

vi. We must become familiar with the Fiqh of the *Sahabah* and *Tabi'un*; and especially with the principles on which they derived their judgements. In particular, the Fiqh of the *Khulafa' Rashidun* and their contemporaries deserves deep study. Then, this knowledge may be presented to those whose task it is to formulate legislation and make judgements in response to the demands of contemporary Muslim society.

vii. We need to take an interest in knowing the aims and purposes of the Shari'ah, and in developing the study of this matter, by setting down rules and guidelines.

Foot Notes:

70 A further reason is the implication that the scholar is attempting to "second guess" the Almighty. (Ed.)

71 Part of this work has been edited by a student as his master's thesis; and he is editing the rest for his doctorate.

72 See Ibn Khaldun, *Al Muqaddimah*. III, 1163-64.

73 al Nashshar. *Manahij al Bahth*, p. 55.

74 See *Musallam al Thubut* and its commentary accompanying al Ghazali's *al Mustasfa*, 1,9-10. The author denied that logic was like this, and claimed that the position of logic in relation to both philosophy and *Usul al Fiqh* was the same. He may have been influenced by the suggestion that logic is the standard of all sciences.

75 See Chapter One of the present work.

76 See al Razi. *Manaqib al Shafi'i*, p. 98 ff. and al Nashshar, op. cit., p.55.

77 Al Imam al Shafi'i's "new" Fiqh is the name given to his legal work after he had settled in Egypt. Essentially, this represents his mature thinking following the long period of his study under both the Maliki and the Hanafi schools of legal thought. (Ed.)

78 See Mustafa Abd al Razzaq, *al Imam al Shafi'i*, p. 45.

79 See al Dahlawi. *Al Insaf* and Abu Zahrah. *Abu Hanifah*, p. 223.

80 See *Tarikh Baghdad* I, Vol. XXXI, p. 368, *al Intiq'a* p. 142, and *Mashayikh Balkh al Hanafiyah*, p. 190.

81 See al Samarqandi. *Mizan al Usul*, I, 52; Taqi al Din al Ghazzi, *al Tabaqat al Saniyah* I, 43; and *Mashayikh Balkh*, p. 193.

82 Ibid.

83 See Muhammad Yusuf Musa. *Thrikh al Fiqh*, p. 160.

84 See al Khawarizmi, *Mafatih al 'Ulum*, Vols. VI, VIII; and Ibn Khaldun, *Al Muqaddimah*, III, 1125-1128, 1161-1166.

85 See *Miftah al Sa'adah*.

86 See al Ghazzali, *al Mustasfa*, Vol. I, p. 3, and *al Mankhil*; also *Shifa' al Ghalil fi Bayan al Shihb Wa al Makhil*, *Masalih al Ta'lil*, and *Tahdhib al Usul*, all of which are important Usuli books.

87 A well-known Saying attributed to the *Khalifah*, 'Umar ibn al Khattab.

a source of disagreement among Muslims, and which still occupy the time of scholars.

ii. Undertake linguistic studies relating to Fiqh which will examine the styles of expression used by the Arabs at the time of the Prophet (PBUH), and note the stages of development which these styles later passed through, and the various meanings assigned to words in current usage at the time. This will enable us to understand the texts as they should be understood.

iii. Pay special attention to the methods and the principles involved in performing Ijtihad, such as *al Qiyas*, *al Istihsan*, *al Maslahah*, and others, and study them from a historical perspective, taking into account the circumstances which dictated the pronouncements of the *Mujtahidun*. We should also try to instil a juristic frame of mind into those who are researching in the fields of *al Fiqh* and *al Usul*.

iv. Realize that it is impossible at this time for there to be a *Mujtahid Mutlaq*, or one who is a legal authority (on the interpretation of the sources) in his own right, to pass judgements on issues. As long as this is so, academic councils are the best alternative.

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

v. We must make it easier for specialists in other fields to study what they need of the sciences of the Shari'ah

then to produce *Fatawa*. On the contrary, their objective was always the establishment of Allah's rule through the application of His law. What this means, essentially, is that the circumstances surrounding the application of law cannot be separated from the conditions attached to it.

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

- i. Review the topics covered by this science, and eliminate those without relevance to the modern scholar or jurist. These might include, *Hukm al Ashya' Qabl al Shar'* "Rulings before the Shari'ah", *Shukr al Mun'im* "How one is required to thank the Almighty Bestower", *Mabahith Hakimiyyat al Shar'* "Studies about the Sovereignty of the Shari'ah", and excessive concern with definitions. We should also dispense with disputes concerning the uncommon *Qira'at Shadhdhah* "Alternate Recitations" of the Qur'an, and the Arabic nature of the entire Qur'an. Likewise, we should now end the long disagreement about single-narrator Hadith by saying that if such a narration is proven to have met the conditions of being authentic *Sahih* it will be acceptable, and laws may be derived from it.

Moreover, we should re-examine all the conditions, laid down by certain early jurists, that seem to have been dictated by circumstances. For example, the condition that a Hadith should not contradict the general principles they established, that it should not be narrated by other than a *Faqih*, that it should not contradict *al Qiyas*, or the traditions of the people of Madinah, or the explicit meaning *Zahir* of the Qur'an. Or the condition that a Hadith, if it deals with a common issue or hardship or affliction, must be widely known. All of these conditions should be rejected, and the same must be done with other conditions which were and are still controversial and

iii. Experience, customs and the public interest.

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

7. There were certain factors in our history, some of which were mentioned above, that both intimidated and imposed many restrictions upon us. Thus, the focus of our Islamic mentality and intellectual attention was diverted to minor issues, so that we were distracted from thinking in comprehensive terms, characteristics considered to be the distinguishing features of Islamic thought. This had a far-reaching effect on the way we dealt with Fiqh and on the solutions we produced, in that these also bore the same characteristics and features.

8. It is well-known that in every science and sphere of life, there are some matters that naturally accept development, that sometimes require it in order to realize their full potential. Yet, there are other matters that are fixed and immutable. According to the logic of Islam, the two must be integrated. Hence *Usul al Fiqh* has fixed rules which cannot be changed, and others which rely on continual development and renewal. This is clear from the foregoing discussion of *Ijtihad*.

Hence, while we urge all Muslim scholars not to begin from a vacuum, but to benefit from the reasoning and *Ijtihad* of the scholars who went before them, we affirm that no one can claim that it is obligatory to follow any *Mujtahid* in matters where his pronouncements were based solely on his individual reasoning. The best we can say in this matter is that his pronouncements are "an opinion, and an opinion can be shared."⁸⁷

9. From studying the methods of the early Muslims, it is clear to us that their aim was not simply to ascertain the law and

5. It is quite obvious that from the beginning of the Umayyad period until the destruction of the Islamic *Khilafah*, authority and leadership in the Ummah were in the hands of those who were not qualified to perform *Ijtihad*, whilst the responsibility for *Ijtihad* passed to the '*Ulama*' who had no authority. And it is difficult to find exceptions to this state of affairs, apart from the *Khilafah* of 'Umar ibn 'Abd al 'Aziz, from whom many judgements involving questions of jurisprudence have been narrated. This situation had the far-reaching effect of separating *Fiqh* and its *Usul* from the practical aspects of Muslim life, so that in many cases these subjects became theoretical and idealistic.⁸³ Essentially, both subjects became descriptions of how Muslim life ought to be; not how it really was, or what it might become.

6. The writers and historians of this science classified it among the sciences of the Shari'ah that are based on transmitted evidence,⁸⁴ even though some writers said that its principles are taken from the Arabic language, the rational sciences, and certain other Islamic disciplines.⁸⁵ One of the most prominent writers in the field, al Imam al Ghazzali, wrote:

The noblest sciences are those in which reason '*Aql*' and received evidence '*Sama*' are married, and in which conclusions based on reason accompany those based on revelation. The science of *Fiqh* and its *Usul* is one of these sciences. It draws equally from the purity of revelation and the best of reason. Yet, it does not rely purely on reason in a way that would be unacceptable to revealed law, nor is it based simply on the kind of blind acceptance that would not be supported by reason.⁸⁶

The statements of al Imam al Ghazzali and other writers on the subject of *al Usul* enable us to suggest that there are three sources of *Fiqh*:

- i. *Wahy* Divine revelation: this includes both the recited, or the inimitable Qur'an, and the unrecited, or the Sunnah.
- ii. '*Aql*' or reason: to explain the texts, to seek ways in which they may be applied and ways in which various parts may be connected to the whole, to search for the reasons behind legislation that seems to have no reason, to derive laws in matters for which the Lawgiver did not lay down an explicit judgement in the texts, and other similar matters which can be defined and explained.

they made on specific issues, and of the substance of argument and debate among them. They did not view *Usul al Fiqh* as a comprehensive legal guideline, or as a methodology capable of regulating the entire legal system. The jurists *Fuqaha*, when faced with questions and situations, used to refer these back directly to the relevant evidence, without feeling the need to have recourse to the general principles articulated in *Usul al Fiqh*.

So, al Imam Abu Hanifah gave *Fatawa* on nearly half a million issues,⁷⁸ which his students learnt and passed on. But, the legal principles on which al Imam Abu Hanifah based these *Fatawa* were never transmitted with anything like an uninterrupted line of authority from him,⁷⁹ apart from a few reports in which he refers to some of the sources of his *Ijtihad*. He said, in one of those reports:

"I follow the book of Allah, and if I find no solution there, I follow the Sunnah of the Prophet, peace be on him. If I find no solution in either the Qur'an or the Sunnah, I follow whichever of the pronouncements of the *Sahabah* I prefer, and leave whichever I wish. If there is a pronouncement on a particular matter by any of the *Sahabah*, I would not adopt any other opinion made by any other scholar. But, if I found a solution only in the opinions of Ibrahim, al Sha'bi, Ibn Sirin, Hasan al Basri, 'Ata' or Sa'id ibn al Musayyab, I would make *Ijtihad* just as they did."⁸⁰

When some people tried to turn the *Khalifah*, al Mansur, against him, Abu Hanifah wrote to the *Khalifah*:

"The situation is not as you have heard, *O Amir al Mu'minin!* I work according to the Book of Allah, then according to the Sunnah of the Prophet, then according to the judgements of Abu Bakr, 'Umar, 'Uthman and 'Ali, then according to the judgements of the rest of the *Sahabah*. Then, if there are any differences between their pronouncements, I resort to *al Qiyas*. No one of Allah's creatures is inherently closer to Him than any other."⁸¹

When he was accused of preferring *al Qiyas* to an explicit text *Nass* in the Qur'an, he replied: "By Allah, those who say that we prefer *al Qiyas* to a *Nass* have lied and slandered us. Is there any need for *al Qiyas* after [finding an explicit] *Nass*?"⁸²

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

2. The first scholar to compile a book about the principles of the science of *Usul al Fiqh* was al Imam Muhammad ibn Idris al Shafi'i (150-204 AH).

The first comprehensive book on the subject was the *Risalah*, which he wrote in response to a request from al Imam 'Abd al Rahman ibn al Mahdi (135-198 AH). This was after the two famous schools of Fiqh, the school of *Ahl al Hadith*, led by al Imam Malik ibn Anas (93-179 AH), and the school of *Ahl al Ra'i*, led by al Imam Abu Hanifah (70-150 AH), had become established and widespread.

Following the widespread circulation of these two legal schools of thought, there arose between the followers of these two schools, in addition to the political, theological and philosophical conflicts of the period, what can be described as "The Fiqh Controversy".⁷²

3. *Usul al Fiqh* is a method of research for the jurist,⁷³ and its place in Fiqh is analogous to that of Logic in Philosophy.⁷⁴ Therefore, it was defined as "the aggregate, considered per se, of legal proofs and evidence that, when studied properly, will lead either to certain knowledge of a Shari'ah ruling or to at least a reasonable assumption concerning the same; the manner by which such proofs are adduced, and the status of the adducer."⁷⁵

So, *Usul al Fiqh* offers comprehensive guidelines which protect the *Mujtahid* from making mistakes in the various ways he uses source material for the purpose of deriving legal judgements.⁷⁶ Nonetheless, it was not used in this way until al Imam al Shafi'i put it to use in his "New" Fiqh.⁷⁷

4. An important fact which should be borne in mind is that scholars studied *Fiqh*, and made pronouncements concerning it, before anyone began to speak of its *Usul* (apart from al imam al Shafi'i in his "New" Fiqh).

Thus, the role given by others to *Usul al Fiqh* was little more than that of justification for legal pronouncements *Fatawa* that

the field of *al Usul*, and the evidence given by the proponents of each, in a brief but excellent fashion. The author also states which of the opinions he prefers. This book, which has been printed several times is a useful one for the student of *Usul al Fiqh* and comparative studies in jurisprudence. However, to the best of our knowledge, it has not been included in the curriculum of any institute, despite its suitability.

Muhammad Siddiq Khan (d 1307) summarized this work in a book entitled *Husul al Ma'mul min 'Ilm al Usul* "The attainment of the Hoped For in the Science of *al Usul*", which is in print.

Indeed, *Irshad al Fuhul* is considered to be an accurate summary of al Zarkashi's *al Bahr al Muhit*; and al Mahallawi's *Tashil al Usul* is considered to be a summary of *Irshad al Fuhul*.

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

1. Writing study guides, summaries and notes. This has been done by the professors at various colleges of Shari'ah and Law in order to make the study of *Usul al Fiqh* easier for their students; after they realized that their students were unable, or unwilling, to study this subject. Certainly, these notes represent no sort of advance in the field; and in most cases they are mere attempts at recasting the issues of *Usul al Fiqh* in a simplified modern idiom. The following scholars, al Marsafi, al Mahallawi, al Khudari, Abd al Wahhab Khallaf, al Shinqiti, al Sayis, Mustafa 'Abd al khaliq, 'Abd al Ghani 'Abd al Khaliq, Abu Zahrah, Abu Nur Zuhayr, Ma'ruf al Dawalibi, 'Abd al Karim al Zaydan, Zaki al Din Sha'ban, Muhammad Sallam Madkur, and others, all wrote books which were originally lectures they had delivered in the colleges of Law and Shari'ah where they taught.
2. The second trend has been the writing of university theses on different aspects of this science, and the researching and editing of unpublished manuscripts. Undoubtedly, both aspects of this trend are of great benefit, and I certainly do not intend to demean the efforts of anyone; but these nonetheless fall short of achieving any sort of development in the field, and the science of *Usul al Fiqh* remains in the same place our predecessors left it in the sixth century AH.

From the above, we may draw the following conclusions:-

1. Nothing of the discipline now known as *Usul al Fiqh* had emerged, with its particular terminology, during the time of the Prophet (PBUH) or his Sahabah.

own times, the two great scholars, Ibn 'Ashur and 'Allal al Fasi have written on the subject of the purposes of the Shari'ah.

Ibn Humam (d 861) wrote *al Tahrir* "The Writing", and his student, Ibn Amir al Hajj (d 879) wrote a commentary on it entitled *al Taqrir wa al Tahbir*. Both are in print. *Al Tahrir* is one of the books written in the combined *Hanafiyah- Mutakallimun* method. There is another commentary, by Amr Badshah, entitled *Taysir al Tahrir* "Facilitating the Writing".

Al Qadi 'Ala' al Din al Mardawi (d 885) wrote a summary of *Usul Ibn Muflih*⁷¹ (d 763) entitled *Tahrir al Manqul wa Tahdhib 'Ilm al Usul*. This work has been researched and edited, and is due to be published soon. The same researcher has also dealt with *Usul Ibn Muflih*.

Later, Ibn al Najjar al Futuhi of the Hanbali school of legal thought wrote a summary of *Tahrir al Mardawi*, and wrote an excellent commentary on it. This commentary is considered to be one of the best and most comprehensive of the later books about *al Usul*. An incomplete version of the book was printed in Egypt before it was researched and edited by two prominent professors, Dr. Nazih Hammad and Dr. Muhammad al Zuhayli. Their work was published by the Center for Academic Research in the College of Shari'ah at Makkah. Most of the book has now been published, and what remains is at the press.

In the twelfth century AH, Muhibb Allah ibn 'Abd al Shakur al Bihari, of the Hanafi school (d 1119 AH) wrote his famous book on *Usul, Musallam al Thubut*. This is one of the most precise and comprehensive books written by the later generation of *Hanafi* scholars. The book has been printed on its own, and with a commentary, in India; and has also been printed, with its famous commentary *Fawatih al Rahamut*, on the margin of al Imam al Ghazzali's *al Mustasfa*, several times.

All of these books were written following the methods mentioned above, and all of them concentrated on supporting their author's *Madhab* and refuting those of his opponents. From the sixth century until the present, there is no book to be found which is concerned with presenting *Usul al Fiqh* as a research tool that will protect the Muslim jurist from making errors in *Ijtihad*; apart from one remark made in passing by al Shaykh Mustafa Abd al Razzaq in his book *Tamhid li al Tarikh al Falsafah al Islamiyah* "Preface to the History of Islamic Philosophy". His student, Dr. Nashshar, tried to explain this remark in his book *Manahij al Bahth* "Methods of Research".

In the thirteenth century AH, al Qadi al Shawkani (d 1255) wrote his well-known book on *Usul, Irshad al Fuhul* "Guidance of the Masters". This book, despite its diminutive volume, presents different opinions in

Usul Al Fiqh Methodology for Research & Knowledge in Islamic Jurisprudence

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IJTIHAD

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

In the eighth century AH, Ibrahim ibn Musa al Shatibi (d 790) wrote *al Muwafaqat* "The Congruences", in which he spoke of Ijtihad in terms of its being an intellectual exercise based on two pillars. The first pillar was complete knowledge of the grammar and syntax of the Arabic language. He left this subject to the scholars of the Arabic language and other writers on *al Usul*. The second pillar of Ijtihad, in al Shatibi's opinion, was knowledge of the purposes behind the legislation of the All-Wise Lawgiver.

Al Shatibi's predecessors in the field of *al Usul* had never paid a great deal of attention to these purposes. Rather, the most they had done in this direction had been to search for principal causes 'Illah. Al Shatibi, on the other hand, wrote his book in order to deal with this important matter. Indeed, knowledge of the purposes *Maqasid* of the Shari'ah is essential to understanding the legislation of the Lawgiver. Yet, the scholars of *al Usul* have never given this book the attention it deserves. This may perhaps be explained by the notion fixed in the minds of many scholars that it is not permitted to seek reasons for legislation by the Almighty, for the reason that such speculation cannot be regulated or rendered precise.⁷⁰ When this is the case, or so goes the reasoning of a great many scholars, the study of such matters is little more than a needless intellectual luxury.

Anyway, al Shatibi's book is in print and widely available; and we can only hope that teachers of *al Usul* and those responsible for drawing up curricula will direct their students' attention to this important work; especially those who are studying *Qiyas al Fiqh* and Ijtihad. In our