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The Origins of Islamic Legal Theory (*Uṣūl al-Fiqh*)

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Abstract: *The question of, and the debate on, the origins of Islamic legal theory continues, largely in the academic circles of Western Islamicists. As for Muslim scholars, they have done little to redress the imbalance. This article presents a summary of the major arguments of Western Islamicists. The arguments are then re-examined to redress any misconceptions about the origins of Islamic legal theory. The ultimate aim is to suggest a new methodology for studying the early legal history of Islam.*

For Muslims, the *Sharīᶜah* is the body of commandments, religious and legal, given by Allah to mankind through the Prophet Muhammad (SAS). Allah's will has been revealed in the sacred book, the Qur'ān, the *Sunnah,* i.e. what the Prophet said, did, or approved of, by *ijmāᶜ* (consensus of opinion in the community), and by *qiyās* (analogical reasoning). These are called the authoritative sources of Islamic jurisprudence. According to Schacht, "although Islamic law is a sacred law, it is by no means essentially irrational."[1] In this regard, one scholar has said that "determining what the law is, was not a matter of speculation. Rulings of individual cases had to be arrived at through a highly complex methodology known as *ijtihād*. This methodology, described fully in the works of *uṣūl al-fiqh*, constituted the only means by which the rulings decreed by God, the *ᶜilm*, could be reached."[2] Hence, *uṣūl al-fiqh* or the Islamic theory of sources is an instrument through which law may be legitimately derived. The *raison d'etre* and the sole purpose

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of *uṣūl al-fiqh* is therefore, to formulate positive law or Islamic *fiqh*. It is said that "legal theory, which continued to be the concern of scholars until pre-modern times, provided the methodology by which a jurist could derive legal solutions for the *nawāzil*, the unprecedented legal cases."[3]

The usefulness of this discipline is beyond doubt. Not only did *uṣūl al-fiqh* rank high on the educational syllabus of the *madrasah*,[4] it was also essential for success in legal professions to the extent that failure to fulfil this requirement betrayed a major deficiency in one's knowledge of legal theory.[5] To give a modern example of the close relationship between the theory and practice of *uṣūl al-fiqh*, we may refer to S.E. Rayner's *The Theory of Contracts in Islamic Law*. The author has preceded his discussion on issues of contract with a lengthy explanation of *uṣūl al-fiqh* entitled "The Muslim Legal Dichotomy."[6] Therefore, it is not surprising that Ibn Khaldūn wrote, "it should be known that the science of the principles of jurisprudence is one of the greatest, most important and most useful disciplines of the religious law. It is concerned with the evidence of the religious law from which the laws and legal obligations of the Muslims are derived."[7]

Therefore, *uṣūl al-fiqh* is a subject which is not only of scholarly interest to classical Muslim *uṣūlists* but is of essential, practical importance to contemporary Muslim jurists for solving the contemporary problems. The more deeply they study *uṣūl al-fiqh*, the more successful and valuable will be their attempts to contribute significantly to Islamic law. In this context, Maḥmaṣṣānī writes that, "If we want to study the new, we must understand the old, and grasp the reasons for its development."[8] Modern Muslim jurists may agree or disagree with the framework of *uṣūl al-fiqh* as laid down by classical and medieval *uṣūlists* but many of the methodological principles that were considered systematic and workable for their times have not lost their significance today.

In order to have a good understanding of the long-established legal system of Islam, it is essential to be familiar with the historical development of *Sharīʿah*, that is, *uṣūl al-fiqh*. Although extensive literature is available on this subject, this article aims to contribute further to the subject by presenting it from an Islamic perspective. Mention should also be made that classical Muslim *uṣūlists* were not as concerned with the history of jurisprudence as they were with the actual subject matter of *uṣūl al-fiqh*. As for modern Muslim writers, they devote no more than a few pages in dealing with the history of *uṣūl al-fiqh*, whereas most non-Muslim works on *uṣūl al-fiqh* are primarily

concerned with the historical aspect of the science, giving less attention to the subject-matter.[9] This paper attempts to provide a fairly complete account of the historical development of *uṣūl al-fiqh* and it is hoped that the study concerning the historical development of *uṣūl al-fiqh* will be a useful reference for non-specialists as well as specialists.

The Emergence of *ʿIlm Uṣūl al-Fiqh*

ʿIlm uṣūl al-fiqh (or simply *ʿilm al-uṣūl, uṣūl al-fiqh* or just *uṣūl*[10]) like other sciences and fields of scientific study, developed gradually. Although modern scholars have made extensive and valuable contributions to the history of *uṣūl al-fiqh* in many aspects, there remains room for further inquiry and investigation concerning the early history of *uṣūl al-fiqh*[11] and its development, particularly with respect to the chronological development of concepts and doctrines within *uṣūl al-fiqh*.

As far as its emergence is concerned, al-Shāfiʿī (d. 204 A. H.) is credited with being the first scholar to write systematically on the subject of *uṣūl al-fiqh*. Muslim and Western scholars alike attribute to al-Shāfiʿī the title of "Father of Muslim Jurisprudence."[12] However, Abū al-Wafā' al-Afghānī, in his introduction to *Uṣūl al-Sarakhsī*, has credited Abū Ḥanīfah (d.150 A.H.), the founder of the Ḥanafī school of law, as the first who spoke about this discipline in his book entitled *Kitāb al-ra'y*.[13] On the other hand, al-Khaṭīb al-Baghdādī believed that Abū Yūsuf (d. 182 A.H.) was the first to complete a book on *uṣūl al-fiqh*.[14] The same primacy was credited to Imām al-Bāqir (d. 114 A.H.) by the Shīʿīs.[15] Muḥammad Abū Zahrah, an eminent Egyptian scholar, has clarified that it was possible that jurists before al-Shāfiʿī might have dealt systematically with *uṣūl al-fiqh* but al-Shāfiʿī's contribution, namely *al-Risālah*, was obviously superior in terms of systematisation and comprehensiveness of composition.[16]

Having established the starting point of Muslim jurisprudence in the late Umayyad period, some Western scholars, led by Professor Schacht, have suggested that *uṣūl al-fiqh*, as a distinct discipline, did not exist during the life time of the Prophet or for the greater part of the first century of Hijrah.[17] In his *Origins*, Schacht concluded that "Muhammadan law did not derive directly from the Koran but developed...out of popular and administrative practice under the Umayyads, and this practice often diverged from the intentions and even the explicit wording of the Koran...norms derived from the Koran were introduced into Muhammadan law almost invariably at a secondary stage."[18] Perhaps, to this effect, it has been contended by

Goitien that the little that the Qur'ān contains on the matter is entirely unsystematic and haphazard.[19] Also significantly, it has been argued by Anderson that the Prophet himself made no attempt to devise any comprehensive legal system.[20]

Schacht, actually, is of the view that the *Sunnah* of the Prophet is a late concept that emerged in consequence of the development of the ḥadīth movement. Schacht's study led him to believe that very little information about the Prophet, outside of the Qur'ān, was handed down from the past. He maintains that what is called the *Sunnah* of the Prophet is not the words and deeds of the Prophet but the "living tradition" of the ancient schools of law which originated from customary practice and individual reasoning and was "back-projected" in the second century to more authoritative sources: first to the Successors (*tabᶜīn*), then to the Companions (*ṣaḥābā*) and finally to the Prophet himself. According to Schacht, it was al-Shāfiᶜī who first verified the *Sunnah* of the Prophet.[22] Therefore, he claims, the bulk of the Prophetic *Sunnah* cannot be considered authentic since many traditions were put into circulation only after al-Shāfiᶜī's time.

It seems that Schacht has confined himself only to the *Sunnah* in his attempt to trace the origin of Islamic law. He claims that since the *Sunnah* was non-existent, or at least open to scepticism, before al-Shāfiᶜī's time, so was *uṣūl al-fiqh*. Schacht goes on to state al-Shāfiᶜī's personal achievements in legal theory as consisting of: (1) the development of a new theory of interpretation for application to the two principal sources of the revealed law (the Qur'ān and the Prophetic traditions), and (2) the almost complete identification of the *Sunnah* with the traditions (aḥādīth).[23] However, adhering mainly to the *Sunnah* and completely ignoring the relevance of the Qur'ān in providing material for *uṣūl al-fiqh* is not an acceptable approach. In his book, *The Origins of Muhammadan Jurisprudence,* Schacht devoted no more than four pages discussing "The Koranic element in early Muhammadan law."[24] This has led to some criticism of Schacht for ignoring the significant role of the Qur'ān in dealing with the foundations and methodology of Islamic law.

Moreover, Schacht adopted a distinct approach in his study for dating the traditions, namely *argument e silentio*.[25] This approach, as he himself put it, was the best way to examine the existence of the traditions in early Islam. He wrote that, "the best way of proving that a tradition did not exist at a certain time is to show that it was not used as a legal argument in a discussion which would have made reference to its imperative, if it had existed."[26] To give an example, Schacht

inferred from the silence of Abū Yūsuf that, during his days, the maxim, "He who kills an enemy has the right to his spoils," did not exist as the saying of the Prophet, otherwise Abū Yūsuf must have certainly mentioned it.[27]

Also, in furnishing proof for his hypothesis, Schacht made frequent deductions from and reference to al-Shāfiʿī's writings to trace the doctrines of the early schools of law. In other words, Schacht was content with basing his theories on Shāfiʿī's polemical writings. The Ḥanafīs as well as the Mālikīs were accused, particularly in the writings of al-Shāfiʿī, of considering other sources of law, such as *qiyās* and the practice of the Medinese, respectively, as superior to solitary traditions when they were in conflict.[28] Schacht quoted al-Shāfiʿī as saying that no *qiyās* is valid when a relevant *Sunnah* is available,[29] and that reasoning and questioning are irrelevant in the face of the traditions of the Prophet.[30] The same criticism is directed against the Mālikīs.[31] From this, Schacht was able to argue that *uṣūl al-fiqh* was known to the Muslims only after al-Shāfiʿī, because the writings of al-Shāfiʿī give the impression that his predecessors were not well-versed in *uṣūl al-fiqh*.

The traditional Muslim point of view, however, is that the content of *uṣūl al-fiqh*, like other religious disciplines, was based on the Qur'ān and the *Sunnah* from the very beginning.[32] As far as the Qur'ān is concerned, it is the very word of Allah, the fundamental textual source of the *Sharīʿah* to which every jurist must refer. The Qur'ān is not and does not profess to be a code of law or even a law book (nor was the Prophet a lawgiver in the Western sense).[33] Therefore, the contention that the legal verses in the Qur'ān are unsystematic and haphazard is accepted only if it is understood with a Western concept of legal activities in mind, because Muslims view the arrangement and style of the Qur'anic verses differently.[34]

As Weeramantry points out:

> The verses of the Qur'ān do not unfold in the neat and systematic order which the scholar would desire, but this has been looked upon in Islamic scholarship as similar to the apparent disorder of the stars in the sky. To the human observer with his limited intellect, they appear to be haphazard in arrangement. Each star, however, has a greater reason for being in its particular place than the observer can comprehend and any rearrangement of its position would disorder the entire scheme.[35]

In the words of Esposito, "[the Qur'ān is] not a comprehensive legal manual but rather an ethico-religious revelation, its primary legal value

is as the source book of Islamic values, from which the specific regulations of substantive law (*furūᶜ al-fiqh*) are derived through human effort."[36] From this, it is clear that the Qur'ān (as well as the *Sunnah*) was accepted from the very beginning as the basis of religion and legislation in Islamic law, setting down the principles as well as the details of many branches of law.

Regarding the Prophet's role, it is commonly acknowledged that he was often approached by the Companions for a decision in a particular legal case or problem. The Prophet answered these questions either personally or by means of direct revelation, that is, the Qur'ān. No question of methodology arose as it was not necessary for the Companions to know the reason behind the regulations since the law was what the Prophet proclaimed. Nevertheless, the possibility of the Companions encountering unprecedented problems was not ignored by the Prophet. This was indicated in his posing of a question to Muᶜādh b. Jabal on the occasion of the latter's departure to Yemen as a judge and a teacher. It is reported that the Prophet asked Muᶜādh what he should do in the event that he failed to find guidance in the Qur'ān and the *Sunnah*; Muᶜādh responded that he would resort to *ijtihād*.[37]

Moreover, we find the Prophet himself sending judges to different towns and localities. The judges appointed were instructed to base their judgements on the law revealed by Allāh and the *Sunnah* of the Prophet.[38] There was no need for methodology during the life of the Prophet for the Companions had direct access to the sources, the necessary guidance for, and the solutions to their problems. Following the demise of the Prophet, "the Companions remained in close contact with the teachings of the Prophet and their decisions were mainly inspired by his precedent. Their proximity to the source and intimate knowledge of the events provided them with authority to rule on practical problems without stressing a need for methodology."[39]

Schacht and the Authority of *Sunnah*

We may now turn to the claim of Schacht that the *Sunnah*, as originally understood by the early schools before al-Shāfiᶜī's time, was not related to the sayings and deeds or tacit approvals of the Prophet but to the "living tradition," the ideal practices of the community as expressed in the doctrine of the school of law. According to Schacht, since al-Shāfiᶜī was the first scholar to confine the concept of *Sunnah* to the model behaviour of the Prophet, no credit should go to those scholars before al-Shāfiᶜī as far as legal theory is concerned. Indeed, this was the idea of Ignaz Goldziher who was the first Western scholar to question the

authenticity of a large proportion of aḥādīth.[40] He considered the greater part of it to be "the result of the religious, historical and social development of Islam during the first two centuries."[41] In other words, the ḥadīth did not serve as a document of the early history of Islam, but rather as a reflection of the practices which appeared in the community during the later stages of its development. Schacht not only agreed that "the *Sunnah* in its Islamic context originally had a political rather than a legal connotation, it referred to the policy and administration of the Caliph,"[42] but also described his book, *The Origins*, in the following words: "This book will be found to confirm Goldziher's results, and to go beyond them in the following respects..."[43]

However, Schacht's thesis that ḥadīth was not accepted as an authoritative source until the time of al-Shāfiʿī is generally refuted by traditionists as well as orientalists simply because, not long after the Prophet's death, a large number of aḥādīth were forged by political, sectarian and other Muslim parties in support of their claims. If aḥādīth were not accepted by all Muslims as an authority, there would be no sense in forging aḥādīth for any purpose.[44] Moreover, to state that no tradition goes back prior to 100 Hijrah creates an unwarranted vacuum in Islamic history. The "first century vacuum" theory does violence to the deeply ingrained sense of tradition in Arab culture which all scholars, both Muslim and Orientalist, have acknowledged. As Fazlur Raḥmān notes, "The Arabs, who memorised and handed down poetry of their poets, sayings of their soothsayers and statements of their judges and tribal leaders, cannot be expected to fail to notice and narrate deeds and sayings of one whom they acknowledged as the Prophet of God."[45]

These two counter-arguments undermine Schacht's thesis and those who follow him in this matter by posing the question that if the Arabs gave special attention to the ancient, pre-Islamic concept of *Sunnah*, why did they not do the same with the Islamic *Sunnah*? If the *Sunnah* had no legal authority in the first place, why did people fabricate Aḥādīth, attributing them falsely to the Prophet? Esposito presents yet another counter-argument when he writes, "from a critical academic viewpoint, to consider all Ḥadīth apocryphal until they are proven otherwise is to reverse the burden of proof. Rather, a ḥadīth accepted for over ten centuries should stand until proven otherwise. This shifting process, while more laborious than Schacht's approach seems sounder scientifically."[46]

Having insisted on the indissoluble unity of his theory, Schacht became sarcastic—even angry—when he realised that some scholars,

while accepting parts of his theory, rejected other parts in effect "minimising the implications of (his) approach."[47] Schacht was later regarded by some Western scholars as too sceptical and too severe in his criticism of the sources of Islamic law.[48] I would like to cite one interesting example of Schacht's scepticism. Schacht, in his *Origins*, cited a dialogue between al-Shāfiʿī and his interlocutor regarding the issue of the authority of the *Sunnah*:

> Q: Is there a *Sunnah* of the Prophet, established by a tradition with an uninterrupted chain of transmitters (*isnād*), to which the scholars in general refuse assent?
>
> A: No, sometimes we find that they disagree among themselves, some accepting it and others not; but we never find a well-authenticated *Sunnah* which they are unanimous in contradicting.[49]

The quotation clearly reveals that there was no dispute on the authority of the *Sunnah* among Muslims at that time. The dispute centred only on the problem of the authenticity of the *Sunnah*; once a particular ḥadīth is well-authenticated, the dispute no longer exists. Schacht's response to this quotation was simple and unfounded, "Shāfiʿī's introduction of the element of unanimity into the discussion...shows that his claim of general agreement is only a clever debating point made by him."[50] This led Hourani to say that, "the conclusions of Schacht, like those of his great predecessors, are to this date standing up well to the test of time and criticism."[51]

As mentioned earlier, Schacht also relied heavily on *argument e silentio*. According to one scholar, this approach has no binding force.[52] First, it is not reliable because the jurists might not have heard some of the traditions reported on the authority of the Prophet, and secondly, they may have heard but then forgotten them. The latter actually happened to al-Shāfiʿī himself when he mentioned that he lost several of his works and so he had to get verified by scholars the traditions which he (still) remembered. He also omitted several traditions for fear of increasing the bulk of his work.[53] Furthermore, *argument e silentio* is totally inapplicable to certain types of literature. In this context, one scholar has concluded that Schacht's *argument e silentio* does not apply to Ibn Ḥanbal's *Masā'il* because Ibn Ḥanbal is not marshalling arguments in polemical situations.[54] "Most often in the *Masā'il,* Ibn Ḥanbal simply answers a question without mentioning any tradition. Sometimes, however, he does mention a tradition as the basis of his answer, depending on circumstances which we cannot know of, or perhaps depending on whether he happened to remember a relevant tradition at the moment of answering. For example, in his son ʿAbd

Allāh's recension, on the question of whether or not a man who wishes to marry a slave-woman may make her manumission her dowry, Ibn Ḥanbal does answer with a tradition:

> (Abd Allāh says) I asked my father about a man who manumits a slave-girl and then sees fit to marry her. He said, "There is no harm in his marrying her." In this matter follow the ḥadīth of Shuᶜaib b. al-Ḥajjāj and Thābit and Qatāda and ᶜAbd al-ᶜAzīz Shuᶜaib from Anas b. Mālik that the Prophet freed Ṣafiya and married her. Thābit asked what he gave her as a dowry, and Anas b. Mālik said, "Herself." He freed her and married her.[55]

In Abū Dāwūd's recension, Ibn Ḥanbal answers this same question, albeit from a slightly different point of view, without mentioning any tradition in his answer:

> (Abū Dāwūd says) I heard, Aḥmad asked about a man who manumits a slave-woman and makes her manumission her dowry. He said, "Such a man does not need a *walī*, but his marriage must be witnessed." I asked, "What should he say to his slave-woman?" He replied: "He should say, 'I hereby manumit you and make your manumission your dowry.' This is valid and it is connected speech, unless he has already freed her. Then, if he wants to marry her, he must have her consent."[56]

Another interesting example in the *Masā'il* pertaining to our discussion is in al-Marwazī's recension in which Ibn Ḥanbal first answers without citing a tradition, but when pressed indicates that he is aware of one. Al-Marwazī asks about a man who marries a woman and commits adultery before having intercourse with her. Ibn Ḥanbal says, "The couple are not separated," and stops. Then al-Marwazī asks, "On the basis of whose ḥadīth do you say this?" And Ibn Ḥanbal replies promptly: "The ḥadīth of ᶜUbaid Allāh b. Abī Yazīd from his father from ᶜUmar."[57]

We shall have occasion to relate the issue of *argument e silentio* with the issue of the emergence of *uṣūl al-fiqh*. But now, we will focus our attention on the polemical writings of al-Shāfiᶜī to which Schacht has made extensive reference. Apart from *al-Risālah*, al-Shāfiᶜī has produced many other treatises related to legal theory. In his works, *Ikhtilāf al-ᶜIrāqiyyīn* and *Kitāb siyār al-Awzāᶜī* (these works contain al-Shāfiᶜī's comments on Abū Yūsuf's work in which the latter refutes the doctrines of Ibn Abī Layā and al-Awzāᶜī, respectively, in favour of those of Abū Ḥanīfah), he demonstrates his familiarity with the doctrine and the legal method of al-Awzāᶜī and three ᶜIraqī scholars: Abū Ḥanīfah, Ibn Abī Laylā and Abū Yūsuf. His work, *Ibtāl al-istihsān*,

clearly evinces his familiarity with the principle of *istiḥsān,* which was widely used by the Ḥanafīs. In *al-Radd ᶜala Muḥammad b. Ḥasan al-Shaybānī*, he shows his familiarity with al-Shaybānī's legal method. In *Ikhtilāf ᶜAlī wa Ibn Masᶜud*, he observes the Iraqi scholars' inconsistency in following the opinion of ᶜAlī b. Abī Ṭālib and ᶜAbd Allāh b. Masᶜud whom they regarded as most authoritative, and in many cases, having priority over the ḥadīth of the Prophet. In *Jimāᶜ al-ᶜilm*, he entered into polemic with the *ahl al-kalām* who insisted on reliance on the Qur'ān in all matters and refused to recognise the ḥadith as a possible basis of law. Indeed, all his writings contain discussions with representatives of the Iraqi and Medinese schools. In these treatises, one can find many statements of al-Shāfiᶜī against his opponents in legal study, from which Schacht deduced that scholars before al-Shāfiᶜī were following unfounded and unsystematic legal theory.

The question here is whether or not we can rely on polemical writings in order to be certain of whatever problem was disputed amongst the jurists. I am personally inclined not to consider this as accurate because even al-Shāfiᶜī himself who, according to many scholars, was the champion or the defender of the *Sunnah*, has been charged by Ibn ᶜAbd al-Ḥakam of neglecting the Qur'ān and the *Sunnah* of the Prophet in his work entitled *al-Radd ᶜalā al-Shāfiᶜī fīmā khālafa fīhi al-kitāb wa al-Sunnah*. In this context, al-Aᶜzamī argues that "if we were to believe every scholar's accusation against his fellows, few would be found who were total adherents of the Qur'ān and the *Sunnah* of the Prophet."[58]

Even Schacht himself admitted that polemical writing might misrepresent the opinions of one's opponent. Though he makes frequent deductions from and references to al-Shāfiᶜī's writings, he also gives several examples of al-Shāfiᶜī's biased editing of an opponent's text.[59] Elsewhere, Schacht charges al-Shāfiᶜī with making unjustified assumptions, arguing arbitrarily and misrepresenting and exaggerating the opinions of his opponents. Schacht provides a few examples of instances that warrant these charges.[60] The weakness of this approach has already been pointed out by Hurgronje who concluded that, very often, a jurist fails to fully understand the nature of polemical writings in Islamic *fiqh*. Hence, the statement of one jurist or one school of law describing the other is unreliable and unacceptable.[61] Therefore, al-Shāfiᶜī is an unreliable source for tracing the doctrines of the ancient schools of law[62] particularly because al-Shāfiᶜī himself, as recorded by Schacht, admitted and declared that no one could be totally objective in one's study, including al-Shāfiᶜī himself.[63]

It is strongly advised that to resolve the issue of the origins of Islamic law one must leave aside al-Shafiʿī's polemical writings and examine every allegation made against a jursit/school of law solely by looking into the original literature and not into their opponents' literature.[64] It would not be appropriate to conclude our present discussion on polemical writing by citing the observation made by Professor Robert Brunschvig that we may well see the origins of Islamic law in a new light, "if we can free ourselves from the hold of al-Shāfiʿī, whose ingenious synthesis has falsified our perspectives for a long time indeed."[65]

Calder's *Studies*

The argument of Schacht in relation to the early history of *uṣūl al-fiqh* has influenced many Western scholars.[66] The most striking example is embodied in Calder's *Studies in Early Muslim Jurisprudence*. The only difference between Schacht and Calder appears to be on the point of determining a date of origin for *fiqh* in Islamic legal history. As Calder puts it, "Schacht locates the origin of *fiqh* in the beginning of the second century whereas I would like to locate it, on the basis of the chronology presented in this work, in the beginning of the third century."[67] In other words, Schacht thought that Islamic law proper started to emerge in the beginning of the second century of Hijrah, while Calder believed that all the literature on Islamic law such as *al-Muwaṭṭaʾ* by Mālik, *al-Mudawwanah* by Saḥnūn, *al-Aṣl* and *al-Mabsūṭ* by al-Shaybanī and even *al-Risālah* by al-Shāfiʿī cannot be the works of their putative authors but must be dated to some time after the compilation of these books.[68] According to Calder, "A period of growth from 200-250 would seem a fair estimation for the accumulation of material, with final reductions taking place towards the end of that period, and minor interpolations continuing into the second half of the centuries."[69]

To give a general idea of how Calder was able to come to this conclusion which is, in itself, far beyond what Schacht originally intended or estimated in his *Origins*, it is sufficient to extract some quotations from Calder's book concerning the origin of *al-Muwaṭṭaʾ*. Calder states that *al-Muwaṭṭaʾ* of Mālik b. Anas in the recension of Yaḥyā is usually considered to be among the earliest of works on Islamic jurisprudence, and is also considered to represent Mālik's final view (Yaḥyā met Mālik and reconfirmed the text of *Muwaṭṭaʾ* in 179 of Hijrah, the year in which Mālik died). For Calder, this is "not to be accepted as an independently known historical fact—it is biographical polemic intended to defend and justify the authority of the work."[70]

Calder cites as argument one type of transmission found in *Kitāb al-Iʿtikāf,* i.e. *ḥaddatha-nī Ziyād ʿan Mālik*. He points out that "this textual characteristic gives rise to the biographical observation that Yaḥyā, in 179, heard the whole of the *Muwaṭṭā'* from Mālik except a few chapters in *Kitāb-Iʿtikāf*."[71] Calder does admit that both Goldziher and Schacht were aware of the problematic nature of this text.[72] However, both treated it as if it could be used directly as an indication of Mālik's juristic technique. In the words of Calder, "This is not justified. I shall argue in what follows that the form of the work, the principles governing its organisation, and many details of its content show that it cannot be by Mālik but must be dated to some time after the completion of the *Mudawwanah*."[73]

So far, it is still difficult to infer from this that there was an element of Schacht's idea in Calder's conclusion. The following discussion will make this clear. Schacht, in his *Origins*, believed, generally and broadly speaking, that the traditions from the Companions and Successors are earlier than those from the Prophet.[74] On other occasions, he said that the *mursal* tradition[75] which forms the most important group of *munqaṭiʿ*, reflects the interval between the real origins of Islamic law and the much earlier period in which its fictitious authorities were being sought.[76] In other words, he believed that what is called the *Sunnah* of the Prophet was back-projected in the second century to a more authoritative source, namely, the Companions and ultimately the Prophet himself.[77]

Following the same line of argument, Calder has undertaken to make a comparison between *al-Mudawwanah* and *al-Muwaṭṭā'*. He observes that *Mudawwanah* does not foreground Prophetic authority, rather, the dialogue material in it foregrounds Mālik's juristic opinion. Also in the *Mudawwanah*, juristic opinions outnumber the Companions' ḥadīth and these outnumber Prophetic ḥadīth.[78] On the contrary, the *Muwaṭṭā'* is designed to provide a background to Prophetic authority; Mālik's role in the *Muwaṭṭā'* is that of mediator of the Prophetic law.[79] It achieves this primarily by the arrangement of the material. The discussion of each chapter begins with the Prophet's saying, followed by the opinions of Companions and then the subsequent jurists. This effect is also achieved by reversing the relative number of Prophetic, Companions' (*saḥābā*) and Successors' (*tabʿīn*) ḥadīth so that the Prophetic ḥadīth outnumber Companions' ḥadīth and the latter outnumber the Successors' ḥadīth—822, 613 and 285 respectively.[80] Calder then concludes that "the *Muwaṭṭā'* clearly represents a later stage in the development of Islamic juristic theory than the *Mudawwanah*...and Schacht's general theory of legal development in early Islamic

jurisprudence is consistent only with the assumption that the *Mudawwanah* precedes the *Muwaṭṭā'*."[81] Calder applied the same methodology of investigation to other books written in the early period of Islam, which led him to conclude that one should assign the final emergence of these books to the middle decades of the third century.[82]

At this stage, I have no intention to engage myself in the details of Calder's hypothesis as the purpose of this article is merely to pinpoint certain lines of arguments pertaining to the "controversial issue" of the origin of Islamic law. For an immediate response, since Schacht's original notion has been severely criticised not only by Muslim scholars but also by some Western scholars, the same criticism would be relevant and applicable to Calder's book. Furthermore, if we were to consider that, for example, *al-Risālah* was written after al-Shāfiʿī's death by al-Rabīʿ, one of his eminent students, we would certainly have come across an intercessory prayer for al-Shāfiʿī, at least once, since it was the custom with Muslim scholars to insert a prayer in their writing mentioning the name of leading scholars or a dead *imām*, particularly the founder of a school of law. This, however, is completely absent in *al-Risālah* because al-Rabīʿ used to write it from the dictation of al-Shāfiʿī himself.[83]

Interestingly, Ḥallāq, in a recent article, has attempted to challenge the widely accepted view that al-Shāfiʿī is the father of Muslim jurisprudence. Not only that, he endeavours to disqualify al-Shāfiʿī's *al-Risālah* as being a book on *uṣūl al-fiqh*.[84] Though arguing from different premises, both Calder and Ḥallaq are actually proposing the same idea, that legal theory proper did not exist at the time of al-Shāfiʿī but emerged later. Ḥallāq has resorted to circumstantial evidence to add weight to his claim by saying that since there was complete absence of any contemporary comment on, or abridgement of the *Risālah* at the time, "we must emphasise, when commentaries and abridgements have already become common place," the existence of *al-Risālah* is disputable.[85] Another argument put forward by Ḥallāq is that "...nor is there to be found a refutation of the *Risālah*—again in a century whose landmark was the intensity with which scholars refuted one another."[86] In other words, the *Risālah* attracted neither commentary nor criticism during the century in which it was purportedly written, whereas this did occur in the subsequent period.[87]

Ḥallāq also asserts that the *Risālah* is predominantly a ḥadīth work. In his own words, he describes *al-Risālah* as a book that "has little to offer in the way of systematic methodology....On the whole, the *Risālah* not only lacks depth...but it also leaves out altogether a host of

fundamental questions considered part of, and indeed indispensable for, *uṣūl al-fiqh*."[88] It has also been argued that it is only after al-Shāfiʿī that literature on *uṣūl al-fiqh* expanded through the work of later jurists who themselves were Shafiʿīs. "The most significant of these scholars," Ḥallāq writes, "were Abū al-ʿAbbās ibn Surayj (d. 306 H) and his students...and the most knowledgeable scholar of *uṣūl al-fiqh* after al-Shāfiʿī was al-Ṣayrafī, the first commentator on the *Risālah*."[89]

One wonders how Ḥallāq, on the basis of the premise that neither commentary nor criticism was reported to exist during the *Risālah's* century, concludes that al-*Risālah* enjoyed marginal importance during that period. If this is the case, does it disqualify *al-Risālah* from being a book on *uṣūl al-fiqh?* If *al-Risālah* is not a book on *uṣūl al-fiqh,* how does Ḥallāq explain, what he admits himself, the great interest in this book in the subsequent century by *uṣūlis*, who were involved in commenting on and explaining the *Risālah*? It might not have attracted much interest in the century in which it was written but it attracted tremendous interest in the subsequent century, indicating that it is a work on *uṣūl*. If it is not, it would not have attracted any interest at all. It is rather unrealistic to expect *al-Risālah* to be a comprehensive and finished product on *uṣūl al-fiqh* at that time when the latter was still in its infancy. It is natural for any science to develop in stages; it is the task of latter scholars to complete and further develop particular domains. Even in the subsequent period, *uṣūl al-fiqh* was and has remained incomplete.

It is also equally inappropriate for Ḥallāq to infer from the expansion of literature on *uṣūl al-fiqh* a century after *al-Risālah*, that al-Shāfiʿī did not contribute positively to the development of *uṣūl al-fiqh* or that his role was marginal. In this regard, it is surprising and ironic that Ḥallāq accepts a scholar such as Ibn Surayj as an excellent jurist, combining superior knowledge of ḥadīth and *fiqh,* but fails to mention any works of Ibn Surayj to prove his point. He depends purely on biographies, admitting that none of Ibn Surayj's works have survived.[90] Ḥallāq mentions a host of other scholars but no works by them are mentioned. Is this not unfair to al-Shāfiʿī?

The claim that *al-Risālah* is a book on ḥadīth is unfounded. Even a cursory look at the contents of *al-Risālah* would make one anticipate that its contents are all-embracing, covering linguistic issues such as *ʾāmm* and *khāṣṣ*, issues related to abrogation and the *Sunnah,* and related discussions of *ijtihād*, *ijmāʿ*, *ikhtilāf*, etc. The fact that al-Shāfiʿī insisted that all legal reasoning discussed in the *Risālah* must rely on the Qur'ān and *Sunnah* does not make *al-Risālah* purely a book on

ḥadīth nor does it preclude from being a book on *uṣūl al-fiqh*. Discourse on the Qur'ān and the *Sunnah* and the principles governing the understanding and derivation of laws from these two sources are the very content and primary concern of *uṣūl al-fiqh*. If we were compelled, for the sake of argument, to bring out the difference between *al-Risālah* and later juristic works on *uṣūl al-fiqh* regarding the treatment of the *Sunnah*, it would be obvious that the difference is only one of emphasis and not of substance. In other words, the difference between one scholar and another, if any, is a matter of special interest of the individual author. For this reason, we find that later works on *uṣūl al-fiqh* are sometimes loaded with a lot of *fiqh* or *kalām*, or logic or grammar depending on the focus of the particular scholars. Despite this, no one ever contends that these books are no longer *uṣūl* books but should be called by other names according to the respective points of emphasis.

Shafi'ī's *al-Risālah*

Thus far, we have discussed many propositions regarding the position of al-Shāfi'ī as the pioneering scholar who systematically articulated the science of the principles of Islamic jurisprudence. In what follows, we shall take a closer look at *al-Risālah*, itself, in our attempt to complete our discussion on the emergence of *uṣūl al-fiqh*. Based on the premise that the emergence of any science, including *uṣūl al-fiqh*, cannot be determined by the use of specific terms such as *uṣūl al-fiqh*, in the case of Islamic legal theory, it can be concluded that in all of the sciences known to people, it is the practice which precedes the theory.[91] Therefore, the question of defining a discipline, or even a particular principle, generally comes after it has been fully developed and applied. It is pertinent that al-Shāfi'ī himself did not use the term *uṣūl al-fiqh*, either in the title of his work or anywhere in the body of the text. He simply called his book *al-Kitāb* or *kitābī* or *kitābunā*.[92] The title *al-Risālah*, meaning "epistle" or "letter," was latter attributed to his work owing to the fact that the latter was originally a letter sent to Ibn Mahdī (d. 198 H) by al-Shāfi'ī.[93]

Hence, denial of the existence of *uṣūl al-fiqh* long before the use of the term is unfounded. That is to say, the absence of certain terminologies does not necessarily signify the non-existence of the concept denoted by those terms. Al-Shāfi'ī's stand in relation to *uṣūl al-fiqh*, indeed, is similar to the position of Aristotle with respect to logic and of al-Khalīl b. Aḥmad with respect to prosody in that both logic and prosody, like *uṣūl al-fiqh*, had been in use for a considerable period of time before they were arranged by latter scholars.[94]

Moreover, there were several books written before al-Shāfiʿī which dealt with one or another of the fundamental discussions which later came to be recognised as *uṣūl al-fiqh.*[95] In this context, the well-known bibliographer, Ibn al-Nadīm (d. 435 H) cited the works of Abū Yūsuf in the following terms: "Abū Yūsuf has written the following works on *uṣūl*[96] and *amālī* (dictations): the book of ritual prayer, the book of alms tax...."[97] Ibn al-Nadīm continues, "...and among those who reported on the authority of Abū Yūsuf is *Muʿallā*; he transmitted his legal thought, his legal principles and his book."[98] Furthermore, Abū Yūsuf in his book *al-Radd ʿalā siyar al-Awzāʿī*, criticised scholars in Syria for their ignorance of *uṣūl al-fiqh.*[99]

In addition to this, the list of al-Shaybānī's works, as mentioned by Ibn al-Nadīm, demonstrates the existence of some principles of *uṣūl al-fiqh* at the time. Among his books are *Kitāb al-istiḥsān* and *Kitāb al-radd ʿalā ahl al-Madīnah.*[100] Having traced the so-called *istiḥsān* application in the early history of Islamic law, Goldziher considered Abū Ḥanīfah as the founder of the principle of *istiḥsān.*[101] What concerns us here is the statement of Schacht which challenges Goldziher's point of view. Schacht notes that the principle of *istiḥsān* already existed, even before the time of Abū Ḥanīfah, as part of Iraqi legal reasoning even though, as Schacht says, the technical terms for *istiḥsān* appeared later for the first time in Abū Yūsuf's work.[102]

These instances which occurred before the appearance of al-Shāfiʿī's *Risālah* show that the early jurists, in general, had some sort of principles of law but they did not leave behind systematic works, unlike al-Shāfiʿī. Professor Khaddūrī, in his introduction to his translation of al-Shāfiʿī's *Risālah,* adduces the following argument. He says, "finally, we may raise the question of the sources from which al-Shāfiʿī drew inspiration and information. This is not an easy question to answer precisely, since al-Shāfiʿī makes no reference in the *Risālah* to books which he may have consulted. In his other works, *Kitāb al-umm* in particular, he devotes whole sections to discussions with other jurists such as Abū Ḥanīfah, al-Awzāʿī, Mālik, Abū Yūsuf and al-Shaybānī which clearly indicate that he had studied the works of these eminent jurists with care."[103] Furthermore, Khaddūrī argues that:

> The vocabulary of the *Risālah* itself raises questions not only of legal nomenclature but also of literary and philosophical terminology. What is obvious is that al-Shāfiʿī rarely defined his terms, thus assuming that both his followers and readers would be familiar with the general and technical words from the content of his writings or from the common usage of the time.[104]

An interesting argument is adduced by al-ʿAlwānī to the effect that

the Prophet had himself encouraged the Companions to practice *ijtihād* which constitutes the kernel of Islamic legal theory. This is supported by the Qur'ān itself in that the Qur'ān indirectly confirms the *ijtihād* carried out by some of the Companions.[105] If *ijtihād* was lacking in this early history of Islam, the above scenario would have not occurred. Obviously, the Companions were able to undertake the assignment of *ijtihād* because they were closely associated with the Prophet who had afforded them a keen sense of the aims of the Lawgiver, of the basic purposes behind Qur'anic legislation, and of the meanings of the texts.[106]

Last but not least, a reading of Western literature on the origin of Islamic legal theory gives a very clear impression that Western Islamicists, in general, maintain the view that Islamic legal theory, as a system of interpretation, did not exist before al-Shāfiʿī's *Risālah*. On the other hand, it is claimed that common legal theory, as represented by al-Shāfiʿī's *Risālah*, did not have anything to do with the development of the substantive law found in *fiqh* manuals, because the main features of law, as we find it today, were already developed by the year 132 H.[107] This law was subsequently recorded in the manuals compiled by Muḥammad al-Shaybānī (d. 189 H) to be followed by the writings of al-Shāfiʿī and *al-Mudawwanah al-Kubrā* of the Mālikī school of law. Therefore, legal theory or *uṣūl al-fiqh* as advocated by al-Shāfiʿī was refined and finalised much later, because it is not the same theory as that expounded by al-Shāfiʿī. Hence, the classical legal theory has nothing to do with the law itself[108] as the jurists at that time relied heavily on personal opinion (*rā'y*) and Umayyad practice.[109]

Pertaining to the statement of Western Islamicists that the jurists relied upon Umayyad practice, Nyazee has painstakingly argued that the above claim is questionable. According to him, this statement and the like are based on a false assumption, prevalent in circles of Western Islamicists, that many of the traditions are apocryphal in nature and the legal theory expounded by al-Shāfiʿī was treated as a common legal theory in Islamic law. As for the latter assumption,[110] "there is no such thing as a common legal theory in Islamic law. A common legal theory is a figment of Joseph Schacht's imagination. Where there is no common theory, it obviously cannot have anything to do with the substantive law."[111]

Furthermore, the writing of a book on legal theory in no way indicates that there was no methodology of interpretation that earlier jurists followed, that is, prior to the writing of such a book. It was pointed out that there are two approaches to the derivation of legal theory. The first is to analyse and study the work of well-known jurists

and judges to identify the methodology that they followed. This was the method generally adopted by the Ḥanafīs.[112] The second method is to lay down rules of interpretation and to make it binding for jurists and judges to follow those rules during adjudication and the derivation of law. The latter method was followed by al-Shāfiʿī who prescribed such rules in his *Risālah*.[113] According to Nyazee, both approaches can have much in common; one method cannot be said to be better than the other, nor does one imply the absence of the other.[114] To conclude, one may say that there is not one but several theories of Islamic law and, accordingly, several systems of interpretation. Each of these systems is highly developed and is analytically consistent within itself.[115]

In any case, the science of *uṣūl al-fiqh,* as we know it from the book of al-Shāfiʿī, existed long before the term for it was established. As concluded by one scholar, "by the time al-Shāfiʿī appeared, much had already been derived. On the basis of the rules he now drew up he found in the techniques and methods of his contemporaries and their predecessors much to criticise."[116]

Conclusion

From the above study, we come to the conclusion that *al-Risālah* is largely a work on methodology. It marked the beginning of systematic work on *uṣūl al-fiqh.* The birth of *uṣūl al-fiqh* as the science of jurisprudence in Islam appears to have occurred sometime prior to the death of ʿAbd al-Raḥmān Ibn Mahdī in 198 H. Ibn Mahdī is said to have written to al-Shāfiʿī asking him to compose a work explaining the legal significance of the Qur'ān and the *Sunnah*.[117] Mention should be made that *al-Risālah* is a well-written document which reflects not only the legal thought and theories of sources of those jurists who were contemporary with al-Shāfiʿī but also those from the past. However, no definite knowledge is available as to the precise date and place in which al-Shāfiʿī composed *al-Risālah*.[118] The reason for this problem, I believe, is that the development of a specific branch of knowledge cannot easily be separated from other related subjects. Not only are they closely related, but they sometimes overlap and are used interchangeably. With this in mind, it is submitted that a researcher would face great difficulty in determining the precise date of the emergence of any specific discipline.

Notes

1. Joseph Schacht, *An Introduction to Islamic Law* (Oxford, U.K.: Oxford University Press, 1964), 4.

2. Wael Bahjat Ḥallāq, "On the Origins of the Controversy About the Existence of Mujtahids and the Gate of Ijtihād," *Studia Islamica* 63 (1986): 132

3. Ibid., 133. For more details, see Abū Isḥāq Ibrāhīm al-Shirāzī, *al-Lumaᶜ fī uṣūl al-fiqh* (Cairo: Maṭbaᶜh Muḥammad ᶜAlī Ṣabīḥ wa Awlāduhū), 4; and Muḥammad bin ᶜAlī al-Shawkānī, *Irshād al-fuḥūl ilā taḥqīq al-ḥaqq min ᶜilm al-uṣūl* (Damascus: Dār al-Fikr, n.d.), 3.

4. Wael Bahjat Ḥallāq, "*Uṣūl al-Fiqh:* Beyond Tradition," *Journal of Islamic Studies* 3, no.2 (1992): 185-186.

5. See e.g., Jamal al-Dīn al-Qāsimī, *al-Fatwā fī al-Islām*, ed., Muḥammad ᶜAbd al-Ḥakīm al-Qāḍī (Beirut: Dār al-Kutub al-ᶜIlmiyyah, 1986), 64.

6. S.E. Rayner, *The Theory of Contracts in Islamic Law: A Comparative Analysis with Particular Reference to the Modern Legislation in Kuwait, Bahrain and the United Arab Emirates* (London: Graham and Trotman, 1991), 1-41.

7. Ibn Khaldūn, *al-Muqaddimah: An Introduction to History*, trans. F.R. Rosenthal (London: Routlege and Kegan Paul, 1968) 3: 23.

8 Muḥammad Ṣubḥī al-Maḥmaṣṣānī, *Falsafa al-tashrīᶜ al-Islamī* (The Philosophy of Islamic Law), trans. F. Ziadeh (Malaysia: Hizbi Pulication, 1987), x.

9. Hashim Kamali, *Principles of Islamic Jurisprudence* (Malaysia: Pelanduk Publications, 1989), xii-xiii.

10. The main terms preferred by Muslim biographers and historians are the first three terms. *Al-uṣūl*, unlike the other terms, reveals the difficulty of deciding whether it is meant to refer to *uṣūl al-fiqh* or to *kalām* (theological principles) since the same word i.e., *uṣūl,* has also been used to describe *uṣūl al-dīn* (the principles of religion).

11. Calder, for example, in his recent book, openly expresses his purpose of studying the early history of Muslim jurisprudence, saying, "Schacht locates the origin of *fiqh* in the beginning of the second century, whereas I would like to locate them, on the basis of the chronology presented in this work, in the beginning of the third century." See Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993), 199.

12. Shams al-Dīn Abū al-ᶜAbbās Ibn Khallikān, *Wafayāt al-aᶜyān wa anbā' abnā' al-zamān*, ed., Iḥsān ᶜAbbās (Beirut: Mu'assasah al-Risālah, 1984), 4: 45; Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: University Press, 1950), 1; Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1978), 60-61.

13. Abū al-Wafā' al-Afghānī, *Introduction to uṣūl al-Sarakhsī*, (Cairo:

Maṭbaᶜah Dār al-Kitāb al-ᶜArabī, 1952), 1: 3.

14. Abū Bakr Aḥmad b. ᶜAlī al-Baghdādī, *Tarīkh Baghdad*, (Beirut: Dār al-Kitāb ᶜArabī), 14: 245-246.

15. Muḥammad Abū Zahrah, *Uṣūl al-fiqh al-Islāmī* (Cairo: Dār al-Fikr al-ᶜArabī, 1958), 14.

16. Ibid., 14.

17. Schacht, *The Origins*, 1, 5, 190, 191, 230; also see Schacht, *Islamic Law,* 19. The significance of Schacht's view lies in the fact that he is considered by many to be the most influential orientalist in the field of Islamic law in the twentieth century. He has deeply influenced Western scholarship through his long teaching career and his many publications on Islamic law, including the pioneering works, *The Origins of Muhammadan Jurisprudence* and *An Introduction to Islamic Law*. See John Esposito, "Muslim Family Law Reform: Towards an Islamic Methodology," *Islamic Studies* 15 (1976):30-31.

18. Schacht, *The Origins*, 224.

19. S.D. Goitein, "The Birth-Hour of Muslim Law? An Essay in Exegesis," *Muslim World* 50 (1960): 24.

20. J.N.D. Anderson, "Recent Developments in Sharīᶜah Law," *Muslim World* 40 (1950): 245.

21. Schacht, *The Origins*, 138-176.

22. Ibid., 80.

23. Ibid., 56, 77.

24. David Powers, *Studies in Qur'ān and Ḥadīth: The Formulation of the Islamic Law of Inheritance* (Berkeley: University of California Press, 1986), 7; Schacht, *The Origins*, 224-227.

25. For details, see Zafar Ishaq Ansari, "The Authenticity of Traditions: A Critique of Joseph Schacht's Argument *E Silentio,*" *Hamdard Islamicus* 7 no. 2 (1984): 51-61.

26. Schacht, *The Origins*, 140.

27. Ibid., 70. For the shortcomings of the argument of *e silentio*, see J.W. Fuck, review of Schacht's *The Origins of Muhammadan Jurisprudence, Journal of the Pakistan Historical Society* 17 (1969): 296.

28. Ibid., 23, 64, 110.

29. Al-Shāfiᶜī, *al-Risālah*, ed. A.M. Shākir (Cairo: Maṭbaᶜah Muṣṭafā al-Bābī, 1940), para. 1817; al-Shāfᶜī, *Ikhtilāf al-ḥadīth*, in *Kitāb al-umm*, vol. 8, ed. M. Zuhrī al-Najjār (Cairo: Maktabah al-Kulliyāt al-Azhariyyah, 1961), 563.

30. Al-Shāfiᶜī, *Ikhtilāf al-ḥadīth*, 479, 484-485.

31. Al-Shāfiᶜī, *Ikhtilāf Mālik wa al-Shāfiᶜī*, in *Kitāb al-umm*, vol 7, ed. M. Zuhrī al-Najjar (Cairo: Maktabah al-Kulliyāt al-Azhariyyah, 1961), 219-220.

32. See Abdur Rahman Doi, "Islamic Law: Western Tyranny by Terms," *The*

Search 3 (1982): 69, 71.

33. S.V. Fitzgerald, "Nature and Sources of the Shari'ah," in M. Khaddūrī and H.J. Liebesny ed., *Law in the Middle East* (Washington D.C.: The Middle East Institute, 1955), 87.

34. See Mustansir Mir, "The Nature of Qur'anic Legislation," *International Journal of Islamic and Arabic Studies* 2 (1985): 13-20; Zafar Ishaq Ansari, "The Contribution of the Qur'ān and the Prophet to the Development of Islamic Fiqh," *Journal of Islamic Studies* 3 (1992): 156-171.

35. C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (London: MacMillan, 1988), 6.

36. Esposito, "Muslim Family Law Reform," 24.

37. Al-Shāfi'ī, *Ibṭāl al-istiḥsān*, in *Kitāb al-umm*, vol 7, 300; Muhammad Ibn Sa'd, *al-Ṭabaqāt al-kubrā*, vol. 3, (Beirut: Dār Ṣādir and Dār Beirut, 1960), 584. In addition, much valuable information about the Prophet's own judgement can be derived from Abū 'Abd Allah Muhammad b. Ahmad al-Qurṭubī, *Aqḍiyat rasūl Allāh* (Allepo: Dār al-Wa'y, 1982).

38. For details on the judicial activities of the Prophet, see M. Ḥamīdullāh, *al-Wathā'iq al-siyāsiyyah* (Beirut, 1968).

39. Kamali, *Islamic Jurisprudence*, 5.

40. Rayner, *The Theory of Contracts*, 4 (note no. 20).

41. Ignaz Goldziher, *Muslim Studies*, trans. C.R. Barber and S.M. Stern, ed., S.M. Stern (London: George Allen and Unwin Ltd., 1967), 2: 19.

42. Schacht, *Islamic Law*, 17.

43. Schacht, *The Origins*, 4-5.

44. Muhammad Zubayr Siddiqi, *Ḥadīth Literature: its Origin, Development, Special Features and Criticism* (India: Calcutta University, 1961), xviii (note no. 3).

45. F. Rahman, "*Sunnah* and *Ḥadīth*," *Islamic Studies* 1 (1962): 4.

46. Esposito, "Muslim Family Law Reform," 30.

47. See Joseph Schacht, "Modernism and Traditionalism in a History of Islamic Law," *Middle Eastern Studies* 1 (1965): 392.

48. Rafeal Talmon, "Schacht's Theory in the Light of Recent Discoveries Concerning the Origins of Arabic Grammar," *Studia Islamica* 65 (1987): 40. Talmon gives an example from Schacht's *Origins* to show how Schacht was so sceptical when he (Schacht) writes that the information supplied by al-Kindī on Egyptian judges in the first centuries of Hijrah were rejected by Schacht as he did not consider them reliable (Talmon, "Schacht's Theory," 40. Cf., Schacht, *The Origins*,100).

49. Schacht, *The Origins*, 11.

50. Ibid.

51. Talmon, "Schacht's Theory," 48.

52. Fuck, "Review on Schacht's Book," 294.

53. al-Shāfiʿī, *al-Umm*, vol. 4: 177; vol. 6: 172; vol. 7: 41, as cited from Ansari, "The Authenticity of Traditions," 61.

54. Susan Spectorsky, "Ahmad Ibn Ḥanbal's Fiqh," *Journal of the American Oriental Society* 20(1982): 463 (note no.9).

55. Ibid., 463.

56. Ibid.

57. Ibid.

58. M.M. al-Aʿzamī, *On Schacht's Origins of Muhammadan Jurisprudence* (Riyāḍ: King Saʿūd University, 1989), 90.

59. Schacht, *The Origins*, 87, 109-112.

60. Ibid., 321.

61. S. Hurgronje, *Selected Works*, ed. G.H. Bousquet and J. Schacht (Leiden: E.J. Brill, 1957), 279.

62. al-Aʿzamī, *On Schacht*, 77.

63. Schacht, *The Origins*, 321.

64. al-Aʿzami, *On Schacht*, 47.

65. R. Brunschvig, "Polemiques Nedievales Autour du rite de Malik," *Andalus* 15 (1950): 413, as cited by U.F. ʿAbd Allāh, "Mālik's Concept of *ʿAmal* in the light of Mālikī Legal Thought" (Ph. D. Dissertation, University of Chicago, 1978), 285. I have argued elsewhere that al-Shāfiʿī was neither responsible for nor the cause of the confusion surrounding the early legal history, for all the writings of al-Shāfiʿī should be read comprehensively on one hand, and from within their respective contexts, on the other. See the writer's article, "Sunnah Dalam Teori Perundangan Islam dan Kedudukannya di Kurun Kedua Hijrah (The Position of the *Sunnah* in Islamic legal Theory With Special Reference to the Second Century of Hijrah)," *Journal Shariʿah* 3 (1995): 1-22.

66. See Aharon Layish, "Notes on Joseph Schacht's Contribution to the Study of Islamic Law," *British Society of Middle Eastern Studies Bulletin* 9 (1982): 33.

67. Calder, *Studies in Early Muslim Jurisprudence*, 199.

68. Ibid., 21, 43-44.

69. Ibid., 51.

70. Ibid., 20.

71. Ibid., 21.

72. See Goldziher, *Muslim Studies*, 2: 204; Schacht, *Introduction*, 44.

73. Calder, *Studies in Early Muslim Jurisprudence,* 21.

74. Schacht, *The Origins*, 5.

75. Literally, suspended; technically an interrupted chain which is disconnected at the point between the Prophet and the one who transmitted from him.

76. Schacht, *The Origins*, 39.

77. Ibid., 138.

78. Calder, *Studies in Early Muslim Jurisprudence*, 23.

79. Ibid., 35.

80. Ibid., 23.

81. Ibid., 24.

82. Ibid., 51.

83. Ahmad M. Shākir, in his introduction to his edition of al-Shāfiʿī's *al-Risālah*, 12.

84. Wael Bahjat Ḥallāq, "Was al-Shāfiʿī the Master Architect of Islamic Jurisprudence?" *International Journal of Middle East Studies* 25 (1993): 588, 592-593.

85. Ibid., 596.

86. Ibid., 591.

87. Ibid.

88. Ibid., 592.

89. Ibid., 596.

90. Ibid., 595.

91. George Makdisi, "The Juridical Theology of Shāfiʿī: Origins and Significance," *Studia Islamica* 29 (1984):9.

92. al-Shāfiʿī, *al-Risālah*, paras 96,573, 625, 709, etc.

93. Majid Khaddūrī, *Islamic Jurisprudence: Shāfiʿī's Risālah*, translated with an introduction, notes and appendices (Baltimore: The John Hopkins Press, 1961), 20-22.

94. Ahmad Yūsuf, *al-Shāfiʿī, wāḍiʿ ʿilm al-uṣūl* (Egypt: Dār al-Thaqāfah, 1990), 34-35.

95. Makdisi, "The Juridical Theology of Shāfiʿī," 9.

96. Shehaby followed by Wael Hallaq has questioned the exact meaning of the word "*Uṣūl*" as recorded in Ibn al-Nadīm's *al-Fihrist*. They believed that *Uṣūl* here was nothing to do with legal theory proper. For details, see Nabil Shehaby, "*ʿIlla* and *Qiyās* in Early Islamic Legal Theory," *Journal of American Oriental Society* 102 (1982): 28; Hallaq, "Was Shāfiʿī the Master Architect?" 588-589.

97. Mohammad bin Isḥāq Ibn al-Nadīm, *al-Fihrist* (Cairo: al-Maṭbʿah al-Raḥmāniyyah, 1929), 286.

98. Ibn al-Nadīm, *al-Fihrist*, 286.

99. Yaᶜqūb b. Ibrāhīm Abū Yūsuf, *al-Radd ᶜalā siyar al-awzāᶜī*, ed. Abū al-Wafāᶜi al-Afghānī (Beirut: Dār al-Kutub al-ᶜIlmiyyah, n.d.), 21.

100. Ibn al-Nadīm, *al-Fihrist*, 288.

101. Schacht, *The Origins*, 112.

102. Ibid.

103. Khaddūrī, *Islamic Jurisprudence*, 25-26.

104. Ibid., 28.

105. Tāhā Jābir al-ᶜAlwānī, *Source Methodology in Islamic Jurisprudence*, revised trans. Yūsuf Talal De Lorenzo and Anas S. al-Shaikh Ali (Virginia: The International Institute of Islamic Thought, 1994), 14-15.

106. al-ᶜAlwānī, *Source Methodology*, 15.

107. Schacht, *The Origins*, 49.

108. Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihād* (Islamabad: The International Institute of Islamic Thought and Islamic Research Institute, 1994), 275.

109. Nyazee, *Theories of Islamic Law*, 275.

110. As for the former assumption pertaining to the authenticity of the Prophetic traditions, it has been dealt with elsewhere in this article.

111. Nyazee, *Theories of Islamic Law*, 277.

112. Ibn Khaldūn, *al-Muqaddimah*, 3:28. This attitude is most evident in their long-standing argument on the validity of a particular principle by saying, "This is indicated by a number of rules pre-determined by our *imāms*" [*hādhā mā dallat ᶜalayhi masā'il ᶜulamā'inā*]. See al-Bazdawī, *Uṣūl al-Bazdawī* (printed on the margin of al-Bukhārī, *Kashf al-asrār ᶜan uṣūl fakhr al-Islām al-Bazdawī*) (Cairo: Dār al-Kitāb al-Islāmī, n.d.),1: 291.

113. Ibn Khaldūn, *al-Muqaddimah*, 3:28.

114. Nyazee, *Theories of Islamic Law*, 278.

115. Ibid.

116. John Burton, *The Sources of Islamic Law: Islamic Theories of Abrogation* (Edinburgh: Edinburgh University Press, 1990), 15.

117. al-Baghdādī, *Tarīkh Baghdād*, 2: 64-65.

118. Aḥmad Yūsuf, *al-Shāfiᶜī*, 38.