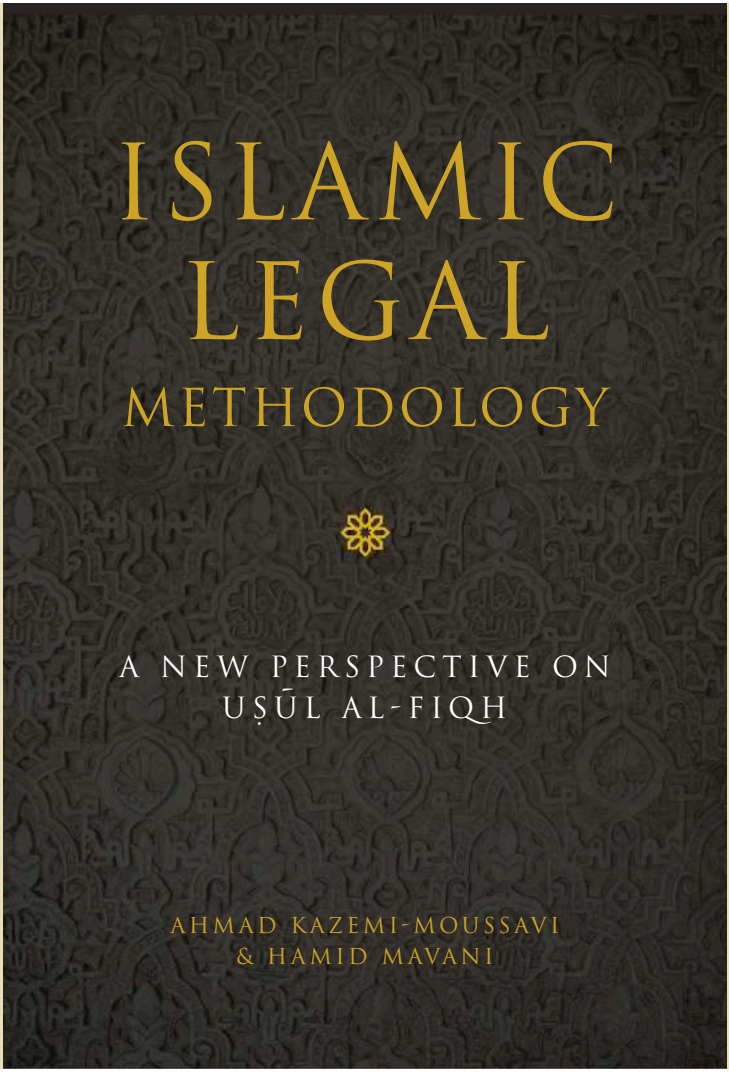
Islamic Legal Methodology

A New Perspective on Uṣūl al-Fiqh



IIIT Books-In-Brief Series

ISLAMIC LEGAL METHODOLOGY

A New Perspective on *Uṣūl al-Fiqh*

Ahmad Kazemi-Moussavi and Hamid Mavani

The International Institute of Islamic Thought (IIIT)
P.O. Box 669
Herndon, VA 20172, USA
www.iiit.org

London Office
P.O. Box 126, Richmond, Surrey, TW9 2UD, UK
www.iiituk.com

Title: BIB - ISLAMIC LEGAL METHODOLOGY: A NEW PERSPECTIVE ON UṢŪL AL-FIQH
Author: AHMAD KAZEMI-MOUSSAVI AND HAMID MAVANI

ISBN 979-8-89193-250-0 Paperback
ISBN 979-8-89193-251-7 eBook

Typesetting by Shiraz Khan

Printed in USA

IIIT Books-In-Brief Series

The IIIT Books-In-Brief Series is a valuable collection of the Institute's key publications written in condensed form designed to give readers a core understanding of the main contents of the original. Produced in a short, easy to read, time-saving format, these companion synopses offer a close, carefully written overview of the larger publication and it is hoped will stimulate readers into further exploration of the original.

The science of *Usul al-Fiqh* is fundamental to the Islamic experience and deeply rooted in Islamic Law, elucidating the derivation of rulings from the Qur'an and Sunnah, through various juristic tools and methods. It employs both reason and revelation to work for the betterment of human society. This work discusses the historical development of the legal methodology for the interpretation of the Shariah, and analyzes proposed reforms by modern Muslim scholars. It aims to (1) summarize *Usul al-Fiqh's* rise and development from rudimentary form to advanced phase by articulating the contributions of eminent jurists on key intellectual debates, and (2) present a schema of reforms, new hermeneutics, and epistemology proposed by modernists to bring about foundational changes in Islamic legal methodology so that they can bypass the authority of the legal language. The critical distinction between the timeless Shari`ah and mutable jurisprudence allows for a mechanism that can review and revise juridical opinions in the light of new information.

Abridged Edition of A. Kazemi-Moussavi and H. Mavani's Original
ISLAMIC LEGAL METHODOLOGY: A NEW PERSPECTIVE ON USUL AL-FIQH
ISBN hbk: 978-1-64205-566-5
ISBN pbk: 978-1-64205-567-2
E-Book: 978-1-64205-351-7
2023

INTRODUCTION

This book studies the history of the advent of Islamic legal methodology called *uṣūl al-fiqh* and the development of concepts integrated into Islamic legal language during the twelve hundred years of recent Islamic history. *Uṣūl al-fiqh* which literally means "principles of jurisprudence," by time, formulated a systematic and rigorous approach to deriving legal rules, one that was both stable and in harmony with the textual sources. The primary juridical concern of time was to establish a precedent for the Qur'an's legal authority, and particularly that of the Sunnah, over the uncontrolled use of independent reason and the preexisting customs of people. This ultimately resulted in the supremacy of the sources of the law: the Qur'an and Sunnah which are collectively called the Shariᶜah. However, as this remains the provenance of the Divine or in the "mind of God," it is essentially inaccessible and thus that which is accessible is no more than the result of a person's utmost intellectual endeavor and exertion (ijtihad). In other words, the only possible result is a tentative fallible approximation of the ideal Shariᶜah that must be interrogated, corrected, and revised both critically and continually if it is to remain relevant in changing times, contexts, circumstances, and customs.

Ijtihad, which relies upon a legal theory and hermeneutic principles, generates positive or substantive law (*furūᶜ*). Being a combination of Islamic law, ethics, and rituals, the Islamic legal-moral-ritual code stands as the major source of inspiration, identity formation, and social cohesion for Muslims. Islamic legal thought developed alongside juridical authority, the holders (*fuqahā'*) of which were assigned by Muslims to deduce legal rules from the normative Shariᶜah. By developing the law's secondary sources, in addition to the Qur'an and the Sunnah, namely, *ijmāᶜ* (juristic consensus) and especially *qiyās* (analogical reasoning), several new components were integrated into the legal methodology and provided greater flexibility and discretion in correlating the revealed texts to the legal rulings. However, the authority of "verbal demonstration" or "signification" remained central to the legal methodology. Modern approaches to a text's form and content have made it possible for scholars to reexamine this methodology outside its traditional boundaries.

This study has two goals: to (1) summarize *uṣūl al-fiqh's* rise and development from its rudimentary form to its advanced and mature phase by articulating the contributions of eminent jurists on key intellectual debates in order to find out how this genre eventually placed exclusive authority in the texts' "verbal demonstration" and (2) present a schema of reforms, new hermeneutics, and epistemology proposed by modernists to bring about foundational changes in Islamic legal methodology so that they can bypass the authority of the legal language. In studying the historical evolution of this discipline, we will explore the cause and scope of its expansion in the works of jurists, who gradually incorporated numerous principles from logic, exegesis, theology, philosophy, Arabic grammar, and other fields. Social exigency and expediency also prompted jurists to amend its format and content by merging their theoretical and social considerations into their legal methodology. Finally, we will survey the legal approaches of some contemporary authors in order to present their critical evaluation of this discipline's traditional methodology and their proposed reforms so that it can better address modern issues. The focus, however, remains on how scholars reshaped and reimagined their legal methodology by echoing the requirements and needs of their own era. The Muslims' encounter with modern scholarship has fostered a new genre of intellectual approaches to Islamic legal theory, one that recognizes a critical role for human reason in legal deliberation. Unparalleled in terms of scope in traditional Muslim thought, it has influenced the Muslim discourse on legal methodology in two important aspects. First, some reformists seek to bring about serious reform without discarding the entire legal theory by aligning the epistemology, hermeneutics, and sciences with contemporary requirements and needs.

Chapter One

The Advent of An Islamic Legal Methodology

uṣūl al-fiqh appeared as a distinct and functional legal discipline at the turn of the fourth/tenth century; however, its birth and growth can be traced back to the advent of the Islamic legal-moral-ritual code in the first/seventh century. Concurrent with the development of jurisprudence

(fiqh), Muslims began to debate ways of understanding and applying new rules. It seems that the problem of "conflicting laws," particularly that of abrogating (*naskh*) some of the Qur'anic rules, concerned the nascent Muslim community the most and brought the necessity of instituting an orderly understanding of the Qur'an and Sunnah when deriving legal rules to the fore. A hadith reported by Ibn Sallām (d. 224/838) includes Caliph ʿAlī b. Abī Ṭālib's (d. 40/661) warning to a local mediator: "One should not engage in settling a case if the abrogated verses of the Qur'an are not known to him." Clearly, "conflicting laws" were among the first elements that encouraged the formulation of a structured and stable methodology, for the knowledge of abrogation is a prerequisite to understanding the applicable legal norm.

The next important factor was the interplay between the prophetic and the lived traditions (*ʿamal*) of Madinah's Muslim community. The Prophet endorsed a substantial amount of the pre-Islamic Arabs' living traditions, but as he was the one who defined his community's normative practice, he also abrogated a sizable number of those that could have interfered with and distorted the prophetic traditions. This problem, in addition to the discrepancies in hadith reports, caused the next generation to begin sifting them and interrogate Madinah's communal tradition to determine their utility and authenticity. The *Kitāb al-Sunan* (The Book of Traditions) and similar books composed during the second half of the first/seventh century testify to the steps Muslims took to devise a more stable and systematic legal hermeneutic. The formal inclusion of *qiyās* (analogical reasoning) paved the way for a wider yet harmonious interpretation or legal hermeneutic. However, its application caused an outbreak of opinionated debates, the rampant use of unfettered speculative reasoning, and the sidelining of Hadith, all of which eroded "a secure and autonomous communal tradition connecting the present-day community to the moment of revelation." This was, in turn, countered by the rise of traditionalism, as reflected by invoking the prophetic hadith reports to discipline the supposed arbitrary legal hermeneutic.

A Synopsis of al-Shāfiʿī's Methodology

Al-Shāfiʿī's approach to a methodical understanding of the revealed sources' authority begins with God's five announcements of those norms (*bayān*) that explain the bilateral connection between the Qur'an and prophetic Sunnah and how it leads to legal knowledge on

specific cases. Central to his approach is that the exclusive "authority of the revelatory sources" should prevail over the community's living traditions and customs in order to produce a sense of commitment to the religious law. Al-Shāfiʿī includes the two supplementary sources of *ijmāʿ* and *qiyās* for acquiring legal rulings for any cases not addressed in the revelatory texts.

I. As the first topic of his argument, he provides five modalities of God's statements of norms (*bayān*) in the form of five possible permutations of the Qur'an and Sunnah:

a. What God communicated via the Qur'an in the explicit and univocal form of a *naṣṣ* (e.g., the obligations to pray and fast) as well as indisputable prohibitions (e.g., intoxicants).

b. What God revealed in the Qur'an is enough for fulfilling the obligation. Therefore, the Sunnah only provides additional but non-essential details. He cites the example of how one can perform *wudū'*.

c. What the Qur'an ordained and the relevant details provided by the Sunnah (e.g., how to perform the ritual prayers).

d. What can be established only by the Sunnah because the Qur'an is silent about it.

e. What Muslims should find out through their interpretive activity (ijtihad) based on the Qur'an and Sunnah, either individually (*qiyās*) or collectively (*ijmāʿ*).

II. Al-Shāfiʿī then turns to meaning analysis and denotation of the revealed texts, after which he introduces the general (*ʿāmm*) and particular (*khāṣṣ*) types of *bayān*. In this chapter, which seems to be the first of its kind in Islamic jurisprudence, he tries to harmonize some conflicting verses of the Qur'an and the Sunnah via particularization.

III. The appearance of abrogation: Al-Shāfiʿī sets a categorical condition that the Qur'an may be abrogated only by the Qur'an, and the Sunnah only by the Sunnah. To him, an abrogated ruling cannot be left without a better replacement. He also discusses cases that are abrogated in part by the Qur'an and in part by the Sunnah or *ijmāʿ*.

IV. The revealed text (*naṣṣ*) and the Sunnah lay down the duties (*farā'id*): Shāfiʿī gives examples of these duties to show how some

verses look general (*ʿāmm*) when, in reality, they are meant to be particular (*khāṣṣ*).

v. Discrepancy of the Traditions: In response to a question on discrepancies among tradition reports, al-Shāfiʿī presents another account of how a Muslim can recognize lucid and ambiguous rulings in addition to the general, particular, and abrogated ones in cases of conflicting laws. He also discusses the reports of the Companions' practices and concludes that only the Sunnah of the Prophet can set laws for the community and that those laws must be followed.

vi. Chapters on knowledge of traditions and ways of authenticating solitary or single-transmitted traditions (*al-akhbār al-āḥād*). Al-Shāfiʿī equates the verification of the just nature (*ʿadālah*) of a hadith transmitter to that of legal testimony (*shahādah*). However, with some caution, he does legitimize the validity of *āḥād* tradition-reports.

vii. Consensus (*ijmāʿ*): al-Shāfiʿī's main concern here is how to obtain consensus on reporting or understanding the Prophet's traditions. Twice in this chapter, he argues that the entire community cannot agree on an error when it comes to understanding the Sunnah, without basing it on a similar tradition-report attributed to the Prophet: "My community [will] never agree on [an] error." One may suggest that either al-Shāfiʿī was unaware of the report or that the report was built upon his words at a later date.

viii. Analogy (*qiyās*): al-Shāfiʿī tends to restrict *qiyās* to those cases that can be connected to an established Qur'anic verse.

ix. Ijtihad: al-Shāfiʿī encourages the practice of ijtihad for both applying and interpreting the Qur'an and Sunnah, citing 2:144, "Turn your face toward the Sacred Mosque," which encourages Muslims to find the proper prayer direction. In his account, *qiyās* appears as part of ijtihad.

x. Juristic preference (*istiḥsān*): al-Shāfiʿī advances this juristic principle in order to exclude it from the class of juridical rational or textual indicants (*adillah*). He considers *istiḥsān* a matter of taste and preference (*taladhdhudh*).

xi. Juristic disagreement (*ikhtilāf*): al-Shāfiʿī divides this into forbidden and permissible disagreements. The former seeks to create schism (*tafriqah*) in the community, whereas the latter is a matter

of differing opinions and interpretation. This topic was later developed into a distinct jurisprudential discipline under the rubric of *ʿilm al-khilāf*.

The constitutive elements of this sketch underline al-Shāfiʿī's efforts to advance the Qur'an and Sunnah as the exclusive canonized sources of revelation. Jurists should interpret the former without the mediation of local traditions and lived practices as part of the hermeneutical repertoire and should use the Hadith to complement and elucidate the Qur'an, especially its multi-vocal and polyvalent verses. Relying on the textual sources as foundational also precluded the arbitrariness of individual reasoning in deducing law. Disillusioned and alarmed by the rampant use of speculative reasoning and reliance on the lived practice of Madinah's Muslim residents due to the lack of a methodical reading of legal sources, al-Shāfiʿī accorded primacy to the Qur'an and Sunnah and established ways of interpreting and harmonizing them partly by introducing the crucial element of "ambiguity," which provided greater interpretive flexibility, in order to reconcile the verses, hadiths, and legal rules to the revealed textual sources. By quoting 3:78, 2:79, and 4:50 and 52 and arguing for the necessity of learning and exerting effort to deduce knowledge (*al-ʿilm wa al-ijtihād*), he was hinting at his trajectory, one that would seek to establish a hierarchy of sources that prioritized the two primary sources in relation to analogy, consensus, and *ra'y*.

The thrust of his argument in *al-Risālah*, despite its being imbued with contemporaneous juridical debates, is to establish the legal authority of the Qur'an and Sunnah and to demonstrate their consistency with the already existing legal rules. According to him, both of these primary sources occupy a central place in Islamic legal thought, whereas ijtihad and *qiyās* are supplementary and auxiliary. His chapters on general (*ʿāmm*) and particular (*khāṣṣ*) ijtihad, as well as the discrepancies among hadith accounts related to the same incident, are part of his legal hermeneutics. The hierarchy of the sources (i.e., the Qur'an, Sunnah, and ijtihad) was generally known to Muslims, but al-Shāfiʿī's conviction in the harmony of revealed laws led him to establish a more explicit arrangement. In the words of El Shamsy: "The locus of collective memory, hitherto diffused in the realm of oral culture and ritual performance, thus shifts to written texts …" It is important to state here that the idea of "four sources of law" was not clearly set in early Muslim thought, that legal consensus (*ijmāʿ*) had yet to acquire

a definitive form, and that the application of *qiyās* remained delimited. Although al-Shāfiʿī apparently had no intention to formulate a distinct category of sources, as his interpretive theory was still rudimentary, the sequence of his rational discussion brought *ijmāʿ* and *qiyās* to the fore in such a manner that later authors could surmise four distinct sources of law.

Almost a century after al-Shāfiʿī presented his *al-Risālah*, Abū al-ʿAbbās Ibn Surayj (d. 306/918), a prominent jurisprudent of Baghdad, dedicated his courses to promoting al-Shāfiʿī's jurisprudence and methodology. He felt that the elegance (*ẓarf*) of these teachings had been overlooked or corrupted by al-Shāfiʿī's immediate students, especially al-Muzānī. The commentaries on *al-Risālah* written by Abū Bakr al-Ṣayrafī (d. 330/942), al-Qaffāl al-Shāshī (d. 333/947), and Abū Isḥāq al-Marwazī (d. 340/951), all of whom were students of Ibn Surayj, were enough to popularize the legal methodology that they deciphered from it. Of course, they also made their own intellectual contributions. But as none of these works are extant, we cannot compare their structures with those of their contemporary Muʿtazilī and Ḥanafī counterparts, upon which we will focus in the following chapters.

Chapter Two

The Approach of Muʿtazilī and Ashʿarī Theologians to Islamic Legal Methodology

Parallel to the methodological efforts of the Shāfiʿī school, Muslim theologians of the early Muʿtazilī and Ashʿarī schools took a keen interest in *uṣūl al-fiqh* and tried to develop its rules further by reason-based legal arguments and by assimilating dialectical theology (*kalām*). Both of these schools can be grouped under the "rational" trend of Islamic thought, despite their difference on the role and scope of human reasoning. The former gives a central place to it, whereas the latter places it after the revealed sources. Melchert prefers to label the latter as a "semi-rationalist" party "who took up the tools of *kalām* in defence of traditionalist doctrines." This "rationalist" approach to *uṣūl al-fiqh* gained momentum despite al-Shāfiʿī's reluctance to imbue his work with contemporaneous *kalāmī* ideas. According to George Makdisi (d. 2002), al-Shāfiʿī wrote *al-Risālah* to defend Islamic

traditionalism against the then current rationalist movement. Muʿtazilī rationalists, who were quite active, played a leading and pioneering role in developing theories of legal methodology right from the outset. In addition to the significant contributions of Muʿtazilī writers of the fourth/tenth and the fifth/eleventh centuries, new investigation shows that Muʿtazilī authors of the third/ninth century wrote treatises designed in an orderly fashion to cover topics of the discipline later known as *uṣūl al-fiqh*. Here, we will deal chronologically with the legal works of some prominent Muʿtazilī and Ashʿarī theologians.

ʿAmrū ibn Baḥr al-Jāḥiẓ

The renowned Arab theologian, prose writer, and prolific author on *adab* Abū ʿUthmān ʿAmrū ibn Baḥr al-Jāḥiẓ (d. 255/869) contributed, among other things, to the field of Islamic legal methodology. Born and raised in Basrah (Iraq), a center of Muʿtaziliī productivity, he travelled to Baghdad to join the House of Wisdom (*Dār al-Ḥikmah*) founded by Caliph al-Ma'mūn (d. 833) to attract scholars specialized in both the religious and natural sciences. He reportedly wrote about 200 treatises on a variety of subjects, approximately thirty of which have been preserved in their entirety and another fifty only partially preserved. His extant works include Arabic grammar, lexicography, poetry, the study of animals, Islamic law and legal methodology, and other subjects. He refers to the non-extant latter work in his *Kitāb al-Ḥayawān*.

Devin Stewart, in his painstaking search for the earliest works on *uṣūl al-fiqh* or references made to them, points to al-Jāḥiẓ's lost but much mentioned *Kitāb Uṣūl al-Futyā wa al-Aḥkām* as a manual on legal methodology. Before dealing with al-Jāḥiẓ's work, he quotes a passage from Ibn Sallām (a hadith master; d. 224/838) and subsequently asserts that "the concept of a complete, finite, and ordered list of the roots of the law existed already in the early ninth century, perhaps even during al-Shāfiʿī's days." In this passage, Ibn Sallām enumerated the sources of legal norms (*uṣūl al-aḥkām*) as "the Book, the Sunnah and what the leading jurists and righteous ancestors who have ruled on the basis of consensus and ijtihad." Missing from the list is *qiyās*, the fourth category. Stewart writes:

> Al-Jāḥiẓ himself describes the work in *Kitāb al-Hayawān* as follows: "*Kitābī fī al-Qawl fī Uṣūl al-Futyā wa al-Aḥkām*" (My book discussing the principles of legal responsa and legal rulings).[6] In an extant

letter, he presents the work as a gift to the Muʿtazilī chief judge of Baghdad, Aḥmad ibn Abī Dā'ūd al-Iyādī (d. 240–854).

Al-Qāḍī Al-Bāqillānī

Abū Bakr al-Bāqillānī (d. 403/1013) was a renowned and preeminent theorist of the Ashʿarī school of theology who subscribed to the Mālikī school of thought. A contemporary of al-Qāḍī ʿAbd al-Jabbār (d. 415/1024), he was born in Basrah but raised and educated in Baghdad, where he became a prominent judge and theologian. His knowledge of formal logic enabled him to debate on Islamic law and theology at the Buwayhid and Byzantine courts. In general, al-Bāqillānī supported the Ashʿarī doctrine of the Qur'an's uncreatedness, inception, divine decree, and the possibility of seeing God.

He made important contributions to the theory of language, signification, and the tension between a word or an utterance's clarity and ambiguity (i.e., the hermeneutics of ambiguity). This is attested to by the fact that subsequent authors and biographers frequently referred to his work. The fourteenth-century biographer Tāj al-Dīn al-Subkī included al-Bāqillānī's *Kitāb al-Taqrīb wa al-Irshād* among the earliest works written on the Islamic legal methodology after al-Shāfiʿī's *al-Risālah* and its commentaries.

Al-Qāḍī ʿAbd al-Jabbār

A stark contrast to al-Qādī al-Bāqillānī is provided by the renowned Muʿtazilī (formerly Ashʿarī) theologian Qāḍī ʿAbd al-Jabbār al-Hamadānī (d. 415/1024), famously known as *Qāḍī al-Quḍāt* (judge of the judges [chief magistrate]), who promoted a theological orientation to legal methodology. Representing Busrah's school of thought, he was born in Hamadān (Iran) and educated first in Busrah and then in Baghdad. The most notable student of al-Jāḥiẓ, who he frequently quotes, this Shāfiʿī jurist argued that believing in the disjuncture between God's eternal speech and the Qur'an's created words, as the Ashʿarīs did, would make God's will humanly unknowable. According to him, this would violate the Muʿtazilī principle that His speech must always provide perfect clarity so that His will could be understood correctly.

In 367/978, the powerful governor and vizier Ṣāḥib ibn ʿAbbād, a staunch supporter of Muʿtazilī theology, invited him to Rayy (part of present-day Tehran) and appointed him chief magistrate. He wrote

several books on Muʿtazilī theology and Islamic legal hermeneutics, including a separate work on Islamic legal methodology, *Al-Nihāyah fī uṣūl al-fiqh*, that has not come down to us. However, in his magnum opus the *al-Mughnī*, which is a systematic work on theology, he deals with subject matters found in legal methodology under the rubric of *sharʿīyyāt* (legal matters) to which we now turn. Governed by the Muʿtazilī understanding of justice, this human faculty attempts to fathom the inherent merit or demerit of an act as well as the divine intent.

Abū al-Ḥusayn al-Baṣrī

In many ways, the work of al-Qāḍī ʿAbd al-Jabbār was continued by his student Abū al-Ḥusayn al-Baṣrī (d.436/1044), who set a standard for composing legal methodology in the early period of Islamic history. A native Basran as well as a Ḥanafī who followed a Muʿtazilī creed, he studied Islamic law and theology as well as medicine in Baghdad and then traveled to Rayy and became one of al-Qāḍī ʿAbd al-Jabbār's pupils. Although a staunch defender of Muʿtazilī thought, he nevertheless challenged some of his teacher's ideas on legal theory and jurisprudence and "aligned himself in his later work with the hermeneutic of al-Karkhī and al-Jaṣṣāṣ." The close relation between Muʿtazilism and Ḥanafism and their influence on each other continued for most of the fourth/tenth and fifth/eleventh centuries. His work *Al-Muʿtamad* is regarded as the earliest well-balanced structure of legal methodology based on both revealed and rational sources, which makes him a scripturalist and a rationalist. His work spread far beyond Muʿtazilī circles, particularly among the Shāfiʿīs and Hanbalīs of Baghdad, the Twelver Shī'ī scholar Sadīd al-Dīn al-Rāzī (sixth/twelfth century), and the Zaydīs of Yemen. As will be shown in the following outline, the Muʿtazilī-influenced al-Baṣrī allocated a separate section to human reason.

The Structure of al-Baṣrī's Legal Methodology

Al-Baṣrī defines *uṣūl al-fiqh* as the method of knowing the legal norms (*aḥkām*) and outlines what he considered to be the topics of its methodology and how they should be arranged. He devotes an introduction to the legal language and the difference between "real" (*ḥaqīqah*) and "metaphorical" (*majāz*).

1. Commands, Prohibitions, and Their Semantic Rules

This includes chapters on (i) the legal text's general and particular

expressions, (ii) its ambiguous and explicit expressions, and (iii) the rules of abrogation. Here al-Baṣrī adds a chapter entitled "acts" (*afʿāl*), which deals mainly with the human ability to recognize good and evil (*al-ḥusn wa al-qubḥ*) with the help of reason prior to revelation.

II. Other Sources of Legal Knowledge
Comprising chapters on: (i) consensus, (ii) the traditions, and (iii) juridical analogy and ijtihad. Al-Baṣrī gives no title to this part, for it is understood that he is dealing with non-scriptural sources of legal knowledge after the Qur'an.

III. The Permissibility of Using Human Reason and Its Limits
Under the title of "*al-ḥaẓr wa al-ibāḥah*," al-Baṣrī allocates a chapter on several topics in an attempt to explain how human reasoning may arrive at legal knowledge.

IV. The Mufti-Commoners' Relations
Al-Baṣrī devoted his last chapter to rules concerning the qualifications of the mufti or *mujtahid* and the procedure for issuing a fatwa. The purpose of these postulates is to qualify and limit the scope of independent reasoning.

The above outline shows the influence of theological concepts, such as people's capacity to evaluate an act's moral status prior to revelation and the permissibility of using human reason while respecting its limits (*al-ḥaẓr wa al-ibāḥah*). In al-Baṣrī's approach, Islamic legal methodology begins with the semantic interpretation of scripture and tradition, continues with the categorization of other sources, and ends with the qualification of a *mujtahid* and the scope of his authority to engage in independent reasoning in the absence of a revealed text. From this viewpoint, we may say that his methodology is founded on the capacity of the person's rational faculty to understand and interpret the scriptural and traditional sources. This scheme can, in essence, be found in al-Shāfiʿī's sketch. And yet al-Baṣrī's work lacks al-Shāfiʿī's defensive argument for the Qur'an's authority, and especially for that of the Sunnah, because by his time all schools had fully recognized their legal weight.

Chapter Three

The Ḥanafī Elaboration of Legal Methodology

The Ḥanafī school's decision to incorporate new and changing social realities into its methodology brought forth a new approach to Islamic legal methodology during the fourth/tenth century. This occurred in Baghdad, which hosted a certain number of Ḥanafī scholars, especially the three contemporaneous shaykhs Abū Zayd ʿUbaydullāh al-Dabbūsī (d. 430/1038), Abū Bakr Muḥammad ibn Aḥmad al-Sarakhsī (d. 490/1096), and Fakhr al-Islām ʿAlī ibn Muḥammad al-Bazdawī (d. 482/1089). The latter figure's legal pedigree can be traced to Abū al-Ḥasan al-Karkhī (d. 340/951) and Abū Bakr al-Jaṣṣāṣ (d. 370/981). These scholars shifted the emphasis from theoretical discussions on the sources' authority to practical solutions for dealing with the continued arising of new contingencies. Their goal here was to make the law's application more consistent by adding more legal maxims (*qawāʿid al-fiqh*, see below) to theories about its authority. Thus Mohammad Hashim Kamali considers this approach as deductive and "pragmatic in the sense that theory is formulated in light of its application to relevant issues."

Al-Rāzī al-Jaṣṣāṣ

An almost-contemporary of al-Bāqillānī, Abū Bakr Aḥmad ibn ʿAlī al-Rāzī (d. 370/981), better known as al-Jaṣṣāṣ, produced the earliest extant text on *uṣūl al-fiqh* (more than 140 years after al-Shāfiʿī's death) and the non-extant book attributed to his colleague Aḥmad al-Shāshī. Both were students of Abū al-Ḥasan al-Karkhī. Al-Jaṣṣāṣ was an Ashʿari theologian who had adopted some Muʿtazilī views as well as refuted sorcery and the idea that humans would be able to see God with their eyes (i.e., the "beatific vision"). Politically he adheres to the emerging tendency among the *ʿulamā'* of disassociating themselves from the government, for he declined the Caliph's offer to assume the position of Baghdad's chief justice (*qāḍī al-quḍāt*). This tendency died out later on, for the *ʿulamā'* gradually became closely attached to the Caliph. He wrote commentaries on the works of early Ḥanafī grand masters such as al-Shaybānī and Abū Yūsuf.

Al-Jaṣṣāṣ' account on legal analogy appears more detailed and well argued. He often equates *qiyās* with ijtihad, as was common in the earliest Sunni and Shiʿi jurisprudential works, and defends both

according to evidence found in the Companions' practice. The reason for this lies not only in the Ḥanafīs' agreement with the wider scope of *qiyās*, but rather in al-Jaṣṣāṣ' elaboration of the ratio legis (*ʿillah*), which is so refined in his analysis. We know that al-Shāfiʿī, when writing about *qiyās*, used *maʿnā* and similar words, as opposed to *ʿillah*, for "the efficacious cause." Nabil Shehaby, a contemporary author, tried to draw parallels between al-Jaṣṣāṣ' presentation of rational and literal proofs and those of Stoic logic. In his view, there is a resemblance between *ʿillah* and the Stoic category of "quality," if not the "common quality" of Diogenes of Babylon (d. 140/150 BCE). Al-Jaṣṣāṣ' account of *ʿillah*, however, shows no influence from any of the logical works, although he does include *ʿaql* among the proofs to legitimize *qiyās* in general. Shehaby's account of Stoic and Babylonian precedents points to the fact that "the efficacious cause," as well as "generals" and "particulars," were commonly understood by ancient communities. However, their ways of articulation and application were independent from each other, as al-Shāfiʿī and al-Jaṣṣāṣ' articulations of *ʿillah* and *ʿāmm/khāṣṣ* show that they are unique to them. Joep Lameer conjectures that Muslim theologians may have borrowed the concept of *ʿillah* from Aristotle (d. 332 BCE) as early as the second quarter of the third/ninth century or were at least inspired by his usage of the term. It was then appropriated by Muslim jurists from Muslim theologians. He supports his latter speculation in this way: "Judging from the fact that the jurists' understanding of the *ʿilla* in terms of such a concept is *wrong*, the theologians' conceptual understanding of the *ʿilla*, on the other hand, *correct*, I conclude that the jurists must have borrowed this concept from the theologians and not the other way round."

The works of al-Jaṣṣāṣ exhibited great sophistication and can be situated between rationalism and traditionalism with ample evidence of Muʿtazilī influence. He included a chapter on the permissibility of using human reason and its limits (*al-ḥaẓr wa al-ibāḥah*) in which he analyzed the moral status of people's actions before the onset of revelation, which inevitably led him to accept reason's role in the absence of religious prescription. In addition to this chapter, al-Jaṣṣāṣ leans upon reason throughout his work, particularly in his assertions of legal analogy (*ithbāt al-qiyās*), explanations of its ratio legis (*ʿillah*), and assessments of the validity of solitary reports.

Shams al-ʿUlamā al-Sarakhsī

Abū Bakr Muḥammad ibn Aḥmad al-Sarakhsī (d. 490/1096) was

educated in Bukhārā and taught in Sarakhs (in contemporary Iran), where he was imprisoned from 466/1074 until about 480/1088, most likely because he criticized the city's ruler for allowing his officers to marry slave girls before their waiting period (*ʿiddah*) ended. One of the last early Ḥanafī scholars, he is one of the most celebrated Ḥanafī jurists who elaborated on Islamic legal methodology's ability to respond to social change and the harmony between theory (*uṣūl*) and practice (*furūʿ*). Besides his book on Islamic legal theory, he authored the widely cited jurisprudential work *al-Mabsūṭ*, one of the most comprehensive Ḥanafī legal texts. It also provides an extensive commentary on al-Shaybānī's *Kitāb al-Siyār*, known as the first extant work on Islam's laws of international relations and war and peace.

Al-Sarakhsī's presentation of *qiyās* is quite comprehensive, as he includes in it a number of related topics such as *istiḥsān* (preference in general), *muʿāraḍah* (conflict of laws), *tarjīḥ* (preference in cases of conflict of laws), and *istiṣḥāb* (presumption of continuity). His treatment of *qiyās* apparently embraces most rational argumentations that are not directly based on the revealed texts. In this connection, his discernment of *qiyās* borders on ijtihad, just as al-Shāfiʿī expressed in his *al-Risālah*. Thus it is hardly surprising that his work contains no chapter on ijtihad, whereas he allots a large introduction to vehemently defend *qiyās* according to the Companions' practices.

Al-Sarakhsī's articulation of *istiṣḥāb al-ḥāl* (the presumption of continuity) is interesting and displays his pragmatic approach to legal theory. Including it under the heading of "argumentations without a proof" or a legal indicant (*iḥtijāj bilā dalīl*), he divides it into (1) The presumption of continuity in the assured absence of any contrary evidence to indicate a change in the situation. He accepts this kind of *istiṣḥāb* based on Qur'an 6:145, which states that eating meat is not prohibited, save for exceptional items like dead meat and pork. He argues that after a legal norm's applicability has been established, its continuity needs no proof; (2) The presumption of continuity based on a fact against the contrary, which is based on speculation and ijtihad. This *istiṣḥāb*, Sarakhsī believes, can be used to examine an excuse or defend a recognized right, but not to establish a new claim, because it is always exposed to the opponent's counterargument; (3) The presumption of a state's continuity before searching for contrary evidence. According to him, this is a case of ignorance (*jahl*) and is unacceptable, except from a person who was unable to search. For instance, if a *dhimmī* who is unaware of Islam's obligatory worship

rituals embraces Islam, he must compensate (*qaḍā*) for that which he missed. This rule does not apply to a *ḥarbī* (warlike non-Muslim) who embraces Islam and no expiation is required, because he was not in a position to be able to search; and (4) The presumption of continuity cannot be used to establish a legal norm (*ḥukm*), since it matches neither the form nor the meaning of *istiṣḥāb*. In the case of a missing person (*mafqūd*), the continuity of his life can be presumed and will be invoked as evidence in establishing his existing rights, but not in establishing a new right for him.

Chapter Four

Shiʿi Legal Methodology

The locus of authority in Shiʿi Islam resides in the Prophet and, by extension, the Twelve Infallible Imams, who are viewed as the legatees and inheritors of his prophetic charisma and knowledge. The leadership vacuum caused by the Twelfth Imam's Greater Occultation, which began in 329/941 and remains ongoing, has made him inaccessible to his followers. The *ʿulamā'*, basing themselves upon rational and traditional evidence, gradually filled this absence by claiming to be his indirect deputies until his return. Prior to this event, the Imams had played a dominant role in guiding the community as the authoritative interpreters of the divine will and the sole arbiters in settling disputes. They would remind their disciples that it is abominable and evil to utter statements on any matter without first having heard it from the divine guide: "*amā inna hu sharr ʿalaykum an taqūlū bi-shay' mā lam tasmaʿū hu minnā*." As such, a number of hadith reports condemn and denounce the use of ijtihad, *ra'y*, and *qiyās* because access to the Imam brought forth an epistemology that resulted in certainty (*yaqīn*) as opposed to probability (*ẓann*). However, the Imams encouraged their followers to sharpen their rational argumentation skills in order to deduce legal rulings derived from Islam's general rules and principles. They might have adopted this approach because the Umayyad and Abbasid rulers kept them under close supervision and often under the threat of persecution, imprisonment, or extended periods of arrest. Naturally, such a hostile environment diminished direct contact between the Imams and their followers. In addition, followers who lived in distant lands had no access to them and thus could not seek a ruling or obtain clarification.

Imams Jaʿfar al-Ṣādiq and ʿAlī al-Riḍā are reported to have said: "It is for us to set out foundational rules and principles (*uṣūl*), and it is for you [the learned] to derive the specific legal rulings for actual cases (*tafrīʿ* or *tafarruʿ*)."

Hossein Modarressi challenges the general view that Shiʿi law remained undeveloped and unsophisticated while the infallible Imams were accessible:

> It is generally believed that Shiʿi law was undeveloped in this period which began with the Prophet and ended in 260/874. This is based on the assumption that since the Imams were present and accessible, there was no great urge to develop the practices of independent judgment and that law was limited to the transmission of traditions. This idea is not correct.

The Shiʿi contribution to *uṣūl al-fiqh* actually began in earnest during the first half of the fifth/eleventh century, due to the efforts of three prominent figures of the Buyid period: Shaykh Mufīd (d. 413/1022) and his disciples Sharīf Murtaḍā (d. 436/1044) and Shaykh al-Ṭā'ifah al-Ṭūsī (d. 460/1067). The latter wrote three distinct treatises on *uṣūl al-fiqh*. Some contemporary authors trace Shiʿi *uṣūlī* works to non-extant treatises of the early Imāmīs, such as Hishām ibn al-Ḥakam (d. c. 190/805) and Yūnus ibn ʿAbd al-Raḥmān (d. 208/823). Since Murtaḍā and Ṭūsī, who would have had easy access to this genre of works, do not refer to them in their works as they did to those of their Sunni and Muʿtazilī predecessors, we content ourselves with what we have at hand.

Al-Shaykh al-Mufīd

Muḥammad ibn Nuʿmān al-Shaykh al-Mufīd (d. 413/1022), a contemporary of al-Qāḍī ʿAbd al-Jabbār, is considered the foremost Shiʿi master to have applied rational *uṣūlī* arguments in rewriting the school's jurisprudence in his principle juridical work: *al-Muqniʿah*. He is the first scholar to move beyond the textual sources and open the door for adopting Muʿtazilī methods and doctrines into mainstream Imāmī thought at a time when the Shiʿi intellectual community dominated the traditionist school and severely censured the introduction of reason and rational methodologies. Al-Mufīd's very brief treatise on legal methodology was quoted and preserved by his pupil al-Karājikī (d. 440/1048). Of course the Shiʿi community had been

acquainted with legal methodology before al-Mufīd, as some earlier Shiʿi jurists had used it; however, only in al-Mufīd's work was it presented as a doctrinal basis for Imāmī thought.

Al-Shaykh al-Ṭūsī

As a student of al-Murtaḍā, "Shaykh al-Ṭā'ifah" Muḥammad ibn al-Ḥasan al-Ṭūsī shares many views with him, including the role of reason. However, he presents a more balanced and practical account of legal methodology than does his master by "modify[ing] the radically rationalist and pragmatic positions of al-Murtaḍā," which largely set the pattern for later Shiʿi *uṣūl* writers to follow. Al-Murtaḍā, who lived during the climax of the moderate Shiʿi reaction to Imāmī traditionism (*Akhbāriyyah*), was skeptical about the influx of exaggerated traditions. Al-Ṭūsī, on the other hand, initiated a new process that combined *Imāmī* traditionism with rational *Uṣūlism*, for his proposed synthesis he adopted traditions from the exaggerated sources even though he maintained his firm *Uṣūlī* position. Al-Ṭūsī legitimized the solitary reports transmitted by *Akhbārī* reporters because he considered them reliable transmitters of traditions, despite their deviant beliefs.

In addition to adding two new collections to Shiʿi tradition sources, al-Ṭūsī also validated solitary traditions with some qualifications in his legal methodology. Thus he is held to have introduced a new conformity between Shiʿi traditionism and *uṣūlī* reasoning, which later became Shiʿi *Ithnā ʿĀsharī* orthodoxy. Apart from his meticulous presentation of Shiʿi law, al-Ṭūsī wrote the first comparative intra-Muslim work, *al-Khilāf*, and another detailed work, *al-Mabṣūṭ*, both of which contained the viewpoints of most Sunni and Shiʿi legal authors and were modelled upon Sunni works.

Here, Shiʿi legal theory benefitted greatly from the heritage of Sunni legal thought that, in many ways, predates Shiʿi legal thought by some 250 years. After all, so long as the infallible Imam was present and considered the sole authority, there was no immediate need to formulate a structured and systematic legal theory. Likewise, the hadiths were not collected until the beginning of his Greater Occultation. Al-Ṭūsī's way of bringing together different views caused British historian and Islamic scholar Norman Calder (d. 1998) to call him the first Shiʿi author to establish an area for "doubt" and, consequently, "choice" that "may be interpreted as a desire to incorporate as harmoniously as possible the divergent characters and views which had been gathered into the nascent Shiʿi tradition."

As regards legal methodology, al-Ṭūsī wrote *al-ʿUddah fī Uṣūl al-Fiqh* to explain the rational principles of Islamic jurisprudence. In it, he provides chapters on the principles of presumed continuity (*istiṣḥāb al-ḥāl*) and the human perception of good and evil (*al-ḥaẓr wa al-ibāḥah*). The elaboration of these topics led to the recognition of reason as a source of legal knowledge in later Shiʿi *uṣūlī* works, beginning with Ibn Idrīs al-Ḥillī (d. 598/1201). Al-Ṭūsī nevertheless repudiates the legal effects of analogy and consensus, although he does allocate a chapter to each. Below, we outline his work to see how he treated methodological issues.

Outline of Al-Ṭūsī's Legal Methodology

Al-Ṭūsī defines *uṣūl-fiqh* as the use of *adillah*, by which legal norms are generally discovered from the sources. Like Murtaḍā, he makes the divine addresses (*khiṭāb*) the basis of legal knowledge. He divides his legal methodology into twelve chapters that, according to his categorization, can be further reduced to six.

1. **Introductory remarks**
   a) Semantic remarks on religious knowledge and its indicators. Al-Ṭūsī's traditional definition divides *ʿilm* into necessary and acquired knowledge. Its indicators include reason (*ʿaql*), reflection (*naẓar*), and contextual signs (*imārah*) in addition to the divine addresses.
   b) Theological remarks on human actions, God's attributes, and those of the Prophet and the Imams, for the sake of understanding their addresses.
2. **Tradition-reports**: Al-Ṭūsī relies upon them as a way to indicate the *khiṭāb*, including topics on:
   a) The definition of *khabar* and how to acquire knowledge from it.
   b) The division of *khabar* into *āḥād* and *mutawātir*. Here, he presents one of his best arguments to validate solitary reports with some conditions.
   c) The commands and prohibitions; their generality and particularization, as well as their lucidity and ambiguity; and the rules of abrogation.
3. **Practices of the Prophet**: Al-Ṭūsī dedicates a separate chapter to this topic.
4. **Consensus, analogy, and ijtihad as annexed methods**: Al-Ṭūsī devotes one chapter to each of these topics, although he attaches

real legal value to them only if they include supporting words from the Imams.

5. **Restricted and unrestricted actions** (***al-ḥaẓr wa al-ibāḥah***): Here, al-Ṭūsī presents an interesting account on the human perception of good and evil.
6. **Presumed continuity** (***istiṣḥāb al-ḥāl***): Unlike al-Murtaḍā, al-Ṭūsī's definition of istiṣḥāb30 allows him to conjoin the present with the past.

Shiᶜi Legal Methodology Adopts Ijtihad

A drastic change appeared in Shiᶜi jurisprudence during the seventh/thirteenth century: The adoption of ijtihad and parts of *qiyās* in *uṣūl al-fiqh* led to the rewriting of Shiᶜi law on a wider doctrinal basis. This adjustment occurred after Sunni jurisprudents developed a theoretical approach to legal methodology (see below, chapter 5). Despite their total devotion to the Imams, the new round of Shiᶜi *Uṣūlism* (during the Mongol period) incorporated new rational elements into Shiᶜi thought. The necessity of theoretical considerations led authors of the *Ḥillah* school to formally embrace ijtihad and incorporate more rational arguments into their jurisprudence.

Al-Muḥaqqiq al-Ḥillī

Al-Muḥaqqiq al-Ḥillī (d. 676/1277) was the first post-al-Ṭūsī Jaᶜfarī author to write a somewhat different treatise on legal methodology. In his *Maᶜārij al-Uṣūl*, he opens the discussion with a brief definition of key terms such as legal norms, knowledge, conjecture, evidence (*dalālah*), contextual signs (*imārah*), truth, and metaphor. Nowhere does he include syllogism, although he does use some of the terminology of logic. He then proceeds with the legal commands and prohibitions, their characteristics, as well as the role of the traditions and consensus in assessing legal norms. Al-Muḥaqqiq devotes seven chapters to the above topics, all of which Ibn al-Ḥājib had categorized as "revealed indicants."

Al-ᶜAllāmah al-Ḥillī

The eminent authoritative scholar of Shiᶜi theology and jurisprudence Ibn al-Muṭahhar al-Ḥillī (d. 726/1327), usually known as al-ᶜAllāmah al-Ḥillī, advanced al-Muḥaqqiq's way of structuring legal methodology, particularly his adoption of ijtihad and parts of *qiyās*. His four works on legal methodology are essentially in line with al-Muḥaqqiq's *uṣūl*

al-fiqh framework. In his *Tahdhīb*, al-ᶜAllāmah al-Hilli legitimized two kinds of *qiyās*: (1) *al-manṣūṣ al-ᶜillah*, in which the ratio legis is designated in the Qur'an and/or the Sunnah, and (2) *al-ḥukm fī al-farᶜ al-aqwā*, wherein the minor case has more applicability to the law than its premise. Al-ᶜAllāmah al-Hilli, as the late Ayatollah Mutahhari suggested, paid careful attention to the changing concept of ijtihad in Sunni law, as well as the exclusion of opinion (*ra'y*) and sometimes of *qiyās* from the sources of the Shariᶜah. As a result, he also modified their juridical position and formally incorporated ijtihad and parts of *qiyās* into the Shiᶜi legal system.

Both al-Muḥaqqiq and al-ᶜAllāmah were clearly impressed by al-Ghazali and Ibn al-Ḥājib's redefinition of ijtihad: "Utmost intellectual endeavor in search for the [most appropriate] legal rule" (*istifrāgh al-wusᶜ li ṭalab al-ḥukm al-sharᶜī*). This necessitates rational (*uṣūlī*) theoretical considerations, but does not depend upon *qiyās*. Once the distinction between ijtihad and *qiyās* and *ra'y* became clear for the Shiᶜis, they embraced the former to the extent that practicing it became one of the most salient characteristics of Shiᶜi jurisprudence in the nineteenth century and thereafter.

This trend toward reviving ijtihad was cemented by al-ᶜAllāmah, who established its epistemology and legitimacy in his *uṣūl al-fiqh* works by affirming a clear-cut epistemological division of knowledge between certainty (*ᶜilm qatᶜī*) and probability (*ẓann*) in Shiᶜi jurisprudence. The Shi'is adopted these central Sunni *uṣūl* concepts. He also insisted upon the need for *mujtahids*. Accordingly, Imāmī scholars from al-Muḥaqqiq al-Ḥilli onward gradually transitioned from the principle of certitude in deriving legal norms to probable opinion and formally embraced it during the fourteenth century by accepting al-ᶜAllāmah al-Ḥillī's ijtihad.

Chapter Five

The Course of Theorizing Legal Methodology

We now turn to a new era during which Islamic legal methodology adopted certain concepts from Greek logic and set new legal principles as part of its intellectual ancestry. The Muslims' incorporation of Aristotelian epistemological elements into *uṣūl al-fiqh* did not fundamentally change the latter's structure, but rather equipped it with

beneficial instruments and, at certain points, added to its methodology's theoretical scope. We already encountered the translation of Aristotelian Peri hermeneias by Ibn al-Muqaffaʿ in the second/eight century. During the following century, the translation of Aristotle's *Categories, Hermeneutica, Analytica Priora*, and *Posteriora* were made available to Muslims mainly through the works of two Abbasid court physicians: Ḥunayn ibn Isḥāq (d. 260/873) and his son Isḥāq ibn Ḥunayn (d. 289/910). Renowned philosophers such as al-Fārābī, Ibn Sīnā, and Ibn Rushd elaborated upon these translations extensively. The former allocated a chapter to juridical analogy in his *Kitāb al-Qiyās al-Ṣaghīr* and tried to explain that "inferences employed in Islamic law can all be shown to comply with rules of Aristotelian assertoric syllogistics." According to Joep Lameer:

> … [S]ince Aristotle's theory of the syllogism employs statement-making (i.e. descriptive) sentences only, which are in the *Prior Analytics* called "proposition" (*protasseis*), it was imperative for al-Fārābī, given the objective of his account, to expressly lay down the condition that any legal prescription that is to be part of legal deduction must be of that sort.

Ibn Ḥazm

A new era of methodological developments was spurred in the fifth/eleventh century by the introduction of logical notions. Among the Muslim *ʿulamā'*, Ibn Ḥazm (d. 456/1064) who upheld Zahirī theory (maintaining the literal meaning) was the forerunner of those who would later on bring some epistemological components, clearly from formal logic, into his methodology. He presented an unusual combination of theology, linguistics, and logic in his work on *uṣūl al-fiqh*, namely, *al-Iḥkām*. He begins his account with theories of knowledge: How are things known – by inspiration, through the guidance of an Imam, by a tradition (*khabar*) of the Prophet, by imitation (*taqlīd*), or by human reason. He favored reason because all channels, even "the traditions should be verified by reason." He adds that logical principles help us "to understand God's intention as conveyed to us through His speech."

Imām al-Ḥaramayn al-Juwaynī

This new phase of methodological development reaches its zenith in the works of al-Juwaynī and al-Ghazālī, both of whom welcomed the inclusion of logic in legal methodology. Imām al-Ḥaramayn al-Juwaynī (d. 478/1085), the Ashʿarī theologian, wrote four books on legal

methodology. Of the four, it is in *al-Burhān* that he marshals the most relevant elements to epitomize the knowledge of his time. The influence of logic and epistemology is visible in his introduction, although he ultimately emphasized rational theology, Arabic grammar and jurisprudence.

Al-Juwaynī presents an interesting account of "knowledge, its bases and indicators" in this work's introduction. He gives the definitions of *ʿilm* according to various theological schools and divides knowledge into ten categories, among which the knowledge of scripture and the traditions (*samʿīyyāt*) are ranked last. Concerning the basis of knowledge of religion, he ranks *ʿaql* (reason) first but confines its role to the necessary understanding of fundamental religious premises.

Abū Ḥāmid al-Ghazālī

Abū Ḥāmid Muḥammad al-Ghazālī (d. 505/1111) is the legal thinker who greatly advanced the theoretical dimension of *uṣūl al-fiqh* and gave a new structure to Islamic legal methodology. He wrote four books on the subject, three of which have reached us. In his first work *al-Mankhūl*, he presents the methodological topics of Islamic jurisprudence on the same pattern established by al-Juwaynī, but gives greater prominence to epistemological and theological issues. His second book, *Shifā'*, is dedicated to the analysis of varieties of *qiyās* and expressly excludes problems discussed in *al-Mankhūl*. In his later work *al-Mustaṣfā*, he sets out a new arrangement for the topics of legal methodology and delicately incorporates some of the epistemological parts of formal logic into his methodology. In the introduction, he states that he provided a new and wondrous (*ʿajīb*) articulation of *uṣūl al-fiqh* in which he combined investigation with innovation.

It was al-Ghazālī who provided new definitions for *qiyās* and ijtihad by placing them in two theoretically separate spheres. He characterized *qiyās* as part of "the method of inference" (*kayfiyyat al-iqtibās min maʿqūl al-alfāẓ*) and placed ijtihad in the category of "qualification of indicants of legal rules," which is required in all spheres of legal inquiry. Unlike most of the preceding jurists, he did not include *qiyās* among the specific sources of law, for he considered it as nothing more than a method of inference that would prove to be effective with newly arising similar cases. The following schematic summary reveals how he replaced the hierarchical classification of the topics of *uṣūl al-fiqh* with a horizontal one.

The Structure of al-Ghazālī's Legal Methodology

Al-Ghazālī begins by defining legal methodology as knowledge of the sources of legal norms and subsequently articulates the meaning of every term that appears in this definition, starting with knowledge. This leads to an extensive epistemological introduction to determine criteria for man's understanding. He restricts them to definition (*ḥadd*) and demonstration (*burhān*), which are applicable to all theoretical sciences.

1. The first quarter deals with legal norms and encompasses:
   a. The nature of legal norms, whether they are based on a rational understanding of good and evil.
   b. Varieties of legal norms: obligatory, forbidden, permissible, etc.
   c. Constituent elements (*arkān*) of legal norms (i.e., God-human relations).
   d. Causes that necessitate the application of a norm. He sets forth the problems encountered in determining the validity of actions (*ṣiḥḥah*) and concessionary laws (*rukhṣah*).

2. The second quarter covers the sources of Islamic law, which include:
   a. The book of God (the Qur'an) followed by these issues:
      i) Facts and metaphors,
      ii) explicit and symbolic verses, and
      iii) abrogation.
   b. The traditions of the Prophet, including discussions on:
      i) the validity of reports,
      ii) solitary reports (*āḥād*).
   c. Consensus, including:
      i) the proof for its being the source of law,
      ii) its constituent parts, and
      iii) rules of consensus, including *istiṣḥāb*.

3. The third quarter deals with the method of setting rules based on the sources. Describing this as the discipline's essential part, it begins with introductory remarks on semantics. This quarter is basically divided into three parts that encompass several chapters and sections.
   a. The expressed speech of God:
      i) General and lucid words (*mujmal wa mubayyan*).

ii) Apparent and divergent meanings (*ẓāhir wa mu'awwal*).
iii) Commands and prohibitions, and their meanings and application.
iv) The generals and particulars on which he allots five sections.

b. The implied and alluded meanings, including the Prophet's actions.
c. The method of deriving legal norms (*aḥkām*) from the sources:
i) On the validity of juridical analogy (*qiyās*).
ii) Validating the cause (*ratio legis*).
iii) On the analogy of resemblance (*qiyās al-shabah*).
iv) The constituent parts of *qiyās*.

4. The fourth quarter is dedicated to the methodology's end users and comprises three chapters:
a. Ijtihad: Al-Ghazālī presents one of the best definitions, namely, the exertion of maximum mental energy to deduce the law from the sources.
b. Imitation and seeking the opinion of *mujtahid*s.
c. Juridical preferences (*tarjīḥ*).

As shown above, al-Ghazālī's division of legal methodology into four parts encompasses all topics that arise under *uṣūl al-fiqh* in accordance with the pattern he set out in his famous book, *Iḥyā'*: 1) legal norms (*aḥkām*), 2) sources or indicators (*adillah*) of the legal norms, 3) the methodology of deriving these norms from the sources, and iv) the necessary qualifications of the one who deduces the law (i.e., the *mujtahid*). He likens this structure to a tree: Its fruits are the legal norms, its roots are the sources, its manner of bearing fruits is the legal methodology, and its end users are the *mujtahid*s.

Almost a century after al-Ghazālī, the Shāfiʿī jurisprudent Fakhr al-Dīn al-Rāzī (d. 606/1209) tried, among other things, to explain the logic of legal methodology and the sequences of its various subjects. In his famous book *al-Maḥṣūl*, he defines *uṣūl al-fiqh* as a compound method by which legal norms are generally known and also discusses the method of reasoning and who is qualified to perform it. This definition reflects the complex and sophisticated nature of legal methodology at that time. In fact, the next problem that al-Rāzī takes up is epistemological, as he offers definitions of knowledge (*ʿilm*),

speculation (*zann*), and conception (*nazar*) as the first necessary steps to understanding key methodological notions such as legal proofs and contextual indicators (*al-dalīl wa al-imārah*).

Sayf al-Dīn al-Āmidī

The course of segregating *uṣūl al-fiqh* from theology while incorporating elements of logic and *kalām* finds another exponent in Sayf al-Dīn al-Āmidī (d. 631/1233), who condenses an epistemo-theological introduction into three and half pages and refers readers to his *Abkār al-Afkār* for greater elaboration. However, under the title of *istidlāl*, by which he means logical inference, he dedicates a chapter to syllogism. Nonetheless, he employs a theological approach when dealing with some of the topics listed under *uṣūl al-fiqh*, as evident in the outline below. He enriched his language with terms borrowed from formal logic and with insights derived from his theological background.

Chapter Six

Remolding Legal Methodology to Respond to Social Reality

A new tendency appeared among some of the legal scholars from the eighth/fourteenth century onward, one that shifted the emphasis from the theoretical, which emphasized the Qur'an and the Sunnah, to the social and practical aspects of Islamic legal methodology. Two towering juridical figures of this period were al-Ṭūfī and al-Shāṭibī, who turned their attention to practical problems of Islamic jurisprudence and sought to lessen the grip of literal hermeneutics. In fact, the theoretical culmination of Islamic legal methodology in the works of al-Ghazālī and Ibn al-Ḥājib paved the way for widening its scope to include new juridical devices such as the "presumption of continuity" and the "higher objectives of law." These devices can practically transcend the limits of text-based reading of the Shariʿah and thus act as a bridge between the methodological theories and social realities of the time.

Najm al-Dīn Sulaymān al-Ṭūfī

Najm al-Dīn Sulaymān al-Ṭūfī (d. 716/1316), a Hanbalī jurist of Baghdad, modified the legal methodology to respond to the existing social context by rearranging the contents of Islamic legal methodology

according to pragmatism. He wrote several abridgements on the *uṣūl* works of earlier authors, including Ibn Qudāmah (d. 620/1223).

In a detailed commentary on his own abridgment of Ibn Qudāmah's Rawḍat al-Nāẓir, al-Ṭūfī says Ibn Qudāmah first followed al-Ghazālī's pattern of incorporating logic into his legal methodology, but later on dropped it due to the protest of his companions. Al-Ṭūfī has apparently chosen the latter version for his commentary, for he claimed that only Ibn al-Ḥājib had really followed al-Ghazālī's method of presenting *uṣūl al-fiqh*.

Abū Isḥāq al-Shāṭibī

Abū Isḥāq Ibrāhīm al-Shāṭibī (d. 790/1388) offered the most impactful changes to the legal theory so that it could address that time's socio-legal challenges. He wrote one of the most inspiring works on legal methodology and its relation to the philosophy of law with a new arrangement based mainly upon the practical context of jurisprudence. In his *al-Muwāfaqāt* (lit. the Concordances), al-Shāṭibī presents *uṣūl al-fiqh* not only as a method to extrapolate rules from the sources, but also to serve the law's aims and objectives – what he calls *maqāṣid al-sharīʿah*. By offering twelve theoretical premises (*al-muqaddimāt al-ʿilmiyyah*) as an introduction, he elaborates upon methods and theories of harmonizing the legal norms (*aḥkām*) with the philosophy of law within the context of the public welfare (*maṣlaḥah*). This approach led him to either propose or maintain several additional postulates as the key methodological premises for understanding the law according to its objective.

The first premise he sets out is that the law's methodological principles are *qaṭʿī* (lit. decisive) not *ẓannī* (lit. probable), because they are concerned with its universal principles (i.e., *ḍarūriyyāt* [lit. necessities], *ḥājiyyāt* [lit. needs], and *taḥsīniyyāt* [lit. improvements]). By presenting this premise, al-Shāṭibī indicates his novel approach to legal knowledge, one that Wael Hallaq considers as "epistemology refashioned." Methodological principles may be drawn from the revelation, reason (*ʿaql*), or convention (*ʿādah*); their certitude can be established by inductive search (*istiqrā'*). Al-Shāṭibī lays special emphasis on the inductive method of reasoning and opposes the deductive or analogical reasoning practiced by the traditional jurists. The latter practice, he adds, allows a jurist to select the text that suits only his purpose, something that is incompatible with the Lawgiver's overall aims and intentions. Khalid Masoud considers *istiqrā'* as al-Shāṭibī's normative

basis of Shariʿah, which is deeply rooted in human welfare and social practices. This assertion can be endorsed by looking at how al-Shāṭibī stresses the notion of *ʿādah* as a valid practice and the method of *istiqrā'* as the best way to reach the truth. They evidently point to his conception of a normative basis for the Shariʿah, which in contemporary society can only be expected.

Given the above, al-Shāṭibī's framework does not fit the conventional structure of legal methodology. Instead of beginning with the hierarchy of the law's four sources followed by the semantics of the Qur'an and traditions, the authority of *ijmāʿ* and *qiyās*, and concluding with the office of *mujtahid* and his preferences, he opens with a socio-historical evaluation of legal norms followed by the philosophy of the law, by another socio-legal assessment of the sources, and finally closes by relocating ijtihad's place in Islamic jurisprudence. By doing so, he instrumentalizes legal methodology so that it can address socio-legal theories and thereby provide a wider scope that was not employed (or even noticed) until the contemporary era.

Chapter Seven

The Reorientation of Legal Methodology in the Recent Era: From Shāh Walīyullāh to al-Zuhayli

Muslims divide Islamic legal history into three eras: the early (*al-mutaqaddim*), the middle (*al-mutawassiṭ*), and the moderns or later scholars (*al-muta'akhkhir*). Although the precise beginning of the recent era is not clearly defined, the period after the Ḥanbalī theologian Ibn al-Qayyim al-Jawziyyah (d. 751/1350) is commonly regarded as "the recent era." Each period, of course, has its own characteristics and figures, but they hardly define an epoch in its totality. This is particularly true with the recent era, which often appears to Muslims as devoid of any outstanding luminaries who are on the same level as their predecessors. As regards legal methodology, a significant feature of the post Ibn al-Qayyim era is the reorientation of al-Ghazālī's method of structuring *uṣūl al-fiqh*, as seen below in the works of some leading Sunni authors. The recent changes in Shiʿi methodology, which mainly highlight the development of literal and rational reasoning, will be dealt with in the succeeding chapter. All of the above changes are considered to have occurred within the conventional parameters of *uṣūl*

al-fiqh. Modern approaches to the Shariʿah that, among other things, brought forth a range of methodological arguments will be discussed in the last chapter.

The Ḥanafī Elaboration of Legal Maxims

One of the recent era's first juridical developments is the elaboration of legal maxims (*qawāʿid al-fiqh*) by the Ḥanafī scholars Ibn Nujaym (d. 970/1562) and Ibn ʿĀbidīn (d. 1252/1836). The former was an Egyptian author who wrote one work on *uṣūl* and five books on fiqh and legal maxims. The significance of his contribution lies in how he elaborated on a number of legal maxims, such as "the role of intention (*niyyah*) in contracts and rituals" and particularly "habit and custom" (*al-ʿādah wa al-ʿurf*), which indicates the *ʿulamā*'s interest in time-honored public practices and merits our attention. Basing the legality of *ʿādah* on the prophetic tradition "Whatever the Muslims deem to be good is good in the eyes of God," he claims that the scope of *ʿādah* is so widespread in jurisprudence that scholars consider it an established principle (*aṣl*). By quoting al-Bazdawī, an early-period Ḥanafī scholar, he attempts to redefine the close connection of habit and "practice" (*istiʿmāl*).

Shāh Walīyullāh Dehlawi

Shāh Walīyullāh of Delhi (d. 1176/1762), whose writings have had a lasting impression upon Muslims living in the Indian Subcontinent and Southeast Asia, did not write a specific work on legal methodology. However, he did elaborate on several key notions of the *uṣūl* in an attempt to explain his new approach to the Shariʿah. His books emphasize the role of both hadith and history in understanding the Qur'an and Islam in practice. Underlining the critical role of ijtihad ranked next in importance, for he considered it "the only instrument left with us for solving the problems emerging in the swiftly changing condition of modern times." In his Persian-language *Muṣaffā*, he unequivocally states that the ijtihad undertaken by contemporary Muslims should be independent, like that of Shāfiʿī's, because the existing hadith texts cannot adequately cover newly occurring cases. The following outline shows the scope and various types of ijtihad that he had in mind:

1. When the truth is decisively determined, then its necessity in such cases is due to its opposite being contradicted, for it is false.
2. When the truth is determined by common consensus, its opposite is therefore false.

3. When a definite choice has been provided between adoptingeither one or another of the two alternatives.
4. When the above choice is given by the dominant opinion.

In his magnum opus *Ḥujjat Allāh al-Bāligḥah*, which deals with Islamic jurisprudence (*fiqh*) and its philosophy, Shāh Walīyullāh deliberates on the history of the rise and development of several sociojuridical notions and their social objectives. Its remarkable part is the chapter on human development (*irtifāq*), which he contends is based on divine inspiration.

Al-Shawkānī

The renowned Yemeni jurist and judge Muḥammad ibn ʿAlī al-Shawkānī (d. 1255/1839), one of the prominent and authoritative representatives of restructuring legal methodology in the thirteenth nineteenth century wrote several books on Islamic theology and fiqh. His work on legal methodology remains a highly referenced textbook. He expounds *uṣūl al-fiqh* in its horizontal structure by abandoning the hierarchical arrangement of legal methodology that had prevailed since the time of Ibn al-Ḥājib. Instead he adopted, with some adjustments, al-Ghazālī's method of commencing with *ḥukm* (legal norm) and then turning to *ḥākim* (juridical governance [i.e., revealed and non-revealed indicants, or *adillah*]), *al-maḥkūm bihi* (the subject of legal ordinances [i.e., the obligation]), and finally to *al-maḥkūm ʿalayhi* (what has been ordained by the law [i.e., "the capacitated person," or *mukallaf*]). Given the diverse topics amassed in *uṣūl al-fiqh*, he treated several issues independently because they did not fit into the aforesaid format. The significance of his work, however, lies in its well-balanced judgments on many controversial issues, some of which are presented below.

Shaykh Muhammad Abu Zahrah

Although affected somewhat by modern approaches to the law, contemporary Islamic legal methodology continues to flourish in its conventional fashion. In this vein, the Egyptian scholar Shaykh Muhammad Abu Zahrah (d. 1974) of al-Azhar University wrote an up-to-date exposition of *uṣūl al-fiqh*. His work is significant because he takes a historical look at a number of important *uṣūlī* questions and also presents a timely re-orientation of notions such as considering the public welfare, objectives of the law, and social justice. Abu Zahrah follows al-Shawkānī's (and to some extent al-Ghazālī's) formula of presenting legal methodology in four quarters. His mature arrangement

of the diverse *uṣūl* topics shows how deeply he had read and benefited from more than eleven centuries of uṣūl writings.

Abu Zahrah opens his work with a brief review of the birth and rise of legal methodology, particularly the emergence of the two main trends of the *uṣūlī* development (i.e., the Ḥanafī and Muᶜtazilī) trends (see Chapters 2 and 3). His first chapter deals with legal norm (*al-ḥukm al-sharᶜī*), its variety, hierarchy, and intensity. A corollary of the legal norm is declaratory law (*al-ḥukm al-waḍᶜī*), whereby Abu Zahrah elaborates upon "legal cause" (*sabab*), "legal condition" (*sharṭ*) and "legal impediment" (*māniᶜ*).

Wahbah al-Zuhayli

Wahbah al-Zuhayli (d. 2015) is a traditional mufti and university professor who has written voluminous works on Islamic jurisprudence and Qur'anic exegesis. His book on legal methodology is one of the most referenced works in the field, after that of his teacher Abu Zahrah.

Like Abu Zahrah, Zuhayli approaches legal methodology by first appraising the legal norms (*aḥkām*) and then turning to the method of deducing *aḥkām* by evaluating their sources, executors, and beneficiaries. We know that this way of formatting *uṣūl al-fiqh* commenced with al-Ghazālī's horizontal approach to legal methodology (see Chapter 5). "The main purpose of legal methodology," al-Zuhayli adds, "is to distinguish legal norms." Similar to Abu Zahrah, he divides the topic of legal norms into four sections: 1) types of legal rules (*ḥukm*), 2) the lawgiver (*ḥākim*), 3) the subject of the law (*maḥkūm fīhi*), and 4) what the law has ordained (*maḥkūm ᶜalayhi*).

Chapter Eight

Revival of the Shiᶜi *Uṣūlī* Doctrine: The Elaboration of Literal-Rational Principles

The *uṣūl* methodology found a new momentum in the Shiᶜi seminaries during the second half of the eighteenth century when the leading jurisprudents of the shrine cities of al-ᶜAtabāt inaugurated an extended form of ijtihad to widen the scope of the *uṣūl* in order to deal with newly occurring issues. This trend, which has continued, gave a distinct

identity to a host of rational principles by separating them from semantics and literal interpretations. A significant number of works were produced to elaborate the new *uṣūlī* methodology among which, the following four renowned figures represent this trend: al-Qummī, Anṣārī, Khurasani and al-Muẓaffar. They were instrumental in solidifying the triumph of the *Uṣūlīs* over the *Akhbārīs*. The latter repudiated the discipline of *uṣūl al-fiqh* and argued in favor of espousing the literal meaning of the hadiths.

During the *Akhbārī's* dominance on the Shiʿi centers of Iran, Iraq, Lebanon and Bahrain, the jurists produced a number of ethico-juridical works based mainly on the tradition-reports compiled by authors such as Mullā Muḥsin Fayḍ Kāshānī (d. 1091/1680) and Mullā Muḥammad Bāqir Majlisī (d. 1111/1699). These works, nevertheless, were not considered typical legal works to meet the growing demands of time-honored questions. By the late twelfth/eighteenth century the *Akhbārī* trend lost much of its appeal among the Shiʿi school of the shrine cities of al-ʿAtabāt, and gave way to the application of *uṣūlī* principles.

The catalyst for the downward trend of *Akhbārism* was the chief jurist of the time Shaykh Yūsuf al-Baḥrānī (d. 1186/1772) who set out to write a comprehensive book on Shiʿi fiqh. To write a full-fledged work of such kind, he had to invoke ijtihad and some *uṣūlī* principles such as *istiṣḥāb* although he theoretically rejected the role of *ʿaql* (intellect) and *ijmāʿ* (consensus) in deriving legal rulings. In fact, he posed the question: how is one to derive law when the possibility of acquiring knowledge no longer existed with the onset of the Imam's occultation? He suggested that the community had no choice but to seek recourse to ijtihad to derive new legal norms. The modern scholar W. Madelung opines that al-Baḥrānī later espoused an intermediate position between *Akhbārism* and *Uṣūlism*. The contemporary author Ayatollah Jannaati has even suggested that al-Baḥrānī had later changed his position and adopted the *uṣūl* methodology and the practice of ijtihad but had kept this hidden from the public.

Al-Baḥrānī exhibited respect and reverence for his *uṣūlī* opponents to the extent that he allowed his chief adversary Muḥammad Bāqir Bihbahānī (d. 1205/1791) to flourish in seminaries by encouraging his students to attend his lectures, and still more, by assigning him the task of leading his funeral prayer upon his death. The efforts made by al-Baḥrānī to reduce the tension between the two factions were misinterpreted by later *Uṣūlīs* as a sign of weakness and, as such, they

credited Bihbahānī with victory over the *Akhbārīs*. Despite al-Baḥrānī's aspiration for respect and civility, the *Uṣūlī–Akhbārī* conflict continued and eventually turned into personal refutations and even bloody clashes between the supporters of two sides during the nineteenth century. Bihbahānī succeeded in re-establishing *uṣūl* methodology in the shrine cities, however he digressed to writing polemical treatises rather than *uṣūl* works. Yet, his direct and indirect students fulfilled the function to which we now turn.

Al-Qummī

Al-Mīrzā Abū al-Qāsim al-Qummī (d. 1231/1815), one of the most renowned students of Bihbahānī, vehemently espoused the method and principles of *uṣūl al-fiqh* and wrote a detailed textbook on this subject. It is worthy to note that following the model set by Shaykh Ḥasan al-ʿĀmilī in his *Maʿālam al-Uṣūl*, al-Qummī focused on semantics and literal interpretation, and presented strong arguments which had often been equipped with terms borrowed from formal logic. However, because of the remnant effects of *Akhbārī* influence, the parts on "discursive reasoning" (*al-mabāḥith al-ʿaqliyyah*) could not yet be developed in their own right in Shiʿi *uṣūlī* writings of the time.

Anṣārī

A new strand of rational maxims developed in the Shiʿi seminaries in the second half of the thirteenth/nineteenth century when the *uṣūlī* trend of jurisprudence became recognized as conventional and mainstream in the Shiʿi community. In constructing and rehabilitating the legal methodology, emphasis on semantics and literal interpretation remained the same, but had been supplemented with a new series of rational argumentations whose essence laid in meticulous interplay between conflicting rules of the law. The towering figure in this regard was Shaykh Murtaḍā Anṣārī (d. 1281/ 1864) who developed this trend of *Usūlism* in the shrine seminary of Najaf. He presented *uṣūl al-fiqh* in two parts: 1) the literal subject matters (*al-mabāḥith al-lafẓiyyah*), and 2) the rational subject matters (*al-mabāḥith al-ʿaqliyyah*).

The first discourse was recorded by one of his students in a book named *Maṭāriḥ al-Anẓār*. The second discourse was contained in several treatises signed and titled by the author as *Farā'id al-Uṣūl*. Central to the present discussion is the latter work where he deals exclusively with the methods of application of rational principles to juridical cases.

Anṣārī's point of departure in this work is epistemological, and begins with the question of how legal knowledge should be attained. He proposes that the position, which a *mukallaf* (capacitated person) usually takes in the understanding of the legal norms is: 1) one of certainty (*qaṭ*ᶜ), 2) a valid conjecture (*ẓann*) or 3) of doubt (*shakk*). The first category applies essentially to certain knowledge of things which are subjects of the legal norms. It is possible that certainty could be acquired within the context of things (i.e. rational premises). As such, knowledge then can be just mediums (*awsāṭ*) between man and the legal norm (*ḥukm*). The validity of this category, therefore, derives from itself rather than the law. Then, Anṣārī raises the question of whether certainty acquired from the rational premises is valid or not? He concludes in the affirmative and adds that the tradition reports should not be taken as opposing "rational certainty." Here, he challenges the Akhbārī's position of refuting logical premises and defends the use of syllogism in legal methodology, which he applies in this part of his work. He includes "general knowledge" (*al-*ᶜ*ilm al-ijmālī*) in the category of relative certainty although its validity appears to be speculative.

Khurasani

One of the most celebrated works in the field of legal methodology is *Kifāyat al-Uṣūl* by a student of Anṣārī named Mullā Muhammad Kazim Khurasani (d. 1329/1911) whose unyielding fatwas in support of Constitutionalism were crucial for the triumph of the Iranian Constitutional Movement of 1906–1911. His work is heavily imbued with semantics of the legal texts to the extent that the authority of sources of the law and rational reasoning appear only in the context of discussion on literal interpretations. In his introduction he explicitly states that the objective of *uṣūl* is to draw generalization out of various subject matters, not merely to elaborate on the four sources of the law. He explains that if one focuses on the sources, the argument would ultimately turn into how to establish the textual authority and applicability of the four legal indicants (*al-adillah al-arba*ᶜ*ah*). However, the scope of literal interpretation is much wider than remaining confined to the *adillah* or the fixed texts.

Al-Muzaffar

Shaykh Muhammad Rida al-Muzaffar (d. 1383/1964), aware of the twentieth century educational changes, attempted to simplify both the language and contents of Islamic legal methodology so as to make it available to a wider range of readers and students. We will focus on

his achievements after a survey on the structure of his presentation of *uṣūl al-fiqh*.

Al-Muzaffar's Presentation of Legal Methodology
Al-Muzaffar divides his legal methodology into four sections preceded by a prelude and an introduction, and followed by an epilogue.

Prelude: Definition, subject matters and setting the topics of *uṣūl*.
Introduction: Linguistic bases of legal texts. How words are laid down to convey meanings; real or metaphor; intention and expression.

A. Semantics (*mabāḥith al-alfāẓ*)
   1. The derived words (*al-mushtaqqāt*).
   2. The commands. He presents varieties of obligatory (*wājib*) norms.
   3. The prohibitions and their varieties.
   4. Implied meanings (*al-mafāhīm*) which are divided into six kinds.
   5. The general and the particular (*al-ʿāmm wa al-khāṣṣ*).
   6. The absolute and qualified meanings (*al-muṭlaq wa al-muqayyad*).
   7. The ambiguous and lucid terms (*al-mujmal wa al-mubayyan*).

B. Rational Entailments (*al-mulāzimāt al-ʿaqliyyah*)
   This is a new title under which al-Muzaffar juxtaposes two sets of never previously related topics:
   1. Independent analytic reasoning (*al-mustaqillāt al-ʿaqliyyah*): human intellectual perception of good and evil.
   2. Dependent analytic reasoning (*ghayr al-mustaqillāt al-ʿaqliyyah*): They include rules of necessity (*iḍṭirārī*), expediency (*maṣlaḥah*), and the principle that entails an obligation from obligatory premises.

C. The Proofs (*ḥujaj*)
   The authority to validate legal norms is derived from:
   1. The Holy Book: The problem of abrogation is discussed here.
   2. The Traditions of the Prophet and infallible Imams.
   3. Consensus: The opinion of the majority indicative of the *ḥujjah*.
   4. The Rational Proof (*al-dalīl al-ʿaqlī*).

5. The Validity of the Manifest Meanings (*ḥujjiyyat al-ẓawāhir*).
6. Fame (*shuhrah*): The Widespread Circulation of Legal Maxims.
7. The Practice of People (*al-sīrah*) which resembles *ʿurf* (custom).
8. *Qiyās*: He defines it as expansion of *ratio legis* to new cases.
9. Equivalence and Preponderance (*al-taʿādul wa al-tarājīḥ*).

D. The Practical Principles
1. The principle of presumption of continuity of the past (*aṣl al-istiṣḥāb*).
2. *Barā'ah*: the state of being discharged from liability.
3. *Iḥtiyāṭ*: to be prudent in case of ignorance of the law or other matters.
4. *Takhyīr* or juristic choice, after exhausting all legal proofs and signs.

As shown above, al-Muzaffar constructed a new format for *uṣūl al-fiqh* in which various topics of the discipline are carefully characterized and arranged according to the category of their functions.

Concurrent with al-Muzaffar and after him, a number of Shiʿi authors presented legal methodology in its traditional form with numerous elaborations or modifications. None of them seem to have surpassed the brevity and thoroughness of al-Muzaffar's work. It should, however, be mentioned that the *uṣūl* writings of the twentieth century thinker and jurist Sayyid Muhammad Baqir al-Sadr (d. 1980) offers another delicate arrangement within the juristic tradition. His work, nevertheless, is divided into three rounds of repetitive presentations in order to suit the format of his class and students and, as such, can hardly qualify as a distinctive format.

In the present era, a number of modern authors reproduced *uṣūl al-fiqh* with new proposals, and some of them suggested a new approach to the Shariʿah in reference to legal methodology to which we will focus in the next chapter.

Al-Sayyid Muhammad Baqir al-Sadr

As an original thinker of Islamic law, al-Sayyid Muhammad Baqir al-Sadr (d. 1400/1980) re-oriented Shiʿi legal methodology with lucidity of language and new logical arguments. He also laid the groundwork for modern Islamic banking and the idea of juridical supervision of governmental institutions. Born in al-Kazimayn (Iraq) in 1935, he

studied in Najaf under two well-known ayatollahs of the time: al-Khu'i and al-Hakim. Aware of the current socio-economic ideas and trends, al-Sadr proposed such alternatives as Islamic insurance and banking systems as well as infusing juristic checks and balances into Muslim governance, which have become partly grounded in Iran and Iraq. Unfortunately, al-Sadr got deeply involved in politics by synthesizing the ideology of the Daʿwah Party (Ḥizb al-Daʿwah al-Islāmiyyah) and refuting Iraq's ruling Baʿth party, which eventually cost him his life in April 1980.

He wrote three books on the discipline of *uṣūl al-fiqh*, the last of which, namely, *Durūs fī ʿIlm al-Uṣūl* (or *al-Ḥalaqāt*), has become the focal point of current Shiʿi scholarship. It consists of three course teachings (*al-ḥalaqāt al-thalāthah*) in which he progressively enhances his elaboration on *uṣūl al-fiqh*. Below, we will present the gist of his account on Islamic legal methodology.

In the introduction, he offers a new definition of *uṣūl al-fiqh*: "knowledge of the shared elements in the procedure of derivation from the divine law" (*al-ʿilm bi al-ʿanāṣir al-mushtarakah fī ʿamaliyyah istinbāṭ al-ḥukm al-sharʿī*). By "shared elements," he means the general principles that one holds in order to make rulings in different areas of the law, as opposed to special principles (*al-ʿanāṣir al-khāṣṣah*) that are restricted to their specific domain.

Chapter Nine

Modern Alternative Approaches to the Theory of Law

At the dawn of the twenty-first century, alternative approaches to the sources of Islamic law have become the salient features of the Islamic intellectual discourse. Although overshadowed by political "Islamism," the theoretical changes in contemporary Islamic legal thought appear to be the current intellectual revival's most compelling facet. Islamic law's rise to prominence in recent decades has ignited new approaches to the primary sources together with novel methods of interpretation. At present, several quarters are voicing a desire for an ideal application of Islamic legal norms as their central theme. Some of them even defy the status quo and consider the system to be outdated because it does

not address the people's aspiration for social justice. In response, some Muslim scholars and intellectuals have sought to rationalize this pressing aspiration's compatibility with modern proposals and a rehabilitated legal theory that they find suitable for the requirements of modernity.

Islamic approaches to legal theory entered a new phase upon their exposure to modern scholarship, which recognizes a critical role for human rationality in legal corroboration unparalleled in Muslim traditional legal thought. Prior to this, the latter had experienced innovations in its legal methodology via the proposals of the Muʿtazilī "rationalists" such as Abū Ḥāmid al-Ghazālī, Abū Isḥāq al-Shāṭibī, and Shāh Walīyullāh. But none of them had ever assigned a central place to human rationality in both perception and analysis, as the modern approaches have.

The modern discourse on legal methodology can be identified with two distinct strains of scholars: 1) those who sought to reform Islamic law and ethics from within the existing system so that it could respond to these new challenges and 2) those who tried to introduce an external approach, namely, to apply the modern disciplines of epistemology or hermeneutics. At the same time, the traditional discourse on law and its methodology still continues, largely oblivious to any new developments. This chapter focuses on new intellectual (non-traditional) approaches only, beginning with those that belong to the first strain.

Muhammad Iqbal

The poet-philosopher Muhammad Iqbal (d. 1357/1938) approached the legal methodology and some *uṣūlī* concepts with a deep insight into both Western and Islamic legal philosophy. As a Hegelian graduate of Cambridge and Munich universities, and therefore fully aware of the role of "human development" in modern thought, he proposed his theory of "human progress" not only to inspire a new spirit of religiosity among Muslims, but also to warn them of Western modernism's deficiency when it came to meeting one's spiritual needs. He put forward the idea of the ego's (*khudī*) development as a "constant becoming" and "self-realization" based on eternal love (*ʿishq*) and quest (*shawq*). For the ego to develop, it requires its freedom as well as its possible faults, both of which Iqbal found in the Qur'an. He wrote:

> Three things are perfectly clear in the Qur'an:
>
> 1. Man is the chosen one by God.

2. That man with all his faults, is meant to be the representative of God on Earth.
3. That man voluntary accepted trusteeship at his peril.

Iqbal attached great importance to reconstructing and codifying Islamic law on the grounds that an Islamic renaissance can be realized only after reexamining modern jurisprudence from the Qur'anic viewpoint. In his article "The Principle of Movement in the Structure of Islam," he critically interrogates the place and role of Islamic law's four sources. He maintained that the Qur'an's main purpose was to awaken in each person the higher consciousness of his/her relationship with God. The notions of "human faults" and "free personality" markedly distinguish Iqbal's thought from that of the traditional idealists, who entertained the idea of the perfect man (*al-insān al-kāmil*).

Iqbal's idea of "free personality" stems from his theory of perpetual change and movement in both nature and history. He identifies the principle of movement within the workings of ijtihad and proclaims that the closing of this particular "door" is "a pure fiction suggested partly by [the] crystallization of legal thought in Islam, and partly by intellectual laziness." He suggests that fiqh should be opened up for criticism and reevaluation.

As far as Islamic law is concerned, Iqbal's suggestions on implementing *ijmāᶜ* and appraisal of *qiyās* seem innovative in both substance and outlook. His proposal of embodying *ijmāᶜ* in the form of a state assembly signifies his pragmatism for putting into effect an Islamic theoretical issue. Yet his redefinition of ijtihad as an instrument of Islamic revival appears as his most persuasive contribution to modern Islamic doctrinal movements.

Taha Jabir Alalwani

Among the graduates of Cairo's traditional school of al-Azhar, Taha Jabir Alalwani (d. 2016) is renowned for his time-honored ideas and command of the Shariᶜah and legal methodology (*uṣūl al-fiqh*). His editing and publishing of *al-Maḥṣūl*, the great *uṣūl* work of Imām Fakhr al-Dīn al-Rāzī (d. 1209), catalyzed Alalwani's legal outlook as depicted in several of his later treatises and articles on legal methodology and the history and principles of Islamic jurisprudence. Alalwani taught Islamic jurisprudence in Saudi Arabia for ten years before becoming a founding member, and subsequently the president of, the International Institute of Islamic Thought (IIIT) in 1985. He also wrote

at length on the ethics of disagreement in Islam, the appraisal of ijtihad as the practice and knowledge of source methodology, and the Islamization of knowledge. Within the context of legal methodology and particularly ijtihad, as we will see below, he offers new proposals for dealing with the social problems facing today's Muslim societies.

Alalwani asserts the decline of ijtihad as the main cause of the present crisis of Islamic law. In several treatises, he surveys the history of ijtihad and the rise of *taqlīd* (unquestioned following of the opinion and practice of others) and concludes that the present crisis of Islamic jurisprudence started with "closing the door of ijtihad" in the tenth century.

Alalwani is one of few Muslim authors who present scholarly opinions of Islamic thinkers regardless of their sectarian or devotional attachments. He refers to and sometimes incorporates Shiʿi-oriented works of thinkers such as Sayyid Jamāl al-Dīn al-Afghānī (d. 1315/1897) and Muhammad Hussain Na'ini (d. 1355/1936) and to their Sunni counterparts such as Shaykh Muhammad Abduh (d. 1324/ 1906) and Abd al-Rahman al-Kawakibi (d. 1320/1902).29 Due to his pioneering work on *The Ethics of Disagreement in Islam*, he is well aware that he should not expect all Muslims, regardless of their circumstances and backgrounds, to agree on what constitutes an ideal vision of Islam. In this book, one finds examples of more tolerant and open-minded attitudes toward disagreements from Islamic history, particularly from the precedents set by the Companions.

AbdulHamid AbuSulayman

AbdulHamid AbuSulayman (d. 2021) was among the authors who sought to reform Islamic methodology from within the traditional legal methodology and align its application so that it could deal with contemporary requirements. His approach to the Shariʿah is imbued with an assumed crisis in the mind of Muslims, a crisis that prevented them from appreciating Islamic values in light of the time-space factors. In his broad criticism of the traditional methodology, he reevaluated the sources of the law and the method of juridical interpretation with reference to the international relations policies of Muslim governments. Here, we content ourselves with new proposals that he proffered in Islamic jurisprudence.

AbuSulayman called his approach to the Shariʿah *aṣālah*, that is innovative, in contrast to some of the traditional approaches, which he labeled "imitative." This approach unveils itself in his treatment of

the authority of the sources of Islamic law; however, he adds many qualifications to bring his approach into line with the orthodox perception of the Shariᶜah. He divides the sources into two types: primary (e.g., the Qur'an, the Sunnah, consensus, and *qiyās*) and secondary (e.g., juridical preference, consideration of the public interest, and the obstruction of ostensibly legitimate means [*sadd al-dharā'iᶜ*]. Concerning the primary source's authority and application, he makes the following novel observations: The Qur'an is the first revealed source of Islamic law and, as such, should neither be considered a subject for abrogation nor divided into Makkan or Madinan verses. Rather, it should be regarded as part of the same whole, whose application must be aligned with the space-time considerations, which are said to be applied "…in the light of changing circumstances in the overall flow of human life and experience."

AbuSulayman observes that this genre of methodology suited the Umayyad and early Abbasid's powerful governments during which the jurisconsults standardized their methodologies. "Contemporary Muslim jurists, though they have attempted to reinterpret many cases of *naskh*, seem to accept the same concept of permanent *naskh*."

Mohammad Hashim Kamali

Mohammad Hashim Kamali (b. 1944) combines aspects of the traditional legal methodology with proposals for adaptation to recent changes within Muslim societies. His consistent engagement with the law has allowed him to not only produce detailed presentations of the field's various disciplines, but also to formulate new proposals that may reconcile the legitimacy of Islamic law with the ruling Muslim governments. He has written several works on various branches of Islamic law, legal methodology, hadith studies, and religious freedom in Islam. His two important works, *Principles of Islamic Jurisprudence* (1989) and *Shariᶜah Law: An Introduction* (2008), allow us to observe his contributions to the field. In the 2003 edition of *Principles*, Kamali first recapitulates most of the topics of legal methodology and then attempts to present a new scheme to reorient some of the subdisciplines of *uṣūl al-fiqh* to address various contemporary issues.

In his introductory remarks, Kamali defines *uṣūl al-fiqh* as both a "methodology" and "principles." "Methodology," in his view concerns mainly methods of reasoning such as analogy (*qiyās*) and the presumption of continuity (*istiṣḥāb*), whereas "principles" include general directives that comprise the larger part of the primary sources and can

be utilized as raw material in the development of law. The components of both of them are, however, the same and include primarily knowledge of the sources of the law and their order of priority; then legal rules, which may be deduced from the sources; and, finally, the exercise of ijtihad.

Tariq Ramadan

The Egyptian author Tariq Ramadan (b. 1962) offers a new angle to reading those verses that legitimize the observation of time-honored social realities in legal administration. His approach does not necessarily derive from modern hermeneutics, but incorporates a novel perspective in which "outside realities" play a central role in understanding the proper Islamic legal norms (*aḥkām*). In his *Radical Reform* (2009), Ramadan espouses a theological approach to the Qur'anic concept of *āyāt* (lit. signs) by which he equates knowledge of the outside world with that of the revealed scripture. He states that the "…surrounding Creation is a Universe of signs that must be grasped, understood, and interpreted." He refers to Abū Ḥāmid al-Ghazālī's use of the term "outspread book" (*al-kitāb al-manshūr*) as the Book of the Universe, which is a theological as well as a physical mirror of the "written book" (*al-kitāb al-masṭūr*; viz., the Qur'an).

Salihi Najafabadi and Legal Methodology

Among the contemporary authors of Shiʿi jurisprudence, only Ayatollah Salihi Najafabadi (d. 2006) has offered a new mode of interpretation that often suited contemporary realities and the place of religion in society. During the 1970s he raised a storm in Shiʿi seminaries with his *Shahīd-i Jāvīd* (The Eternal Martyr), in which he denied the predestined character of Imām al-Ḥusayn's martyrdom and cast doubts on the doctrine of the Imāms' infallibility. As a proponent of Islamic unity, he wrote treatises in support of juridical rapprochement with mainstream Sunni Muslims. In his post-Revolution works, he provided a new context for the theory of *wilāyat al-faqīh* (guardianship of the jurisprudent) in which he – unlike Ayatollah Khomeini – laid primary emphasis on the role of people in choosing their leader. Ayatollah Najafabadi regarded the process of instituting (*inshā'*) by the people as the basis of the authority of "a qualified leader" in both confirming and validating that figure's position.

By proposing what he calls a "concrete" (*inshā'ī*) context for applying and implementing this particular theory, he implied that Khomeini's presentation of it was based on "abstract" (*khabarī*) or theoretical

premises that ignore the people's vital role in validating the *faqīh's* authority. He tried to incorporate their role and interests into the governing institution of "the qualified leadership" by bringing the modern concepts of "majority rule, bilateral contract and the role of human intellect" into conformity with Islamic principles.

Majority Rule

As a social norm, majority rule is a pre-requisite for concluding any communal decision, including the Islamic decision-making process known as *shūrā*. Nevertheless, standard Muslim jurisprudence did not accept this social norm, and many jurisprudents repudiated it on the grounds that several Qur'anic verses did not "recognize" the majority's opinion. Among early Muslim scholars, al-Shāfiʿī appears to have corroborated the validity of the community's majority opinion (*akthar al-ʿāmmah*), especially in reporting the prophetic traditions.

Later, the Ḥanafī jurist al-Jaṣṣās al-Rāzī (d. 370/980) allocated a chapter to "the majority views" in his work on *uṣūl al-fiqh*. He eventually did not support this idea, but the fact that he both presented and subsequently repudiated its advocates' arguments shows that Muslim scholars have been aware of its importance as a norm, although they have been unable to establish its expected "religious truth" on the basis of majority opinion.

Ayatollah Najafabadi appears to be the first Shiʿi jurisprudent to adopt and justify this concept by a careful examination of relevant Qur'anic verses, which he divided into two categories: 1) Those that contain the phrase "Most of the people have no knowledge (*aktharuhum lā yaʿlamūn*)."

Bilateral Contract

Ayatollah Najafabadi used legal methodology to expand the application of some verses to embrace today's requirements, especially in terms of political legitimacy. The general ruling of "fulfill your contracts" (5:1) served as his argument's pivotal point. He held that *bayʿah* (a procedure for recognizing a person's authority or social status) was the legal channel through which the social contract would be concluded. Indeed, he considered it as effectively investing the ruler with authority in contradistinction to the orthodox view that restricted this to a purely confirmatory function.

The Role of Human Intellect

Ayatollah Najafabadi assigned an independent role to human intellect in terms of understanding social affairs and sought to establish his thesis according to the Qur'an and tradition-reports. In the introduction of his work he spoke about *aṣālat al-ʿaql* (lit. the principality of intellect) and excluded political matters such as *wilāyat al-faqīh* from the jurisdiction of unquestioning religious allegiance (*taʿabbud*). To harmonize this rationalism with Islamic principles, he referred to several verses (e.g., 12:2 and 36:68) that advise people to use their own judgment and quoted a tradition-report from Kulaynī's *al-Kāfī* in the chapter on *ʿaql*. Nevertheless, he considered it necessary to add that the validity of the same rationalism is based on and derived from reason and can only be confirmed by reported traditions.

Mohsen Kadivar

Mohsen Kadivar is a prominent Shiʿi jurist and theologian who stands between the traditional and modern approaches to Islamic legal thought. As an electronic engineering student at Shiraz University, Kadivar was drawn into religious studies during the 1979 revolution. He studied Shiʿi jurisprudence under Ayatollah Hossein Ali Montazeri in the 1990s when the latter was dismissed from his position as Ayatollah Khomeini's successor. Following his teacher's ideas, Kadivar first concerned himself with the political side of Islamic jurisprudence but later presented his own understanding of Islamic legal philosophy. Thus far, he has published more than 20 works on Islamic law and philosophy. Only in his 2007 article on Islamic legal methodology, however, did he exhibit his command of the limits of Islamic legal language.

Kadivar claims that "understanding the legal text" is the central problem of all Abrahamic religions. In Islamic legal methodology, texts are divided into *nass* (explicit and therefore definitive meaning) and *ẓāhir* (manifest and therefore speculative meaning). Given that the decisive majority of texts are *ẓāhir*, the topic of "the authority of manifest implications" became this discipline's central theme to such an extent that it occupies half of the content of most such works. His argument that the key to understanding the meaning is *ʿurf* (the customary usage of language) led him to ask how these usages should be understood: "How much [do] a reader's information and presuppositions interfere in such an understanding?" Islamic traditional scholars have never addressed this question, although most authors rewrote Islamic law according to the presuppositions of their time.

Chapter Ten

Modern Hermeneutics and Legal Language

Ever since 1980, the legal language of Islam has been subjected to not only fresh legal deliberation, but also to a new series of epistemological analyses, i.e., modern hermeneutics – a discipline concerned with the nature and presuppositions of the interpretation of religious texts.

Prior to the 1980s, most changes to Islamic law were offered through the channels of interpretive disciplines such as *tafsīr* (exegesis), *ta'wīl* (allegorical interpretation) and ijtihad (independent judgment), all entrenched in the rules of Islamic legal methodology (*uṣūl al-fiqh*). None of these devices were used to extend the meaning of a text beyond the literal demonstration of the text or beyond the religious context in which the texts emerged; whereas the modern epistemological approach seems to essentially rest on "presuppositions" surrounding the understanding of the text. The process of understanding a text, in this approach, does not begin with reading the text, but rather it starts prior to that with the dialogue between the culture shaping the reader's perception (see below). Innovative approaches to the Shariʿah are best reflected in the works of the five figures discussed in this chapter.

Nasr Hamid Abu Zayd

The prominent Egyptian author Nasr Hamid Abu Zayd (d. 2010) was among the first Islamicists who approached the Shariʿah by applying hermeneutics as a method of inquiry into the interpretation of legal texts. His early works centered on evaluating Muslims' methods of semantics, implications in the interpretation of the texts according to the European founders of hermeneutics such as Friedrich Schleiermacher (d. 1834) and Wilhelm Dilthey (d. 1911). To them hermeneutics is a process of reconstruction by the reader of the original intention of the author. Abu Zayd examined the writings of Muslim scholars and grammarian such as al-Jāḥiẓ (d. 255/869), Abū Bakr al-Bāqillānī (d. 403/1013) and ʿAbd al-Qāhir al-Jurjānī (d. 471/1078) in light of their theories of hermeneutics. He attempted to present a fresh and often critical reading of their writings.

The controversial work of Abu Zayd, *Mafhūm al-Naṣṣ*, is one of his discourses on the Qur'anic sciences. In this book, he launched a new

way of reading religious texts in light of modern hermeneutics. To signify the importance of the text, he referred to the Islamic Arabian civilization as "Civilization of the Text" (*ḥaḍārat al-naṣṣ*) in contrast to the Greek which he dubs "Civilization of Reason" (*ḥaḍārat al-ʿaql*). His emphasis, therefore, is on the understanding of texts that require interpretative skills to discern the cultural context surrounding the presentation of a text. The Qur'an being the prime source-text of Islam, he categorizes its verses to two: those revealed before the Hijrah as "faith building" in contrast to those after the Hijrah (622–632) which are more of society building in character.

But Muslim interpreters often separated the text from the legal norm, and some of them even claimed that the *ḥukm* or the command of God existed before the coming of the text. Abu Zayd drew out three factors that may cause this misunderstanding:

1. The literal implication (*al-dalālah al-lughawiyyah*) was confused by some of the interpreters with the legal implication (*al-dalālah al-sharʿiyyah*), as in the Qur'anic verse 14 in chapter 87: "He will prosper he who purifies himself." "Purification" in this Makkan verse does not imply zakah (legal alms) which, according to the famous Qur'anologue al-Suyūṭī (d. 911/1505) was historically established after the *Hijrah*.
2. Some interpretations were attributed to the Prophet's Companions whose explanations are associated with the Madinan period, whereas the content of the verse belonged to the Makkan era. To solve the problem, the later *ʿulamā'* had to assume that the *ḥukm* existed before the text. Qur'anic verse 33 of Makkan chapter 41 reads: "Who is better in speech than he who calls [people] to God, performs righteous deed and says 'I am of those who bow in Islam.'" It was quoted from ʿĀ'ishah (d. 58/678) that the verse was revealed for the *muezzin* (announcer of the hour of prayer); whereas history tells us the *adhān* (the call for prayer) was established in the early Madinan period.
3. Confusing the sequence of verses with the occasion of revelation resulted in different readings of a verse, and in gainsay assumptions: firstly that the text was revealed before the occasion arose, and secondly the text preceded its suitability and necessity to be a legal norm.

Mohammed Arkoun

As a precursor in the application of critical analyses in the religious sciences, Mohammed Arkoun (d. 2010) influenced the contemporary Muslim mind in rethinking Islamic values. He brought to the fore the idea of historicity and the deconstruction of the Shariᶜah. He believed that the development of Islamic law was influenced by Greek philosophy. That is to say that Aristotle's concept of substance as the primary essence of a thing introduced to Muslims the notion of originality in the sense that concepts have their origins in a reality that is external. This notion not only became a point of departure in Islamic legal methodology but also the very Arabic term aṣl derives its methodological meaning from this origin. This assertion may be examined in a scholarly manner in the context of correspondence (*ṣidq*), since we know that this idea appeared in Muslims' *uṣūl al-fiqh* in the fifth/eleventh century, and cannot be detected in the works of early Shāfiᶜī, Ḥanafī and Muᶜtazilī authors. Furthermore, this idea should not be confused with Muslims' commonly believed maxim of *nafs al-amri* (thing in itself) that holds an existing truth behind concepts.

Abdolkarim Soroush

Abdolkarim Soroush (b. 1945) is a contemporary Iranian thinker who has thus far offered the most popular proposals for bridging the present gap between modernity and tradition in the Muslim world. Born in Tehran and trained in both the religious (Islamic) and scientific disciplines, Soroush was able to foresee the inevitable conflicts between the two realms, and to come up with widely agreeable proposals to both Western and Islamic modernists. His contributions to Islamic thought include suggestions for humanizing the revealed law, application of modern hermeneutics for setting legal norms, reconstruction of Islamic thought on its innate structure, and emphasizing the mystical beauty of Sufism. Here, we basically focus on his legal approach.

Soroush's first and probably the most controversial proposal was his theory of contraction and expansion of the Shariᶜah, which was primarily published in the form of a series of articles in 1987 and later as a book. His point of departure in this book is scientific in the sense that it deals with how knowledge derived from the sciences reshapes our views of the world and affects our understanding of religion. He gives an example of how the discovery of the theory of the Earth's orbit round the sun had shaken some of the existing worldviews not only from the cosmological standpoint but also from philosophical and epistemological ones. Another example is how Emanuel Kant reformed

his epistemological philosophy when he learned about Newtonian physics.

Mojtahed Shabestari

An amazing adoption of modern hermeneutics into religious thought is displayed in the writings of Sayyed Mohammad Mojtahed Shabestari (b. 1937), a retired professor of theology at Tehran University. He was trained in the Shiʿi seminary of Qum, but he also studied German philosophy and Protestant Theology during 1968–77 when he was the director of the Islamic (Shiʿi) Center at Hamburg, Germany. In spite of his jurisprudential background and devotional attachment to Islam, Shabestari's writings increasingly lean towards modern hermeneutical understanding of the religion and its socio-legal norms. He published many works in Persian, among which four of his books in addition to some of his recent interviews demonstrate his approach to the Shariʿah and Muslim society.

Shabestari deliberates on the tendency of the human mind towards conceptualizing things before they turn into beliefs or into established knowledge. He emphasizes presuppositions, which play a vital role in the formation of premises that build one's understanding of a discipline: "Without knowledge of hermeneutics," he argues, "a defensible fiqh and legal methodology cannot theoretically take shape." He considers as "human phenomena" all topics of legal methodology (*uṣūl al-fiqh*) such as "general and its particularization," "statement and conception," and "authority of literal demonstration" (*ḥujiyyat al-ẓuhūr*).

Concerning the semantics of religious texts, Shabestari does not see the traditional literal interpretation (*mabḥath al-alfāẓ*) as flexible enough to capture the variety of contextual meanings. He argues that the traditional semantics deems "words" as representing the external realities, and it is enough to know the grammar of the language and verbal rules of legal methodology to understand the meaning and applicability of legal norms. Whereas the modern theory of semantics defines "meaning" as a tool in the structure of each language which speaks about external realities, but these are not the same realities. Shabestari frequently demonstrates a great fascination with religiosity, faith and devotion; nevertheless, he confines them to "personal prophetic experience." He bases faith on the divinely associated free will which is part of one's existence but different from his belief (*iʿtiqād*).

Jasser Auda

We now turn to the work of a promising contemporary Egyptian author Jasser Auda (b. 1966), who claims to be introducing a new approach to Islamic law particularly to the theory of *maqāṣid*, which he translates as "purposefulness." He dismisses "Islamic modernism" as being unnecessarily apologetic about traditional Islam because it was by and large a reaction to European modernism which endorsed the ideas of centrality and supremacy of modern sciences. Furthermore he criticizes the way Muslim reformists (such as Abduh, Tahtawi and Mohammad Iqbal) incorporated the concept of "causality" in order to re-interpret or re-word the philosophy of religion in Islam. That is to say they "re-interpreted" Islamic articles of faith (the Qur'an and Sunnah) in a way to fit the conclusions of (pre-twentieth century) science, and "causality" which was the logic of modernist *kalām* (philosophy of religion). Abduh's *Risālat al-Tawḥīd* is the clearest example of the above changes in attitude. Auda then explains the contemporary changing status of philosophic thought as follows:

> In the west, the second half of the twentieth century witnessed post-modernism's complete rejection of all modernist "meta-narration." ..[A]ll streams of postmodernism agreed on the ʿdeconstruction of centrism'. Thus, according to postmodernists, the center should remain void of anything, whether it is science, man, the west, or even God. 'Rationality' itself, according to postmodernists, became an undesirable form of centrism and marginalization. 'Irrationality' became a desirable and 'moral' alternative. 'Islamic postmodernism,' in turn, utilized deconstructionist concepts in order to criticize central and basic Islamic articles of faith in a radical way. The centrality of the Qur'an and the Prophet in Islam and Islamic law was made subject to a 'free play of the opposites,' to borrow an expression from Derrida.

He then defines "systems theory" before offering his proposal for an "Islamic systems philosophy" as a rational and non-Eurocentric "postmodern" philosophy:

> Systems theory and philosophy emerged in the second half of the twentieth century as an anti-thesis of both modernist and postmodernist philosophies. Systems theorists and philosophers reject the modernist reductionist view that all human experiences could be analyzed into indivisible causes and effects. On the other hand, systems philosophy also rejects postmodernist irrationality and deconstruction, which are

> 'meta-narration' in their own right. Thus according to systems philosophy, the universe is neither a huge deterministic machine nor a totally unknown being, complexity can be explained neither via a series of 'nothing-but' cause and effect operation nor via claims of 'non-logocentric irrationality,' and the problems of the world could be solved neither via more technological advances nor via some sort of nihilism. Hence, thanks to systems philosophy, the concept of 'purposefulness,' with all of its teleological shadows, was back to philosophical and scientific discourses.

By appropriating "the concept of purposefulness," Auda provides a space for the *maqāṣid* theory in his "systems approach." He first refers to the difference between goal and purpose as the latter produces the same outcome in different ways and different outcome in the same or different environment. Thus, purpose-seeking systems could produce different outcomes for the very same environment as long as these different outcomes achieve the desired purpose. Islamic theology (*kalām*) has discussed this problem in the context of "causation" in divine actions (*taʿlīl afʿāl Allāh*). After quoting some Muʿtazilī and Ashʿarī views, Auda finally arrives at Māturīdī's view that "divine actions have causes/purposes out of God's grace."

Conclusion

Muslims' perception of law and the authority of the Shariʿah finds its best expression in *uṣūl al-fiqh*, a discipline developed over time to set up a legal methodology. The objective of the methodology in the beginning was to identify the sources of that law, its hierarchical order, to establish its supremacy, and facilitate the text deducing process by way of literary interpretation and rational explanation. In time it emerged as a broad discipline not only to introduce Islamic approaches to the law but also to train Muslim minds for further critical analysis. In this effort, *uṣūl al-fiqh* adopted a number of principles from Arabic semantics and Greek syllogism, and developed its own literal-rational doctrines. However, none of the above developments changed its character, which essentially remained a discipline deeply based on the literal demonstration of the texts. In essence, it always remained the method of conforming the law to its revealed sources. Nevertheless, the contemporary hermeneutical readings of the Shariʿah, and new proposals to incorporate "statutory laws" into the sources suggest an extra dimension for the legal methodology.

The last point which we had occasion to address in this research is the structural problem in the Muslim methodological approach to the Shariᶜah. That is, the theological assumption adopted by most *uṣūlī* authors that "societal realities" have a meta-historical and self-existing (*wāqiᶜī wa nafs al-amrī*) character beyond that of any identifiable interaction with the human mind. By this assumption "the social truth" must merely be discovered from the fixed texts, and literally demonstrated. This vantage point in practice leaves no room for the human mind to venture into timely adjustments of the divine law for changing societies. By offering alternative outlooks, as we saw above, a number of contemporary authors attempted new proposals to align legal methodology with the requirements of time. It still depends on the contemporary Muslim thinkers to develop more practical perspectives on how to conform today's social realities to the revealed sources.

The Authors

AHMAD KAZEMI-MOUSSAVI is a Professor of Islamic law and modern Islamic developments who currently teaches at George Washington University. He taught these fields in the University of Maryland, University of Virginia, and International Islamic University of Malaysia. Born in Iran he was educated in law there, going on to obtain a Ph.D. in Islamic Studies from McGill University, Montreal (Canada). He has published several books and more than a hundred articles in English and Persian.

HAMID MAVANI is an Associate Professor of Islamic studies at Bayan Claremont Islamic Graduate School where he teaches courses on Islamic thought and modern developments in Islam. He has published several books including *Religious Authority and Political Thought in Twelver Shi'ism: From Ali to Post Khomeini*.

IIIT Books-In-Brief Series is a valuable collection of the Institute's key publications written in condensed form to give readers a core under-standing of the main contents of the original.

This book discusses the historical development of the legal methodology for the interpretation of the Shariah, and analyzes proposed reforms by modern Muslim scholars. This study has two goals: (1) to summarize usul al-fiqh's rise and development from its rudimentary form to its advanced and mature phase by articulating the contributions of eminent jurists on key intellectual debates, and (2) to present a schema of reforms, new hermeneutics, and epistemology proposed by modernists to bring about foundational changes in Islamic legal methodology so that they can bypass the authority of the legal language. The critical distinction between the timeless Shariah and mutable jurisprudence allows for a mechanism that can review and revise juridical opinions in the light of new information.

London Office
IIIT Books-in-Brief

979-8-89193-250-0

9 798891 932500