of Muhammadan Jurisprudence*, (Oxford: Clarendon Press, 1979), pp.22

ten years earlier. This would have been a good argument had he stopped right here. But to readers dismay, he continues on to tell us:

As to individual Iraqians, we find Abu Hanifah already technically interested in traditions. Abu Yúsof continues the systematic collection of traditions and shows himself interested and knowledgeable in traditions. Being later, he is subject to a stronger influence from traditions going back to the Prophet and companions than Abu Hanifah.³⁸

Juxtaposing this statement with the implication he had when presenting the figures in the table above is asking us readers to believe in two conflicting conclusions at the same time: Tradition from the Prophet either became more important as time went by, or they became less important, Schacht cannot have it both ways. But let's ignore this contradiction and continue to summarize his major conclusion, which I am listing below, then briefly provide a critical appraisal of his findings.

1. According to Schacht, Islamic law fell outside the sphere of religion. The Prophet did not intend to create a new system of jurisprudence. His authority was not legal. As far as believers were concerned, he derived his authority from the truth of his religious message.
2. Islamic law, as we know it, did not exist during the lifetime of Mohammad or for the greater part of the first Islamic century. Although the Qur'án laid down certain rules in the areas of family law, inheritance, and ritual, the first generation of Muslims, Schacht contends, paid only perfunctory attention to these rules and drew only the most elementary conclusions from them... The actual foundations of Islamic law were established not by Mohammad and his Followers, but by the early Qá'ís, legal specialists appointed by the Umayyad governors who transformed the popular and administrative practices of the Umayyads into the religious law of Islam.³⁹
3. The Sunnah originally meant "living tradition" (*al-`amal al-Mujtama` `alayh*). This early concept of Sunnah, which was not related to the sayings, and deeds of the Prophet, formed the basis of the *legal theory* of the schools of law.
4. These ancient schools of law gave birth to an opposition party, religiously inspired, that falsely produced detailed information about the Prophet in order to establish a source of authority for its view on jurisprudence.
5. By the third century it has become a common practice that scholars from both camps project their own statements into the mouth of the Prophet. The result is thus, hardly any legal tradition can be considered authentic.
6. The system of *Isnád* used for authentication of Hadíth documents has no historical value for it was invented by those scholars who were falsely attributing their own doctrines back to earlier authorities. As such *isnád* is useful only as a means for dating forgeries.

³⁷ This argument based on the statistics provided above further lose thrust when one first factors in the geographical area where each collection appeared, a factor that of course would show proportionality to the amount of tradition verses the number of available narrators. Secondly, it must be noted that Prophetic tradition after all the sayings of one person namely the Prophet. Companions traditions on the other hand are a collection of the sayings many individuals, thus it would make sense that traditions from the Prophet could be less in number compared to those from the Companions and the later authorities.

³⁸ Schacht, Joseph, *The Origins of Muhammadan Jurisprudence*, (Oxford: Clarendon Press, 1979), pp.33

³⁹ Powers, David S., *Studies in Qur'án and Hadíth*, (Berkeley: University of California Press, 1986), pp. 1

Any critical mind would notice the methodological errors that Schacht failed to address. Below I would list few obvious ones. Like Goldziher, Schacht clearly committed himself to tradition and virtually ignored Qur'anic injunctions. Other scholars like Fitzgerald, Coulson, Goitein, and Powers, who considered the Qur'anic evidence, have reached different conclusions that do not support Schacht's.

Additionally, most of Schacht's arguments about the position of the Sunnah of the Prophet in the doctrines of the ancient schools of law were derived from the writings of Shāfi'ī or they are based on Schacht's own deductions from those writings and assertions of Shāfi'ī. This is hardly a reliable method given that Schacht himself quotes dozens of examples of Shāfi'ī's lack of objectivity. He even mentioned several examples of Shāfi'ī's biased editing of his opponent's texts.

Lastly, his stated method: "The best way of proving that a tradition did not exist at a certain time is to show that it was not used as a legal argument in a discussion which would have made reference to it[s] imperative if it had existed"⁴⁰ is ludicrous and far from being scientific. For in order for us to accept this method, Schacht must first prove that: (a) if a certain Hadīth X was not mentioned by a scholar A, then A is ignorant of X; (b) all works of early scholars have been preserved and readily available in their complete form; (c) if scholar A does not mention the Hadīth X, then X does not exist; (d) all scholars are in fact knowledgeable; and (e) if scholar A writes on a subject, then A must use all Ahādīth and all evidence that existed up until that time.

Similarly, it is only an assumption, and a misleading one, to argue that growth of the Hadīth tradition is indicative of the growth in fabrication, because correlation is never an explanation.

Once again, Schacht, like Goldziher considers tradition to be the basis of legal theory, hence they believed that by discrediting traditions and the means by which traditions are authenticated, the legal theory as well would be brought into the sphere of doubt. As is going to be shown in our presentation of later works, it seems that traditions is no more than a single building block of a complex structure.

Before I proceed to discuss other works on Islamic law, I would briefly examine the views of scholars who adopted the historical/descriptive method as they attempted to provide an overview of the intellectual and legal development in the Islamic civilization. M. Hodgson, like a number of other scholars, opted to explain these activities by the social interactions that took place after the expansion. For example, Falsafah (philosophy), according to him, came first as a result of the expansion which brought about the Greek and other outside influence, Kalām (and Usūl) is thus a reaction (apologia):

The way of life and thought of the Sharī'ah-minded grew directly out of those Irano-Semitic cultural traditions which stemmed from and further developed the Prophetic summons of axial times. The Glory of Faylasufs was their cosmology, their rationalistic portrayal of the universe as a whole and of the place of the human soul in it. This was standing challenge to the devotees of the monotheistic tradition to do as well... The piety-minded had tended to develop, as part of their over-all intellectual structure, the rudiments of an argued theory of God and mankind... Such activity was called Kalām.⁴¹

⁴⁰ Schacht, Joseph, *The Origins of Muhammadan Jurisprudence*, (Oxford: Clarendon Press, 1979), pp.140

⁴¹ Hodgson, Marshall G. S., *The Venture of Islam*, (Chicago: University of Chicago Press, 1974), vol. 1, pp. 410 & 437-8

This analysis cannot be supported by historical events, a look at the chronology would make it clear that Hodgson's theory falls short of establishing solid links between the evolution of Kalám and philosophy:

Philosophers:

Mohammed Ibn Zakkariya al-Rází died in 925

Al-Farábí died in 950

Ibn Síná died in 1037

Kalám figures:

Wá#il Ibn `A>á' died 749

Bishr Ibn al-Mu`tamir died in 825

Abu al-Hudhail died in 840

Ahmad Ibn Abí Du'áb died in 855

Al-Jubá'í, Abu Ali died in 906

Al-Ash`arí died in 935

Al-Máturidí died in 944

Law figures:

Abu Hanífah died in 767

Málik Ibn Anas died in 795

Al-Sháfi`í died in 820

Ibn `anbal died in 854

Even if we are to ignore the Kalám materials that started as early as the first civil war, Clearly Kalám preceded philosophy by more than two centuries. In the light of this, how could Kalám--never mind Usúl--be a reaction to Greek philosophy that only found its way, by all accounts, during the Abbasid period?

A more moderate view—yet comes from the same premise--is expressed by Rahmán who attributes the merge of new sciences and the creation of many disciplines and institutions to the changing socio-political realities. He argued, for instance, that the role of the Prophet and community (Ummah) leader put Islam on a course that made it hard to separate the religion from the state.⁴² Further more, he adds that the expansion of the Arab empire outside Arabia and the assimilation of Byzantine and Persian institutions and the local elements into an Islamic framework, defined the Muslim state and set its limits.⁴³ It is the Umayyad's employment of Hellenized Christian Arabs, he asserts, that set the mild separation of religion from the state and created the various theological sects.⁴⁴ The Abbasid era brought about intellectual movements that sought to reconcile secular and Hellenistic thought with religion. That culminated in the formation of legal schools in the second and third centuries (8th & 9th CE). The power gained by Islamic law stimulated the new converts in Africa and central Asia to adopt Sufism by the fifth century, which was transformed into the religion of the masses.⁴⁵

This evolutionary scheme, in my opinion, downplays the role of the Arabists and the Arabic language in thrusting law into the forefront. Usúl relied heavily on the Arabic grammar as a substitute for the Kalám, hence non-Arab natives found it challenging to establish themselves on an equal footing with the Arabs. Opposite of this, we find Persians, Africans, Spanish, and Turkic scholars excelled in the fields of philosophy,

⁴² Rahman, Fazlur, *Islam*, (Chicago: University of Chicago Press, 1979), pp. 1

⁴³ Rahman, Fazlur, *Islam*, (Chicago: University of Chicago Press, 1979), pp. 2-3

⁴⁴ Rahman, Fazlur, *Islam*, (Chicago: University of Chicago Press, 1979), pp. 3

⁴⁵ Rahman, Fazlur, *Islam*, (Chicago: University of Chicago Press, 1979), pp. 5-6

medicine, mathematics, and astronomy. Sufism naturally found a hub in regions remote from the Arabist centers like those in Medinah, Mecca, and even Syria.

The normative approach championed by Goldziher and Schacht found supporting ground in the movement of systemization of legal thought and to a lesser extent in the changing social conditions of the Ummah. Historians who applied a descriptive methodology sought to seek roots for their theories in the generational and ethnic interactions that took place after the expansion. A period during which elements of foreign cultures found their way to influence the burgeoning Islamic civilization as argued by Hodgson and by Rahmán⁴⁶. In the coming few paragraphs, I would briefly focus on a third approach, the analytical method, that built on the successes of previous generations of scholars to contribute great deal of fresh ideas to this lively exchange of ideas on the subject matter at hand.

Although the framework remained the same—that is to rethink the authenticity and role of tradition in legal thought--the evidence provided by the scholarship during the last three decades however had given fresh start to research in this field. For instance, Calder used a close “literary analysis of illustrative passages from all major early juristic texts” to conclude that “the evidence of the Mudawwanah suggests that the emergence of written materials within this tradition cannot have been much earlier than 200 and that its earliest form was broad collections of authority statements deriving from Hijází authorities, only gradually narrowing in focus to Málik.⁴⁷ He then goes on to add that “Muwatta’ Málik (in the recession of Ya<yá) should be dated 270 H.”⁴⁸ Thus, unlike Schacht who locates the origins of Fiqh in the beginning of the second century, Calder locates it in the end of the third century.⁴⁹ After responding to those who used the normative method, he continues to challenge the proponents of the idea of civilizational exchange, arguing that “with respect to borrowing: a community which has or is on the process of developing a corporate identity will be incapable of identifying, never mind borrowing, specific features of foreign cultures.”⁵⁰ Similarly, Crone’s conclusion that: “the Sharí’ah is a provincial law recast with Jewish concepts at its backbone and numerous Jewish (and other foreign) elements in its substantive provisions”⁵¹ was strongly rejected by Calder.⁵²

What must be said concerning the research of Calder is that he concentrated exclusively on Tradition. Hence one might assume that either Calder believed that these traditions are the foundation of Islamic legal theory, or he believes that the difference between Usúl and Furú’ is so negligible that one need not include Qur’ánic evidence. For this reason I believe that Calder’s findings can be greatly enhanced if supplemented by another original and provocative work undertaken by David Powers.

By means of literary analysis of several Qur’ánic inheritance verses and Prophetic Hadíth, Powers “sought to demonstrate that the operation of the “science of shares” is

⁴⁶ Rahmán may have used both methods in the same work, his shift back and forth between the two approaches give him room to incorporate more than a single idea without facing the burden of providing substantial body of evidence, since he simply tended to point out to previous and current findings to support a particular view that he adopted or developed.

⁴⁷ Calder, Norman, *Studies in early Muslim Jurisprudence*, (Oxford: Clarendon Press, 1993), 17

⁴⁸ Calder, Norman, *Studies in early Muslim Jurisprudence*, (Oxford: Clarendon Press, 1993), 37

⁴⁹ Calder, Norman, *Studies in early Muslim Jurisprudence*, (Oxford: Clarendon Press, 1993), 199

⁵⁰ Calder, Norman, *Studies in early Muslim Jurisprudence*, (Oxford: Clarendon Press, 1993), 201

⁵¹ Crone, P., *Roman, Provincial, & Islamic Law*, pp. 92-93

⁵² Calder, Norman, *Studies in early Muslim Jurisprudence*, (Oxford: Clarendon Press, 1993), 209

predicated upon a series of assumptions about readings, syntax, the meaning of the words, etc., that represent a secondary stage of the development." Explaining his method further, he adds that he "attempted to work backward from the accepted understanding of these texts" to what he believed "to have been their original significance;" having accomplished this, he was able to reconstruct the system of inheritance which, he believes, "was received by Mohammed. This system, referred to in this book as the proto-Islamic law of inheritance, differs from its Islamic counter part in several important respects."⁵³

Powers research led him to contend that "neither the classical Islamic representation⁵⁴ nor the superimposition theory⁵⁵ adequately accounts for the formation of Islamic law on inheritance. Both theories start from the assumption that the traditional understanding of the Qur'anic and Prophetic pronouncements on inheritance is identical to the understanding of Mohammed and the early community. But this may not be the case."⁵⁶ Although Powers primarily concentrated on verses related to inheritance, one could easily expend the findings to cover all areas of Islamic law. For his contentions have no logical limit that makes his conclusions applicable only to family law. Although Powers ought to be accredited for adding the Qur'anic dimension to the debate on Islamic jurisprudence, he nonetheless was not clear on how he would apply his findings to ratify the existing legal theory, nor did he attempt to draw conclusions as to the nature of Islamic law with its two components *Usúl* and *Furú`*.

It is my view that modern scholarship is headed towards a serious debate that would eventually provide a better understanding of Islamic legal theory and *Fiqh* as two separate fields that each requires our undivided attention. Wael Hallaq seems to have generated enough momentum by a series of publications that focused exclusively on the Islamic "Legal Theory". But as far as defining it, I must say that the distinction remains as ambiguous as it was for centuries. Notwithstanding this, I believe that his work deserve to be treated even briefly as we conclude our survey of this subject matter.

It shall be noted from the beginning that Hallaq's *Usúl al-Fiqh* which is in his opinion, "the theoretical and philosophical foundation of the Islamic law, constituted and umbrella under which synchronic and diachronic variations existed." He departs from previously held views on the "notion that the legal theory, as it came to be known later, was the product of the second/eighth century and that Ibn Idrís al-Sháfi`í was its architect."⁵⁷ For him then, it was by the end of the third/ninth century, when *Usúl al-Fiqh* came into existence as an integral legal methodology." He adds that "since its beginning, Islamic legal theory has concerned itself with the establishment of principles and precepts

⁵³ Powers, David S., *Studies in Qur'án and Hadíth*, (Berkeley: University of California Press, 1986), pp. xii

⁵⁴ With this, I believe Powers refers to the findings of Schacht and Goldziher.

⁵⁵ Marçais, W., (*Des Parent et allies successbles en droit musulman*) is the author of the superimposition theory that argued that the origin of the Islamic law of inheritance can be found in the disparity in the level of social organization characteristic of Mecca and Medina. He argued, largely on the basis of Khadija's activities as a successful merchant, that women in Mecca could own and inherit property. In Medina on the other hand, the right to inherit was supposedly restricted to males. (conc. Higher level of social rganization in Mecca than in Medina)

⁵⁶ Powers, David S., *Studies in Qur'án and Hadíth*, (Berkeley: University of California Press, 1986), pp. 17-18

⁵⁷ Hallaq, Wael B., *A History of Islamic Legal Theories*, (Cambridge: Cambridge University Press, 1997), pp. vii

that govern the procedure of *Ijtihād*, or legal interpretation.”⁵⁸ This characterization however lacks logical consistency, and historical factuality. Because if legal theory is concerned with *Ijtihād*, and Hallaq considers Usūl to have started in al-Shāfi‘ī’s time, does that mean that there were no *Ijtihād* before that? His attempt to portray the evolution of Islamic legal theory as having occurred systematically greatly risks weakening the historical background, which represents the actual domain of events. His study is further compromised when he tried to establish some sort of contrast between the Islamic legal theory and the foundation of Common Law. In my view this approach encouraged the reader as well as the author to look at Islamic law outside its cultural and social context which are—in my opinion—particularly essential to proper understanding of Islamic jurisprudence:

Common Law is rooted in, or grafted to, sociology. As such, it is to be construed in sociological terms. Common law is an instrument of social control and its relevance to society is an ever-present element in the mind of counsel as well as of the court. On the other hand, law in Islam is conceived not as a means employed in the service of society, but rather, in the service of God, who alone knows what is best for society.⁵⁹

More important is Hallaq’s carelessness in moving between Fiqh cases and Usūl case as it shall be clear from the following quote:

The often-quoted ruling about *watr*, a type of prayer whose performance is recommended rather than obligatory, is particularly illustrative. On the basis of an inductive survey, it was found that unlike *watr*, no obligatory prayers examined could be performed while on a journey. The ruling that the performance of *watr* is only recommended and not obligatory was deemed probable (*| annī*) rather than certain (*qat`ī*) precisely because the inductive survey of prayers was admittedly incomplete, since *watr* was not included in the survey.⁶⁰

Hallaq has the tendency to use a Fiqh case to illustrate an Usūl case. The passage above is affirmative of this trend. This of course represents a methodological error let alone an intellectual flaw. It is the consensus of Muslim and non-Muslim scholars who dealt with Islamic law that Theology and Usūl have precedence over Fiqh.⁶¹ By moving from a Fiqh case to an Usūl question, one risk committing a number of errors the least of which is the misrepresentation of the two fields as a single discipline. The fact of the matter however, is that, as early as the period that Hallaq mentions as the beginning of Usūl al-Fiqh as an independent methodology, Fiqh and Usūl merged as two distinct fields; each with its own topic, its own method, and its own results of inquiry. A case in point is the number of faulty assertion, never mind conclusions, made by Hallaq in the above quote.

First of all, it must be noted that Muslim jurists consider obligatory prayers to be mandated by Qur’ānic texts, hence obligatory prayers are not a subject of “inductive survey” as claimed by Hallaq. The inductive survey was only used to rule on the issue of

⁵⁸ Hallaq, Wael B., *Ifta’ and Ijtihad in Sunni Legal Theory: A Developmental Account*, in *Islamic Legal Interpretation*, ed. M. K. Masud, B. Messick, & David Powers, (London: Harvard University Press, 1996), pp. 33

⁵⁹ Hallaq, Wael B., *Law and Legal Theory in classical and Medieval Islam*, (Britain: Variorum Press, 1995) pp. 1-81

⁶⁰ Hallaq, Wael B., *Muslim Use of Induction in Legal Thought*, in *Islamic Law and Jurisprudence*, edited by N. Heer, pp. 6

⁶¹ For a convincing discussion of this point refer to Aran Zysow’s dissertation.

watr prayer which is not covered by Mutawátir tradition from the Qur'án and the Sunnah. Secondly, even the person on a journey must perform *all* obligatory prayers. There is no reference in any Islamic legal source I know that excuses the traveler from performing his obligatory prayer. In fact, travelers may be excused from performing recommended prayers and may shorten the obligatory prayers that consist of four rak`ás by half.⁶² The erroneous conclusion reached by Hallaq is the result of this blurring of the boundaries separating Usúl from Furú`, that can be very critical if coupled with a weak reading of Usúl texts.⁶³

It is my belief that a proper understanding of the definition and the boundaries of Usúl al-Fiqh and Fiqh depends greatly on the level of our discrimination between what constitutes an Usúl case and what constitutes a Furú` case. Using the prayers example for instance, one ought to see how conscious Muslim scholars were in determining Legal Rules (al-a`kám al-Shar`iyyah). It is my opinion that the activities in Usúl tend to increase as we move from Obligatory (wájib) to the Permitted (mubá<). In other words, there are more Usúlí activities on matters not covered in the Qur'án but more discussions from an Usúl perspective of traditions of the Prophet and the Companions. In order to illustrate, let's consider the case of particular obligatory prayers.

Prayers' motions and activities like Rukú`, sujúd, and Qirá`ah are considered *obligatory* pillars without which a prayer would be considered incomplete. Tashahhud, takbír, and tasbíc on the other hand are considered "Sunnah". If one is to forget a "Sunnah" component of the prayer, he may simply make it up by an extra Sujúd to be performed at the end of the prayers. It happens then that the mandatory parts of a prayer are considered so because they were explicitly mentioned in the Qur'án in one context or another. "Sunnah" parts on the other hand are less certain. This microanalysis must be contrasted to the macro-analysis adopted by Hallaq and other scholars, a practice that led them to undermine the distinction between Usúl issues, and Fiqh cases.

Let's now recap the outcome of the various disciplines and summarize the list of influential figures in the field of Islamic law during the last period, which also was known as the Golden Age of the Islamic philosophy and legal study. In fact, this period is the *birth-date* of the scholars after whom millions of Muslims name their religious affiliation. It was to this age that Muslims of today trace back their logic and religious reasoning. Today virtually all Muslims refer to Imam *Ja`far al-Sádiq*, *Abu Hanífa*, *al-Sháfi`í*, *Málik Ibn Asas*, or *Ahmad Ibn `anbal* as the ultimate sources of Islamic law. Each of these schools of thought however has adopted a systematic approach based on one of the dominant philosophical trends that developed in this phase. It suffices to mention the *Dháhiri* and the *Mu`tazilite* schools of philosophy.

The precursors of these development goes back to the elementary question asked before even the merge of these schools of law: Must we take the apparent meaning of the legal texts that exist in the *Qur'án* and the tradition of the Messenger or use reason and logic and build on that foundation?

⁶² For Zuhr, `Asr, and Isha prayers, the traveler may only perform two rak`as for each for example.

⁶³ It is my judgement that Hallaq misunderstood the passage he read (and cited in his footnote) in al-Razi's al-Mahsul. Al-Razi wrote: "al-istiqrá' al-Maznun: huwa ithbat al-hukm fi kulliyin, lithubutihi fi ba`dhi juz'iyatihi. Mithaluhu: qawlu ashabiná fi al-watr; innahu laysa biwajibin, li'annahu yu'adda `ala al-rahila. [wa la shay'a mina al-wajib yu'adda `ala al-rahila.]" it seems that Hallaq understood "rahila" to mean "traveler" where it actually means "the animal" that is carrying the travelers, a camel or a horse etc.. With this interpretation we know that Obligatory prayers must be performed even on the back of the animal on which the traveler is riding, where as watr cannot be performed hence one may not have to perform it at all if traveling.

The answer has given rise to two trends: A group of philosophers and traditionalists known as *Ahl Al-Hadīth* (People of the Tradition) who have argued for the adoption of the literal meanings of the legal texts available in the *Qur'ān* and the *Sunnah*. This trend can be identified as the school of Traditionalism.

Another group of philosophers and traditionalists known as *Ahl -Al-Ra'y* (People of Reason) suggested the reliance on logic and reason to interpret the legal texts. These were influenced by what I sought to name the school of Rationalism.

Law in the Islamic studies goes through different processing mechanisms before it reaches the ordinary person in its *ready-to-use* form. The distinct feature that does not exist in its counter-part in the Western legal theory is its domain of belonging. As early as the Renaissance period, Western law has been ejected from the religious domain. Islamic legal philosophy on the other hand, remained as an essential part of what is recognized as *Islamic Law* regardless of the fundamental differences between the various schools of thought.

Islamic law has been self-conscious to a point that rules have to be based on a fundamental theory that is valid on the philosophical level. Such a relationship necessitates a philosophical orientation to any jurist before being able to issue legal rulings. Generally, the philosophical orientation falls in one of the two schools of philosophical thought previously stated. Simply put, a *Hanafī* scholar must be able to support his argument based on logic and reason, whereas a *Hanbalī* lawyer must be able to provide an *explicit Qur'ānic* or authoritative⁶⁴ tradition to support his ruling. That is so because *Hanafīs* are expected to adhere to Rationalism, while *Hanbalīs* had more of a Traditionalist orientation.

The educational process as well as the legal training amalgamated philosophy and other sciences as a prerequisite before reaching any acceptable level of issuing formal legal opinion. Despite the fact that the study of the *Qur'ān*, *Hadīth*, and various commentaries on the *Qur'ān* and *Hadīth* were among the curriculum, these two sources nonetheless, remained more like a constitutional document. *Qur'ān* and *Hadīth* represented the outer limits and the exterior boundaries of law. Jurists *Ijtihād* was then the intellectual debate within that sphere.

The novel issues and the diverse cultures and customs of people living under the rule of the Islamic state necessitated fresh legal rules. Such a need revived the question of the qualifications of the authority that can issue such new rules as well as the binding power of such rules if they ever come to exist. The political corruption of the *Umayyad* and *Abbasid* rulers highlighted the inevitable conflict: "Can one obey rules issued by governors who are not just leaders (*Adl*)? Can one obey laws that contradict the *Qur'ān* and the *Sunnah*? Are the new rules --even if they are issued by legitimate pious scholars-- as binding and as valid as the explicit rules of the *Qur'ān* and the *Sunnah*? Is Analogy adopted by earlier Islamic scholars a valid approach of law making?

It is this kind of questions and obstacles that put the Islamic legal philosophers on the same path taken by scholars who appeared after the Renaissance. In dealing with these issues, they adopted key concepts, which we are going to cite.

Ijtihād and Mujtahids

⁶⁴ Hanbalīs accept traditions reported on the early Caliphs and *Companions* as legally binding texts as we will see later.

*Ijtihád*⁶⁵ is the most charged word in Islamic jurisprudence. Many Muslim thinkers argue that *Ijtihád* is the third legislative source in Islamic law. We must note however, that the *Shi`ite* School of thought did not accept this concept until the departure of their last *Imám*, because they believed that only chosen Imams have the authority to prescribe laws. Later, and once faced with the reality that there is no "living Imam", their scholars were divided: A group embraced *Ijtihád* as a legitimate legislative method, others still rejected it.

The rest of Muslim scholars used this concept as the backbone of Islamic legal theory. It was reported that after the establishment of the Islamic state in Madínah, large number of tribes on the peripheries accepted Islam. At this point of time, the Prophet decided to delegate a number of his *Companions* to teach *Qur`án* and to serve as judges and governors. The best definition and standard of *Judgeship* may be taken from a famous report known as the *Tradition of Mu`ádh Ibn Jabal*. Before sending him to Yemen the Prophet interviewed *Ibn Jabal* as follows:

- *How are you going to rule?*
- *I will refer to the Qur`án.*
- *What if you do not find a ruling in the Qur`án?*
- *Then I will refer to the Sunnah of the Messenger of God.*
- *What if you do not find a ruling in the Sunnah?*
- *Then, I will exert my effort to extract law myself. [ajtahidu ra`yí]*
- *You have said the truth. Thank God Who guided the messenger of the Messenger of God to the right decisions.*⁶⁶

From the root of the same word (*Ijtihád*) comes the title of Muslim jurist: *Mujtahid*.

A *Mujtahid* is the title of a scholar who is qualified to provide formal legal opinion. The Muslim community recognizes a number of prominent *Mujtahids* whom we are going to list below:

Ja`far Ibn Mohammed: One of the Imams recognized by the *Twelver Shi`ites* (hence their other name: *Ja`farís*). He relied on the reported traditions, as well as reason in order to extract new laws. Laws --in his opinion-- are stated in the *Qur`án* and the *Sunnah*. Beyond that it is up to the *Imám* to rule relying on reason and logic. His followers reject *Qiyás* as valid method of legislation.

Abu Hanífah Al-Nu`mán: His method was to refer to the *Qur`án* first, if he does not find a ruling, then he uses the Authentic *Sunnah*. If he does not find a ruling then he refers to any consensus reached by the *Companions*. Finally he uses his Reason to extract laws. He rejects the authority of the Followers (*Tabi`ín*) and argues saying: `They are but men who can think, and so am I.'⁶⁷

Málik Ibn `Anas: He is the leader of the Traditionalists (*Ahl-al-Hadíth*) as opposed to Rationalist Abu Hanífah. He also takes the Legal sources in the following order: *Qur`án*,

⁶⁵ *Ijtihád* is one of those Arabic words hard to translate. I will translate it into `Independent Thinking' for this purpose.

⁶⁶ This Hadíth has been reported in *Monad Imam Ahmad* and *Suntan Ibn Rajah*.

⁶⁷ Mohammed Salam Madkur, *al-Ijtihád fee al-Tashríf al-Islámí*, Cairo: Daar al-Nahdhah al-Arabiyyah, 1984, p. 73.

the *Sunnah* even if it is reported by one authority, and the consensus and even the practices (*Urf*) of the people of Madīnah.⁶⁸

Mohammed Ibn Idrīs al-Shāfi'ī: He is the author of *al-Risālah*. His work is the first systematic legal work. His sources are the *Qur'ān*, the Authentic *Sunnah*, the Singular *Hadīth* (Prophet's *Hadīth* that falls short of *mutawātir*), consensus⁶⁹, and finally using Analogy to extract his own rulings.

Ahmad Ibn Hanbal: He relies heavily on the legal texts: *Qur'ān*, the Authentic *Sunnah*, the consensus of the *Companions*, the *Hadīth* of the *Companions*, and if there is no explicit text from the *Companions* he cites their different opinions but he is generally reluctant to provide a definite ruling.

Zayd Ibn Ali Zayn al-`Abidīn Ibn al-Hussain: The founder of the *Zaydī* school of thought. He disagrees with the *Ja`farīs* regarding the validity of governance of the *Lesser Qualified* even if there exists the *Best Qualified* person.

While these people were the ones who have formulated law and semi-codified it for the public, the real debate however was really the one on the philosophical level. The starting point was the issue of *Ta'wīl* (interpretation) of the *Qur'ān*. A group that came to be known as the *Mu`tazilites* denied the literal interpretation of the *Qur'ānic* passages and affirmed man's free will. On the other end of the spectrum, *Dhāherīs* --whom I classify as Traditionalists-- adhered to literalism and determinism. Traditionalists argue that one can know his faith without knowing *how* it can be true. *Mu`tazilites* chose to defend the faith by the use of reason and thus to render their beliefs intellectually respectable. The defense of faith was taken up by *Abu al-Hudhayl al-`allāf* (d. 840) who introduced into Islamic theology many of the Greek metaphysical notions. Later *Mu`tazilites*, such as *al-Ghazālī*, argued fervently against the notion of causality borrowed from Aristotle. Bound as it was to political considerations, the fate of Islamic Philosophy changed with the Caliphs. *Mu`tazilites* dominated the theological world of Islam from the year 833 until the year 848. The forces of Traditionalism, led by *Ahmed Ibn Hanbal* (d. 855), managed to restore the dominance of Traditionalists with vengeance. The intellectual battle (bloody physical ones sometimes) continued even as the *Mu`tazilites* were losing ground. While the battle of the two extremes is under way, *Abu al-Hasan Ali al-Ash`arī* announced his defection from the *Mu`tazilites* camp and established a new school of thought on middle grounds. *Ash`arī* movement is in fact the precursor of what came to be identified as *Islamic Orthodoxy*. Although Islamic Law Schools of Thought as we read about them today do not feature names like *al-Ghazālī*, *Avicenna (Ibn Sīnā)*, *Averroes (Ibn Rushd)*, *al-Allāf*, *Ibn al-Arabī* etc., no one can underestimate the influence of their work on the formulation of Islamic law. Their work was very challenging intellectually therefore, it needed another breed of scholars to put its byproducts into *down-to-earth* terms that can be understood by the ordinary person.

⁶⁸ Ibid, p. 74.

⁶⁹ Consensus according to Abu Hanīfah refers to the consensus of all the scholars of the Islamic nation since the demise of the prophet. But he considers the consensus of the *Companions* to be higher than the general consensus.