

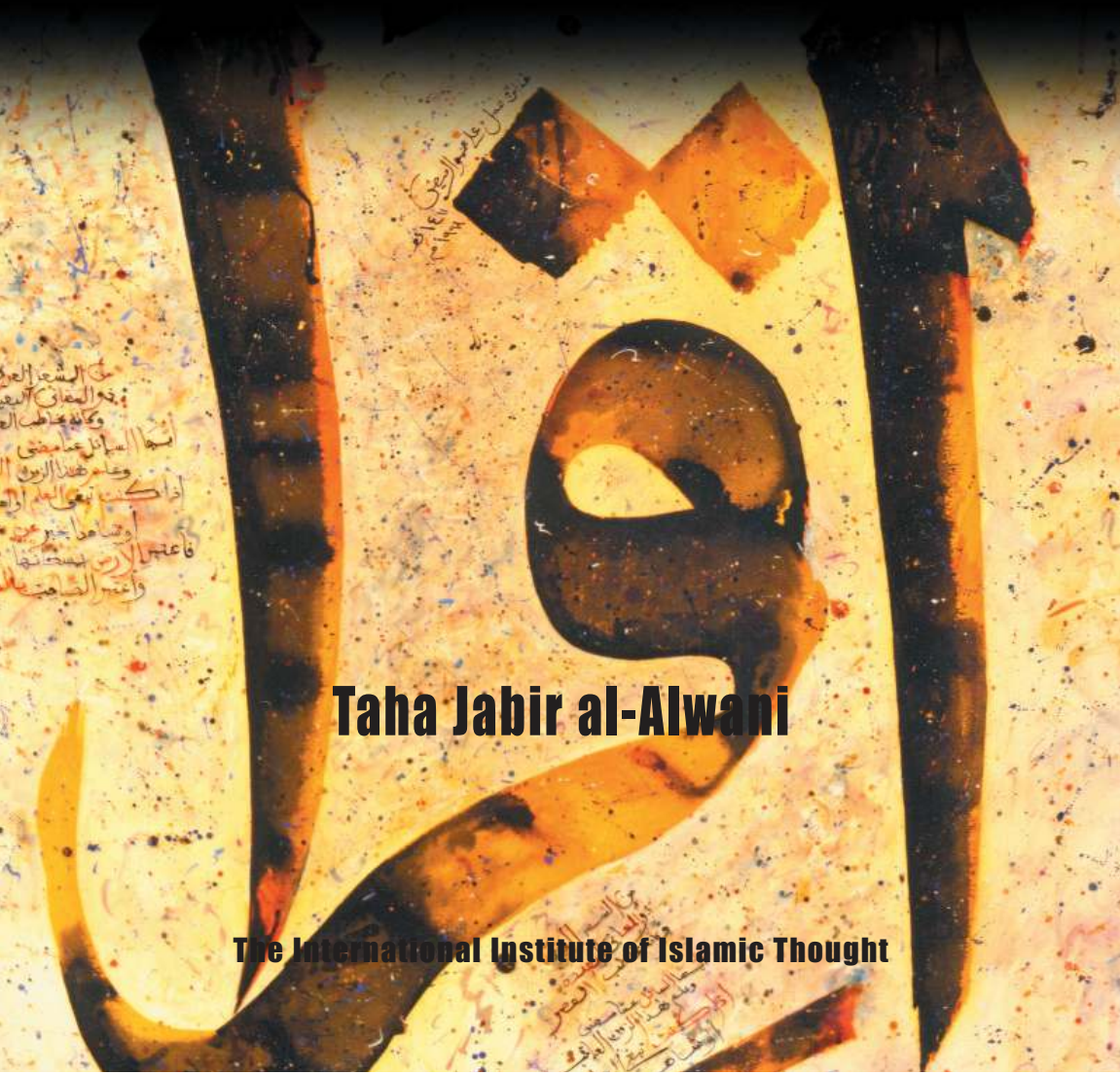
**SOURCE METHODOLOGY IN**

# **Islamic Jurisprudence**

*Usul al-Fiqh al-Islami*

**Taha Jabir al-Alwani**

**The International Institute of Islamic Thought**



SOURCE METHODOLOGY IN  
ISLAMIC JURISPRUDENCE

*Uṣūl al-Fiqh al-Islāmī*



TAHA JABIR AL-ALWANI

*A New Revised English Edition by*  
YUSUF TALAL DELORENZO & ANAS S. AL SHAIKH-ALI



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## DEDICATION

*We present this study to those among the Muslim youth who are searching for a ray of light in the deepest darkness that surrounds us, and who are seeking a solution and a way out of the crisis that currently overwhelms us; in the hope that it may be of benefit to them, inshā' Allah.*





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## Foreword

THE INTERNATIONAL INSTITUTE OF ISLAMIC THOUGHT (IIIT) has great pleasure in presenting a newly revised and edited edition of Dr. Taha Jabir al-Alwani's *Source Methodology in Islamic Jurisprudence: Uṣūl al-Fiqh al-Islāmī*. Since publication of the first edition in 1990, the work has proved to be extremely popular, receiving attention from a large circle of readership worldwide, successful enough, felt the publishers, to warrant the production of a third edition.

*Uṣūl al-fiqh* is a science in which reason and revelation come together, where considered opinion is accompanied by received law. Yet, *al-Uṣūl* does not rely purely on reason in a way that would be unacceptable to revealed law, nor is it based simply on the kind of blind acceptance that would not be supported by reason. Hence, the science of *uṣūl al-fiqh* has been called the "Philosophy of Islam".

*Uṣūl al-fiqh* is a very complex and important subject, difficult to grasp even for those with an understanding of the Arabic language the medium in which most written material has hitherto been available. This translation has tried to bridge the gap by presenting to an English-speaking audience an introduction and insight into some of the basic and core aspects of this vital subject.

It is also an attempt to simplify *uṣūl al-fiqh* and introduce it to specialists in the social sciences and humanities who do not have the opportunity to study the details of the science considered to be the most important method of research produced by Muslim thought during its most creative period.

In conformity with the IIIT In-House Style Sheet, *A Guide for Authors, Translators and Copy-Editors*, words and proper names of Arabic origin or written in a script derived from Arabic have been transliterated throughout the work except when mentioned in



quoted text. In such cases they have been cited as they appear without application of our transliteration system. However, words and common nouns of Arabic origin that have entered into general usage are not italicized, nor written with initial capital.

We would like to express our thanks to Dr. Taha J. al-Alwani, who, throughout the various stages of the production of this edition, cooperated with the editorial group at the IIIT London Office.

We would also like to thank the editorial and production team at the London Office and those who were involved in the completion of this book: Shiraz Khan, Dr. Maryam Mahmood, and Melissa Dyson, all of whom worked tirelessly in preparing this new edition for publication. May God reward them and the author for all their efforts.

Shāban 1424  
October 2003

DR. ANAS AL SHAIKH-ALI  
ACADEMIC ADVISOR  
IIIT LONDON OFFICE

## *A Word from the Editors*

THE BRIEF EDITORS' INTRODUCTION TO THE FIRST EDITION BEGAN AS FOLLOWS:

Legal studies in any language pose problems to authors and readers alike. In translation, those same problems are compounded, even many times over at some places in the text, so that quite often the result is, to say the least, disappointing. Unfortunately, with regard to English translations of classical works of the Islamic intellectual heritage, this sort of disappointment has been the rule rather than the exception.

Certainly, to the student of *Uṣūl al-Fiqh* this disappointment has been all the more acute. While translations of classical works in the field are nonexistent, with the shining exception of Professor Khadduri's excellent rendition of Imam al-Shāfi'ī's *Al-Risālah*, there is as yet no general and systematic study of the discipline in English. In Western languages, even survey literature on the subject is scarce.

In the years that have passed since the publication of the first edition of this work, however, a number of significant studies on the subject have appeared. The Institute had itself published two works in Arabic on the *maqāṣid*. While mention of several of these works is made at various places in the notes of this edition, it will not be out of place to acknowledge here the valuable contributions to the field of English made by the following scholars: Bernard Weiss, Wael Hallaq, Ahmad Zaki, Frank Vogel, Nuh HaMim Keller, Marcia Hermansen, M. Hashim Kamali, Ahmad Hasan, Khalid Masud and Imran Nyazee. The Institute can only hope that the interest shown by these scholars and others will contribute to a serious effort among Muslims, and particularly among Muslim social

scientists, to approach the classical discipline of *uṣūl* as the forerunner, if not the foundation, of a new methodology for dealing with the sciences of revelation in the overall quest for answers to the problems of Muslim society today.

The present volume should be understood as an overview of the field, and as an introduction to the classical discipline. It remains the conviction of the Institute that the source methodology developed by the scholars of *uṣūl* for dealing with and interpreting the texts of the Qur'an and Sunnah is the sort of tool that needs to be placed in the hands of Muslim social scientists. By acquainting them with the field and with those who have enriched it in the past, the Institute hopes to increase the appreciation of modern scholars for this discipline and the academic excellence which it represents.

Certainly, for our part, we can only hope that we have succeeded in making the text clear. Moreover, we have taken pains to include a full subject index that should prove useful to specialist and generalist alike. Also, while the Arabic edition of this book was published with topic headings, it was not divided into chapters. In the interest of clarity, we have divided the work into chapters by converting, where necessary, topic headings into chapter headings; and by adding brief explanatory notes.

May our modest effort, joined in a worthier labor of the author, be accepted by the Almighty, and may it be of some service to those who seek the truth and work for the betterment of our universal nation.

YUSUF TALAL DELORENZO

ANAS AL-SHAIKH-ALI

## *Author's Introduction*

The research for this work originally formed part of the studies I undertook for Islamic jurisprudence for the doctoral program at Al-Azhar University in 1973. On the occasion of the Second International Conference on Islamic Thought, held in Islamabad, Pakistan in 1982 on the subject of the “Islamization of Knowledge,” material from this thesis was presented in a revised form.

When the League of Muslim Youth expressed their desire to hold a course on *Uṣūl al-Fiqh* (Source Methodology in Islamic Jurisprudence), the material for this study formed one of the six subjects covered in the course. Then, as many of those who attended the course expressed a wish to obtain the lectures in printed form, and as the study was already being printed as one of the papers for the Islamabad Conference on the Islamization of Knowledge, which the Institute will soon publish\*, *inshā'Allah*, we decided to take this opportunity to present this part of the Conference material to both those who attended the course and to others who may wish to gain knowledge of this essential science of Shari‘ah.

The science of *uṣūl al-fiqh* is rightly considered to be the most important method of research ever devised by Islamic thought. Indeed, as the solid foundation upon which all the Islamic disciplines are based, *uṣūl al-fiqh* not only benefited Islamic civilization but contributed to the intellectual enrichment of world civilization as a whole. It will not be out of place to note here that the methods of analogical reasoning developed within the framework of Islamic Jurisprudence constituted the methodological starting-point for the establishment and construction of empiricism, which in turn is considered to be the basis for contemporary civilization. We

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\* The edited proceedings of the Islamabad Conference were published by the Institute as volume number 5 in the Islamization of Knowledge Series, and is entitled *Islam: Source and Purpose of Knowledge* (Herndon, Virginia: IIIT, 1988).

present this brief work to all those who are interested in gaining some knowledge of this science; and we ask Allah to help us benefit from what we learn, and to learn that which will benefit us, and to protect us from knowledge which is not beneficial, and from deeds that are not acceptable to Him. All praise and thanksgiving belong to Him, the Lord and Sustainer of all the worlds!

TAHA JABIR AL-ALWANI

## CHAPTER ONE

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# *Uṣūl al-Fiqh: Methodology for Research and Knowledge in Islamic Jurisprudence*

### DEFINITION

The science of source methodology in Islamic Jurisprudence (*uṣūl al-fiqh*) has been defined as the aggregate, considered per se, of legal proofs and evidence that, when studied properly, will lead either to a certain knowledge of a Shariʿah<sup>1</sup> ruling or to at least a reasonable assumption concerning the same; the manner by which such proofs are adduced, and the status of the adducer.<sup>2</sup>

### SUBJECT MATTER

As its subject matter, this science deals with the proofs in the Shariʿah source texts, viewing them from the perspective of how, by means of ijtihad,<sup>3</sup> legal judgements are derived from their particulars; though after, in cases where texts may appear mutually contradictory, preference has been established.<sup>4</sup>

### BENEFIT

The science of *uṣūl al-fiqh* engenders the ability to have knowledge of Shariʿah rulings through study, on the part of those qualified to perform ijtihad and who meet all its requirements, of the legal proofs revealed in the sources by the Lawgiver.

The benefit to be had from this science to those not qualified to perform *ijtihād* is that, through their study of the classical schools of legal thought (*madhāhib*; sing. *madhhab*) of the *mujtahidūn* (those who practice *ijtihād*) and the reasoning behind their rulings, the student of source methodology in Islamic Jurisprudence is enabled to understand the various schools of thought, to analyze them, to choose from among their interpretations and assign preference, and to adduce legal arguments on the basis of the principles formulated by the classical *mujtahidūn*.

#### THE SCIENCES FROM WHICH *UṢŪL AL-FIQH* DERIVED ITS ACADEMIC BASIS

The science of *uṣūl al-fiqh* is in fact an independent and autonomous field. It is, however, based upon certain fundamental predication (*muqaddamāt*), knowledge of which the Islamic legal scholar cannot do without. These predication have been derived from several other disciplines:

- (a) Some are derived from the science of Aristotelian logic which the philosopher-theologian writers (*muttakallimūn*) had become accustomed to discussing in the introductions to their works. These academic discussions dealt, for example, with the ways in which words convey meanings, the division of subjects into present and predicable, the need for, and varieties of, discourse depending on conceptual principles taken from interpretations and definitions, the validity of conclusions based on inductive reasoning, and discussions about the evidence and how it may be used to prove the claims of the one who is adducing it, or to refute contradictions, and so on.
- (b) Some are derived from *ʿilm al-kalām* (scholastic theology), and include discussions of such questions as the nature of jurisdiction, in the sense of whether it is the Shariʿah itself or reason which decides what is right or wrong; or whether one can have knowledge of right and wrong before the Revelation; or whether rendering thanks to the Creator is a duty derived from the

Shari‘ah or from human reasoning.

- (c) Some are general linguistic rules which the scholars of *uṣūl* developed through linguistic research and presented in a crystallized form, such as research dealing with languages and their origins, the classification of words into metaphorical and literal, discussions of etymology, synonymy, emphasis, generalization, specification, the meanings of grammatical particles and so on.
- (d) Some are derived from the classical sciences of the Qur’an and the Sunnah, such as discussions concerning the transmission of Hadith<sup>5</sup> by a single narrator (*āḥād*), or by an impeccable plurality of narrators (*tawātur*), the non-standard recitations of the Qur’an and the rules about them, the criteria for the acceptance (*ta‘dīl*) or rejection (*jarḥ*) of narrators of Hadith, abrogation of legislation (*nāsikh wa mansūkh*)<sup>6</sup>, the condition of the text of a hadith and its chain of narrators, and so on.
- (e) Finally, the examples cited by the scholars of *uṣūl* in illustration of their arguments are derived from the specifics of fiqh<sup>7</sup>, and from detailed evidence for the same as taken from the Qur’an and the Sunnah.

The issues with which the scholars of *uṣūl* are primarily concerned include the following:

Logic and its predications

Linguistics

Commands and prohibitions

Comprehensive (*‘āmm*) and particular (*khāṣṣ*) terms

Inconclusive (*mujmal*) and determined (*mubayyan*) concepts

Abrogation (*naskh*)

Deeds (in particular, those of the Prophet (ṢAAS)<sup>8</sup>, and their significance)

Consensus (*ijma‘*)

Narrations relating to the Sunnah

Analogical reasoning (*qiyās*)

Indicating preference in cases of apparent contradiction



Exercising legal acumen and scholarship (ijtihād)  
 Following a specific school of legal thought (*taqlīd*)  
 Disputed sources (those other than the four “agreed” sources)

#### ORIGINS AND DEVELOPMENT OF UṢŪL AL-FIQH

It is difficult to attempt a study of *uṣūl al-fiqh* and its development without considering the history of fiqh, the practical precepts of the Shari‘ah that have been gleaned from detailed source evidence.

The lexical meaning of *aṣl* (pl. *uṣūl*) is foundation, or basis – that upon which something else is built. In the legal system of Islam, fiqh is built upon and stems from the bases *uṣūl* which constitute its source evidence. Hence, in order to understand the origins of *uṣūl al-fiqh*, we need to have a general idea of the history of Islamic legislation (*tashrī‘*).

Establishing Shari‘ah legislation, prescribing by law, laying down rules and regulations, and defining systems is a function which is specific to Allah (SWT)<sup>9</sup> alone. Anyone who presumes to ascribe these functions to any other than Allah commits the sin of *shirk*,<sup>10</sup> as, in doing so, he/she has effectively contradicted the belief in the “Unization” of Allah (*tawḥīd*)<sup>11</sup>.

Allah has provided articulate proofs and clear source evidence in order that the believers should have no trouble in finding their way to the particulars of His legislation. With reference to some of this source evidence, the Ummah has agreed on its validity and its relevance to the *aḥkām* (legal rulings), and has accepted it as such. However, there are differences with regard to other kinds of source evidence.

The source evidence upon which the whole Ummah fully agrees, and on the validity of which there is a general consensus, comprises the two sources that formed the basis of legislation at the time of the Prophet. These two sources of legislation are:

1. **The Qur’an:** This may be defined as the words revealed to the Prophet, the recitation of which itself constitutes an act of worship, the shortest surah<sup>12</sup> of which is a challenge to mankind to

produce anything the like thereof, every letter of which has been transmitted to us via an indisputably authentic chain of authority (*tawātur*), which is written between the two covers of the Qur'an beginning with *Sūrat al-Fātiḥah* (the Opening Chapter) and ending with *Sūrat al-Nās*. (no. 114).

2. **The Sunnah:** This includes everything, other than the Qur'an, which has been transmitted from the Prophet: what he said, did and agreed to. Thus, every utterance of the Prophet apart from the Qur'an, and every deed, from the beginning of his mission to the last moment of his life, constitute his Sunnah, in the general sense of the word, whether these establish a ruling which is generally applicable to all members of the Ummah, or a ruling which applies only to the Prophet himself or some of his *Ṣaḥābah* (Companions of the Prophet). Regardless to whether what the Prophet did was instinctive or otherwise, his every word, deed, and approval and disapproval of the deeds or words of others may be taken as the basis for evidence in a legal ruling. This is so regardless of whether his utterances or actions related to matters of faith or practice, or whether they were concerned with commanding or recommending, prohibiting, disapproving, or allowing; and regardless of whether his word or action was based on a ruling previously revealed in the Qur'an, or whether it served independently to establish legislation.

During the lifetime of the Prophet, all the legal rulings (*aḥkām*) of the Shari'ah, inclusive of all of its classifications, such as principal and derived rulings, teachings on the fundamentals of the faith, and regulations regarding personal practice and legalities, were derived from these two sources, the Qur'an and the Sunnah.

**Ijtihad** was practiced by the Prophet and by those of his Companions with legal proclivities (*ahl al-Nazar*). The Prophet's ijtihad was sometimes confirmed by the Qur'an and sometimes not; in which case it was explained that the better solution was other than that which he had adopted. The ijtihad made by the Companions was always in response to situations which actually occurred to them. Later, when they met the Prophet, they would explain what

happened and tell him what they had decided. Sometimes he approved of their *ijtihād*, and such decisions of theirs (having gained the approval of the Prophet) became a part of the *Sunnah*. If he disapproved of their *ijtihād*, his explanation of the correct procedure would become the *Sunnah*.

Thus, we can say that at that stage legislation depended on two forms of Divine Revelation (*waḥī*):

1. Recited Revelation (*waḥī matlū*); or the Qur'an with its absolute inimitability (*i'jāz*).
2. Non-recited revelation (*waḥī ghayr matlū*); or the *Sunnah* of the Prophet Muhammad.

Indeed, the *ijtihād* made by the Prophet set a precedent for his *Ṣaḥābah* and later Muslims, that clearly established the legitimacy of *ijtihād*, so that when they could not find an express legal ruling in the Qur'an or the *Sunnah*, they were to make use of *ijtihād* in order to arrive at judgements on their own.

Moreover, probably to reinforce and establish this concept, the Prophet used to order certain of his Companions to make *ijtihād* concerning certain matters in his presence. Then he would tell them who was correct and who was mistaken.

#### METHODS FOR DERIVING RULINGS FROM THE SOURCES

##### *The Qur'an*

The Qur'an was learned and understood by the *Ṣaḥābah* without their ever having recourse to formal rules of grammar. Likewise, endowed as they were with clear vision, sharp wits, and common sense, they readily understood the aims of the Lawgiver and the wisdom behind His legislation.

Indeed, the *Ṣaḥābah* rarely used to question the Prophet about any matter unless he himself mentioned it first.

It is reported that Ibn 'Abbās said:

I have never seen a people better than the *Ṣaḥābah* of the Prophet,

may Allah bless him and grant him peace. Throughout his mission, until he passed away, they only asked about thirteen matters, all of which are mentioned in the Qur'an. For example, [the meaning of]: "They ask you about fighting in the sacred month..." (2:217); and "They ask you about the menstruating woman..." (2:222). [The *Ṣaḥābah*] only asked [the Prophet] about matters which were of actual concern to them.<sup>13</sup>

Ibn 'Umar said in this respect:

Do not ask about something that has never happened, for I heard [my father] 'Umar ibn al-Khaṭṭāb curse the one who asked about something which had not occurred.<sup>14</sup>

Al-Qāsim said to the third generation of Muslims:

You ask about things we never asked about, and you quarrel about things we never quarrelled about. You even ask about things with which I am not familiar. If we did know, however, it would not be lawful for us to remain silent [if questioned] concerning them.<sup>15</sup>

Ibn Ishāq said:

I met more of the Prophet's *Ṣaḥābah* than anyone else did; and I have never seen a people who lived more simply, or who were less demanding on themselves.<sup>16</sup>

'Ubādah ibn Nusay al-Kindī said:

I have known a people whose austerity was not as rigid as yours, and whose questions were quite other than the ones you ask.<sup>17</sup>

Abū 'Ubaydah said in his book *Majāz al-Qur'an*:

It has never been reported that any of the *Ṣaḥābah* went to the Prophet for knowledge of anything which could be found in the Qur'an.<sup>18</sup>

### *The Sunnah*

The part of the Sunnah which consisted of the Prophet's words was in the Companion's own language, so they knew its meaning and understood its phrases and context.

As far as the Prophet's deeds were concerned, they used to witness them, then tell others exactly what they had seen. For example, hundreds of people saw the Prophet making *wuḍū'*,<sup>19</sup> and then adopted his practice without asking him about details, such as which of the various acts in *wuḍū'* were obligatory and which were recommended, which were merely allowed and which were not. Likewise, they witnessed him performing hajj<sup>20</sup> and salah,<sup>21</sup> and other acts of worship.

People were heard asking the Prophet to give *fatāwā*<sup>22</sup> concerning various matters, and he did so. Cases were referred to him, and he would pronounce his judgement. Problems would arise amongst the *Ṣaḥābah*, and he would give a definite answer, whether the problems concerned mutual relations, personal conduct, or various political matters. They witnessed all these situations and they understood the context in which they took place, so that the wisdom and purposes of the Prophet's judgements were not hidden from them.

People also saw how the Prophet used to notice the conduct of his *Ṣaḥābah* and others. Thus, if he praised anybody, they knew that the person's act had been a good one; and if he criticized anybody, they knew that there had been something wrong with what the person had done. Moreover, all the reports concerning the Prophet's *fatāwā*, rulings, decisions and approval or disapproval of various matters indicate that they took place in the presence of many people. So, just as the colleagues of a doctor know, owing to their long association and experience,<sup>23</sup> the reasons for his prescribing certain medicines, so also the *Ṣaḥābah* of the Prophet knew exactly the reasoning behind his decisions.

### *Ijtihad*

The indications that *ijtihād* is valid and relevant in the contemporary context are many. For example, Mu'ādh ibn Jabal states that when the Prophet sent him to Yemen, he asked:

“What will you do if a matter is referred to you for judgement?”

Mu'ādh said: “I will judge according to the Book of Allah.” The

Prophet asked: “What if you find no solution in the Book of Allah?” Mu‘ādh said: “Then I will judge by the Sunnah of the Prophet.” The Prophet asked: “And what if you do not find it in the Sunnah of the Prophet?” Mu‘ādh said: “Then I will make *ijtihād* to formulate my own judgement.” The Prophet patted Mu‘ādh’s chest and said: “Praise be to Allah who has guided the messenger of His Prophet to that which pleases Him and His Messenger.”<sup>24</sup>

This *ijtihād* and forming of one’s own judgement, as mentioned by Mu‘ādh, is further explained in the advice ‘Umar gave to Abū Mūsā when he appointed him a judge: “Judgement is to be passed on the basis of express Qur’anic imperatives or established Sunnah practices...” Then he added:

Make sure that you understand clearly every case that is brought to you for which there is no applicable text of the Qur’an and the Sunnah. Yours, then, is a role of comparison and analogy, so as to distinguish similarities in order to reach a judgement that seems nearest to justice and best in the sight of God.<sup>25</sup>

Consequently, Imam al-Shāfi‘ī explained “opinion” as meaning *ijtihād*, and *ijtihād* as meaning *qiyās*.<sup>26</sup> He said: “They are two names for the same thing.”<sup>27</sup>

Abū Bakr al-Ṣiddīq (RAA)<sup>28</sup> said: “As far as the Prophet is concerned, his opinion was always correct because Allah guided him. In our case, however, we opine and we conjecture.”<sup>29</sup>

Thus, we may state that the concern of *ijtihād* or “opinion,” at that stage, went no further than one of the following:

- (a) Applying one or another of the possible meanings in cases where a sentence may lend itself to two or more interpretations, e.g. when the Prophet ordered the Muslims to pray among Banū Qurayzah.<sup>30</sup>
- (b) Comparative *qiyās*; which deals with a matter by comparing it with another, similar matter which is dealt with in the Qur’an or the Sunnah. For example, the *qiyās* of ‘Ammār who compared the case of *tayammum*<sup>31</sup> when in a state of *janābah* to *ghusl*,

and therefore rubbed his whole body with dust.<sup>32</sup>

- (c) Ijtihad by taking into account something which is potentially beneficial; or prohibiting something which could lead to wrong doing; or deriving a particular ruling from general statements; or adopting a specific interpretation.

The extent of the Prophet's concern with encouraging the *Ṣaḥābah* to make ijtiḥad and training them in its use can be seen in his saying: "When a judge makes ijtiḥad and reaches a correct conclusion, he receives a double reward; and if his conclusion is incorrect, he still receives a single reward."<sup>33</sup>

The ijtiḥad of many of the *Ṣaḥābah* was so accurate that in many cases the revelations of the Qur'an confirmed it, and the Prophet supported it. Obviously, their close association with the Prophet had afforded them a keen sense of the aims of the Lawgiver, of the basic purposes behind the Qur'anic legislation, and of the meanings of the texts; opportunities which those who came after them did not directly enjoy.

## *The Ṣaḥābah Who Gave Fatāwā During the Prophet's Lifetime*

The Ṣaḥābah who gave *fatāwā* in the Prophet's lifetime were: Abū Bakr, ʿUmar, ʿUthmān, ʿAlī, ʿAbd al-Raḥmān ibn ʿAwf, ʿAbd Allah ibn Masʿūd, Ubay ibn Kaʿb, Muʿādh ibn Jabal, ʿAmmār ibn Yāsir, Ḥudhayfah ibn al-Yamān, Zayd ibn Thābit, Abū al-Dardā, Abū Mūsā al-Ashʿarī, and Salmān al-Fārisī.

Some Ṣaḥābah gave more *fatāwā* than others. Those who gave the most *fatāwā* were: ʿĀ'isha, ʿUmar ibn al-Khaṭṭāb and his son ʿAbd Allah, ʿAlī ibn Abī Ṭālib, ʿAbd Allah ibn ʿAbbās and Zayd ibn Thābit. The *fatāwā* given by any of these six would fill a great volume. For example, Abū Bakr Muḥammad ibn Mūsā ibn Yaʿqūb ibn al-Khalīfah al-Ma'mun collected the *fatāwā* of Ibn ʿAbbās in twenty volumes.

Those from who a lesser number of *fatāwā* were narrated are: Umm Salmah, Anas ibn Mālik, Abū Saʿīd al-Khudrī, Abū Hurayrah, ʿUthmān ibn ʿAffān, ʿAbd Allah ibn ʿAmr ibn al-ʿĀṣ, ʿAbd Allah ibn al-Zubayr, Abū Mūsā al-Ashʿarī, Ṣaʿd ibn Abī Waqqāṣ, Salmān al-Fārisī, Jābir ibn ʿAbd Allah, Muʿādh ibn Jabal and Abū Bakr al-Ṣiddīq. The *fatāwā* of each of these thirteen would fill only a small part of a book.

To this list can be added Ṭalḥah, Zubayr, ʿAbd al-Raḥmān ibn ʿAwf, Imrān ibn Ḥusayn, Abū Bakrah, ʿUbādah ibn al-Ṣāmit and Muʿāwiyah ibn Abī Sufyān. The rest gave only a few *fatāwā*, and only one or two, in some instances more, have been transmitted from any of them. Their *fatāwā* could be collected into a small



volume, but only after much research and sifting through the texts.<sup>34</sup>

In preparing their *fatāwā* the *Ṣaḥābah* used to compare the particulars of events that had happened to them with similar matters for which judgements had been given in the texts of the Qur'an and the Sunnah. In thus referring the matter to the sources, they employed the method of looking for the meaning and the legal significance through examination of the text's literal wording, its implications, and any other relevant details.

Having arrived at a decision, they would then explain to others how they had adduced the arguments that led them to their judgements, whether these had been derived from the letter of the text or from its spirit, and the people would follow them. Indeed, these early Muslim jurists never stopped researching a question until they reached a decision they felt certain of, and until they were completely satisfied that they had done their best and could do no more.

#### THE ERA OF THE GREAT ṢAḤĀBAH

After the time of the Prophet came the era of the great *Ṣaḥābah* and the Rightly Guided *Khulafā'*.<sup>35</sup> This period lasted from 11 to 40 AH. The reciters (*qurrā'*) was the term used at the time to denote those *Ṣaḥābah* who had a good understanding of fiqh and gave *fatāwā*.

#### THE TIME OF ABŪ BAKR AL-ṢIDDĪQ

Maymūn ibn Mahrān summed up Abū Bakr's method of arriving at legal judgements as follows:

Whenever a dispute was referred to him, Abū Bakr used to look in to the Qur'an; if he found something according to which he could pass a judgement, he did so. If he could not find a solution in the Qur'an, but remembered some relevant aspect of the Prophet's Sunnah, he would judge according to that. If he could find nothing in the Sunnah, he would go and say to the Muslims: "Such and such

a dispute has been referred to me. Do any of you know anything in the Sunnah according to which judgement may be passed?” If someone was able to answer his question and provide relevant information, Abū Bakr would say: “Praise be to Allah who has enabled some of us to remember what they have learnt from our Prophet.” If he could not find any solution in the Sunnah, then he would gather the leaders and elite of the people and consult with them. If they agreed on a matter then he passed a judgement on that basis.<sup>36</sup>

If all the methods mentioned above failed to produce any result, then he would make ijtiḥad and form his own opinion, either by interpreting a text in such a way that its legal implications became apparent, or by exercising his own legal acumen.

An example of ijtiḥad of the first kind was when he was asked about the *kalālah*. In response, Abū Bakr said: “My opinion, if it is correct, then it is from Allah, and if it is wrong, then it is from myself and from *Shayṭān* (Satan). The *kalālah* is one who has neither ascendants nor descendants.”<sup>37</sup>

Another example of the same was when ‘Umar mentioned to him the following ḥadith of the Prophet: “I have been commanded to wage war against people until they say that there is no god but Allah...”<sup>38</sup> and Abū Bakr said, “zakah<sup>39</sup> is a part of it.”<sup>40</sup>

When Abū Bakr wanted to wage war against those who were withholding zakah, ‘Umar cited this ḥadith to show that fighting them was not permitted, because the Prophet had said: “...until they say that there is no god but Allah. Then, if they say this, their blood and their wealth will be spared by me, except where due by right [i.e. unless they commit crimes that are punishable in accordance with the Shari‘ah].”

According to ‘Umar, these acts were: adultery, murder, and apostasy; since withholding zakah was not expressly mentioned by the Prophet. But Abū Bakr said to him: “Zakah is a part of it. By Allah, I would fight anyone who performed salah but did not pay zakah! If anyone were to withhold from me even the smallest amount they used to pay to the Prophet, I would go to war with them over it.”

An example of the second type of *ijtihād* was when he decided that the mother's mother may inherit, but the father's mother may not. Some of the *Anṣār* said to him: "You allow a woman to inherit from the deceased, while he would not inherit from her if she were the deceased. And you have left with nothing the woman from whom he would inherit were the situation reversed."

Abū Bakr then decided that both maternal and paternal grandmothers would share one sixth of the inheritance.

Another example is his judgement that everyone should receive an equal share from the public treasury. ʿUmar asked him: "How can you consider one who entered Islam with misgivings to be equal to the one who left his home and wealth behind, and migrated to be with the Prophet?" Abū Bakr, however, insisted that: "They all entered Islam for the sake of Allah, and their reward is with Him; this world is nothing."

When, however, ʿUmar became *khalīfah*,<sup>41</sup> he differentiated between people and he paid the "stipend" according to how each person had entered Islam, whether they had migrated, and how much they had suffered for the sake of Islam.

Another example of Abū Bakr's exercise of *ijtihād* was when he compared the appointment by the *khalīfah* of his own successor, to the appointment by means of *bayʿah*.<sup>42</sup> Thus he appointed ʿUmar to be the *khalīfah* after him, and the *Ṣaḥābah* agreed with him.

Khālīd ibn al-Walīd wrote to Abū Bakr, telling him that in some areas of the Arabian Peninsula he had found men engaging in homosexual practices. Abū Bakr decided to consult the *Ṣaḥābah* for their opinions as to what he should do about it.

One of the *Ṣaḥābah* was ʿAlī, and his was the strictest judgement. He said: "This sin was known only in one nation, and you know what Allah did to them. I suggest that these people be burnt to death." Abū Bakr wrote back to Khālīd to tell him that they should be burnt to death, and this was done.<sup>43</sup>

#### SPECIAL FEATURES OF FIQH IN THE PERIOD

1. The use of *qiyās* was widespread in cases where there was no

relevant text in the Qur'an or the Sunnah; and none of the *Ṣaḥābah* objected to this.

2. *Ijma'* was also widely used as a basis for judgement. This was facilitated by the fact that the *Ṣaḥābah* were few, and it was easy for them to agree amongst themselves. They used *ijma'* in many cases: For example, their decisions that the *khalīfah* or imam should be appointed, that apostates should be fought and killed, that an apostate could not be taken as a prisoner of war, and that the Qur'an should be collected and written down in one volume.

#### THE TIME OF 'UMAR IBN AL-KHAṬṬĀB

'Umar's recommendations to the judge, Shurayḥ, as mentioned above, explain his way of deriving judgements from the available evidence. The most noticeable feature of 'Umar's methodology, however, is the fact that he often consulted the *Ṣaḥābah* and discussed matters with them so as to reach the best understanding and find the most appropriate way to carry out judgements. In his approach to questions of legalities, 'Umar was like a shrewd and cautious chemist whose intent is to produce medicine that will cure the disease without causing adverse side effects.

As a result, 'Umar left us a great wealth of jurisprudence. Ibrāhīm al-Nakha'ī (d.97 AH) said that when 'Umar was martyred, "nine-tenths of all [available] knowledge disappeared with him."<sup>44</sup> Ibn Mas'ūd said of him: "Whatever path 'Umar chose, we found it easy to follow."<sup>45</sup>

'Umar's understanding was comprehensive and he possessed good common sense. Thus, he was quick to relate the particular to the general, and could pursue the ramifications of an issue back to basic principles in order to see its wider implications. This is how he was during the times of the Prophet and Abū Bakr, and he did not change himself when he became the *khalīfah*.

'Umar learnt a great deal from the Prophet. He often noticed that the Prophet would refrain from issuing an order to the people

to do something good, although he wanted to do so, because he did not want to subject them to hardship. The Prophet often used to say: "If it were not that I am afraid to impose hardship on my Ummah, I would have commanded them to do...such and such."<sup>46</sup>

Sometimes the Prophet would forbid them from doing certain things, and then, when he saw that the reason for forbidding was no longer valid, he would lift the ban. On other occasions, he would be about to forbid something, and the people would tell him of the hardship and distress that such a prohibition would cause them, so he would abandon his resolve in order to spare them the hardship.

ʿUmar saw how the Prophet, whenever he was faced with a choice between two things, would always choose the easier of the two; and this had a great effect on him. Indeed, ʿUmar well understood that the Shariʿah has purposes and aims which must be discerned and considered; and that there are grounds for, and reasons behind, these judgements, some of which are made clear in the primary texts while others are only alluded to. He felt it the duty of scholars to discover those reasons which are not specified in the texts, so that legal judgements may be applied to new issues and developments, and everything brought under the judgement of Allah so that people will not become accustomed to seeking remedies for, and legal rulings on, their problems outside the Shariʿah.

Hence, when we look at ʿUmar's practice of *ijtihad*, we find clear methods of arriving at judgements. Anyone who studies his *fatāwā* will readily see that the reasoning behind them is based on the public interest, on taking precautions to prevent wrongdoing or to combat corruption, and on adopting the easiest and most expedient course under the law.

ʿUmar, for example, declared some judgements invalid because the reasons for enforcing them no longer applied, or because some of the conditions for following them no longer prevailed. Among those judgements were his request to the Prophet that the prisoners of the battle of Badr be killed; his suggestions about *hijāb*<sup>47</sup>; that the Prophet should not tell the people that whoever testified that "there is no god but Allah" would enter Paradise, in case they relied only on that and made no further effort; his suggestion to

Abū Bakr that he should no longer give an extra share from the public treasury to those who had recently embraced Islam; and his decision not to distribute conquered lands among the army.

#### THE TIME OF ʿUTHMĀN IBN ʿAFFĀN

When allegiance was given to ʿUthmān, it was done on the condition that he worked in accordance with the Qurʾan and the Sunnah, and the precedent set by the first two *khulafāʾ*. This he promised to do. ʿAlī, however, indicated that when he became *khalīfah* he would be prepared to work according to the Qurʾan and the Sunnah, and then to do the best that his own knowledge and energy would allow. Because ʿUthmān showed that he was willing to undertake to work in accordance with the precedents set by the first two *khulafāʾ*, he was supported by ʿAbd al-Raḥmān, who cast the deciding vote. Thus, a third source of legislation, the precedent set by the first two *khulafāʾ* was added at the time of the third *khalīfah*, and was approved by him.

Since ʿAlī had reservations about this, when he himself became *khalīfah* he acted according to his own ijtihad in matters for which the earlier *khulafāʾ* had already produced ijtihad. For example, ʿAlī reconsidered the issue of whether slave women who had borne children to their masters could be sold.

ʿUthmān ibn ʿAffān was one of the Ṣaḥābah who did not produce a great number of *fatāwā*, probably because most of the matters he came across had already been dealt with by Abū Bakr and ʿUmar, and he preferred to adopt their opinions. But in some cases, he had to make ijtihad, just as his predecessors had done. Once, before ʿUthmān had become *khalīfah*, ʿUmar asked him about a legal matter. In reply, ʿUthmān said: “If you follow your own opinion that will be right. But, if you follow the opinion of the *khalīfah* before you [Abū Bakr], that is better, because he was so good at passing judgement!” He also performed his own ijtihad when, during the hajj, he did not shorten salah in Minā; though certainly it is permitted to do so. There are two possible explanations for this: first, he had been married at Makkah, and thought

that the people of Makkah were not permitted to shorten their salah in Minā; second, he was afraid that some bedouins might be confused when they watched him do so, and so he did not.

‘Uthmān also formulated the ijtiḥād that everyone should read the Qur’an according to Zayd’s way of recitation, because he thought that this was the most sound, and also the most likely to forestall disagreements.

#### THE TIME OF ‘ALĪ IBN ABĪ ṬĀLIB

‘Alī was like ‘Umar ibn al-Khaṭṭāb, in the way that he understood and applied the texts of the Qur’an, and in his deep concern with linking particular issues to general principles. Prior to his assuming the office of *khalīfah*, he was considered the best judge in Madinah. When the Prophet appointed ‘Alī judge in Yemen, he prayed for him, saying: “O Lord! Guide his heart and make him speak the truth.” Indeed, ‘Alī proved to be an excellent judge, and resolved many difficult cases.

‘Alī described his own knowledge by saying: “By Allah, no verse of the Qur’an was ever revealed except that I knew about what it was revealed, and where and why it was revealed. My Lord had bestowed upon me a heart that is understanding and a tongue that is articulate.” Whenever a matter was referred to ‘Alī for judgment, he would accept it without hesitation. And if he were asked to give a fatwa, he would do so by citing from the Qur’an and then the Sunnah. Indeed, the extent of his knowledge of both was very well known. ‘Ā’ishah said: “In regard to the Sunnah of the Prophet, he was the most knowledgeable of all people.”

‘Alī used *qiyās*, *istiṣḥāb*,<sup>48</sup> *istiḥsān*,<sup>49</sup> and *istiṣlāḥ*,<sup>50</sup> always basing his opinion on the broader aims of the Shari‘ah. When consulted about a possible increase in the *ḥadd* punishment for one found guilty of drinking alcohol, he compared drunkenness to the false accusation of adultery, on the basis that drunkenness could lead a person to make such an accusation.

During the tenure of his *khilāfah*, ‘Umar consulted ‘Alī about the punishment of a group of people who jointly conspired to commit

premeditated murder. ‘Alī said: “O Commander of the Faithful! If a group of people joined together in stealing, would you not cut off one hand of each of them?” When ‘Umar replied in the affirmative, ‘Alī said, “Then the same applies in this case.” Consequently, ‘Umar uttered his famous saying: “If all the citizens of San‘ā were to join together in murdering one man, I would execute the lot of them.” The analogy between murder and robbery was made because in each case there is a criminal motive shared between all those who commit these acts, and it is this which requires rebuke and deterrent punishment.

Moreover, ‘Alī, preferred to burn alive those overzealous apostates and heretics who defied him, although he was well aware that the Sunnah ruling was merely to put such disbelievers and apostates to death. In this ruling, ‘Alī showed himself keen to establish the strictest possible deterrent from the worst kinds of apostasy, because if considered this to be a very serious matter. Thus, he established the harshest punishment for such an act, so as to deter people from committing it. Moreover, to emphasize this, he recited the following verses of poetry:

*When I realized how grave the matter was,  
I lit my bonfire and called for Qanbar.*

Once ‘Umar heard of a woman whose husband was away on a military expedition and who was receiving strangers in her home. ‘Umar therefore decided to send a messenger to her that she should not receive strangers whilst her husband was absent. When the woman heard that the *khalīfah* wanted to speak to her, she became fearful and, as she was pregnant, she miscarried the child on her way to see ‘Umar. Greatly disturbed by what had occurred, he consulted the *Ṣaḥābah* about the matter. Some of them, including ‘Uthmān ibn ‘Affān and ‘Abd al-Raḥmān ibn ‘Awf, assured him: “You were merely trying to educate her; you have done nothing wrong.” When ‘Umar turned to ‘Alī, asking his opinion, ‘Alī said:

These men have spoken, and if this is the best opinion they can



come up with, then fair enough. But, if they have only spoken to please you, then they have cheated you. I hope that Allah will forgive you for this sin, for He knows that your intention was good. But, by Allah, you should pay compensation for the child.

‘Umar said: “By Allah, you have spoken sincerely to me. I swear that you should not sit down until you have distributed this money among your people.”

#### THE *FUQAHĀ’* AMONG THE *ṢAḤĀBAH* AND THE *TĀBĪ‘ŪN*

This period is considered to have begun in 40AH when the period of the *al-Khulafā’ al-Rāshidūn* ended. Thus began a new era, that of the *fuqahā’* from among the *Ṣaḥābah* and the elder *Tābi‘ūn*.<sup>51</sup> Legislation during this stage was still very much as it had been in the previous stage, as its sources, i.e. the Qur’an, the Sunnah, *ijma’* and *qiyās*, remained the same. Nonetheless, it differed in many aspects from what had gone before as follows:

1. Scholars had become more interested in delving into what lay beyond the explicit meanings of the texts.
2. Their ways of dealing with the Sunnah underwent a great deal of change. Essentially, the difference was the outcome of political differences that accompanied the emergence of various sectarian and philosophical factions, such as the Shi‘ah and also the *Khawārij*, whose attitude to the Sunnah was different. The Shi‘ah refused to accept *aḥādīth* not narrated by their own *a’immah*; and the *Khawārij* refused to accept *aḥādīth* if, anywhere in the chain of narrators, there was no more than a single narrator.<sup>52</sup> The *Khawārij* also rejected any *aḥādīth* not supported by a text from the Qur’an.
3. Owing to the divisions which had arisen, *ijma’* was no longer a possibility in this period. Basically, this was because every group mistrusted the scholars of every other group, and would no longer accept any of their opinions, whether they agreed or disagreed with them. In addition, the *fuqahā’* from among the

*Ṣaḥābah* had become scattered all over the Islamic world, so that it was no longer possible for them to meet to discuss matters.

4. Also in this period, the narration of Hadith and Sunnah became popular, whereas this had not previously been the case.
5. The fabrication of Hadith, for many well-known reasons which we do not need to discuss here, became widespread. In this respect, Muslim reported that Ibn ʿAbbās said: “We used to narrate many *aḥādīth* from the Prophet without ever having to worry about fabrication, but when people started to become careless in narrating things attributed to the Prophet, we stopped narrating *aḥādīth*.”

## *Legislation After the Time of the Ṣaḥābah*

The time of the Ṣaḥābah came to an end between the 90 and 100 AH, and was followed by the time of the *Tābiʿūn* whose scholars became responsible for fiqh and giving *fatāwā*.

The last of the Ṣaḥābah in Kufah died in 86 or 87 AH. The last one in Madinah, Sahl ibn Saʿd al-Sāʿidī, died in 91 AH. The last one in Basrah, Anas ibn Mālik, died in 91 AH (some say 93 AH). The last one in Damascus, ʿAbd Allah ibn Yusr, died in 88 AH. The last of the Ṣaḥābah, ʿĀmir ibn Wāthilah ibn ʿAbd Allah (Abū al-Ṭufayl), died in 100 AH.

Thereafter, those who became responsible for issuing *fatāwā* were the freedmen (*mawālī*), most of whom had lived among the *fuqahāʾ* among the Ṣaḥābah, such as: Nāfiʿ, the freedman of Ibn ʿUmar; ʿIkrimah, the freedman of Ibn ʿAbbās; ʿAṭāʾ ibn Abī Rabaḥ, the *faqīh* of Makkah; Ṭāwūs, the *faqīh* of the people of Yemen; Yaḥyā ibn Kathīr, the *faqīh* of Yamamah; Ibrahīm al-Nakhaʿī, the *faqīh* of Kufah; al-Ḥasan al-Baṣrī, the *faqīh* of Basrah; Ibn Sīrīn, also of Basrah; ʿAṭāʾ al-Khurāsānī in Khurāsān, and others.

Indeed, Madinah was unique in having a *faqīh* who was an Arab from Quraysh, Saʿīd ibn al-Musayyab.

These *Tābiʿūn* vary rarely altered the *fatāwā* of the Ṣaḥābah from whom they had gained their knowledge; hence it is difficult to find differences between the methods they used to derive judgements and those of their predecessors.

Even so, the methods of deriving judgements were, at this stage, starting to evolve and, in the process, to become clearer than ever before.

It is narrated that al-Ḥasan ibn ʿUbayd Allah al-Nakhaʿī said: “I asked Ibrāhīm al-Nakhaʿī: “Did you hear from others all the *fatāwā* that I hear you giving?” He said “No.” So I asked him: “Then you give *fatāwā* that you did not hear?” He said: “I heard what I heard; but when I was confronted with matters concerning which I had not heard anything, I compared them, by analogy, with matters which I had heard about.”<sup>53</sup>

Among the significant features of this period was the emergence of differences of opinion between legal scholars on a variety of matters. This was underscored by two decisions taken by the *khalīfah* of the times, ʿUmar ibn ʿAbd al-ʿAzīz.

1. He ordered that practices attributed to the Prophet should be collected and written down. Accordingly, the people of every locality wrote down in books whatever they knew to be a part of the Sunnah.<sup>54</sup>
2. He restricted the authority to issue *fatāwā*, in most districts, to a few named individuals, as he did in Egypt, when he named only three people for this purpose. Interestingly, two of them were freedmen, Yazīd ibn Abī Ḥabīb and ʿAbd Allah ibn Abī Jaʿfar, and the third was an Arab, Jaʿfar ibn Rabīʿah. When the *khalīfah* was questioned about appointing two freedmen and only one Arab, he answered: “What fault is it of mine if the freedmen are improving themselves and you are not.”<sup>55</sup>

In his letter to Abū Bakr Muhammad ibn ʿAmr ibn Ḥazm al-Anṣārī, the *khalīfah* explained his reasons for ordering that the practices attributed to the Prophet should be written down.

He wrote: “Look for whatever hadith of the Prophet, or Sunnah, or practice you can find. Then write these down for me; for I fear that this knowledge will pass away with the passing of the scholars.”<sup>56</sup>

AFTER THE *TĀBI'ŪN*: THE TIME OF *AL-A'IMMAH AL-MUJTAHIDŪN*

This period was described by Walī Allah al-Dahlawī as follows:

The *fuqahā'* of the period took the hadith of the Prophet, the decisions of the early judges, and the legal scholarship of the *Ṣaḥābah*, the *Tābi'ūn* and the third generation, and then produced their own ijtihad.

This was the way the legal scholars of those times worked. Basically, all of them accepted both the *musnad*<sup>57</sup> as well as the *mursal*<sup>58</sup> hadith. Moreover, it became their practice to cite the opinions of the *Ṣaḥābah* and the *Tābi'ūn* as evidence. Essentially, there were two reasons for this:

1. Such opinions were actually *aḥādīth* of the Prophet which had been narrated by one of the *Ṣaḥābah* or the *Tābi'ūn* who, for fear of misquoting, had not dared to attribute them to the Prophet.
2. The other likelihood is that such opinions were derived by the *Ṣaḥābah* from the texts of *aḥādīth*, and represented their own understanding of the Sunnah.

In this respect, of course, the *Ṣaḥābah* were better than those who came later, because they had known the Prophet, and were thus more capable of interpreting what he had said. Therefore, their judgements and opinions were accepted as authoritative, except in cases where they themselves differed, or where their pronouncements were in clear contradiction to sound *aḥādīth* of the Prophet.

On the other hand, in the cases where two or more *aḥādīth* conflicted, the scholars would refer to the opinions of the *Ṣaḥābah* in order to determine which of the two was the correct one. Thus, if the *Ṣaḥābah* had said that a hadith had been abrogated, or was not to be understood literally; or if they did not expressly say anything about a hadith, but had ignored it, and had not acted in conformity with it, thus indicating that the hadith in question was in some way defective, or that it had been abrogated, or that its interpretation

was other than the literal, then *al-A'immaḥ al-Mujtahidūn* would accept their opinions.

When the pronouncements of the *Ṣaḥābah* and *Tābi'ūn* differed on any matter, then each *faqīh* would follow the rulings of those from the same region as himself, and his own teachers, because he would be more able to discern the authenticity, owing to his familiarity with the narrators, of the opinions and sayings that reached him on their authority. Likewise, the *faqīh* would be better acquainted with their legal methodology.

The legal school of thought based on the opinions of 'Umar, 'Uthmān, Ibn 'Umar, 'Ā'ishah, Ibn 'Abbās, Zayd ibn Thābit, and their companions among the *Tābi'ūn*, like Sa'īd ibn al-Musayyab (d. circa 93 AH), 'Urwah ibn al-Zubayr (d. 94 AH), Sālim (d. 106 AH), 'Aṭā' ibn Yasār (d. 103 AH), al-Qāsim ibn Muḥammad (d. 108 AH), 'Ubayd Allah ibn 'Abd Allah (d. 99 AH), al-Zuhrī (d. 124 AH), Yaḥyā ibn Sa'īd (d. 143 AH), Zayd ibn Aslam (d. 136 AH) and Rābi'at al-Ra'ī (d. 136 AH), was the school most acceptable to the people from Madinah. It was for this reason that Imam Mālik based his legal arguments on their teachings.

In the same way, the legal opinions of 'Abd Allah ibn Mas'ūd and his companions, the judgements of 'Alī ibn Abī Ṭālib, Shurayḥ (d. 77 AH), and al-Sha'bī (d. 104 AH), and the *fatāwā* of Ibrāhīm al-Nakha'ī (d. 96 AH) were the most acceptable to the people of Kufah. Commenting on this phenomenon, al-Dahlawī wrote:

When Masrūq (d. 63 AH) followed Zayd ibn Thābit's opinion concerning sharing out the inheritance between the grandfather and the brothers [of the deceased], 'Alqamah (d. 62 AH) asked him, "Are any of you more knowledgeable than 'Abd Allah [ibn Mas'ūd]?" Masrūq answered, "No, but Zayd ibn Thābit and the people of Madinah share the inheritance between the grandfather and the brothers..."

Thus, if the people of Madinah agreed on a matter, the scholars of the generation following the *Tābi'ūn* adopted it resolutely. This is what [Imam] Mālik meant when he said: "The Sunnah concerning which we, the people of Madinah, have not differed is such-and-such."

If the early scholars of Madinah had differed concerning any matter, the later scholars would follow those opinions which were stronger and more dependable by virtue either by their having been adopted by a majority of the early scholars, or of their having been the result of sound legal analogy, *qiyās*, or which were derived from some text in the Qur'an or the Sunnah. It is to this process that [Imam] Mālik refers when he says: "This is the best that I have heard." Then, if the later scholars could find no solution to a problem in the work of their predecessors, they would themselves turn to the relevant texts in order to formulate their own legal opinions.

...At this stage, the scholars were inspired to start recording things in writing. So [Imam] Mālik (d. 179 AH) in Madinah, Ibn Abī Dhi'b (d. 158 AH), Ibn Jurayj (d. 150 AH) and Ibn Uyaynah (d. 196 AH) in Makkah, al-Thawrī (d. 161 AH) in Kufah, and Rabī' ibn al-Ṣubayḥ (d. 160 AH) in Basrah, began to write things down, and they all followed the same method.

When the *khalīfah* al-Manṣūr performed hajj and met [Imam] Mālik, he said: "I have decided that copies be made of these books which you have written. I will send a copy to every region of the Muslim world and order the scholars to act in accordance with them and not to refer to any other works."

Mālik said: "O 'Amīr al-Mu'minīn, do not do that! Already the people have heard different legal opinions, and listened to *aḥādīth* and narrations; and they have accepted whatever has reached them first, so that this had contributed to differences in the prevailing practices among people. Leave the people of each town with the choice they have already made."

The same story is told in reference to the *khalīfah*, Harūn al-Rashīd, that he wanted to compel people to follow the *Muwatta'*. But Mālik said to him: "Do not do that, for the *Ṣaḥābah* of the Prophet used to differ on the Sunnah. Then they scattered and settled throughout the Muslim world, and now their different ways are firmly established."

...Mālik was the most knowledgeable about the *aḥādīth* related by the people of Madinah from the Prophet, and Mālik's chain of narrators was the most reliable. He was also the most knowledgeable

about the judgements of ‘Umar and the legal pronouncements of ‘Abd Allah ibn ‘Umar and ‘Ā’ishah and their companions from among the seven *fuqahā’*. The sciences of Hadith narration and fatwa were based on the knowledge of [Imam] Mālik and those like him.

[Imam] Abū Ḥanīfah was devoted to the legal interpretations of Ibrāhīm al-Nakha‘ī and his colleagues, and would rarely transgress their arguments. He was excellent at producing decisions based on Ibrāhīm’s method, exact in employing that methodology in order to deal with details of case law.

If you wish to know the truth about what we have stated, then summarize the teachings of Ibrāhīm and his cohorts as recorded in the following works: *Al-Āthār* [Traditions] by Muḥammad al-Shaybānī, the *Jāmi‘* [The Compendium] of ‘Abd al-Rāziq and the *Muṣannaf* [Compilation] of Ibn Abī Shaybah, and compare them with [Imam] Abū Ḥanīfah’s formal opinions. Indeed, you will find that Abū Ḥanīfah departs only rarely from their way, and even then his opinion will not differ from the opinions of the jurists of Kufah.<sup>59</sup>

In fact, al-Dahlawī’s comments need to be considered. He was very eager to stress that Mālik and Abū Ḥanīfah were more or less conforming to the opinions of the *Tābi‘ūn* and the *Ṣaḥābah* before them (as opposed to generating their own *ijtihād*), and had not transcended the jurisprudence of their predecessors. This, however, is a conclusion with which it is difficult to agree.

It is well known that there are various approaches to *fiqh*; and each Imam adopted a different approach to the subject. It is not a simple matter to claim that these were drawn from the *Ṣaḥābah* and the *Tābi‘ūn*. Consider, for example, Mālik’s taking the customs and practices of the people of Madinah as a secondary source for legislation; or Abū Ḥanīfah’s use of *istiḥsān* and *‘urf* (local custom that is “recognizably” good).<sup>60</sup>

Moreover, neither of them based their arguments on the *fatāwā* of the *Tābi‘ūn*, but rather competed with them, saying: “They were men [of knowledge] and so are we.”



In addition, unlike anyone before them, each had laid down his own set of conditions for accepting *aḥādīth* as authentic.

Moreover, the incidence of the increased circulation of *aḥādīth* in those times, in addition to the appearance of *aḥādīth* that had never been circulated at all, led, in some cases, to legal rulings and positions quite different from those held by the *Ṣaḥābah*.

#### RATIONALISTS AND TRADITIONALISTS:

##### *AHL AL-ḤADĪTH AND AHL AL-RA'Ī*

Perhaps this truth may become all the more intelligible when we mention the emergence of two informal schools of legal thought, the rationalists or *ahl al-Ra'ī* (lit. opinion), and the traditionalists or *ahl al-Ḥadīth*, and the appearance of differences between them concerning source methodology and issues of case law. While it is true that both of these schools had their roots in the approaches of the preceding two generations, it was at this time that their differences in matters of fiqh became clear; and it was at this time that people began grouping themselves on the basis of their differences in deriving legal points from the sources.

Writers on the Islamic legal history emphasize that the rationalist school of *ahl al-Ra'ī* was an extension of the school of 'Umar and 'Abd Allah ibn Mas'ūd, who, among the *Ṣaḥābah*, were the most wide-ranging in their use of *ra'ī*. In turn, 'Alqamah al-Nakha'ī (d. circa 60 AH), the uncle and teacher of Ibrāhīm al-Nakha'ī, was influenced by them. Ibrāhīm then taught Ḥammād ibn Abī Sulaymān (d. 120 AH), who in turn was the teacher of Abū Ḥanīfah.

The same historians stress that the traditionalist school of *ahl al-Ḥadīth* was a continuation of the school of those *Ṣaḥābah* whose fear of contradicting the letter of source texts (*nuṣūṣ*) made them circumspect to the point where they never went any further than the texts themselves. This was the case, by and large, with 'Abd Allah ibn 'Umar ibn al-Khaṭṭāb, 'Abd Allah ibn 'Amr ibn al-'Āṣ, al-Zubayr, and 'Abd Allah ibn 'Abbās.

The school of *ahl al-Ḥadīth* became widespread in the Hijaz for many reasons, of which perhaps the most important were the great

number of *aḥādīth* and other narrations known to the people of that area, and the fact that the region was more stable after the seat of the *khilāfah* had been removed, and most of the political activity had been transferred, first to Damascus, then to Baghdad. The Imam of Madinah, Saʿīd ibn al-Musayyab, once noted that the people of Makkah and Madinah had not lost much of their fiqh and knowledge of Hadith, because they were familiar with the *fatāwā* and reports of Abū Bakr, ʿUmar, ʿUthmān, ʿAlī (before he became *khalīfah*), as well as ʿĀʾishah, Ibn ʿAbbās, Ibn ʿUmar, Zayd ibn Thābit and Abū Hurayrah, and thus did not need to use *raʾī* in order to derive law.

The school of *ahl al-Raʾī*, on the other hand, gained currency in Iraq. The scholars of this group thought that the legal interpretations of the Shariʿah should have a basis in reason, should take into account the best interests of the people, and should be backed by discernable wisdom. Indeed, these scholars felt it their duty to uncover the higher meanings and the wisdom behind the laws, and to make the connection between them; so that if the reasons for any law were to lose relevance with the passing of time and the changing of circumstances, the law would no longer be valid. If they found the reasons behind the law, they would sometimes prefer to cite arguments based on analytical treatment of those reasons. Thus, in many cases, reason would be accorded legalistic preference when such reasoning conflicted with the evidence of certain categories of *aḥādīth*.

The spread of this method in Iraq was helped by the numbers of *Ṣaḥābah* influenced by the methods of ʿUmar. Among them were Ibn Masʿūd, Abū Mūsā al-Ashʿarī, ʿImrān ibn al-Ḥusayn, Anas ibn Mālik, Ibn ʿAbbās and others. The spread was also assisted by the transfer of the *khilāfah* to Iraq, and the settling there of ʿAlī and his supporters.

When sects, like the Shiʿah and the *Khawārij*, appeared in Iraq, conflict arose and the fabrication of hadith became widespread.<sup>61</sup> Consequently, the legal scholars of Iraq were forced to lay down conditions for the acceptance of hadith, according to which only a few of the reports given by the *Ṣaḥābah* living in Iraq were acceptable.

Moreover, the great number of legal problems and the constant increase in unprecedented legal issues in that area were more than could be dealt with on the basis of reliable *aḥādīth*.

So, it was in this way that the people, those who had not joined either the Shi'ah or the *Khawārij*, were divided into two groups, *ahl al-Ḥadīth* and *ahl al-Ra'i*; and the conflict between them intensified.

Thus, *ahl al-Ra'i* often used to criticize *ahl al-Ḥadīth* for having little intelligence and less fiqh-understanding; while *ahl al-Ḥadīth* claimed that the opinions of *ahl al-Ra'i* were based on no more than conjecture, and that they had distanced themselves from the necessary circumspection in those matters of religious significance which could be ascertained only through recourse to the source texts.

In fact, *ahl al-Ra'i* agreed with all Muslims that once a person has clearly understood the Sunnah, he may not reject it in favor of what is no more than someone's opinion. Their excuse in all those cases in which they were criticized for contradicting the Sunnah is simply that they did not know any hadith concerning the matter in dispute, or that they did know a hadith but did not consider it sound enough owing to some weakness in the narrators or some other fault they found in it (a fault which perhaps others did not consider to be damaging), or that they knew of another hadith which they considered sound and which contradicted the legal purpose of the hadith accepted by others.

Moreover, *ahl al-Ḥadīth* agreed with *ahl al-Ra'i* on the necessity of having recourse to reason whenever a matter occurs for which there is no specific ruling in the source texts. Still, in spite of these areas of agreement, the conflict and the tension between the two groups remained acute.

## CHAPTER FOUR

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### *Imam al-Shāfiʿī*

Imam al-Shāfiʿī was born in 150 AH, the year in which Imam Abū Ḥanīfah died. He studied fiqh, first in Makkah with some scholars of *ahl al-Ḥadīth*, such as Muslim ibn Khālid al-Zinjī (d. 179 AH) and Sufyān ibn ʿUyaynah (d. 198 AH). Then he went to the Imam of Madinah and the leader of *ahl al-Ḥadīth*, Mālik ibn Anas, and studied with him, and committed to memory (so as later to relate it) Mālik's collection of hadith and legal opinions, the *Muwattaʿaʿ*. Indeed, Imam al-Shāfiʿī always felt himself indebted to Imam Mālik

It is reported that Yūnus ibn ʿAbd al-ʿAʿlā heard al-Shāfiʿī say: “Whenever the ʿulama are mentioned (and their work and knowledge compared), Mālik outshines them all. No one has ever done me a greater favor than Mālik ibn Anas.”<sup>62</sup> This is what Imam al-Shāfiʿī said after he had studied with masters of language, poetry, literature, the natural sciences, mathematics and history.

Al-Shāfiʿī was not impressed with all that he had learned of the work of *ahl al-Ḥadīth*. For example, he criticized them for accepting a hadith that is *munqaṭiʿ*,<sup>63</sup> saying: “The *munqaṭiʿ* is nothing.”

Imam al-Shāfiʿī also criticized them for accepting the *mursal*<sup>64</sup> variety of hadith (though he himself made an exception in the case of *mursal* hadith related by Saʿīd ibn al-Musayyab), and for imposing overly strict conditions on the acceptance of narrators as reliable (and the hadith they related as authentic).

When Imam al-Shāfiʿī went to Iraq, to the strong hold of *ahl al-*

*Ra'ī*, he noticed that they were always eager to find fault with the legal methods and opinions of the people of Madinah, and especially his teacher, Imam Mālik. Thus Imam al-Shāfi'ī stood up in defense of his teacher, his school of thought, and his methods. It is narrated that he once said:

Muḥammad ibn al-Ḥasan said to me: “Our teacher (i.e. Abū Ḥanīfah) was more knowledgeable than yours. Your teacher should not have spoken, but our teacher would have been wrong to remain silent.” I became angry and said to him: “I ask you by Allah, who had more knowledge of the Sunnah of the Prophet, Mālik or Abū Ḥanīfah?” He said, “Mālik. But our teacher was more adapt at *qiyās*.” I replied: “Yes, and Imam Mālik was more knowledgeable than Abū Ḥanīfah about the Qur'an, about abrogation, and about the Sunnah of the Prophet. Whoever has more knowledge of the Qur'an and the Sunnah has more right to speak!”<sup>65</sup>

Imam al-Shāfi'ī studied the books of Muḥammad ibn al-Ḥasan and other Iraqi scholars.<sup>66</sup> Indeed, he became Muḥammad ibn al-Ḥasan's pupil, and discussed his opinions, all the while supporting the Sunnah and *ahl al-Ḥadīth*.

Imam al-Shāfi'ī left Baghdad for a period of time, and when he returned, in 195 AH, there were forty or fifty study circles that met regularly at the great mosque. Imam al-Shāfi'ī began moving from one circle to another, explaining what “Allah and His Prophet said,” while other teachers spoke only of what their teachers said. Eventually, there were no study circles left in the mosque other than that of Imam al-Shāfi'ī.

Some of the great scholars of *ahl al-Ra'ī*, like Abū Thawr, al-Za'farānī, al-Karabīsī and others, attended the study circles of Imam al-Shāfi'ī. Many abandoned the way of *ahl al-Ra'ī* and began to follow Imam al-Shāfi'ī. Imam Aḥmad ibn Ḥanbal also attended this circle, and it is narrated that he said:

Any narrator of Hadith who carried an ink pot benefited in some way from Imam al-Shāfi'ī.” When Imam Aḥmad was asked to explain, he said: “*Ahl al-Ra'ī* used to laugh at *ahl al-Ḥadīth* until Imam al-Shāfi'ī taught them otherwise, and vindicated the traditionalist position through sound arguments.”<sup>67</sup>

Moreover, it was in response to a request from *ahl al-Ḥadīth* that Imam al-Shāfi'ī wrote his book, *Al-Ḥujjah* (The Argument), in Baghdad, in order to refute the arguments that *ahl al-Ra'ī* had brought against him.<sup>68</sup> Thereafter, Imam al-Shāfi'ī travelled to Egypt where he found that most of the people adhered strictly and unquestioningly to the opinions of Mālik. Consequently, Imam al-Shāfi'ī began a critical analysis of Mālik's legal opinions, and found that in some cases:

...he [Mālik] formulates opinions on the basis of a general principle, while ignoring the specific issue; whereas, at other times he gives a ruling on a specific issue and ignores the general principle.

Imam al-Shāfi'ī also found that Mālik sometimes rejected a sound hadith in favor of a statement made by one of the *Ṣaḥābah* or the *Tābi'ūn*, or in the preference of his own reasoning. Imam al-Shāfi'ī also discovered that Mālik rejected the statement of one of the *Ṣaḥābah* in favor of the opinion of a *Tābi'ī*, or his own personal opinion; and that he would do this in individual cases, and in extrapolating legal details, without taking general principles into account. Moreover, Mālik claimed in many cases that there was *ijma'* concerning this matter, when there was, in fact, disagreement about it.

Al-Shāfi'ī also found that Mālik's opinion that the *ijma'* of the people of Madinah could be treated as source evidence was, in fact, not very strong. He wrote a book entitled *Al-Ikhtilāf ma'a Mālik* (Disagreement with Mālik) in which he dealt with all the matters mentioned above.<sup>69</sup>

According to Imam al-Shāfi'ī, Imam Mālik exceeded the proper bounds in applying his principle of *al-maṣāliḥ al-mursalah* (the interest of the greater good) without having recourse to the abundance of evidence available. His opinion in regard to Abū Ḥanīfah was that, in many cases, he concentrated on the particular, and on minor issues and details, without regard to basic rules and principles.<sup>70</sup>

With these matters in mind, then, Imam al-Shāfi'ī came to the conclusion that the undertaking most deserving of attention was

the collection of the principles of jurisprudence, the organization of the basic rules for their application, and the development of a source methodology by means of which questions of fiqh may be decided through proper recourse to valid and relevant forms of evidence. Thus, fiqh might become the practical application of this methodology, so that a new fiqh might emerge as an alternative to the two established legal schools of thought.

It was for this reason that Imam al-Shāfi'ī wrote the *Risālah*, and built his fiqh and legal teachings on the foundations of the principles of the methodology expounded in that book.

Imam Aḥmad ibn Ḥanbal said: “until Imam al-Shāfi'ī came along, we never thought of things like the general and the specific (*al-ʿāmm wa al-khāṣṣ*).”<sup>71</sup>

Imam al-Shāfi'ī used to say to Imam Aḥmad:

“You have more knowledge about Hadith and narrators than I do. So if a hadith is authentic then tell me. If it is authentic, I will accept it, even if it is [reported by narrators] from Kufah, Basrah or Damascus.”<sup>72</sup>

This statement clearly indicates that Imam al-Shāfi'ī was more concerned with establishing principles than with dealing with minor issues and details.

The scholars writing on the history of *uṣūl al-fiqh* unanimously agree that the first writer on the subject was Imam al-Shāfi'ī, and that the first book ever written on the subject was *al-Risālah*.<sup>73</sup>

In his book, *al-Baḥr al-Muḥīṭ*, al-Zarkashī (d. 794 AH) devoted a chapter to this, in which he said:

Imam al-Shāfi'ī was the first to write about *uṣūl al-fiqh*. He wrote *al-Risālah*, *Aḥkām al-Qur'an* [Legal Interpretations of the Qur'an], *Ikhtilāf al-Ḥadīth* [Conflicting Hadith], *Ibtāl al-Istiḥsān* [The Invalidity of Juristic Preference], *Jimā' al-ʿIlm* [The Congruence of knowledge], and *al-Qiyās* [Analogical Reasoning]—the book in which he discussed the error of the Mu'tazilah group, and changed his mind about accepting their testimony. Then, other scholars followed him in writing books on *uṣūl*.

In his commentary on *al-Risālah*, al-Juwaynī wrote:

No one before Imam al-Shāfi'ī wrote books on the subject of *uṣūl*, or had as much knowledge of it as he did. It is related that Ibn ʿAbbās mentioned something about the particularization of the general, and that some of the others among the early scholars made pronouncements which suggested they understood these principles. Still, those who came after them said nothing about *uṣūl*, and they contributed nothing to it. We have seen the books of the Tābiʿūn and the third generation, and have found that none of them write books about *uṣūl*.<sup>74</sup>

THE METHOD OF IMAM AL-SHĀFI'Ī IN HIS BOOK,  
*AL-RISĀLAH*

Imam al-Shāfi'ī began his book by describing the state of mankind just before the mission of the Prophet, in doing so, he divided them into two groups:

1. *Ahl al-Kitāb* (People of the Book); otherwise, the followers of earlier revelation who had altered their scripture and tampered with some of its legal injunctions. Essentially, these people had lapsed into disbelief and then attempted to fuse their falsehood with the Truth which Allah had revealed.
2. *Mushrikūn* and *kāfirūn* who worshiped idols instead of Allah.

Then Imam al-Shāfi'ī went on to say that Allah rescued all mankind by sending them the last of the Prophets, and revealing to him His Book, so that people might be delivered by means of it from the blindness of disbelief into the light of guidance:

Behold, it is a Divine Scripture, sublime. No falsehood can attain to it openly and neither in a stealthy manner, [since it is] bestowed from on high by One who is Truly Wise, Ever to be Praised.  
(Qur'an 41:41-42)

Imam al-Shāfi'ī went on to discuss in detail the status of the Qur'an and its comprehensive statements about what Allah had permitted and prohibited, how people are to worship Allah, the rewards of those who obey Him, and how He admonished them



through the stories of those who had gone before.

Then Imam al-Shāfi‘ī explained that students seeking knowledge of Islam should learn as much of the Qur’an and its sciences as possible; and that when their intentions are pure they may both quote its verses and infer meanings from them.

At the end of his introduction to *al-Risālah*, Imam al-Shāfi‘ī wrote:

No misfortune will ever beset any of the followers of Allah’s religion for which there is no guidance in the Book of Allah to indicate the right way. For, Allah, the Blessed and Most High said:

“A Book We send to you, that you may bring forth mankind from darkness to light, by the permission of their Lord to the path of the Almighty, the Praiseworthy.” (14:1)

He also said:

“And We sent down to you the Reminder, that you may make clear to mankind what was sent down to them; and so haply they may reflect.” (16:44)

And:

“And We have sent down to you the Book as an explanation of everything; and as a guidance, and a mercy, and good tidings to the Muslims.” (16:89)

Also:

“Likewise, We have revealed to you a spirit of Our bidding. You did not know what the Book was, nor the faith; but We made it a light by which We guide whomsoever We will from Our servants. And, verily, you shall be a guide unto the right path, the path of Allah.” (42:52)

There follows a chapter on *bayān*<sup>75</sup> in which the word is defined as a legal term, and then divided into categories in explanation of the ways that the Qur’anic declaration indicates matters of legal significance.

There are five such categories:

1. That which Allah declared [in the Qur'an] as a specific legal provision which admits of no interpretation other than its literal meaning. This category of *bayān* needs no other explanation than the Qur'an itself.
2. That which the Qur'an mentions in texts that may be interpreted in several ways, and for which the Sunnah provided an explanation of exactly which one was intended.
3. That which was clearly stated to be obligatory; and which the Prophet explained in terms of how, why, upon whom, and when applicable and when not.
4. That which was explained by the Prophet but not mentioned in the Qur'an. Allah commanded in the Qur'an that the Prophet be obeyed and his rulings accepted. Therefore, what is said on the authority of the Prophet, is said on the authority of Allah.
5. That which Allah requires His creation to seek through *ijtihād*. This is *qiyās*. According to Imam al-Shāfi'ī, *qiyās* is a method for reaching a legal decision on the basis of evidence (a precedent) in which a common reason, or an effective cause, is applicable.

Imam al-Shāfi'ī then went on to explain these five categories in five separate chapters, giving examples and evidence for each. Thereafter, *al-Risālah* included the following chapters:

- The general declaration revealed in the Qur'an intended to be general (*ʿāmm*), but which includes the particular (*khāṣṣ*).
- The explicit general declaration of the Qur'an in which the general and the particular are included.
- The explicit general declaration of the Qur'an which appears to be general but is intended to be entirely particular.
- The category of *bayān* in the Qur'an, the meaning of which is clarified by context.
- The category of *bayān* in the Qur'an the wording of which indicates the implicit (*al-bāṭin*) rather than the explicit (*al-ẓāhir*)
- That, of the Qur'an, which was revealed as general but which the Sunnah specifically indicates is meant to be particular.

In the above-mentioned chapter, Imam al-Shāfi'ī explained the validity of the Sunnah as evidence and its status in the religion. For this reason, he then included the following chapters:

- A declaration concerning the duty imposed by Allah in the Qur'an to follow the Sunnah of His Prophet.
- Allah's command ordering obedience to the Prophet as being both associated with obedience to Him and ordered independently.
- Allah's command ordering obedience to the Prophet.
- The obligation made clear by Allah that the Prophet was obliged to observe what was revealed to him and to obey whatever commands Allah gave him; and that Allah will guide any who follow him (the Prophet).

In this chapter, Imam al-Shāfi'ī affirmed that parts of the Sunnah of the Prophet dealt with and were related to the Qur'an, whilst other parts explained matters concerning which there was no relevant text in the Book. Imam al-Shāfi'ī also showed that part of the Sunnah existed independently of the Qur'an, and quoted evidence in refutation of those who disagreed with him on this matter. Then he said:

I shall explain what I have already said about the sunna, [whether] it specifies the Book of God or provides [additional legislation] for matters on which there is no text in the Book, such examples as may clarify the meaning of the subject that was discussed. The first one I take up will be [a discussion] on the sunna based on the Book of God. I shall discuss by means of *istidlāl* (deductive reasoning) the sunna relating to the subject the *nāsikh* (abrogating) and the *mansūkh* (abrogated) passages in the Book of God. Next, [I shall] state the duties provided in the text [of the Book] and the sunna which the Apostle has laid down on the basis of the Book; the general duties which the Apostle specified for its modes and its times of fulfillment; next the general [commands] which were intended to be general and the general [commands] which were intended to be particular; and [finally] the sunna [of the Prophet] for which there is no text in the Book.<sup>76</sup>

There follows a chapter entitled, “The Origin of the Abrogating and the Abrogated,” which explains that Allah used abrogation to make the Shariʿah easier and more flexible. This chapter also makes the point that a verse (*āyah*) of the Qurʾan can only be abrogated by another verse of the Qurʾan; and that the Sunnah can only be abrogated by the Sunnah. Then he dealt with the abrogating and the abrogated which are indicated in part by the Qurʾan and in part by the Sunnah. Thereafter, he mentioned the *fard*-duty of salah and the explanation in the Qurʾan and the Sunnah concerning those who may be excused from performing it, and those whose salah is not accepted because of some act of disobedience they may have committed. Then Imam al-Shāfiʿī continued to discuss the abrogating and the abrogated that are indicated by the Sunnah and *ijmaʿ*.

He devoted a separate chapter to *fard*-duties: *fard*-duties laid down in the text of the Qurʾan; *fard*-duties laid down in the Qurʾan which the Prophet also dealt with in the Sunnah; *fard*-duties laid down in the text of the Qurʾan which the Sunnah indicated were meant to be particular in application; general *fard*-duties which are clearly meant to be compulsory and for which the Prophet gave the explanation as to how they were to be performed – like salah, zakah, hajj, *ʿiddah*,<sup>77</sup> the number of wives, women whom one is not permitted to marry, and dietary prohibitions.

In the next chapter he discussed and explained defects in Hadith, and explained that the contradictions between *ahādīth* could be attributed to many reasons: a contradiction might appear because one hadith was abrogated by another, or because mistakes occurred in the narration of the hadith; mistakes which might cause contradictions in the hadith, and many other reasons for such contradictions. Then he dealt with the various types of prohibitions, and explained that some *ahādīth* clarify others.

Imam al-Shāfiʿī also included a chapter on knowledge, and explained that there are two types of knowledge. The first is that sort of common knowledge which no sane, mature adult could possibly not have. All of this knowledge can be found in the text of the Qurʾan, and its details are known to Muslims because it has been transmitted down from the Prophet to each succeeding generation

in turn. There is no dispute concerning the authenticity of this knowledge, and all are agreed that it is binding. Indeed, the nature of this knowledge is such that there can be no mistakes in its transmission or interpretation.

The second type of knowledge is of details which stem from the obligations, and the specific laws relating to them. These are not mentioned in the text of the Qur'an, and most of them are not mentioned in the text of the Sunnah, apart from individual narration (*akhbār al-āhād*). Thus, Imam al-Shāfi'ī introduced a new subject, the individual narration, (*khābar al-wāḥid*).

Imam al-Shāfi'ī then explained what is meant by this term, and the conditions which determine whether or not a narration is of the individual variety. The difference between testimony and reporting, *shahādah* and *riwāyah*, was explained; as were those matters which may be accepted through an individual narration, and those for which *khābar al-wāḥid* alone is not sufficient. Then Imam al-Shāfi'ī discussed the authority of *khābar al-wāḥid*, and whether such reports could be deduced as evidence. His conclusion, which was supported by very sound agreements, was that indeed they could be used. Thus, Imam al-Shāfi'ī succeeded in refuting all the misgivings brought up by his opponents on this issue.

The following chapters then discuss:

- Ijma': its definition, and legal authority.
- Qiyās: its meaning and nature, the need for it, the varieties of *qiyās*, and who is, and is not, competent to employ it.
- Ijtihad: how it is based first on the Qur'an, and then on the Sunnah; what constitutes correct and incorrect *ijtihad*.
- *Istiḥsān* (juristic preference): al-Shāfi'ī was careful to explain that no Muslim is permitted to use *istiḥsān* in order to contravene the Hadith, nor may he pronounce any legal judgement which is not based on the Qur'an, Sunnah, *ijma'* or *qiyās*. He also explained the difference between *qiyās* and *istiḥsān*.

- Disagreement among scholars: Imam al-Shāfi‘ī explained that these disagreements are of two types: those which are prohibited and those which are not. The types of disagreements which are not allowed are those concerning matters for which Allah has provided clear evidence in the texts of the Qur’an or in the Sunnah. The sort of disagreement which are permitted pertain to matters which could be interpreted in several ways and to which each scholar applies his own reasoning. Imam al-Shāfi‘ī then gave examples of both kinds of disagreements, and mentioned the reasons for each. He also gave examples of issues on which the *Ṣaḥābah* had disagreed, such as *‘iddah*, oaths and inheritance. In this chapter, Imam al-Shāfi‘ī mentioned something of his methodology for assigning preference to the opinions of the *Ṣaḥābah* when they differed.

*Al-Risālah* concludes with an explanation of al-Shāfi‘ī’s opinion on the “categories of evidence” mentioned above:

We make decisions on the basis of [text of the] Book and the generally accepted sunna, concerning which there is no disagreement, and we maintain that therefore such decisions are right according to both the explicit and the implicit [meaning of these sources]. We also make decisions on the basis of a single-individual tradition on which there is no general agreement, and we hold that we have made the decision correctly according to its explicit meaning, since it is possible that he who related the tradition may have made an error in it. We also make decisions on the basis of consensus and analogy, although the latter is the weaker of the two instruments. Analogy is used only in case of necessity, since it is not lawful if a tradition exists...<sup>78</sup>

From the writings of Imam al-Shāfi‘ī, we know which sources of Islamic jurisprudence were agreed upon, and which were the cause of disagreement at that time. The sources which were agreed upon were the Qur’an and the Sunnah in general. The sources concerning which there was disagreement included the Sunnah in its entirety, to some, and *khābar al-wāḥid* narrations (which Imam al-Shāfi‘ī referred to as *khāṣṣ*) in particular. But Imam al-Shāfi‘ī’s

contribution was that he examined these two issues both in their entirety in *al-Risālah* and *Jimā' al-ʿIlm*.

Other matters on which there were disagreements included:

1. *Ijma'*: Disagreements concerning its validity as evidence; the different types of *ijma'*; whose *ijma'* may be accepted as evidence; matters in which *ijma'* may be considered as evidence; and how the public may be made aware that there is *ijma'* on any particular matter.
2. *Qiyās* and *istiḥsān*: There were disputes concerning the meaning of these terms, their nature, validity as evidence, the possibility and method of using them, and whether the actions of the *Ṣaḥābah* could be considered *qiyās* or *istiḥsān*.
3. There was also open disagreement concerning the significance of the Qur'anic command and prohibition, their meanings and their impact on the rest of the legal, fiqh judgements. We may notice that in this period, the four Sunni *a'immaḥ* did not use strictly defined terminology such as *tahrīm* (prohibition), *ijāb* (obligation), etc, for these words were not commonly used in their vocabulary. Rather, this kind of legal terminology appeared later on, as Ibn al-Qayyim has pointed out.<sup>79</sup>
4. Other sources of Islamic jurisprudence concerning which there are differences were not commonly discussed at the time of the early jurists. For example, such terms as *ʿurf*, *ʿādah*,<sup>80</sup> and *istiḥāb* were not part of their vocabulary.

## *Uṣūl al-Fiqh After Imam al-Shāfiʿī*

Imam al-Shāfiʿī's *al-Risālah* dominated studies in Islamic jurisprudence from the moment it appeared. Indeed, as a result of it, there was a division of scholars into two groups. One group, the majority of *ahl al-Hadīth*, accepted it, and used it in support of Imam al-Shāfiʿī's school of legal thought. The other group, however, rejected most of what it contained, and attempted to refute whatever of al-Shāfiʿī's work contradicted their own methods and practice before it had a chance to influence people. The members of this group were taken almost exclusively from *ahl al-Raʿī*, all of whom were in disagreement with nearly all that al-Shāfiʿī had written.

Ibn al-Nadīm mentioned books which were written in the field of *uṣūl al-fiqh* after *al-Risālah*, including *al-Nāsikh wa al-Mansūkh* and *al-Sunnah* by Imam Aḥmad ibn Ḥanbal (d. 233 AH). *Al-Sunnah*, however, is more a book on *tawḥīd* and Islamic beliefs (*ʿaqāʾid*) than of jurisprudence. There are two versions of this work in print; the longer version is the one printed in Makkah in 1349 AH, of which there are manuscript copies in Dār al-Kutub and *Zāhiriyyah* libraries in Egypt and Damascus respectively. A smaller version, printed in Cairo without a date, deals with all the fundamental beliefs of the Sunni Orthodoxy, or *ahl al-Sunnah*.

Imam Aḥmad also wrote *Ṭāʿat al-Rasūl* (Obedience to the Messenger). Ibn al-Qayyim quotes from it often in his book, *Iʿlām al-Muwaqqiʿīn*, and it seems that he possessed a copy of the work.



Nonetheless, I have looked for this book in many places, but have never been able to find it. From the quoted passages in Ibn al-Qayyim's book, it is apparent that the book was indeed an important one on the subject of jurisprudence, and the methodology of dealing with the Sunnah. It may have been lost after Ibn Qayyim's time, or bound into another book, or the title page lost so that it may be found only after much searching.

The sources also mention that Dāwūd al-Zāhirī (d.270 AH) wrote *Ijma'* (Consensus), *Ibtāl al-Taqlīd* (On the Abolition of Imitation), *Khabar al-Wāḥid* (On the Individual Narration), *al-Khabar al-Mūjib* (On the Obligating Narration), *al-Khuṣūṣ wa al-'Umūm* (On the Particular and the General), *al-Mufassar wa al-Mujmal* (The Succinct and the Detailed), *al-Kāfi fī Muqābalāt al-Muṭṭalibī*<sup>81</sup> (On the Encounter with al-Shāfi'ī) and *Mas'alatayn Khālaḥa Fihimā al-Shāfi'ī* (Two Issues on Which he Differed with al-Shāfi'ī).

During this period, the 'ulama who accepted the school of Imam Abū Ḥanīfah devoted their attention to the study of al-Shāfi'ī's *al-Risālah*, both in order to refute what they disagreed with, and to derive their own source methodology and principles of jurisprudence from the *fatāwā* made by Imam Abū Ḥanīfah.

In this vein, the Ḥanafī scholars produced several works: 'Īsā ibn Abbān (d. 220 AH) wrote *Khabar al-Wāḥid*, *Ithbāt al-Qiyās*, (Validating Analytical Deduction), and *Ijtihad al-Ra'i* (The Exercise of Legal Reasoning). Al-Barza'ī (d. 317 AH) wrote *Masa'il al-Khilāf* (Issues of Disagreement), of which there is a 236-page copy in al-Zaytunah Library in Tunis, number 1619. Abū Ja'far al-Ṭahāwī (d. 321 AH) wrote *Ikhtilāf al-Fuqahā'* (Disagreement of the Jurists), which was summarized by Abū Bakr al-Jaṣṣāṣ (d.370 AH). There is a copy of this book in Cairo. For more details, refer to the index of *Ma'had al-Makḥṭūṭāt* (1/329).<sup>82</sup> Al-Karābīsī al-Najafī (d. 322 AH) wrote *al-Furūq* (Differences), of which they are manuscripts in Aḥmad III and Fayḍ Allah libraries in Istanbul. Several untitled works on jurisprudence were also attributed to Ibn Samā'ah (d. 233 AH).<sup>83</sup> Al-Kannānī (d. 289 AH) wrote *al-Hujjah fī al-Radd 'alā al-Shāfi'ī* (The Evidence in Refutation of al-Shāfi'ī).

ʿAlī ibn Mūsā al-Qummī al-Ḥanafī (d. 305 AH) wrote *Mā Khālafa Fīhi al-Shāfiʿī al-ʿIrāqīyyīn fī Aḥkām al-Qurʿan* (Instances in which al-Shāfiʿī Disagreed with the Iraqis in the legal interpretation of the Qurʿan), *Ithbāt al-Qiyās*, *al-Ijtihad* and *Khabar al-Wāḥid*. Abū al-Ḥasan al-Karkhī (d. 340 AH) wrote his well known book *al-Uṣūl* (The Sources) which was printed with a collection of other books in Cairo (no date). Abū Sahl al-Nawbakhtī (d. circa 93 AH), who belonged to the *Imāmiyyah*, wrote *Naqḍ Risālat al-Shāfiʿī* (A critique of al-Shāfiʿī's *al-Risālah*), *Ibtāl al-Qiyās* (Invalidating *Qiyās*), and *al-Radd ʿalā Ibn al-Rawāndī fī Baʿḍ Ārāʾihi al-Uṣūliyyah* (Refutation of Certain of Ibn al-Rawāndī's Legal Opinions). Ibn al-Junayd (d. 347 AH), who belonged to the *Zaydiyyah* school, wrote *al-Faskh ʿalā man Ajāza al-Naskh limā Tamma Sharʿuhu wa Jalla Naḥu* (The Nullification of those who Permitted Abrogation on Laws already Promulgated and Proved Beneficial), and *al-Iḥām li Uṣūl al-Aḥkām* (Understanding Juristic Principles).

The adherents of al-Shāfiʿī's school of legal thought (*al-Shāfiʿiyyah*) produced the following works: Abū Thawr (d. 240 AH) wrote *Ikhtilāf al-Fuqahāʾ* (Disagreement of the Jurists). Abū ʿAbd Allah Muḥammad ibn Naṣr al-Marwazī (d. 294 AH) also wrote a book on the same subject. Abū al-ʿAbbās ibn Surayj (d. 305 AH) wrote a book refuting both ʿIsā ibn Abbān and Muḥammad ibn Dāwūd al-Zāhirī on matters in which they differed with al-Shāfiʿī. Ibrāhīm ibn Aḥmad al-Marwazī (d. 340 AH) wrote *al-ʿUmūm wa al-Khuṣūṣ* (The General and the Particular) and *al-Fuṣūl fī Maʿrifāt al-Uṣūl*<sup>84</sup> (Chapters and Knowledge of Legal Source Methodology).

Some of these scholars devoted their attention to producing commentaries on al-Shāfiʿī's *al-Risālah*, like Abū Bakr al-Ṣayrafī (d. 330 AH), Abū al-Walīd al-Nīsābūrī (d. 365 or 363 AH), Abū Bakr al-Jawzaqī (d. 388 AH) and Abū Muḥammad al-Juwaynī, the father of the famed Imam al-Ḥaramayn.

Commentaries of *al-Risālah* are also attributed to five other scholars, namely: Abū Zayd al-Jazūlī, Yūsuf ibn ʿUmar, Jamāl al-Dīn Afqahsī, Ibn al-Fākihānī, and Abū al-Qāsim ʿIsā ibn Nājī.

None of these commentaries, from when the scholars used to

quote until after the seventh century, has come to light in modern times.

Shaykh Muṣṭafā ʿAbd al-Rāziq<sup>85</sup> mentioned that the public library in Paris held a copy of al-Juwaynī's commentary on *al-Risālah*, and quoted some parts of it. I myself have tried – but failed – to locate this manuscript in Paris, perhaps it has been placed with other books under a different heading or title.<sup>86</sup>

#### DEVELOPMENTS IN UṢŪL AL-FIQH AFTER IMAM AL-SHĀFIʿI

What we have mentioned so far can hardly be regarded as development, as it mainly resolves around criticizing, supporting or commenting on *al-Risālah*, and really goes no further than that. Once the discipline has been established, the state of affairs continued to about the beginning of the fifth century AH, when what could be considered a significant development in the field began to take place.

During this period, al-Bāqillānī (d. 403 AH) and ʿAbd al-Jabbār al-Hamadānī (d. 415 AH) undertook to rewrite the whole subject of the practice and principles of Shariʿah source methodology, or *uṣūl*.

In his book *al-Baḥr*, al-Zarkashī wrote:

... the judge of *ahl al-Sunnah*, Abū Bakr al-Ṭayyib al-Bāqillānī, and the judge of the Muʿtazilah, ʿAbd al-Jabbār, came and expanded upon what had been written, clarified what had previously been little more than indications, provided detail to what had been mentioned in a general way, and removed ambiguities.

Al-Bāqillānī earned that title of *Shaykh al-Uṣūliyyin*<sup>87</sup> (Master of the Scholars of *Uṣūl*), after he wrote *al-Taqrīb wa al-Irshād* (Clarification and Guidance). This book has been lost for centuries, though it may yet turn up in one collection of manuscripts or another. In any case, the scholars of *uṣūl* continued quoting from it until the ninth century AH.

For his part, ʿAbd al-Jabbār wrote a book entitled either *al-ʿAhd*

(The Covenant) or *al-ʿAmad* (The Pillars) and also wrote his own commentary on it. Imam al-Ḥaramayn (d. 478 AH) summarized al-Bāqillānī's *al-Taqrīb wa al-Irshād* in a book entitled *Talkhīṣ* (The Summarizing) or *al-Mulakhkhaṣ* (The Summary), of which some pages are preserved in some manuscript collections. Later scholars of jurisprudence transmitted many of al-Bāqillānī's ideas from his work.

Imam al-Ḥaramayn patterned his own book on *uṣūl*, *al-Burhān* (The Proof), on al-Bāqillānī's *Taqrīb*, in that it included all fields of jurisprudence, it was free in its method, and followed whatever evidence was available.<sup>88</sup> He disagreed with his teachers, Imam al-Ashʿarī and Imam al-Shāfiʿī, on so many issues that many of his fellow scholars from the Shāfiʿī school of legal thought rejected his commentary and did not give it the attention it deserved, even though they transmitted a great deal from it in their own books. Two Mālikī scholars, Abū ʿAbd Allāh al-Māzarī (d. 536 AH) and Abū al-Ḥasan al-Abyārī (d. 616 AH), wrote commentaries on *al-Burhān*. A third Mālikī scholar, Abū Yaḥyā, combined the two commentaries. Still, all three scholars dealt harshly, if not somewhat unfairly, with Imam al-Ḥaramayn because of what they considered to be his audacity in refuting Imam al-Ashʿarī on matters where he disagreed with him, and with refuting Imam Mālik on the question of *al-maṣāliḥ al-mursalāh*. Imam al-Ḥaramayn added introductions to Imam al-Shāfiʿī's book which dealt with matters not found in *al-Risālah*. He began by discussing the knowledge of those sources and concepts which anyone who wishes to study any science in depth must have. He explained that the sources of *uṣūl al-fiqh* were *ʿilm al-kalām* (scholastic theology), Arabic language and *fiqh*. Then he dealt with legal judgements, duties, and competence, discussing in detail issues pertaining to various sciences, and explaining those which could be understood by reason, and those by religion. All the above matters formed an introduction to a discussion of the term *bayān* (perspicuous declaration), the subject with which Imam al-Shāfiʿī began *al-Risālah*.

It is quite apparent, however, when we see how Imam al-Ḥaramayn dealt with the subject of *bayān*, and with other of the

subjects mentioned in *al-Risālah*, that Imam al-Ḥaramayn defined the terms, including *bayān*, more precisely than Imam al-Shāfiʿī had done. He defined it, explained its essence, mentioned disagreements over it, and set forth its different categories. He also dealt with another matter which Imam al-Shāfiʿī had not covered, i.e. *ta'khīr al-bayān 'ilā waqt al-ḥājah* (deferment of *bayān* until the time when it was needed), and disagreements over it. Then, in discussing the different categories of *bayān*, he reiterated the five categories which Imam al-Shāfiʿī had mentioned, advocated Abū Bakr ibn Dāwūd al-Zāhiri's comments on the subject, and then mentioned the other categories of *bayān*, which some jurists had suggested.

Imam al-Ḥaramayn held the opinion that what was meant by *bayān* was “evidence,” of which there are two types: *ʿaqlī* (rational) and *samʿī* (received). The basis for “received” evidence is the inimitable Qurʾan; so that the closer the evidence is to the Qurʾan, the more precedence it has. Hence the order of priority in “received” evidence is: the Qurʾan, the Sunnah, *ijmaʿ*, *khabar al-wāḥid*, and *qiyās*.

Then he turned to languages, and explained that the scholars of jurisprudence had dealt with linguistic matters which the scholars of Arabic had omitted, such as for instance, *awāmīr* (commands), *nawāhi* (prohibitions), and *al-ʿumūm wa al-khuṣūṣ* (the general and the particular), which al-Shāfiʿī had covered.

In the course of this linguistic discussion, Imam al-Ḥaramayn mentioned some of al-Bāqillānī's ideas, which clearly indicates that al-Bāqillānī had already made these additions to the methods of al-Shāfiʿī.

When Imam al-Ghazālī was the student of Imam al-Ḥaramayn it was only natural that he be influenced by him. In fact, Imam al-Ghazālī wrote four books on the subject of *uṣūl*. The first was *al-Mankhūl* (The Sifted), a medium-sized volume written as though for beginners or intermediate-level students of *uṣūl*. Of the second book nothing is known except that it was referred to in *al-Mustasfā*,<sup>89</sup> and that its title was *Taḍhīb al-Uṣūl* (On the Refinement of *Uṣūl*). The third book was entitled *Shifāʾ al-Ghalīl fī Bayān al-Shibh wa al-*

*Mukhayyal wa Masālik al-Taʿlīl*, and was edited and published in Baghdad in 1390/1971. Imam al-Ghazālī's encyclopedia of Shariʿah source methodology, his fourth book on the subject, and his last word, was *al-Mustaṣfā*, which has been printed several times in Egypt and elsewhere. This is the work he wrote after coming out of his period of meditation and seclusion. Al-Ghazālī began his book with an introduction in which he covered nearly all of Aristotelian logic, a subject in which he had always been deeply interested. Then he wrote on the *ḥadd* (prescribed punishment – plural *ḥudūd*), about the conditions that must be satisfied before it can be applied, and about the different types of *ḥudūd*. He then discussed the *dalīl* (evidence) and its various types.

At this point in the book, al-Ghazālī proceeded to discuss the four poles of his work, headings under which everything in the field of *uṣūl* is covered, and with which his teacher, Imam al-Ḥaramayn, and predecessors, such as al-Bāqillānī, were most concerned. As his teacher has held opinions that differed from those of al-Shāfiʿī and al-Ashʿarī, so also did Imam al-Ghazālī hold opinions which differed from those of his predecessors. Likewise, among Imam al-Ghazālī's contemporaries there were those who accepted his views and those who did not.

These were the most important developments made by the followers of Imam al-Shāfiʿī in the field of *uṣūl*.

The second group to contribute to the development of the discipline were the Muʿtazilah. After the judge ʿAbd al-Jabbār had written his book, *al-ʿAmad* or *al-ʿAhd*, in addition to a full commentary on it, he recorded some of his opinions on *uṣūl* in his encyclopedia, some parts of which have been found and printed under the title *al-Mughnī*. The seventeenth volume of this encyclopedia was devoted to studies of *uṣūl*.

As Imam al-Ḥaramayn concerned himself with the books of al-Bāqillānī, so Abū al-Ḥusayn al-Baṣrī al-Muʿtazilī (d. 435 AH) concerned himself with the books of ʿAbd al-Jabbār, and wrote a commentary on *al-ʿAmad* or *al-ʿAhd*. When he felt that this commentary was too long, he summarized it in his well-known book *al-Muʿtamad* (The Reliable), which is in print and widely available.

During this period, Shaykh Abū Ishāq al-Shīrāzī (d. 476 AH) wrote his two books, *al-Lamʿ* (The Bright Light) and *al-Tabṣīrah* (Enlightenment), both of which are in print. Abū Yʿalā al-Farrāʾ al-Ḥanbalī wrote a book entitled *al-ʿUddah fī Uṣūl al-Fiqh* (The Tools of *Uṣūl al-Fiqh*), which was edited and published in Saudi Arabia in 1400/1980. Ibn ʿAqīl al-Baghdādī, another Ḥanbalī scholar, wrote *Al-Waḍīḥ fī al-Uṣūl* (What is Clear in *Uṣūl*), Abū al-Khaṭṭāb wrote his well known book, *al-Tamhīd* (The Preface), which was recently edited and published in Makkah.

Among the books written by scholars of the Mālikī school of legal thought at that time was *ʿUyūn al-Adillāh fī Masāʾil al-Khilāf bayna Fuqahāʾ al-Amṣār* (Profusion of Evidence on Controversial Issues among the Jurists of the New Muslim Settlements) by Ibn Qaṣṣār al-Baghdādī (d. 398 AH), of which there is a copy at Qarawiyīn University in Fez.<sup>90</sup> Al-Shīrāzī considered this the best book by any Mālikī scholar on the subject of juristic differences. Ibn Qaṣṣār also wrote *Muqaddimah fī Uṣūl al-Fiqh* (Introduction to *Uṣūl al-Fiqh*) of which there is a copy at al-Azhar University library.

The books of the *Shāfiʿiyyah*, *Ḥanābilah*, *Mālikiyyah* and *Muʿtazilah* all followed a similar pattern in terms of the order of their chapters and the treatment of their subject matter. Eventually, this pattern became known as “the method of the *Mutakallimūn*.”

#### THE ROLE OF THE FOLLOWERS OF ABŪ ḤANĪFAH IN THE WRITING OF UṢŪL

Some historians of *uṣūl al-fiqh* have suggested that al-Qāḍī Abū Yūsuf and Muḥammad ibn al-Ḥasan wrote about jurisprudence,<sup>91</sup> but this claim has not been proven. The author of *Kashf al-Zunūn*<sup>92</sup> quoted ʿAlāʾ al-Dīn al-Samarqandī’s saying from *Mizān al-Uṣūl* (*Uṣūl in the Balance*):

Know that *uṣūl al-fiqh* is a branch of *uṣūl al-dīn*; and that the composition of any book must of necessity be influenced by the authors beliefs. Therefore, as most of the writers on *uṣūl al-fiqh*

belong to the Muʿtazilah who differ from us in basic principles, or to the *ahl al-Ḥadīth* who differ from us in questions of detail, we cannot rely on their books.

Our [Ḥanafī] scholar's books, however, are of two types. The first includes books that were written in a very precise fashion, because their authors knew both the principles and their application. Examples are: *Ma'khaḍh al-Sharʿ* (The Approach of the Shariʿah) and *al-Jadal* (the Argument) by Abū Maṣṣūr al-Māturīdī (d. 333 AH).

The second type dealt very carefully with the meanings of words and was well arranged, owing to the concern of the authors with deriving detailed solutions from the explicit meanings of narrations. They were not, however, skilful in dealing with the finer points of uṣūl or questions or pure reason. The result was that the writers of the second type produced opinions in some cases agreeing with those whom we differed. Yet, books of the first type lost currency either because they were difficult to understand or because scholars lacked the resolution to undertake such works.

There is much more that could be said about how accurately this statement depicts the development of the Ḥanafī studies of uṣūl, even if it were made by a Ḥanafī. The statement does, nonetheless, come to close to reality in explaining the role of the *Ḥanafīyyah* in the development of uṣūl al-fiqh. In the first period, these scholars concentrated, even before Imam al-Māturīdī, on discussing the issues brought up by Imam al-Shāfiʿī in *al-Risālah*, as ʿĪsā ibn Abbān and others.

During the following period, one of the most prominent writers of uṣūl was ʿUbaydullah al-Karkhī (d. 340 AH). His book on uṣūl consists of a limited number of pages that were printed with Abū Zayd al-Dabbūsī's book *Ta'sīs al-Nazar* (Establishing Opinion) which has been published in several editions in Cairo.

Then, Abū Bakr al-Jaṣṣāṣ (d. 370 AH) wrote *al-Fuṣūl fī al-Uṣūl* as an introduction to his *Aḥkām al-Qur'an* (Legal Interpretations of the Qur'an). *Al-Fuṣūl* has been researched and edited for a doctoral thesis, and was published recently in Kuwait.<sup>93</sup>



True development of the *Ḥanafīyyah* writing on the subject of *uṣūl* may be considered to have begun with Imam Abū Zayd al-Dabbūsī (d. 340 AH), who wrote two important books on the subject: *Taqwīm al-Adillah* (Appraising Evidence), all or some of which has been researched and edited, but which has not yet been printed, and *Ta'sīs al-Nazar*.<sup>94</sup> Abū Zayd made use of the work on *uṣūl* done by his predecessors, especially that of al-Karkhī and al-Jaṣṣāṣ, but with the difference that he expanded the field and explained it in greater detail; he also made brief reference to the points on which the *Ḥanafīyyah* agreed and disagreed with others on matters of *uṣūl*. Abū Zayd was followed by Fakhr al-Islām al-Bazdawī (d. 482 AH), who wrote the well known *Kanz al-Wuṣūl 'ilā Ma'rifat al-Uṣūl* (A Treasury on Attaining Knowledge of the *Uṣūl*) in which he dealt with *uṣūl* in general. Later the *Ḥanafī* scholars took great interest in the book and wrote many commentaries on it, the best and most important of which was *Kashf al-Asrār* (Secrets uncovered) by 'Abd al-'Azīz al-Bukhārī (d. 830 AH). This commentary has been published in several editions in both Istanbul and Egypt. Likewise, Shams al-A'immah al-Sarkhasī (d. 423 AH) wrote *Uṣūl al-Sarkhasī* which has been printed in two volumes in Egypt. This book is considered to be in many ways an alternative reading of al-Dabbūsī's *Taqwīm al-Adillah*. The *Ḥanafī* scholars of *uṣūl* took great interest in the books of al-Bazdawī and al-Sarkhasī, and have concerned themselves with teaching and commenting upon them for centuries.

From the above it should be clear that the development of *uṣūl al-fiqh*, as a specialized discipline, had been completed, and that its issues and academic parameters had been defined by the fifth century AH. Indeed, by that century, the scholars of every school of legal thought had recorded their own interpretations and understandings of *uṣūl al-fiqh*.

THE METHODS OF THE FOLLOWERS OF IMAM AL-SHĀFI'Ī OR,  
THE *MUTAKALLIMŪN*, AND THOSE OF THE *ḤANAFIYYAH*

Writings on this subject of *uṣūl* generally followed one out of two

methods. The first was al-Shāfiʿī's method, or that of the *Mutakallimūn*. This was the one followed by the *Shāfiʿiyyah*, the *Mālikiyyah*, and the *Ḥanābilah* and the *Muʿtazilah*,<sup>95</sup> and it was known as the “method of the *Mutakallimūn*” because the authors of books written in this way used to introduce them with discussions of theological and philosophical issues, such as *ḥasan* and *qabīḥ* (the good and the reprehensible), *ḥukm al-ashyāʾ qabl al-sharʿ* (The Legal Status of Matters prior to the [revelation of] Shariʿah), *shukr al-munʿim* ([the necessity of] gratitude to the Bestower), and *al-ḥākim* (the question whether it is the Shariʿah or reason which decides what is right or wrong).

A further reason for its being labelled “the method of the *Mutakallimūn*” was the use of the deductive method in defining principles of source methodology, in ascertaining the validity of those principles, and in refuting those whose opinions differed, without paying much attention to the issues and details which stem from the application of these principles.

#### THE METHOD OF THE ḤANAFĪ SCHOLARS OF UṢŪL

The Ḥanafī method of writing on *uṣūl* entailed defining the principles of *uṣūl* from the details of legal issues with which their earlier predecessors had already dealt. Thus, the basis of their studies was derived from the details of previously settled legal issues, and not the reverse.

Therefore, one who studies *uṣūl al-fiqh* by this method will gather the details of issues concerning which the Ḥanafī *aʿimmah* have already given *fatāwā*, and then analyze them. Through his analysis he will decide the basis on which these *fatāwā* were given.

Al-Dahlawī commented:

...I found that some of them claimed the differences between Abū Ḥanīfah and al-Shāfiʿī were founded on the *uṣūl* mentioned in al-Bazdawī's book and elsewhere. But the truth is that most of these *uṣūl* were themselves derived from the differing legal pronouncements of the *aʿimmah*. My opinion is that such principles of *uṣūl* as the rules which say that the particular (*khāṣṣ*) is obvious

(*mubayyan*), and does not need to be followed by a declaration (*bayān*); that the addition of details to a text constitutes abrogation (*naskh*); that the comprehensive (*‘āmm*) is definitive (*qaṭ‘ī*) like the particular (*khāṣṣ*); that mere numbers of narrations may not be taken as a factor in according preference (*tarjīh*) to one opinion or another; that the hadith of one who is not a *faqīh* need not necessarily be adopted in cases where there can be no resort to reason; that there is no legitimacy to the notion of progressing from a precondition (*shart*) or description (*waṣf*) to a legal deduction; that the imperative (*‘amr*) in a text always indicates legal obligation (*wujūb*); and so on; all of these are examples of principles inferred from the judgements of the *a’immah*. Indeed, there are no sound narrations to suggest that Abū Ḥanīfah or his two companions, Muḥammad and Abū Yūsuf, adhered to any of these principles of source methodology. As such, then, these principles deserve no more to be preserved and defended, as al-Bazdawī and the others did, than the opposing principles do.<sup>96</sup>

#### THE SCIENCE OF UṢŪL AL-FIQH DURING THE SIXTH CENTURY AH AND THE FOLLOWING PERIOD

Following consolidation of the subject matter of this discipline, according to the method of the *Mutakallimūn*, in four major works: *al-‘Ahd*, *al-Mu‘tamad*, *al-Burhān* and *al-Mustaṣfā*, two great scholars from among the *Mutakallimūn* summarized these four books in works of their own. The first was Imam Fakhr al-Dīn al-Rāzī (d. 606 AH), who summarized them in his book *al-maḥṣūl* (The Sum and Substance), which I had the honor of researching and editing. This work had been printed in six volumes by Imam Muḥammad ibn Sa‘ūd University, and has now been reprinted. The second was Imam Sayf al-Dīn al-Āmidī (d. 631 AH), who summarized these four books in *al-Iḥkām fī Uṣūl al-Aḥkām* (Precision in the Source Methodology of Law), which has been published in Riyadh, Cairo and elsewhere.<sup>97</sup>

These two books are lengthier and certainly easier to read and understand than others. Of the two, *al-Maḥṣūl* is written in clearer language, and is more detailed in its explanations. Many glosses and

commentaries have been written on these two books. Tāj al-Dīn al-Armawī (d. 656 AH) summarized *al-Maḥṣūl* in his book *al-Hāṣil* (The Outcome) which was researched and edited for a doctoral thesis at al-Azhar University, but has not yet been published.

Muḥammad al-Armawī (d. 672 AH) summarized it in *al-Tashīl* which was edited but never published. Imam al-Rāzī himself also summarized *al-Maḥṣūl* in a book entitled *al-Muntakhab* (Selections) which has also been researched and edited.

Qāḍī al-Bayḍāwī (d. 685 AH) summarized *al-Hāṣil* in his book *Minhāj al-Wuṣūl 'ilā 'Ilm al-Uṣūl* (The Way of Mastering the Science of Uṣūl); but his summary was so abbreviated that the result is like a riddle, very difficult to understand. Thus, many scholars undertook to produce commentaries on this book. Among such commentaries, the best is that of *al-Isnawī* (d. 772 AH), which is entitled *Nihāyat al-Su'l* (An End to Questioning). This book occupied the attention of scholars in the field for a long time, and the *Shāfiʿiyyah* scholars at al-Azhar are still devoted to it.

Al-Āmidī's book, *al-Iḥkām* (Precision) was summarized by Ibn al-Ḥājib (d. 646 AH) of the Mālikī legal school in his book *Muntaha al-Su'l wa al-'Amal fī 'Ilm al-Uṣūl wa al-Jadal* (The Ultimate in the Sciences of Jurisprudence and Argumentation) which is well known among the followers of Imam Mālik. The best available commentary on this work is that of ʿAḍḍ al-Dīn (d. 756 AH), for which several glosses and commentaries have been written. All of these books were written following the method of the *Mutakallimūn*, defining the principles, basing evidence upon them, and refuting by means of them those who held opposing views.

The *Ḥanafīyyah* scholars of *uṣūl* concentrated on studying the books of al-Bazdawī and al-Sarkhaṣī. This situation remained the same until the end of the sixth century and the beginning of the seventh century AH, when the scholars of *uṣūl* began using a new method. This method entailed combining the methods of the *Mutakallimūn* and the *Ḥanafī* scholars to produce books that combined the *uṣūl* of the two groups.

Following this method, Muẓaffar al-Dīn al-Sāʿātī (d. 694 AH) wrote *Baḍīʿ al-Niẓām al-Jāmiʿ bayna Kitābay al-Bazdawī wa al-*

*Ihkām*. This book is one that is readily available in print.

Şadr al-Shariḥ (d. 747 AH) of the Ḥanafī school wrote *Tanqīh al-Uşūl* (Refining *Uşūl*), in which he summarized *al-Maḥşūl*, *Uşūl al-Bazdawī* and *Mukhtaşar ibn al-Ḥāḡib*. He then wrote a commentary on his own book entitled *Tawḍīḥ al-Tanqīḥ* (Clarification of Refining) to which al-Taftāzānī (d. 792 AH) added a marginal commentary entitled *al-Talwīḥ*. All three books, *al-Tanqīḥ*, *al-Tawḍīḥ* and *al-Talwīḥ* are available in print.

Among the *Shāfiʿiyyah* scholars, Tāj al-Dīn al-Subkī wrote his famous book, *Jamʿ al-Jawāmiʿ* (The Compilation of the Comprehensive). In the introduction, he mentioned that he had compiled his work from a hundred different books on *uşūl*. Many scholars wrote commentaries and added footnotes to al-Subkī's book. Of these, perhaps the most important and most widely available commentary is *Sharḥ al-Jalāl al-Muḥallī*, which remains even today the basis for studies in *uşūl*, especially for the *Shāfiʿiyyah* scholars.

Badr al-Dīn al-Zarkashī (d. 794 AH) also wrote a commentary, entitled *Tashnīf al-Masāmiʿ* (Pleasing the Ears), part of which was printed in Cairo with footnotes by Shaykh al-Muṭṭīʿī (d. 1354 AH). A part of this book was researched and edited for a doctoral thesis at Imam Muḥammad ibn Saʿūd University.

Al-Zarkashī also wrote *al-Baḥr al-Muḥīṭ* (The Vast Ocean), in which he collected the submissions of scholars of *uşūl* from over one hundred books. A student began researching and editing this book under my supervision and has already completed one volume and made it ready for publication. It has since been published in its entirety by the Ministry of Awqaf in Kuwait.

Among the Ḥanābilah, Ibn Qudāmah (d. 620 AH) wrote *Rawḍat al-Naẓīr wa Jannāt al-Manāẓīr*, in which he summarized al-Ghazālī's *al-Mustaṣfā*, and added to it other useful material on matters on which the Ḥanābilah disagreed with others. This book has been printed several times, and the Ḥanābilah took great interest in it, to the extent that they ignored nearly all other books. Sulaymān al-Ṭūfī (d. 716 AH) summarized this work, and then commented on his summary in two volumes.

Among the *Mālikiyyah*, al-Qarāfī (d. 684 AH) wrote *Tanqīḥ al-*

*Fuṣūl fī Ikhtiṣār al-Maḥṣūl* (Refining chapters in the Summary of *al-Maḥṣūl*). Al-Qarāfī also wrote a commentary on *al-Maḥṣūl* in a large volume entitled *Nafāʾis al-Uṣūl* (Treasures of *Uṣūl*), part of which has been researched and edited under our supervision in Riyadh.

## *Issues Related To Ijtihad*

The subject of ijtihad traditionally took up an entire chapter in a book of *uṣūl*. In that chapter, the author would first deal with ijtihad by defining it, explaining the conditions for its validity, and differentiating between the various kinds of ijtihad. Then, he would discuss whether or not the Prophet considered ijtihad to be a form of worship (*ʿibādah*), whether or not it constituted a form of *ʿibādah* for the *Ṣaḥābah* during the Prophet's lifetime, whether only one answer resulting from ijtihad on any issue could be correct, or whether there could be several correct answers, and when ijtihad was and was not permitted. Then the scholars dealt with the subject of *taqlīd* in the same fashion.

In the eighth century AH, Ibrāhīm Abū Mūsā al-Shāṭibī (d. 790 AH) wrote *al-Mūwāfaqāt* (The Congruences), in which he spoke of ijtihad as an intellectual exercise based on two pillars. The first pillar was complete knowledge of the grammar and syntax of the Arabic language. He left the details of this subject to the scholars of the Arabic language and other writers on *uṣūl*. The second pillar of ijtihad, in al-Shāṭibī's opinion, was knowledge of the purposes behind the legislation of the Lawgiver. Al-Shāṭibī's predecessors in the field of *uṣūl* had never paid a great deal of attention to these higher purposes. Rather, the most they had done in this direction had been to search for a principle cause, *ʿillah*. Al-Shāṭibī, on the other hand, wrote his book in order to deal with this important matter. Indeed, knowledge of the purposes or *maqāsid* of the

Shari<sup>h</sup> is essential to understanding the legislation of the Law-giver. Yet, the scholars of *uṣūl* have never given this book the attention it deserves. This may perhaps be explained by the notion fixed in the minds of many scholars that it is not permitted to seek reasons for legislation by the Almighty, because such speculation cannot be regulated or rendered precise.<sup>98</sup> When this is the case, or so goes the reasoning of a great many scholars, the study of such matters is little more than a needless intellectual luxury.

Anyway, al-Shāṭibī's book is in print and widely available; and we can only hope that the teachers of *uṣūl* and those responsible for drawing up curricula will direct their student's attention to this important work, especially those who are studying *qiyās*, *ta<sup>l</sup>līl*<sup>99</sup> and *ijtihād*.<sup>100</sup> In our own times, the two great scholars, Ibn ʿĀshur and ʿAllāl al-Fāṣī have written on the subject of the purposes of Shari<sup>h</sup>.<sup>101</sup>

Ibn al-Humām (d. 861 AH) wrote *al-Taḥrīr* (The Writing), and his student, Ibn ʿAmīr al-Ḥājj (d. 879 AH) wrote a commentary on it, entitled *al-Taqrīr wa al-Taḥbīr*. Both are in print. *Al-Taḥrīr* is one of the books written in the combined *Ḥanafīyyah–Mutakallimūn* method. There is another commentary, by Amīr Bādshāh, entitled *Taysīr al-Taḥrīr* (Facilitating the Writing).

ʿAlā' al-Dīn al-Mardāwī (d. 885 AH) wrote a summary of *Uṣūl Ibn Muḥliḥ* (d. 763 AH), entitled *Taḥrīr al-Manqūl wa Tahdhīb ʿIlm al-Uṣūl*. This work has been researched and edited, and is due to be published soon. The same researcher has dealt with *Uṣūl Ibn Muḥliḥ*. Later, Ibn al-Najjār al-Futūhī of the Ḥanbalī school of legal thought wrote a summary of *Taḥrīr al-Mardāwī*, and also an excellent commentary on it. This commentary is considered to be one of the best and most comprehensive of the later books about *uṣūl*. An incomplete version of the book was printed in Egypt before it was researched and edited by two prominent professors, Dr. Nazīh Ḥammād and Dr. Muḥammad al-Zuḥaylī. Their work was published by the Center for Academic Research in the College of Shari<sup>h</sup> at Makkah.

In the twelfth century AH, Mūḥibb Allah ibn ʿAbd al-Shakūr al-Bihārī (d. 1119 AH), of the Ḥanafī school, wrote his famous book



*Musallam al-Thubūt*. This is one of the most precise and comprehensive books on *uṣūl* written by the later generation of Ḥanafī scholars. This book has been printed on its own, and with a commentary, in India; and it has also been printed, with its famous commentary *Fawātiḥ al-Raḥamūt*, in the margin of al-Ghazālī's *al-Mustaṣfā* several times.

All of these books were written following the methods mentioned above, and all of them concentrated on supporting their author's school of legal thought, and refuting those of his opponents.

From the sixth century until the present, there is no book to be found which is concerned with presenting *uṣūl al-fiqh* as a research tool that will protect the Muslim jurist from making errors in *ijtihād*, apart from one remark made in passing by Shaykh ʿAlī ʿAbd al-Rāziq in his book *Tamhīd li Tārīkh al-Falsafah al-Islāmiyyah* (Preface to the History of Islamic Philosophy). His student, Dr. al-Nashshār, tried to explain this remark in his book *Manāhij al-Baḥth* (Methods of Research).

In the thirteenth century AH, al-Shawkanī (d. 1255 AH) wrote his well known book entitled *Irshād al-Fuḥūl* (Guidance of the Masters). This book, despite its diminutive proportions, presents different opinions in the field of *uṣūl*, and the evidence given by the proponents of each, in a brief but excellent fashion. The author also states which of the opinions he prefers. This book, which has been printed several times, is a useful one for the student of *uṣūl al-fiqh* and comparative studies in jurisprudence. However, to the best of our knowledge, it has not been included in the curriculum of any institute, despite its suitability.

Muhammad Ṣiddīq Khan (d 1307 AH) summarized this work in a book entitled *Ḥuṣūl al-Ma'mūl min ʿIlm al-Uṣūl* (The Attainment of the Hoped for Science of *Uṣūl*), which is in print. Indeed, *Irshād al-Fuḥūl* is considered to be an accurate summary of al-Zarkashī's *al-Baḥr al-Muḥīṭ*; and al-Maḥallāwī's *Tashīl al-Uṣūl* is considered to be a summary of *Irshād al-Fuḥūl*.

After this period, we find that the study of *uṣūl* has followed either one of two major trends:

1. Writing study guides, summaries and notes. This has been done by lecturers and professors at various colleges of Shari'ah and Law in order to make the study of *uṣūl al-fiqh* easier for their students, after they realized that their students were unable, or unwilling, to study this subject. Certainly, these notes did not contribute much to this field; and in most cases they are little more than attempts at recasting the issues of *uṣūl al-fiqh* in a simplified modern idiom. The following scholars, al-Marṣafī, al-Maḥallāwī, al-Khudrī, 'Abd al-Wahhāb Khallāf, al-Shinqīṭī, al-Sāyis, Muṣṭafā 'Abd al-Khāliq, 'Abd al-Ghanī 'Abd al-Khāliq, Abū Zahrah, Abū al-Nūr Zuhayr, Ma'rif al-Dawālībī, 'Abd al-Karīm Zaydān, Zakī al-Dīn Sha'bān, Muḥammad Sallām Madhkūr, and others, all wrote books which were originally of Law and Shari'ah where they taught.
2. The second trend has been the writing of university theses/dissertations on different aspects of this science, and the researching and editing of unpublished manuscripts. Undoubtedly both aspects of this trend are of great benefit, and I certainly do not intend to demean the efforts of anyone. Nonetheless, they fall short of achieving any sort of development in the field, and the science of *uṣūl al-fiqh* remains in the same place our predecessors left it in the sixth century AH.

From the above, we may draw the following conclusions:

1. Nothing of the discipline now known as *uṣūl al-fiqh* had emerged, with its particular terminology, during the time of the Prophet or his *Ṣaḥābah*.

Nonetheless, almost all the various ijtihad processes employed during these two periods could be classified under the principles articulated by this science. The reason for this is that they used to derive detailed legal rulings on particular issues from the sources of law as a matter of instinct, just as they used to speak Arabic instinctively, or without being aware of the rules of grammar (which had yet to be articulated at the time).

2. The first scholar to compile a book about the principles of the science of *uṣūl al-fiqh* was al-Shāfiʿī (150–204 AH).

The first comprehensive book on the subject was *al-Risālah*, which he wrote in response to a request from Imam ʿAbd al-Raḥmān ibn Mahdī (135–198 AH). This was after the two famous schools of fiqh, the school of *ahl al-Ḥadīth*, led by Imam Mālik ibn Anas (93–179 AH), and the school of *ahl al-Raʾī*, led by Imam Abū Ḥanīfah (70–150 AH), had become established and widespread.

Following the circulation of these two legal schools of thought, there arose between their followers, in addition to the political, theological and philosophical conflicts of the period, what can be described as “the fiqh controversy”.<sup>102</sup>

3. *Uṣūl al-fiqh* is a method of research for the jurist,<sup>103</sup> and its place in fiqh is analogous to that of logic in philosophy.<sup>104</sup> Therefore, it was defined as “the aggregate, considered per se, of legal proofs and evidence that, when studied properly, will lead either to a certain knowledge of a Shariʿah ruling or to at least a reasonable assumption concerning the same; the manner by which such proofs are adduced, and the status of the adducer.”<sup>105</sup>

So *uṣūl al-fiqh* offers comprehensive guidelines which protect the *mujtahid* from making mistakes in the various ways he uses source material for the purpose of deriving legal judgements.<sup>106</sup> Nonetheless, it was not used in this way until Imam al-Shāfiʿī put it to use in his “new” fiqh.<sup>107</sup>

4. An important fact that should be borne in mind is that scholars studied fiqh, and made pronouncements on it, for a long time before anyone began speaking about its *uṣūl* (apart from Imam al-Shāfiʿī in his “new” fiqh).

Thus, the role given by others to *uṣūl al-fiqh* was little more than that of justification for legal pronouncements (*fatāwā*) that they made on specific issues, and of the substance of argument and debate among them. Moreover, they did not view *uṣūl al-fiqh* as

a comprehensive legal guideline, or as a methodology capable of regulating the entire legal system, The *fuqahā'*, when faced with questions and situations, used to refer these back directly to the relevant evidence, without feeling the need to have recourse to the general principles articulated in *uṣūl al-fiqh*.

So, Imam Abū Ḥanīfah gave *fatāwā* on nearly half a million issues,<sup>108</sup> which his students learnt and passed on. But, the legal principles upon which Imam Abū Ḥanīfah based these *fatāwā* were never transmitted with anything like an uninterrupted line of authority from him,<sup>109</sup> apart from a few reports in which he refers to some of the sources of his ijtihad. He said, in one of those reports:

I follow the Book of Allah, and if I find no solution there, I follow the Sunnah of the Prophet, peace be upon him. If I find no solution in either the Qur'an or the Sunnah, I follow whichever of the pronouncements of the *Ṣaḥābah* I prefer, and leave whichever I wish. If there is a pronouncement on a particular matter by any of the *Ṣaḥābah*, I would not adopt any other opinion made by any other scholar. But, if I found a solution only in the opinions of Ibrāhīm and al-Sha'bi, Ibn Sīrīn, al-Ḥasan al-Baṣrī, 'Aṭā' and Sa'īd ibn al-Musayyab, I would make ijtihad just as they did.<sup>110</sup>

When some people tried to turn the *khalīfah*, al-Manṣūr, against him, Abū Ḥanīfah wrote to the *khalīfah*:

The situation is not as you have heard, O *Amīr al-Mu'minīn*. I work according to the Book of Allah, then according to the Sunnah of the Prophet, then according to the judgements of Abū Bakr, 'Umar, 'Uthmān and 'Alī, then according to the judgements of the rest of the *Ṣaḥābah*. Then, if there are any differences between any of their pronouncements, I resort to *qiyās*. No one of Allah's creatures is inherently closer to Him than any other.<sup>111</sup>

When he was accused of preferring *qiyās* to an explicit text (*naṣṣ*) in the Qur'an, he replied: "By Allah, those who say that we prefer *qiyās* to a *naṣṣ* have lied and slandered us. Is there any need for *qiyās* after [finding an explicit] *naṣṣ*?"<sup>112</sup>

5. It is quite obvious that from the beginning of the Umawī period until the fall of the Islamic *khilāfah*, authority and leadership in the Ummah were in the hands of those who were not qualified to perform *ijtihād*, whilst the responsibility for *ijtihād* rested with the *ʿulama*, who had no authority. It is difficult to find exceptions to this state of affairs, apart from the *khilāfah* of *ʿUmar ibn ʿAbd al-ʿAzīz*, from whom many judgements on questions of jurisprudence have been narrated. This situation had the far reaching effect of separating *fiqh* and its *uṣūl* from the practical aspects of Muslim life, so that in many cases these subjects became theoretical and idealistic.<sup>113</sup> Essentially, both subjects became descriptions of how Muslim life ought to be; not how it really was, or what it might become.
6. The writers and historians of this science classified it among the sciences of the Shariʿah that are based on transmitted evidence,<sup>114</sup> even though some writers said that its principles are taken from the Arabic language, the rational sciences, and certain other Islamic disciplines.<sup>115</sup> One of the most prominent writers in this field, Imam al-Ghazālī, wrote:

The noblest sciences are those in which reason (*ʿaql*) and received evidence (*samʿ*) are married, and in which conclusions based on reason accompany those based on revelation. The science of *fiqh* and its *uṣūl* is one of these sciences. It draws equally from the purity of revelation and the best of reason. Yet it does not rely purely on reason in a way that would be unacceptable to revealed law, nor is it based simply on the kind of blind acceptance that would not be supported by reason.<sup>116</sup>

The statements of Imam al-Ghazālī and other writers of *uṣūl* enable us to suggest that there are three sources of *fiqh*:

- (a) *Wahī*, or Divine Inspiration: this includes both the recited, or the inimitable Qurʾān, and the unrecited, or the Sunnah.
- (b) *ʿAql* or reason: to explain the texts, to seek ways in which they may be applied and ways in which various parts may be

connected to the whole, to search for the reasons behind legislation that seems to have no reason, to derive laws in matters for which the Lawgiver did not lay down an explicit judgement in the texts, and other similar matters which can be defined and explained.

(c) Experience, customs and the public interest.

All the *uṣūl*, both those which scholars have agreed upon and those concerning which there are disagreements, may be classified under the above three headings, as follows: The Qur'an, the Sunnah, *ijma'*, *qiyās*, the idea that what is basically beneficial is permitted and what is basically harmful is prohibited, *istiḥāb* and *istiḥsān*. In addition, the pronouncements of the *Ṣaḥābah* which were well known among them and which none of them opposed; the principle of adopting the least rigorous alternative; studying a few of the available relevant cases for purposes of comparison, common interest and customs which were neither commanded nor prohibited in any Islamic source; the conclusion that there is no law when there is nothing to indicate any law; the laws of nations before Islam, and closing the door on justifications.

7. There were certain factors in our history, some of which were mentioned above, that both intimidated and imposed instructions upon us. Consequently, the focus of our Islamic mentality and intellectual attention was diverted to minor issues, so that we were distracted from thinking in comprehensive terms, a characteristic that had once been considered to be the distinguishing feature of Islamic thought. This had a far-reaching effect on the way we dealt with *fiqh* and on the solutions we produced, in that these also bore the same characteristics and features.
8. It is well known that in every science and sphere of life, there are some matters that are naturally prone to development, that sometimes even require it in order to realize their full potential. Yet, there are some matters that are fixed and immutable.

According to the logic of Islam, the two must be integrated. Hence *uṣūl al-fiqh* has fixed rules which cannot be changed, and others that rely on continual development and renewal. This should be clear from the foregoing discussion of *ijtihād*.

Hence, while we urge all Muslim scholars not to begin from a vacuum, but to benefit from the reasoning and *ijtihād* of the scholars that went before them, we affirm that no one can claim that it is obligatory to follow any *mujtahid* in matters where his pronouncements were based solely on his individual reasoning. The best we can say in this matter is that his pronouncements are “an opinion, and an opinion can be shared.”<sup>117</sup>

9. From studying the methods of the early Muslims it is clear to us that their aim was not simply to ascertain the law and then to produce *fatāwā*. On the contrary, their objective was always the establishment of the rule of Allah through the application of His law. What this means, essentially, is that the circumstances surrounding the application of law cannot be separated from the conditions attached to it.

If, having understood the above, we wish to restore this science to its rightful place among the Islamic sciences, and transform it into a method of research into the source evidence of the Shari‘ah from which we may derive rulings on, and solutions to, our contemporary problems (thus maintaining the sovereignty of the Shari‘ah) we must do the following:

- (a) Review the topics covered by this science, and eliminate those without relevance to the modern scholar or jurist. These might all include *ḥukm al-ashyā’ qabl al-shar‘* (rulings before the Shari‘ah); *shukr al-mun‘im* (how one is required to thank the Bestower); *mabāḥith ḥākimiyyāt al-shar‘* (studies about the sovereignty of the Shari‘ah); and excessive concern with definitions. With should also dispense with disputes concerning the uncommon recitations, *al-qirā’āt shadhdhah*, of the Qur’an, and the Arabic nature of the entire Qur’an. Likewise, we should now end the long disagreement about the single narrator hadith

by saying that if such a narration is proved to have met the conditions of being authentic (*ṣaḥīḥ*), it will be acceptable, and laws may be derived from it.

Moreover, we should re-examine all the conditions laid down by certain early jurists that seem to have been dictated by circumstances. For example, the condition is that a hadith should not contradict the general principles they established, that it should not be narrated by other than a *faqīh*, that it should not contradict *qiyās*, or the traditions of the people of Madinah, or the explicit meaning (*ẓāhir*) of the Qur'an. Or the condition that a hadith, if it deals with a common issue or hardship or affliction, must be widely known. All of these conditions should be rejected, and the same must be done with other conditions which were and are still controversial and a source of disagreement among Muslims, and which still occupy the time of scholars.

- (b) Undertake linguistic studies relating to fiqh which will examine the styles of expression used by the Arabs at the time of the Prophet, and note the stages of development, which these styles later passed through, and the various meanings assigned to words in current usage at the time. This will enable us to understand the texts as they should be understood.
- (c) Pay special attention to the methods and the principles required in performing ijtihad, such as *qiyās*, *istiḥsān*, *maṣlaḥah*,<sup>118</sup> and others, and study them from a historical perspective, taking into account the circumstances which dictated the pronouncements of the *mujtahidūn*. We should also instill a juristic frame of mind into those who are researching in the fields of fiqh and *uṣūl*.
- (d) Realize that it is impossible at this time for one person to be a *mujtahid muṭlaq*, or a legal authority in his own right (on the interpretation of the sources), capable of passing judgement on all manner of issues. As long as this is so, academic councils are the best alternative.



In order to enable these councils to meet the needs of the Ummah in matters of legislation, they should be composed of experts whose specializations cover all aspects of life, and who would be able to perceive clearly any problem presented to them. In addition to this, they would have to have complete knowledge of the general rules and principles of the Shari'ah of Islam. Such councils would also include jurists of the highest level possible, knowledgeable in both the sciences of the Shari'ah and the detailed source evidence. Perhaps one of our great jurists was referring to this idea when he was approached by someone who wanted to break his fast in the month of Ramadan, and the jurist told the man to seek the opinion of a trustworthy Muslim doctor, adding that if the doctor considered the fast injurious to his health, then it would be permissible for him to cease his fast.

- (e) We must make it easier for specialists in other fields to study what they need of the sciences of the Shari'ah.
- (f) We must become familiar with the fiqh of the *Ṣaḥābah* and the *Tābi'ūn*; and especially with the principles on which they derived their judgements. In particular, the fiqh of *al-Khulafā' al-Rāshidūn* and their contemporaries deserves close study. Then, this knowledge may be presented to those whose task it is to formulate legislation and make judgements in response to the demands of contemporary Muslim society.
- (g) We need to take an interest in knowing the aims and purposes of Shari'ah, and in developing the study of this matter by setting down rules and guidelines.

## NOTES

<sup>1</sup> Shari‘ah: The collective name for all the laws of Islam including Islam’s whole religious and liturgical, ethical and jurisprudential systems.

<sup>2</sup> See Fakhr al-Dīn al-Rāzī, *al-Maḥṣūl fī ‘Ilm Uṣūl al-Fiqh*, edited by Dr. Taha Jabir al-Alwani (Riyadh: Imam ibn Sa‘ūd Islamic University, 1399/1979); 1st edition, part 1, 94.

<sup>3</sup> Ijtihad: Considering that the accepted juridical source of Islam are valid for all times and places, ijtihad may be described as a creative but disciplined intellectual effort to derive legal rulings from those sources while taking into consideration the variables imposed by the fluctuating circumstances of Muslim society. See Taha Jabir al-Alwani, *Ijtihad* (Herndon, Virginia and London, IIIT, 1993); “*Taqlīd* and Ijtihad,” *American Journal of Islamic Social Sciences* (AJISS), VIII, 1, 129-142; “The Crisis in Fiqh and the Methodology of Ijtihad,” VIII, 2, 317-337; “*Taqlīd* and the Stagnation of the Muslim Mind,” VIII, 3, 513-524; “*Taqlīd* and Ijtihad,” IX, 2, 233-242; “The Scope of *Taqlīd*,” IX, 3, 383-386.

<sup>4</sup> See the notes on *uṣūl al-fiqh* prepared by the professors of the Shari‘ah Faculty, al-Azhar University, for the academic year 1382/1963, 22.

<sup>5</sup> Hadith (pl. *aḥādīth*): The verbalized form of a tradition of the Prophet Muḥammad (ṢAAS) constitutive of his Sunnah. Also a collective term for all the *aḥādīth*. With capital H it applies to the sciences dealing with the Prophet’s tradition in all aspects. The scholars of Hadith are called *muḥaddithūn*.

<sup>6</sup> *Nāsikh wa munsūkh*: This is the study of those verses of the Qur’an whose contents have abrogated a legal meaning in another verse, or in a hadith, which is therefore called *munsūkh*. This branch of *uṣūl* also studies whether or not the contents of the hadith may abrogate legal meanings in the Qur’an, and in other hadith.

<sup>7</sup> Fiqh: Knowledge of Islam through its laws; science of the law of Islam. *Faqīh* (pl. *fuqahā’*): A specialist in fiqh. Also can be a synonym for *‘alim* (pl. *‘ulama*) meaning Islamic scholar.

<sup>8</sup> ṢAAS: *Ṣalla Allahu ‘alayhi wa Sallam*: May the peace and blessings of Allah be upon him. This prayer is said by Muslims whenever the name of the Prophet Muḥammad is mentioned, or whenever he is referred to as the Prophet of Allah.

<sup>9</sup> SWT: *Subḥānahu wa Ta‘ālā*: May He be praised and may His transcendence be affirmed. Said in all occasions.

<sup>10</sup> *Shirk*: Association of other beings with Allah; opposite of *tawḥīd*. *Mushrik* (pl. *Mushrikūn*) A person who practices or believes in *shirk*.

<sup>11</sup> *Tawḥīd*: The act of affirming that Allah is the One, the Absolute Transcendent Creator, the Lord and Master of all that is. *Tawḥīd* is the essence of Islam. For a thorough study see Ismā‘īl R. Al-Farūqī, *al-Tawḥīd*, (Herndon, Virginia: IIIT, 1992); Ismā‘īl R. Al-

Farūqī and Lois Lamya al-Farūqī, *The Cultural Atlas of Islam* (New York: Macmillan, 1986), 73–91

<sup>12</sup> Surah (pl. *suwar*/surahs) Chapter of the Qur'an. Each chapter is divided into a number of verses *āyāt* and the chapters and characterized, according to the place of their revelation as being either Makkan or Madinan.

<sup>13</sup> See 'Abd Allah ibn 'Abd al-Raḥmān al-Dārimī, *Sunan*, I, 51.

<sup>14</sup> Ibid., I, 50.

<sup>15</sup> Ibid., I, 49.

<sup>16</sup> Ibid., I, 51.

<sup>17</sup> Ibid.

<sup>18</sup> Quoted by Shaykh Muṣṭafā 'Abd al-Rāziq in *Tamhīd li Tārīkh al-Falsafah al-Islamiyyah* (Cairo), 152.

<sup>19</sup> *Wuḍū'*: Ritual washing of parts of the body before salah (prayer).

<sup>20</sup> Hajj: the fifth pillar of Islam consisting of acts performed in and around Makkah on the ninth and tenth days of *Dhu al-Hijjah*, the last month of the Islamic lunar year.

<sup>21</sup> Salah: The act of worship resembling prayer in Islam. There are five appointed ritual *ṣalawāt* daily: *fajr*: (dawn), *zuhr* (noon), *aṣr* (mid-afternoon), *maghrib* (dusk), *ishā'* (night); but a person can, and does, perform voluntary ones.

<sup>22</sup> *Fatāwā* (sing. *fatwa*): A juristic opinion given by a *faqīh*, an 'alim, a *muftī*, or a *mujtahid* on any matter pertinent to Islamic law.

<sup>23</sup> Al-Dahlawī, *Hujjat Allah al-Bālighah*, Egypt, I, 289.

<sup>24</sup> For information concerning the validity of citing Hadith as evidence, see the author's, *al-Ijtihad wa al-Taqlīd* (Cairo: Dar al-Anṣār), 23–24; and the chapters on ijtihad in *al-Maḥṣūl*.

<sup>25</sup> See Ibn al-Qayyim, *Iḥām al-Muwaqqi'īn*, passim.

<sup>26</sup> *Qiyās*: Legal reasoning, by means of induction, deduction, etc, from the texts of the Qur'an and the Sunnah.

<sup>27</sup> See Imam al-Shāfi'ī, *al-Risālah*, Cairo, 476.

<sup>28</sup> RAA : *Radiya Allahu 'Anhu*: May Allah be pleased with him. Said whenever a Companion of the Prophet is mentioned by name.

<sup>29</sup> Ibn al-Qayyim, op. cit, I, 54; Ibn 'Abd al-Barr, *Jāmi' Bayān al-Ilm*, II, 134.

<sup>30</sup> The Prophet sent out a party of Muslims with the directions, "Perform the *ṣalāt al-ʿaṣr* at Banū Qurayzah." Interpreting this literally, one group of Muslims in the party continued their journey through to sunset, without stopping for *ṣalāt al-ʿaṣr* at its prescribed time. A second group, however, more inclined to follow the spirit rather than the letter of the Prophet's words, stopped short of Banū Qurayzah in order to perform the salah at the prescribed time. When informed of what each group had done, the Prophet said that both had been right. (Eds.)

<sup>31</sup> *Tayammum*: The substitution (for reasons of availability, health, etc.) of sand, stone, or even snow for the usual purification by water and the ritual ablution therewith. *Janābah*: Any act which breaks the ritual purity of the Muslim; the state of such impurity. *Ghusl*: Total self washing of the body, or ritual purification in preparation for salah or burial.

<sup>32</sup> This hadith is a well-known and authentic one, and was included by Bukhārī, Abū Dāwūd, Nasā'ī, ibn Mājah, and Aḥmad in their Hadith collections. (Eds.)

<sup>33</sup> This hadith is a sound one and was related by Bukhārī, Muslim, and several others in their collections of authentic Hadith. (Eds.)

<sup>34</sup> See ibn Ḥazm, *al-Iḥkām*, V, 92–93.

<sup>35</sup> *Al-Khulafā' al-Rāshidūn*: The four rightly guided caliphs who ruled in succession after the Prophet's passing: Abū Bakr, 'Umar, 'Uthmān, and 'Alī.

<sup>36</sup> Al-Dahlawī, op. cit, I, 315.

<sup>37</sup> There is a disagreement about the meaning of the word *kalālah*. According to some, it denotes those who die leaving no lineal heirs, neither issue nor father nor grandfather. Others, however, see it as referring to those who die without issue, regardless of whether succeeded by father or grandfather. The relevant verse in the Qur'an is found in *Sūrat al-Nisā'*, 4:176. And it was on the basis of this verse that Abū Bakr ruled as he did. Abū Bakr's reasoning was that the verse specifies that the sister of the *kalālah* is to receive a half of the inheritance; and if the father had been alive, the sister would not have inherited from the *kalālah* at all. Thus, while the Qur'an does not specify the matter, it is fairly clear that the implied meaning is that the *kalālah* is the one who dies leaving no lineal heirs in either direction. (Eds.)

<sup>38</sup> This hadith is an authentic one and was related by Bukhārī, Muslim, Tirmidhī, Ibn Mājah, Aḥmad and others. (Eds.)

<sup>39</sup> Zakah: Usually rendered as the “poor-due” or legal charity, zakah is the public welfare tax that must be paid by all Muslims whose wealth and/or income is above a certain minimum. An individual's wealth can be in the form of cash, commodities, livestock, agricultural goods and other items. *Zakah al-fiṭr* is another kind of obligatory dues a Muslim gives at the end of the fasting month of Ramadan, shortly before the celebration of the festival of *ʿĪd al-fiṭr*, which signifies the fast's completion.

<sup>40</sup> Abū Bakr meant to say that the interpretation he gave to the words of the hadith was not a strictly literal one. Rather, Abū Bakr felt that the creedal formula, “There is no god but Allah,” is actually to be understood topically as an indication of faith, where faith includes several articles, including zakah, in addition to profession of the creed. (Eds.)

<sup>41</sup> *Khalīfah* (pl. *khulafā'*): Vicegerent of Allah in space-time. *Khilāfah* is the institution of man as vicegerent of Allah; the institution of government as continuation of the worldly government of the Prophet.

<sup>42</sup> *Bay'ah*: The nomination of the *khaliṭfah* by the leaders of the Ummah, or the seconding of that nomination by the members of the Ummah in general; the covenant the first Muslims of Madinah entered into with the Prophet, giving him their obedience, allegiance and protection.

<sup>43</sup> Ibn al-Qayyim, op.cit.

<sup>44</sup> Al-Dahlawī, op. cit, I, 278.

<sup>45</sup> Ibid.

<sup>46</sup> Perhaps the most popular hadith to use this format is the one about brushing one's teeth before salah. (Eds.)

47 *Hijāb*: The Islamic dress code for women.

48 *Istiṣhāb*: The consideration of circumstances in the process of adducing a legal argument.

49 *Istiḥsān*: The acceptance of a more subtle *qiyās* or analogy over one that compares less relevant terms. It is in this context that *istiḥsān* has sometimes been translated as “juristic preference.”

50 *Istiṣlāḥ*: Legal consideration of the welfare and well-being of both the individual and society as a whole.

51 *Tābiʿūn* (sing. *Tābiʿī*): Literally followers; members of the first generation of Muslims to follow the contemporaries of the Prophet.

52 Such *aḥādīth* are called individual narrations (*khabar al-wāḥid*), or, in the plural, *āḥād*. The question of status of such *aḥādīth* is discussed later in this volume. (Eds.)

53 Ibn Ḥajar, *al-Iṣābah*, IV, 112; and Ibn ʿAbd al-Barr, *al-Istīʿāb* (in the margins of *al-Iṣābah*), 415.

54 Ibn ʿAbd al-Barr, *Jāmiʿ Bayān al-ʿIlm*, I, 33.

55 Al-Maqrīzī, *Khutaṭ*, IV, 143

56 This letter was narrated by Imam Bukhārī in his *Ṣaḥīḥ* without a formal chain of narrators. It was also included by Imam Mālik in his *Muwattaʿa*, See al-Zarqānī’s commentary, I, 10.

57 *Musnad*: A hadith with an unbroken chain of narrators, all the way back to the Prophet.

58 *Mursal*: A hadith whose chain of narrators is broken at the end, i.e. one ascribed by a *Tābiʿī* as having come directly from the Prophet. Essentially, as the *Tābiʿī* could not possibly have heard the hadith from the Prophet, the hadith he related in this manner must have been told to him either by another *Tābiʿī*, or by one of the *Ṣaḥābah*. But, as the *Tābiʿī* scholar had no doubts concerning the trustworthiness of the one from whom he had heard the hadith, he felt it unnecessary to name him. For later generations of fiqh and Hadith scholars, however, the question of whether *mursal* hadith could be accepted became a serious issue. The reason for their concern was that the chain of such a hadith is, after all, a broken one; and there is no certainty that, if the *Tābiʿī* narrator had related the hadith from another of his generation, that the other *Tābiʿī* was a reliable narrator. For the fiqh and Hadith scholars of the early generations, however, this was not a great problem, as they were familiar with the *Tābiʿī* narrators and the *shuyukh* from whom they had heard and narrated Hadith. Thus, both Imam Abū Ḥanīfa and Imam Mālik accept *mursal* hadith; while Imam al-Shāfiʿī and Imam Aḥmad reject the *mursal*. (Eds.)

59 Quoted freely from al-Dahlawī, op. cit, I, 205–308.

60 What the author is saying here is that these were the methodological tools unknown to the *Ṣaḥābah*, yet widely applied and employed by these two *aʿimmah*. (Eds.)

61 As each sect strove to outdo the other, and gain converts from mainstream Islam, they took to distorting the meanings of the Prophet’s words as recorded in the Hadith, and to manufacturing, and then ascribing to the Prophet, words and meanings designed to suit their own purposes. (Eds.)

62 Ibn ʿAbd al-Barr, *al-Intiqāʿ*, 23

<sup>63</sup> A hadith with a break anywhere in the chain of its narrators is called a *munqatiʿ*. As it may not, therefore, be established with any certainty that the hadith was passed on from an earlier generation, and thus was not from the Prophet, such a hadith was rejected by the later *fuqahāʾ*. (Eds.)

<sup>64</sup> See note number 58.

<sup>65</sup> Ibn ʿAbd al-Barr, op. cit., 24

<sup>66</sup> It should be mentioned here that Muḥammad ibn al-Ḥasan had also studied under Imam Mālik, and that his version of Imam Mālik’s *Muwattaʾ* is considered by many to be the most authentic. Imam Muḥammad’s *Kitāb al-Radd ʿAlā Ahl al-Madinah* is an eloquent expression of the differences of the methodological approaches taken by the two schools of legal thought, Mālikī and Ḥanafī, in particular, and by *ahl al-Raʾī* and *ahl al-Ḥadīth*, in general. Moreover, the conversation between Imam Muḥammad and Imam al-Shāfiʿī quoted above is not an accurate representation of Imam Muḥammad’s estimation of his first teacher, Imam Abū Ḥanīfah, and may well have been among the considerable body of literature that was fabricated, by zealous followers, in praise of certain *aʾimmah* and in censure or deprecation of others. For more information, see Shaykh Muḥammad Zāhid Kawtharī, *Taʾnīb al-Khaṭīb*. (Eds.)

<sup>67</sup> Ibn ʿAbd al-Barr, op. cit., 86.

<sup>68</sup> Ibid.

<sup>69</sup> See Fakhr al-Rāzī, *Manāqib al-Shāfiʿī*, 26.

<sup>70</sup> Imam al-Ḥaramayn, ʿAbd al-Mālik al-Juwaynī, *Mughīth al-Khalq*.

<sup>71</sup> Al-Zarkashī, *al-Baḥr al-Muḥīṭ*, MS.

<sup>72</sup> Ibn ʿAbd al-Barr, op. cit., 25.

<sup>73</sup> There has been little dissension on this matter. Recently, however, followers of the earlier schools of legal thought have produced some evidence that indicates that scholars before Imam al-Shāfiʿī, like Imam Abū Yūsuf of the Ḥanafī school, did write about this important branch of the Shariʿah sciences. (Eds.)

<sup>74</sup> See ʿAbd al-Rāziq, op. cit., 234.

<sup>75</sup> In his introduction to the translation of *al-Risālah*, Majid Khadduri discusses the meaning of *bayān*. He writes:

“By al-bayān, which al-Shāfiʿī applies to Quranic communications, he means a clear declaration embodying a rule or a principle of law. The term is frequently used in the *Risālah* either in the sense of mere declaration, embodying a rule of law, or in clarifying the meaning of a certain rule of law.”

Accordingly, the term *bayān*, is translated by Khadduri as a perspicuous “declaration.” See Majid Khadduri, *al-Shāfiʿī’s Risālah: Treatise on the Foundations of Islamic Jurisprudence*, second edition, (Cambridge: The Islamic Texts Society, 1987), 28. (Eds.)

<sup>76</sup> Khadduri, 122

<sup>77</sup> *Iddah*: The period of time a woman must wait following divorce or widowhood before she can remarry.

<sup>78</sup> Khadduri, 350-351.

<sup>79</sup> Ibn al-Qayyim, op. cit., I, 32.

<sup>80</sup> *‘Ādah*: Custom, practice. A given community’s customs not going against the principles of Islam. Admissible as part of Islamic law.

<sup>81</sup> By al-Muṭṭalibī he meant Imam al-Shāfi‘ī.

<sup>82</sup> An edition of the section of Jaṣṣaṣ’s summary of this book was published in Pakistan by the Islamic Research Institute. The editor of that volume, however, mistakenly attributed the work directly to Abū J‘afar al-Ṭahāwī. (Eds.)

<sup>83</sup> See Ibn al-Nadīm, *al-Fihrist*, 284

<sup>84</sup> Ibn al-Nadīm, op. cit, 299.

<sup>85</sup> See ‘Alī ‘Abd al-Rāziq, op. cit.

<sup>86</sup> Probably the only way to find it is to sift through all the manuscripts. That, however, is a daunting task.

<sup>87</sup> See al-Qarāfi, *Nafa’is al-Uṣūl*, I, 1-19.

<sup>88</sup> A fine edition of *al-Burhān*, edited by Dr. ‘Abd al-‘Azīm al-Dib, was published in 1979 in Qatar. (Eds.)

<sup>89</sup> See al-Ghazālī, *al-Mustaṣfā*, I, 187.

<sup>90</sup> See Brockelmann, appendix II, 963, No. 49.

<sup>91</sup> See Makkī, *Manāqib al-Imam Abī Ḥanīfah*, II, 245; the introduction to *Uṣūl al-Sarkhasī*, I, 3; Qutubzadeh, *Miftāḥ al-Sa‘ādah*, II, 37; and Ibn al-Nadīm, *al-Fihrist*. Everyone who made this claim based his information on Ibn al-Nadīm’s comment in his biography of Muḥammad ibn al-Ḥasan: “He has a book of *uṣūl* which includes chapters on salah, zakah and hajj.” This, however, would appear to refer to a work on *Uṣūl al-Dīn*. (In fact, it is more likely that the reference is to Imam Muḥammad ibn al-Ḥasan’s work on fiqh, *Kitāb al-Aṣl*, which was published in five volumes in Pakistan. (Eds.)

<sup>92</sup> See Ḥajī Khalīfah Shalabī, Vol. I, 110-111.

<sup>93</sup> Al-Jaṣṣaṣ’s main work, *Aḥkām al-Qur’an*, was the subject of this editor’s thesis, and is presently being translated, along with detailed annotation, into English (Eds.)

<sup>94</sup> *Taqwīm al-Adillah* has been edited in ten volumes and is soon to be published, Allah willing. (Eds.)

<sup>95</sup> Each of these groups of scholars added something of their own to their books, though they used the same format for writing and the same method of presenting evidence and arguments.

<sup>96</sup> See al-Dahlawī, op. cit, I, 336-341; also his *al-Inṣāfi Bayān Asbāb al-Ikhtilāf* (Salafiyyah, Cairo) 38-40.

<sup>97</sup> After the first edition of this work appeared, Professor Bernard Weiss of the University of Utah published an exhaustive study of Āmidī’s work in a volume entitled, *The Search for God’s Will*. (Eds.)

<sup>98</sup> A further reason is the implication that the scholar is attempting to “second guess” the Almighty. (Eds.)

<sup>99</sup> *Ta’līl al-Aḥkām*: Rationalization of the legal verdicts in the Shari‘ah. (Eds.)

<sup>100</sup> Dr. Khālīd Mas‘ūd of the Islamic Research Institute of Pakistan has published a valuable study in English of al-Shāṭibī’s work under the title of *Islamic Legal Philosophy*. Other recent studies of al-Shāṭibī’s work include Dr. Aḥmad al-Raysūnī’s, *Naẓariyat al-*

*Maqāṣid ʿinda al-Imam al-Shāṭibī*, fourth edition (Herndon, Virginia: International Institute of Islamic Thought, 1995) and Dr. Ḥammādī al-ʿUbaydī, *al-Shāṭibī wa Maqāṣid al-Shariʿah* (Beirut: Dar Qutaybah, 1992) (Eds.)

<sup>101</sup> Another contemporary to write on the subject was Dr. Yūsuf Ḥāmid al-ʿĀlim whose *al-Maqāṣid al-ʿĀmmah li al-Shariʿah al-Islamiyyah* was published in 1991 by the International Institute of Islamic Thought. (Eds.)

<sup>102</sup> See Ibn Khaldūn, *al-Muqaddimah*, III, 1163–64

<sup>103</sup> Al-Nashshār, *Manāḥij al-Baḥth*, 55.

<sup>104</sup> See *Musallam al-Thubūt* and its commentary, accompanying Ghazālī's *Mustaṣfā*, I, 9–10. The author denied that logic was like this, and claimed that the position of logic in relation to both philosophy and *uṣūl al-fiqh* was the same. He may have been influenced by the suggestion that logic is the standard of all sciences.

<sup>105</sup> See Chapter One of the present work.

<sup>106</sup> See al-Rāzī, *Manāqib al-Shāfiʿī*, 98 ff, and Al-Nashshār, op. cit., 55.

<sup>107</sup> Imam al-Shāfiʿī's "new" fiqh is the name given to his legal work after he had settled in Egypt. Essentially, this represents his mature thinking following the long period of his study under both the Mālikī and the Ḥanafī schools of legal thought. (Eds.)

<sup>108</sup> See Muṣṭafā ʿAbd al-Rāziq, *al-Imam al-Shāfiʿī*, 45.

<sup>109</sup> See al-Dahlawī, *al-Inṣāf*; and Abū Zahrah, Abū Ḥanīfah, 223 ff.

<sup>110</sup> See *Tārīkh Baghdad*, Vol XXXI, 368, *al-Intiqāʿ*, 142, and *Mashāyikh min al-Balkh al-Ḥanafīyyah*, 190.

<sup>111</sup> See Samarqandī, *Mīzān al-Uṣūl*, I, 52; Taqī al-Dīn Ghazzī, *al-Ṭabaqāt al-Saniyyah* I, 43; and *Mashāyikh min al-Balkh*, 193.

<sup>112</sup> Ibid.

<sup>113</sup> See Muḥammad Yūsuf Mūsā, *Tārīkh al-Fiqh*, 160.

<sup>114</sup> See al-Khawarizmī, *Maḥātīl al-ʿUlūm*, Vols. VI, VIII; and Ibn Khaldūn, *al-Muqaddimah*, III, 1125–1128, 1161–1166.

<sup>115</sup> See *Miftāḥ al-Saʿādah*.

<sup>116</sup> See al-Ghazālī, *al-Mustaṣfā*, Vol. I, 3, and *al-Mankhūl*; also *Shifāʾ al-Ghalīl fī Bayān al-Shibh wa al-Makhīl wa Masālik al-Taʿlīl*, and *Tahdhīb al-Uṣūl*, all of which are important books on the subject.

<sup>117</sup> A well known saying attributed to ʿUmar ibn al-Khaṭṭāb.

<sup>118</sup> *Maṣlaḥah* (pl. *maṣāliḥ*) Considerations of public interests. It is generally held that the principle objective of the Shariʿah and all its commandments is to realize the genuine *maṣlaḥah* or benefit of its jurisdiction.



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*wujūb*, see under “obligation”, 54

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UŞÛL AL-FIQH IS A SCIENCE WHICH IS DEEPLY EMBEDDED IN THE ISLAMIC EXPERIENCE AND ONE WHICH, THANKS TO ITS METHODS AND CONCERNS, HELPED GENERATE AN EMPIRICAL TREND IN MUSLIM CULTURE, IN TURN BENEFITING WESTERN THINKING. ITSELF A CREATION OF INFLUENCES FROM WITHIN AND WITHOUT, AL-UŞÛL, OFTEN CALLED "THE PHILOSOPHY OF ISLAM," INVITES BOTH REASON AND REVELATION TO WORK FOR THE HARMONY AND WELL-BEING OF HUMAN SOCIETY.

ALTHOUGH THE SCIENCE OF AL-UŞÛL IS MAINLY CONCERNED WITH LEGAL MATTERS, ITS RANGE AND THE ARSENAL OF TOOLS IT USES MAKES IT ATTRACTIVE TO STUDENTS OF ISLAMIC JURISPRUDENCE AS WELL AS TO OTHER SCHOLARS OF ISLAMIC KNOWLEDGE AND CULTURE. THE DIFFICULTIES IT POSES ARE INEVITABLE. THIS BOOK, HOWEVER, ATTEMPTS TO SIMPLIFY THIS "MOST IMPORTANT METHOD OF RESEARCH EVER DEvised BY ISLAMIC THOUGHT" DURING ITS MOST CREATIVE PERIOD, AND BRING IT TO THE UNDERSTANDING AND APPRECIATION OF THE MODERN LEARNER, WHILE UNDERSCORING ITS IMPORTANCE AND RELEVANCE TO THE WORLD OF ISLAM TODAY.

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