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Usul al-Fiqh and *Ijtihad* in Shi'ism

A discourse on Islamic reformation requires a detailed and nuanced discussion of *ijtihad*. This is because the latter is an essential interpretive tool that jurists use in the derivation of legal injunctions. A discussion on *ijtihad* is also important because jurists invoke the principles anchored in Islamic legal theory (*usul al-fiqh*) in their exegetical analysis as to what constitutes the intention of the Lawgiver. This chapter explores the origins and subsequent development of both *ijtihad* and *usul al-fiqh* in Shi'ism and then explains the principles that jurists employ in extrapolating legal prescriptions. It also examines the multitudinous tools that a jurist has recourse to before enunciating a ruling on a particular subject.

Muhammad Baqir al-Sadr defines *usul al-fiqh* as "a study of the general principles [established] for the inference of a juridical ruling" (*al-'ilm bi-l'anasir al-mushtarika fi 'amaliyya istinbat al-hukm al-shari'*).[1] This discipline posits general principles through which a jurist can decipher or deduce laws from the normative sources.[2] Besides propounding principles for extrapolating laws from the revelatory sources, *usul al-fiqh* also furnishes the methodology and devices a jurist needs to infer laws on issues that are not explicitly mentioned in these sources.[3]

It should be also noted that whereas *usul al-fiqh* postulates general principles for the derivation of the law, substantive law (*fiqh*) applies those principles to

[1] Muhammad Baqir al-Sadr, *Durus fi 'Ilm al-Usul* (Beirut: Dar al-Kitab al-Lubnani, 1978), 1/38–39.

[2] The view that actual law is logically derived from principles established in Islamic legal theory has been contested by many scholars. Scholars have argued that the law actually unfolds in the midst of the needs of the community. Mohammed Fadel, for example, maintains that, in many cases, the actual impact of *usul al-fiqh* on the working out of the law was quite minimal. Sherman Jackson calls the dictum that Islamic legal theory is the exclusive determinant of the content of Islamic law a fiction. See Mohammed Fadel, "'*Istihsan* is Nine-Tenths of the Law': The Puzzling Relationship of *Usul* to *Furu'* in the Maliki *Madhhab*," in Bernard Weiss, ed., *Studies in Islamic Legal Theory* (Leiden: Brill, 2002), 161–76; Sherman Jackson, "Fiction and Formalism: Toward a Functional Analysis of *Usul al-Fiqh*," in Weiss, ed., *Studies in Islamic*. Behnam Sadeghi also argues that laws are the starting point, not the end result for Hanafi jurists. See Behnam Sadeghi, *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition* (New York: Cambridge University Press, 2015), xii.

[3] Norman Calder has aptly termed it a methodology whereby the *fuqaha*' related revelation to prescription. Norman Calder, "The Structure of Authority in Imami Shi'i Jurisprudence," PhD thesis (London: School of Oriental and African Studies, 1979), 173. Various other definitions are given for this discipline, See for example Muzaffar's definition in Muzaffar, *Usul al-Fiqh*, 1/9; Ja'far b. al-Hasan al-Hilli (Muhaqqiq), *Ma'arij al-Usul* (Qum: Sayyid al-Shuhada', 1983), 47. For a definition of *usul al-fiqh*, see also Mahdi 'Ali Pour, who mentions several definitions of *'ilm al-usul*. Mahdi 'Ali Pour, *al-Madkhal Ila Ta'rikh 'Ilm al-Usul* (Qum: Markaz al-Mustafa, 2011), 54–55. See Tusi's definition in Muhammad b. al-Hasan Tusi, *'Udda al-Usul*, 2 vols. (Qum: Sitare, 1995), 1/7.

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particular cases. Stated differently, *usul al-fiqh* sets forth guiding principles for the interpretation of revelation and its translation into prescription. Manuals on *usul al-fiqh* contain chapters discussing various subjects like linguistic signification (*dalalat al-alfaz*), commands (*awamir*), and interdictions (*nawahi*). Other sections in the texts of legal theory comprise discussions on injunctions that are general (*ʿamm*) or restricted (*khass*) in their application and those which are qualified (*muqayyad*) or unqualified (*mutlaq*) in their signification.[4] *Usul al-fiqh* also seeks to determine issues like how a word that appears in a text will be construed and the possible meaning/s it will connote.

Various genres of principles animate a jurist in engaging the legal issues that confront him. For example, when faced with conflicting traditions on a particular topic, a jurist must attempt to harmonize the contents of the traditions before examining their *isnad* (chain of transmission). The jurist would first invoke the Usuli principle of *al-jamʿ al-ʿurfi* to construe a commandment stated in a tradition as referring to preference rather than to a requirement to perform an act. Thus, for example, the normal denotation of a command when used in a sentence is that of incumbency. However, when a tradition that explicitly commands an act to be performed is countered with another tradition that states its opposite, a *mujtahid* can construe the directive to imply a strong preference for performing the act so as to reconcile the contents of the two opposing traditions.[5]

The same principle applies to interpreting verses in the Qur'an. Some imperatives cited in the Qur'an are seen as indicating an obligation to perform an act (e.g., 2:43) whereas others (24:33) designate a mere preference. Verse 5:2, "When you have left the sacred territory, then go hunting," is interpreted by jurists to mean that hunting outside the Kaʿba is an indifferent (*mubah*) act. Thus, depending on the context, scholars of Islamic legal theory have argued that the imperative form in a *hadith* may indicate an obligation, recommendation, or indifference.[6] It is because of such variances and disparate interpretations that some traditions command the performance of an act and yet other traditions indicate that the same act does not have to be undertaken.[7]

Another principle that is outlined and scrutinized extensively in *usul al-fiqh* is the probativity (*hujjiyya*) of a single narrator (*khabar al-wahid*). Most juridical rulings (*ahkam*) are derived from traditions reported from the Prophet and Imams. Since most *ahadith* (traditions) are narrated by isolated reports (*khabar al-wahid*) and there can be many contradictory reports on an issue, *usul al-fiqh*

[4] Calder, "The Structure of Authority in Imami Shiʿi Jurisprudence," 175.

[5] For examples of how this principle is used in the case of offering shortened prayers, see Liyakat Takim, "Offering Complete or Shortened Prayers? The Traveler's *Salat* at the Holy Places," *The Muslim World* 96, no. 3 (2006): 401–22.

[6] See for further details, see Wael Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1999), 48–49.

[7] Fayd, *Vizhegiha-yi Ijtihad*, 411.

poses questions such as, How does a *faqih* decide which tradition to accept in issuing a *fatwa*? Is he permitted to accept a *hadith* that has been transmitted by a single narrator? What do the contents in the traditions actually connote?

Another principle employed in this field is that of the "primacy of the apparent meaning." This is also called the probativity (*hujjiyya*) of the prima facie (*zuhur*) understanding of common usage. Basically, this principle considers whether a jurist can be confident that the apparent meaning that a word conveys is binding (*hujjiyya zuhur al-lafz*) or not. Does a word that is used in a *hadith* signify its apparent meaning? The principle of *hujjiyya zuhur al-lafz* states that unless indicated otherwise, the apparent connotation of a word is to be construed as the intended meaning and is therefore binding. In the absence of any contextual indicators, the first meaning that occurs in a person's mind when s/he hears it is assumed to be the closest to the linguistic or literal indication of the expression.

In assessing the intended meaning of a word or phrase, Muslim legists also assume that authors of a text are cognizant of the original meanings of words, the linguistic conventions of their language, and how words that are uttered or transmitted will be understood by the populace for which the message is intended. Jurists also assume that unless there is evidence to suggest otherwise, a speaker usually intends the normal or literal sense of the words s/he uses. For example, an indicator (*qarina*) may indicate that the speaker is using a specific word in a nonliteral sense. Under such circumstances, a listener would be justified in interpreting that word in a different manner.[8]

In demonstrating some of the principles delineated in *usul al-fiqh* and how they can be deployed to extract a *hukm* (sing. of *ahkam*) Muhammad Baqir al-Sadr quotes the *fatawa* given on three separate issues. These pertain to whether immersing oneself in water invalidates a fast, whether it is obligatory to pay the *khums* tax for one who inherits property from his father, and whether a prayer is invalidated by a person laughing out loudly while s/he is praying. In considering whether a fast is invalidated by submerging one's head in water al-Sadr states that a jurist would initially consult a *hadith* transmitted by Yaʿqub b. Shuʿayb, a companion of Jaʿfar al-Sadiq. The tradition states that a fast is invalidated by immersing the head in water. Before delivering a definitive verdict on this, a *faqih* would have to ensure that all the narrators appearing in the transmission of the tradition have been authenticated and deemed credible in the biographical works (*Kutub al-Rijal*). Biographical profiles (*tarajim*) would testify to their moral probity and reliability in transmitting traditions.

[8] Muhammad Baqir al-Sadr, *Lessons from Islamic Jurisprudence*, trans. Roy Mottahedeh (Oxford: Oneworld, 2005), 92–95. Also *Maʿalim al-Jadida li'l-Usul* (Beirut: Dar al-Maʿarif, 1989), 15–16. For an illustration as to how the interpretive process works, see Weiss, *The Spirit of Islamic Law*, 101.

Usul al-fiqh would also provide proofs to vindicate the acceptance of isolated traditions (*khabar al-wahid*) as having been approved by the Lawgiver. Moreover, *usul al-fiqh* would also clarify that the apparent meaning conveyed by the tradition, "one who fasts cannot submerge himself in water" is clear to the listener and authoritatively binding. The principles embedded in *usul al-fiqh* would further state that the denotation (*mafhum*) of the word *La* (a term used to indicate proscription) alludes to an interdiction from performing an act rather than preferred aversion (*kiraha*). Having sifted through and applied all the principles and proofs cited in the Usuli sources, the jurist will conclude that it is prohibited to submerge one's head in water when fasting.[9]

Usul al-Fiqh and Nontextual Sources

Islamic jurisprudence is much more than a series of ritual acts. It is a combination of a moral code of conduct that covers a wide array of activities ranging from the economic, political, cultural, religious, to the personal and social.[10] A necessary part of any legal system, including Islamic law, is the formulation of laws that respond to novel circumstances and changing societal needs. It is necessary, therefore, to explore the concepts and nuanced discourse that undergird Islamic legal theory so as to comprehend the tools and methodologies that Muslim jurists use in discovering moral-legal injunctions. To be sure, jurists have to link the principles enunciated in *usul al-fiqh* to real-time issues so as to deduce correct and binding edicts.

Shiʿi *usul al-fiqh* manuals are divided into two sections. The first segment expounds the methods of rendering juristic judgments from the authoritative sources of law, namely, the Qur'an, *sunna*, consensus (*ijma'*), and reason (*'aql*). Every part of *usul al-fiqh* is further subdivided into subsections. The domain of semantic discussions, for example, explores the possible connotations of a commandment (*amr*) and prohibition (*nahy*) of words that appear in the texts. As explained before, Usulis discuss, for example, whether a command in a text conveys an obligation, recommendation, or mere permission to perform an act, and whether an interdiction indicates that an act must not be performed or whether it refers to mere disapproval (*makruh*) of the act.[11]

This section also investigates and expounds the wide array of terms that appear in legal texts. Words are divided into various categories ranging from

[9] Baqir al-Sadr, *Durus fi 'ilm al-usul*, 1/38–40. Baqir al-Sadr, *Lessons*, 37–38.

[10] Zackery Heern, *The Emergence of Modern Shiʿism: Islamic Reform in Iraq and Iran* (London: Oneworld, 2015), 44.

[11] For details of these, see Hossein Modarressi, *An Introduction to Shiʿi Law: A Bibliographical Study* (London: Ithaca Press, 1984), 10.

perspicuous and unclear (*zahir* and *mubham*), ambiguous and explicit (*mujmal* and *mubayyan*), general and restricted (*ʿamm* and *khass*), to absolute and restricted (*mutlaq* and *muqayyad*).[12] The second segment of *usul al-fiqh* expounds the interpretive rational devices that a jurist can use when the revealed sources are either ambivalent or reticent on an issue. This section focuses on the premises and the scope of four general procedural principles (*al-usul al-ʿamaliyya*): the principles of exemption (*baraʾa*), continuity (*istishab*), precaution (*ihtiyat*), and choice (*takhyir*). As will be explained later in this chapter, these four principles have assumed great importance in modern Shiʿi juristic discourse. Especially since the time of Murtada al-Ansari (d. 1864), considerable scholarly effort has been expended on elaborating the methods and modes of their application.

A central question for any assessment of *ijtihad* concerns the nontextual sources that a *mujtahid* has at his disposal. More specifically, in conjunction with the Qur'an and *hadith*, on what sources should new prescriptions be based? Can a jurist use rational constructs outside the revealed texts? This question is one of the main distinguishing features between the Sunni and Shiʿi legal schools. Sunni jurists concur that consensus (*ijmaʿ*) and analogy (*qiyas*) are legitimate sources to be used in addition to the Qur'an and *hadith*. They also accept principles like *istihsan* (juristic preference based on what is most appropriate under the circumstances), *maslaha* (a ruling that is conducive to the public welfare), and other tools in the derivation of legal injunctions. Scholars of the Usuli school of thought (which has been the dominant school in Twelver Shiʿism since the eighteenth century), on the other hand, reject *qiyas* as a source from which the law can be derived. Instead, they maintain that consensus (*ijmaʿ*) and reason (*ʿaql*) constitute the third and fourth sources, respectively.

Besides the two sections mentioned, Usuli texts also contain a chapter on the contrariety between the textual sources and methods for resolving the contradictions between them. Most treatises also insert a discussion of the qualifications and stipulations of a jurist who issues legal verdicts as a result of his intellectual endeavors (*ijtihad*) and the conditions required of a jurist whose legal decisions are binding and must be followed by the masses.[13]

Ijtihad during the Times of the Imams

Having examined the definition, contents, and some of the principles that undergird *usul al-fiqh*, I now explore its genesis and subsequent development in Shiʿi intellectual history. Since *usul al-fiqh* and *ijtihad* are deeply interlaced, an

[12] Ibid.
[13] Ibid., 10–11.

analysis of the history and evolution of Shiʿi legal theory requires an examination of the various forces that led to the development of *ijtihad* and the interpretive tradition in Shiʿism.

After the Prophet Muhammad passed away, the need to deploy rational tools in deriving legal norms was sensed by the majority of the Muslims. This was because the Prophet's death had signaled the termination of authoritative guidance in the form of textual sources (the Qur'an and Prophetic practices). Henceforth, Muslims could only approximate God's will by devising and applying various tools like *qiyas*, *ijtihad*, *ra'y* (personal reasoning), and *istihsan* when a particular solution to a legal problem could not be extracted from the revelatory sources.

The Shiʿis, on the other hand, rejected *ijtihad* as a methodological tool during the physical presence of the Imams (up to 874 CE), since their presence obviated the need to resort to independent reasoning. For the Shiʿis, reasoning is not able to arrive at conclusions that are based on certitude because it is considered to be faulty and fallible. Statements and acts of the Imams are considered to be as binding as those of the Prophet himself, and hence as part of the *sunna*. This was because the Imams are considered to be infallible interpreters and expositors of the Divine message. Significantly, due to their aversion to personal reasoning, terms like *ijtihad* and *mujtahid* were not used by the Imams. The Imams were neither called *mujtahids* nor did they use the appellation to refer to any of their companions.[14]

It should be remembered that, during this period, the term *ijtihad* was often used to refer to the personal judgment (*ra'y*) of a scholar. Due to this factor, *ijtihad* was perceived pejoratively by the Shiʿis. They repudiated *ijtihad*, as it could only lead to an opinion that was based on probability rather than certitude. This may explain why tenth-century Shiʿi scholars like the Nawbakhtis and ʿAbd al-Rahman al-Zubayri composed treatises condemning the use of *ijtihad*.[15]

Despite the denunciation of *ijtihad* and *ra'y* among Shiʿi circles, a number of the close associates of the Imams like Muhammad b. Muslim (d. 767) and Hisham b. al-Hakam (d. 807) applied personal reasoning and their understanding of the Imams' teachings when preaching to the Shiʿi community. On many occasions, the Imams reproached and even cursed these disciples for deviating from their teachings.[16] The usage of independent reasoning by the Imams' associates can be further adduced from reports that some of them issued juridical opinions based

[14] Liyakat Takim, "A Brief History of *Ijtihad* in Twelver Shiʿism," in Mohsen Eslami, ed., *Shia Tradition and Iran: Contemporary Global Perspectives* (New York: Global Scholarly Publications 2013), 82.

[15] Ahmad b. ʿAli al-Najashi, *Kitab al-Rijal* (Qum: Maktaba al-Dawari, 1976), 152–53; Modarressi, *An Introduction*, 30.

[16] Takim, *The Heirs of the Prophet*, 94–106. Also Muhammad b. ʿUmar Kashshi, *Ikhtiyar Ma'rifa al-Rijal*, ed. al-Mustafawi (Mashhad: Danishgahi Mashhad, 1969).

on their personal interpretation of the Imams' teachings. The following anecdote exemplifies this:

Muʿidh b. Muslim said:

> Al-Imam al-Sadiq said to me, "I understand that when you are in the mosque you issue *fatawa*." I said, "Yes, I do that." I then said to him, "I would like to ask you something before I depart: When I sit in the mosque, someone often asks me something. If I am aware that he is against you and [yet] acts based on your edicts, I cite a legal opinion that is in accordance with his school. However, if I realize that he is among your companions, I issue a ruling based on your school. But if I am not sure which group he belongs to I give him various *fatawa* and insert your edict among them." The Imam responded, "Continue along the same lines because this accords with my method."[17]

Shiʿi scholars of the Buyid period (945–1055) freely admitted that some disciples of the Imams had resorted to independent reasoning and *qiyas* in arriving at legal decisions. Al-Sharif al-Murtada says companions of the Imams like Yunus b. ʿAbd al-Rahman (d. 823) and Fadl b. Shadhan (d. 873–4) had issued judgments based on *qiyas*.[18] The prominent disciple of the tenth and eleventh Imams Fadl b. Shadhan, had allegedly depended on *ra'y* in arriving at decisions on matters relating to divorce and inheritance.[19] He is also accused of deploying *qiyas* in resolving legal issues, a point that is highlighted by the famous jurist al-Saduq.[20]

Many guidelines regarding the proper procedures for deriving laws from the revealed sources were prescribed by the Imams themselves. In fact, traditions state that the Imams instructed their disciples on how to derive laws based on the procedures and principles they taught them. For example, Shiʿi sources claim that the Imams Jaʿfar al-Sadiq and ʿAli al-Rida (d. 818) said, "It is our duty to set forth and explain the major principles (*usul*) to you, and it is up to you to deduce the rulings [from them]."[21] Several traditions indicate that the Imams had also taught some of their prominent companions certain Usuli principles. According to a tradition reported from Zurara b. Aʿyan:

[17] Al-Hurr al-ʿAmili, *Wasa'il al-Shi'a*, vol. 18, hadith # 37.

[18] Cited in Muhammad al-Mahdi Bahr al-ʿUlum, *al-Fawa'id al-Rijaliyya* (Najaf: 1965), 3/215 (quoting from an unpublished text of al-Murtada's *Risala*).

[19] Bahr al-ʿUlum, *Fawa'id*, 3/215–19. Modarressi, *Introduction*, 30.

[20] Al-Saduq, *Man La Yahduruhu'l-Faqih* (Qum: Imam al-Mahdi, 1983), 4/197. See Takim, *The Heirs of the Prophet*, chapter 3, for a more extensive discussion on this.

[21] Muhammad b. Ahmad b. Idris, *Mustatrafat al-Sara'ir* (Qum: Madrasa al-Imam al-Mahdi, 1987), 575. See a similar tradition from the eighth Imam ʿAli al-Rida cited in al-Hurr al-ʿAmili, *Wasa'il al-Shi'a*, 27/42.

> I said to Abu Jaʿfar (al-Baqir), "May I be sacrificed for you, when two conflicting *hadith* are transmitted which one of them should we accept?" He replied, "Accept that which is accepted by your companions and reject the unfamiliar tradition." I [then] said, "What shall we do if both of them are well-known (*mashhur*)?" He said, "[in that case] accept that which appears more upright (*aʿdal*) and trustworthy (*awthaq*)." I then said, "What do we do if both are upright and trustworthy?" The Imam said, "See which of them agrees with the opinions of the *ʿamma* (i.e., Sunnis). Abandon that view and take the [one that] contradicts what the *ʿamma* accept, for the truth lies in what is opposed to their view." I said, "At times we are confronted with two traditions that agree with the *ʿamma* or both oppose their views; what should we do in such cases?" The Imam said, "Choose that *hadith* which is closer to caution (*ihtiyat*) and disregard the other one." I said, "What shall we do if both traditions accord with [the principle of] caution or if both oppose it?" He then responded, "In that case, choose any one of them and abandon the other one."[22]

Whether factual or contrived, the tradition demonstrates that some principles of legal theory were expounded by the Imams and that these were often invoked by their disciples to arrive at legal decisions. Other traditions indicate that the Imams—especially Jaʿfar al-Sadiq—were questioned about the principles and rules (*qawaʾid*) for deducing and formulating laws. In response, the Imams adumbrated some of the principles behind the laws. The principle of *baraʾa* (exemption of duty—to be examined later), for example, is reported in many traditions from the Imams.[23]

In addition, the Imams reportedly provided instructions on how to formulate laws when there are no guidelines outlined in the revealed sources. Such instructions were used by subsequent jurists in the development of *usul al-fiqh*. Shiʿi scholars also cite as evidence some tracts that were reportedly composed by their disciples. In particular, they claim that Hisham b. al-Hakam, a disciple of the sixth and seventh Imams, had composed a book on linguistics and that the aforementioned Yunus b. ʿAbd al-Rahman had reportedly written a short treatise on *usul al-fiqh*.[24] Further illustrations of debates on *usul al-fiqh* among the Shiʿis during this period are demonstrated

[22] Muhammad b. ʿAli (Ibn Abi Jumhur), *ʿAwali al-laʾali al-ʿAziziyah fi al-Ahadith al-Diniyya*, 4 vols. (Beirut: Matbaʿa Sayyid al-Shuhada, 1983), 4/133.

[23] ʿAli al-Fadil al-Najafi, *ʿIlm al-Usul: Taʾrikhan wa-Tattawuran* (Qum: Matbaʿa Maktab al-Iʿlam al-Islami, 1997), 35–37. Explicating this principle, al-Sadiq is reported to have stated that everything is permitted unless you are certain that it has been prohibited. al-Najafi, *ʿIlm al-Usul*, 38. For a discussion of other principles ibid., 39.

[24] Al-Hasan al-Sadr, *Taʾsis al-Shiʿa* (Tehran: Manshurat al-Aʿlami, n.d.), 310–11; also Adnan Farhan, *Haraka al-Ijtihad ʿInd al-Shiʿa al-Imamiyya* (Beirut: Dar al-Hadi, 2004), 238–42.

by a report that Darim b. Qabisa, a companion of al-Rida, had reportedly compiled a book on the abrogating (*nasikh*) and abrogated (*mansukh*) verses of the Qur'an.[25]

Even if these claims are accepted, there is no evidence to indicate that systematic or well-defined principles of *usul al-fiqh* were formulated or articulated by the companions of the Imams. While traditions definitely state that the Imams had taught their disciples some principles that were applied by later scholars of *usul al-fiqh*, there is no proof to indicate that a full-fledged or properly articulated system of this discipline had been worked out during their times. Since the disciples of the Imams questioned them on issues pertaining to jurisprudence, the Imams explicated some principles which they could use in deducing legal opinions. The Imams, for example, are reported to have taught the disciples how to resolve conflicting traditions or what conclusions to reach in the absence of any revelatory proof.

A close review of Shiʿi biographical and juridical texts indicates that treatises regarding topics discussed in *usul al-fiqh* manuals were composed soon after the short *ghayba* period (874–940) began. Ibn al-Nadim (d. 990) recorded two treatises written by Abu Sahl al-Nawbakhti (d. 924) which suggests that the topic of *usul al-fiqh* was already addressed, if not practiced, by the Shiʿis of that era. The first treatise was a refutation of Muhammad b. Idris al-Shafiʿi's (d. 820) *Risala*. The second work discusses the general or specific principles in *usul al-fiqh*.[26]

Abu Sahl's nephew, the famous heresiographer, Hasan b. Musa al-Nawbakhti (d. 912–921), is also reported to have written two treatises on the specific and general rules and the validity of using isolated traditions.[27] According to Ibn al-Nadim, Abu Sahl also wrote on other Usuli principles like the invalidity of *qiyas*, and a refutation of the *ijtihad* of Ibn Rawandi.[28] According to Devin Stewart, Shiʿi texts on *usul al-fiqh* may have been composed in the early Buyid period, although they are no longer extant. More specifically, he believes that ʿAli b. al-Husayn b. ʿAli al-Masʿudi (d. 956), the famous historian, may have written a tract on the subject.[29]

[25] ʿAli Pour, *al-Madkhal Ila Ta'rikh*, 85.

[26] Muhammad b. Ishaq ibn al-Nadim, *Kitab al-Fihrist*, trans. Bayard Dodge. 2 vols. (New York: Columbia University Press, 1970), 1/440.

[27] Najashi, *Kitab al-Rijal*, 24. Abu'l-Qasim al-Khu'i, *Muʿjam Rijal al-Hadith*, 23 vols. (Beirut: Dar al-Zahra, 1983), 5/142. Ahmad Kazemi Moussavi, *Religious Authority in Shiʿite Islam: From the Office of Mufti to the Institution of Marjaʿ* (Kuala Lumpur: ISTAC, 1996), 76–77.

[28] Al-Najafi, *ʿIlm al-Usul*, 73.

[29] Devin J. Stewart, *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System* (Salt Lake City: University of Utah Press, 1998), 137–39.

Ijtihad during the Major Occultation of the Twelfth Imam

During the minor occultation, Shiʿi scholars continued the trend of citing traditions in expounding legal precepts. This was, in all probability, because of the presence of many texts that included the four hundred *usul* works (*al-usul al-arbaʿu mi'a*) that had been compiled by the Imams' associates.[30] At this time, the process of extrapolation of legal prescriptions was not imbibed with the complex and obfuscating principles of Islamic legal theory. This was because Shiʿi scholars like Muhammad b. Yaʿqub al-Kulayni (d. 941) and al-Saduq were engaged primarily in amassing and recording traditions from the Imams.

The penchant for collecting and recording traditions and issuing legal decrees based on *hadith* reports was a salient trait of the scholars in Qum like al-Saduq, a feature that continued until the tenth century. To further vindicate their practice, the scholars cited traditions from the Imams that denounced Sunni interpretive tools like those of analogical deduction (*qiyas*) and independent reasoning (*ijtihad*). The negative stance toward Sunni legal practices was premised on the view that *ijtihad* was a deductive process based on personal conjecture[31] and therefore had no legal basis in the *shariʿa*. Due to this, the term *ijtihad* was used in a disparaging way by the Shiʿis until the thirteenth century. The denunciation of *ijtihad* during this period also indicates that Shiʿi jurists wanted to construct a legal edifice that was devoid of any doubt or uncertainty.

With the passage of time, Shiʿi *fuqaha'* sensed the need to respond to newer issues and novel circumstances that emerged during the post-*ghayba* period. They also realized that, in their deliberations, they had to go beyond the narrow confines of citing and extrapolating laws from the Imams' traditions. The first Shiʿi jurist who is reported to have used *ijtihad*, albeit in a rudimentary form, was Abu Muhammad al-Hasan b. 'Aqil al-Hadhdha', also known as Ibn Abi 'Aqil (fl. 9th CE). His book titled *al-Mutamassik bi habl-i Al al-Rasul* is mentioned by the Shiʿi biographer al-Najashi (d. 1058–9) as one of the most acclaimed texts on the subject. In this work, Ibn Abi 'Aqil considers and critiques some of the principles employed in rendering juridical proclamations. Although Ibn Abi 'Aqil's work is no longer extant, Ayatullah Ibrahim Jannati (b. 1933), a contemporary Iranian Shiʿi scholar, stresses that Ibn Abi 'Aqil mentions some of the hermeneutical strategies of *usul al-fiqh* that were developed and elaborated on by subsequent jurists.[32] Prior to Ibn Abi 'Aqil's time, Shiʿi jurisprudence took the form of narrating and interpreting traditions. There was little, if any, rational element

[30] An *asl* is a notebook that comprises traditions heard directly from the Imams. See Takim, *The Heirs*, 122; Takim, "A Brief History of *Ijtihad* in Twelver Shiʿism," 84–85.

[31] The term "conjecture" is used to refer to a conclusion reached by surmising or one that is based on probability.

[32] Jannati, *Tatawwur Ijtihad dar Hawze-ye*, 1/227.

involved, especially as very few derivative principles had been formed by this period.[33]

Another important Shiʿi scholar was Muhammad b. Ahmad al-Katib al-Iskafi (d. 991), also known as Ibn Junayd. He elaborated and expounded the principles of *ijtihad* in several works on jurisprudence. The most significant of these are *Tahdhib al-Shiʿa li-Ahkam al-Shariʿa* and *al-Mukhtasar al-Ahmadi li al-fiqh al-e Muhammadi*. He also composed a treatise on *usul al-fiqh* titled *Kitab al-Ifham li-Usul al-Ahkam*. Scholars who read this work, like Abu Jaʿfar b. Maʿd al-Musawi, remark that they had not seen a more articulate or well-researched juridical tract than Ibn Junayd's work.[34]

Due to their predilection for speculative analysis and rational arguments, both Ibn Abi ʿAqil and Ibn Junayd were pioneers in Shiʿi deductive law. Although they resorted to reasoning in inferring legal precepts, their approach was quite different. Generally speaking, Ibn Abi ʿAqil depended mainly on the Qur'an and *mutawatir* (widely transmitted) *hadith*. This is because he did not accept isolated traditions as reliable sources for legal practices. Ibn Junayd's approach was quite different in that he was more inclined to deploy reason (*ʿaql*) and to explore the rationale behind the precepts of the *ahkam*. He disagreed with Ibn ʿAqil in that he considered *khabar al-wahid* (isolated tradition) to be a legitimate source of law.[35] Both Ibn Abi ʿAqil and Ibn Junayd were excoriated and marginalized by the Buyid scholars, al-Mufid, al-Murtada, and Tusi.

Although Ibn Abi ʿAqil's works were appreciated by many, his juridical opinions were not circulated or quoted until the time of the scholars of Hilla in the thirteenth and fourteenth centuries.[36] Ibn Junayd, on the other hand, was widely condemned by Shiʿi scholars for employing *qiyas* and *ijtihad* in his legal opinions. For example, al-Mufid criticizes him for his dependence on *qiyas* and *raʾy*,[37] and al-Murtada attacks Ibn al-Junayd for his reliance on rare traditions (*akhbar shadhdha*), speculations, and the usage of *ijtihad* and personal opinion.[38] Such stratagems had introduced elements of uncertainty and speculation in Shiʿi jurisprudence. It has to be remembered that these were precisely the charges that the Shiʿis had leveled at the Sunnis.

It was the scholars of Hilla, starting with Ibn Idris al-Hilli (d. 1202), who quoted and lauded the works of both Ibn ʿAqil and Ibn Junayd. In fact, both

[33] Ibid., 1/228.

[34] https://www.al-islam.org/al-tawhid/general-al-tawhid/ijtihad-its-meaning-sources-beginnings-and-practice-ray-muhammad-ibrah-4.

[35] Takim, "A Brief History of *Ijtihad* in Twelver Shiʿism," 85.

[36] Ali Rizek, "Scholars of Hilla and the Early Imami Legal Tradition: Ibn Abi ʿAqil and Ibn al-Junayd, 'The Two Ancient Scholars,'" in Sebastian Günther, ed., *Knowledge and Education in Classical Islam: Religious Learning between Continuity and Change*, 2 vols. (Leiden: Brill, 2020), 799–800.

[37] Al-Mufid, *al-Masaʾil al-Sarawiyya* (Qum: n.p. 1992), 58–59.

[38] Rizek, "Scholars of Hilla and the Early Imami Legal Tradition," 801–804.

Muhaqqiq and ʿAllama al-Hilli copiously quote and refer to them in their works. The disparaging remarks of the Buyid scholars were replaced by more laudatory and positive comments by the jurists of Hilla.[39] It is possible that one of the reasons for this change in attitude was that this period witnessed an epistemological transition whereby the scholars of Hilla had to accept some form of speculation and conjecture rather than insisting on complete certitude in the derivation of religious ordinances. By accepting *ijtihad* and *qiyas* as legitimate principles in *usul al-fiqh* Ibn al-Junayd had relinquished a key strategy in Shiʿi polemics against the Sunnis, namely basing their jurisprudence on certitude rather than conjecture. Paradoxically and perhaps unintentionally, Ibn Junayd's methodology brought Shiʿi jurisprudence closer to its Sunni counterparts.

Later scholars claimed that Ibn Junayd had regretted his use of *qiyas* and abnegated it. Others tried to reinterpret and recast his methodological approach. The contemporary jurist Ayatullah al-Sistani for example, maintains that accusations of deploying *qiyas* leveled against Ibn Junayd and other Shiʿi scholars are misplaced because the term *qiyas* was used in a different and wider connotation at that time. *Qiyas*, according to al-Sistani, was also used to denote consistency with the spirit of the text (*al-muwafaqa al-ruhiyya*) rather than referring to analogy, as is popularly assumed.[40]

Shiʿi *Usul al-Fiqh* Works in the Buyid Era

The earliest extant Shiʿi works on *usul al-fiqh* can be traced to the Buyid period. More specifically, the three most important scholars during this period, Shaykh al-Mufid, al-Sharif al-Murtada, and Shaykh Tusi all composed works in this field. Al-Mufid's work on the subject titled *Tadhkira fi Usul al-Fiqh* provides a critique and further elaboration on the *usul* methodology that had been established by both Ibn Abi ʿAqil and Ibn al-Junayd. His extant *usul* work is an abridgment of his original work by al-Karajiki (d. 1057), the author of *Kanz al-Fawa'id*. Al-Karajaki states that he has reproduced only the salient features of al-Mufid's book.[41] A perusal of the abridged text in *Kanz al-Fawa'id* indicates that al-Mufid accepts isolated traditions (*khabar al-wahid*) only if they are accompanied with indicators. In addition, he rejects *qiyas* and *ijtihad* because they were founded on *ra'y*.[42] Al-Mufid's legal methodology can also be discerned from his major work

[39] Of the two, Ibn Abi ʿAqil was more praised and appreciated. Ibn Junayd's views were quoted especially by ʿAllama, but there were few positive evaluations concerning him. Ibid., 809. al-Subhani, *Ta'rikh al-Fiqh al-Islami*, 238–9.

[40] See his arguments in ʿAli al-Husayni al-Sistani, *al-Rafid fi 'ilm al-Usul* (Qum: Mahr, 1993), 11.

[41] For the contents of al-Mufid's *usul* work, see ʿAli Pour, *al-Madkhal Ila Ta'rikh*, 98.

[42] Ibid., 99.

on Shiʿi jurisprudence, *al-Muqnia*. Here, he adopts a middle ground between traditionalists, whom he denounces as being parochial, and the rationalists for their dependence on *qiyas* and *ijtihad*.

Al-Sharif al-Murtada wrote numerous texts on *usul al-fiqh*, the most famous being *al-Dhariʿa ila Usul al-Shariʿa*. In assessing the significance of al-Murtada's text, it should be noted that during his time, *usul al-fiqh* was not considered an independent discipline. *Usul al-fiqh* discourse was often included in the same works as *ʿilm al-fiqh* or *kalam* (theology). Topics such as the attributes of God or evidence to prove the belief in the hereafter with isolated traditions were deliberated along the same vein as the principles of the deduction of juridical prescriptions. The evolution in and elucidation of the principles of *usul al-fiqh* took place gradually as Shiʿi *fiqh* expanded.

Although neither Tusi nor his book are directly mentioned in *al-Dhariʿa*, al-Murtada condemns Tusi's work on *usul* because it included topics that were quite irrelevant to *usul al-fiqh*. More specifically, al-Murtada is critical of Tusi's insertion of the definition of necessary and acquired knowledge, how speculation can produce certitude, the question of causality, the status of the Qur'an and prophetic *hadith* as scripture, and other subjects included in Tusi's introduction to his work.[43]

In his criticism of *ʿUdda al-Usul*, al-Murtada states,

> I am aware of someone who has written on *usul al-fiqh* and its principles. However, he has exceeded its parameters. Although he was correct in presenting its principles and forms, he has gone beyond [the subject of] *usul al-fiqh* and its methods and boundaries.[44]

Rather than restricting themselves to narrating traditions, Shiʿi jurists gradually sensed the need to develop new principles of deriving laws from the *hadith* literature. This need was augmented by the fact that traditions from the Imams to resolve new issues were either unavailable or irrelevant.

Tusi's *ʿUdda al-Usul*

Tusi's seminal work on *usul al-fiqh*, titled *ʿUdda al-Usul*, expands on the works of previous scholars like al-Mufid, whose tract is both shorter and less detailed. In the introduction to *ʿUdda*, Tusi indicates that some of al-Mufid's statements

[43] ʿAli b. al-Husayn al-Murtada, *al-Dhariʿa ila Usul al-Shariʿa* (Tehran: Daneshghah Tehran, 1983), 2nd ed., 2 vols., 1/1–4.
[44] Ibid.

needed to be rectified and that al-Murtada had yet to compose a comprehensive work on *usul al-fiqh*, although he had taught the subject for some time.[45]

He writes in the preamble to *al-ʿUdda*:

> You (may Allah grant you strength) have requested me to write a concise book on *usul al-fiqh* that covers the [main] chapters based on our [legal] school and principles. Those who have [previously] written on this question have done so based on their foundations (*usul*). None of our companions has authored [a treatise] on the topic except Shaykh Abu Abdullah [al-Mufid] in *al-Mukhtasar*.[46]

In all probability, al-Murtada's *al-Dhariʿa* was not completed when Tusi composed his work, since the latter does not refer to it. However, Tusi quotes passages from *al-Dhariʿa*, at times, almost verbatim.[47] His chapter on *qiyas*, for example, is appropriated almost entirely from al-Murtada's work. It appears that Tusi quotes from al-Murtada's lectures on the subject or he may have seen portions of the manuscript, since *al-Dhariʿa* was made available only after Tusi's *ʿUdda* had been completed.

Apart from mentioning the normal subjects in *usul al-fiqh* discourse, Tusi also propounds and explicates a wide array of exegetical and hermeneutical principles required for a proper understanding of revelation, thus demonstrating that traditions alone were insufficient to comprehend and determine God's law. He articulates and expounds six major principles necessary for the understanding and interpretation of revelation: These were *haqiqa* (literal) and *majaz* (metaphor), *mutlaq* (unconditional) and *muqayyad* (conditional), *mujmal* (ambivalent) and *mubayyan* (clear), *awamir* (commandments) and *nawahi* (prohibitions), *umum* (general) and *khusus* (specific), *nasikh* (abrogator) and *mansukh* (abrogated).

Tusi was advocating for the use of rational constructs in interpreting traditions and, in the process, choosing a middle line between the traditionalist and rationalist approach in which both Usuli principles and traditions are incorporated. The principles that Tusi clarified were adopted and elaborated on by subsequent scholars. His *al-Mabsut* also indicates that most studies on the topic had not engaged inferential *fiqh* (*al-fiqh al-istidlali*) in his time and were restricted to extrapolating laws from textual sources.

In complete contrast to his teachers, Tusi argues in the *ʿUdda* for the validity of isolated traditions (*khabar al-wahid*) and contends that these genres of traditions

[45] Stewart, *Islamic Legal Orthodoxy,* 135.
[46] Tusi, *ʿUdda*, 1/3–4.
[47] ʿAli Pour, *al-Madkhal Ila Ta'rikh*, 109. For a list of the topics covered in the *ʿUdda*, ibid., 109.

had been accepted and practiced by previous generation of scholars. He further maintains that the Lawgiver had allowed it, whereas al-Murtada had denied it.[48] Apart from his work on Usul, Tusi also composed other works in the legal field. One of his most important work on jurisprudence is *al-Nihaya*, a book that expounds juridical cases based on Usuli principles. Among all the Shiʿi juridical texts, it was *al-Nihaya* that was used as a standard legal work in the seminaries for a long time. In this work, Tusi uses *ijtihad*, albeit in a rudimentary form, to deduce verdicts from traditions. Tusi also composed *al-Mabsut*, a voluminous work on jurisprudence in which he systematically derived laws based on Usuli principles. His methodology in this work was diametrically opposed to those scholars who had confined their works to direct citation of traditions.[49]

Ijtihad in the Buyid Period

As previously mentioned, up to the thirteenth century, *ijtihad* was equated with analogy and personal reasoning by the Shiʿis. Anti-Sunni diatribe by Shiʿi scholars of the time can be discerned by the slogans they deployed, namely, condemnation of *ijtihad*, *istihsan*, *qiyas*, *zann*, and *khabar al-wahid*. Sunni usage of these devices became tools that Shiʿis could and did exploit in their disputations with their adversaries. They were part of the continuing invective that claimed Shiʿi law was devoid of the conjectures, speculation, and diversity that had plagued much of Sunni jurisprudence. During this period, Shiʿi scholars categorically denounced the deployment of *ijtihad*.[50] The Shiʿi stance on *ijtihad* is typified by al-Murtada, who states in his refutation of a Muʿtazili scholar,

> As to *ijtihad* the evidence demonstrates that what you (ʿAbd al-Jabbar) call *ijtihad* is based on false premises. One of these is that *ijtihad* in law is, according to you, a [method of] ascertaining an opinion based on probability (*ghalaba al-zann*) where there are no explicit indicators. However, conjecture (*zann*) is not acceptable in the *shariʿa*. It is improper that the legal status of something should be grounded on conjecture.[51]

Evidently, al-Murtada sees *ijtihad* as a method of establishing *shariʿa* precepts bereft of textual evidence. *Qiyas*, he contends, is a form of *ijtihad*.[52] This

[48] For a summary of other views of Tusi in ʿ*Udda*, see ʿAli Pour, *al-Madkhal Ila Taʾrikh*, 110–11.

[49] Muhammad b. al-Hasan Tusi, *al-Mabsut*, 8 vols. (Tehran: al-Matbaʿa al-Haydariyya, 1967), 1/2. Moussavi, *Religious Authority*, 83.

[50] On Mufid's rejection of *ijtihad*, see Muhammad b. Muhammad al-Mufid, *Awaʾil al-Maqalat fi al-Madhahib waʾl-Mukhtarat* (Qum: Maktaba Dawari, n.d.), 154.

[51] Al-Sharif al-Murtada, *al-Shafiʿ fiʾl-Imama* (Tehran: Muʾassasa al-Sadiq, 1989), 1/169.

[52] Al-Murtada, *al-Dhariʿa ila Usul al-Shiʿa*, 2/792.

observation is further borne out from a statement in his *al-Intisar*. Referring to Ibn al-Junayd's methodology, al-Murtada states, "It is premised on personal views and reasoning that Ibn al-Junayd depended upon on this issue, this is clearly erroneous." Similarly, when discussing the wiping (*mash*) on both feet when performing the ablution, al-Murtada says, "We do not consider *ijtihad* to be correct and do not support it."[53]

Tusi's stance on *ijtihad* bears a striking resemblance to that of al-Murtada. In his *'Udda*, he includes a chapter on *ijtihad*, which he refutes as a form of personal reasoning. He adds, "This discussion [of *ijtihad*] is not necessary because, as we have discussed before, *qiyas* and *ijtihad* are not permissible in the *shari'a*."[54] Tusi's remarks clearly indicate that *ijtihad* was not accepted by the Shiʿi scholars of his time.

Ironically, Tusi employed some of the principles of *ijtihad* to establish legal precepts. In his seminal work, *al-Mabsut*, Tusi complains that Shiʿi interlocutors mock and deride them, claiming that, due to the methods they employ, Shiʿis are not equipped to extract the *furuʿ* (derivatives) from the *usul* (foundations), and that their scope of juristic inference is restricted to the texts (*nusus*) related by their narrators. Apparently, Sunnis had also accused Shiʿis of a literal application of traditions without employing any form of reasoning. The interlocutors further taunted the Shiʿis, stating that their repudiation of *qiyas* and *ijtihad* rendered them incapable of resolving many legal challenges because their rules and principles of deduction were strictly circumscribed.

Tusi refutes these accusations, asserting that they arise due to the adversaries' ignorance of the Shiʿi legal system. He further states, "had they checked our narrations and jurisprudence, they would have realized that most of the issues they mention are presented in our traditions which are transmitted from the Imams, whose statements, insofar as their authoritativeness is concerned, [is based on] following the Prophet."[55]

Tusi asserts that his method of deducing legal precepts was premised on Usuli reasoning. He acknowledges that his approach differed considerably from those employed by other Shiʿi scholars who had restricted their judgments based on the citation and interpretation of traditions. One of the reasons for composing *al-Mabsut* was to refute Sunni accusations. Tusi also admits that a major impediment to the composition of this work was that it was not usual for Shiʿis to engage in *ijtihad*. Nor was it normal for them to deduce particular laws from universal ones. Prior to Tusi's time, the scope of Shiʿi *fiqh* works was restricted to the review and extrapolation of laws from traditions and texts.

[53] Baqir al-Sadr, *Lessons*, 50.
[54] Tusi, *'Udda*, 2/733.
[55] Tusi, *al-Mabsut*, 1/2.

Tusi also responds to Sunni accusations by denying that the paucity of *furuʿ* laws in Shiʿi *fiqh* works was intrinsic. Rather, the Shiʿi legal corpus could be interpreted exegetically to provide as many, if not more injunctions than the Sunnis had done. In essence, Tusi projects the Sunni legal corpus as predicated on conjecture and doubtful tools such as *raʾy*, *qiyas*, and *ijtihad*. Shiʿi substantive law, on the other hand, was predicated on the *ahadith* from the Imams and interpretive constructs that had produced legal declarations based on certitude rather than conjecture.

Ironically, since Tusi considered isolated traditions to be valid, there is a transition in his epistemology from certitude to probability. His stance on *khabar al-wahid* also meant that many cases that were not dealt with by previous scholars were now open to consideration, since he was able to accept many more traditions that may have been otherwise denied. Tusi was also able to liberate the study of substantive law from its traditional confinements. Prior to his time, jurists depended mainly on traditions and the derivation of principles from them. He was the first Shiʿi jurist to engage in the process of juridical inference (*al-fiqh al-istidlali*) by examining and elucidating its principles.[56] More significantly, his work is indicative of the expansion of Shiʿi jurisprudence and its legal system, for he utilized the methodological and epistemological frameworks that had been proposed by earlier scholars such as Ibn Abi ʿAqil and Ibn al-Junayd.

Tusi's epistemological transition enabled him to argue for a legal edifice that would incorporate an element of speculation in the form of isolated traditions. In many ways he was the precursor to the acceptance of *ijtihad* by the scholars of Hilla. The post-Tusi era marks a time of intellectual stagnation especially as no scholar could challenge or ameliorate his works. For this reason, Shiʿi scholars often describe this period as the time of *taqlid* (imitation), which actually means the acceptance of Tusi's legal edicts and methodology. Most scholars during this period accepted his legal determinations without challenging them.

The Rehabilitation of *Ijtihad* in Shiʿi Jurisprudence

The coming of the Seljuq dynasty after the overthrow of the Buyids in 1055 was a major setback for the Shiʿis, who were persecuted by the new rulers. Due to increased riots and anti-Shiʿi hostilities, the Shiʿi center of learning moved from Baghdad to Najaf under Tusi. Later, under increased persecution and pressure, it moved to Aleppo in 1145 and subsequently to Hilla, where it remained for a long time. It was the jurists of Hilla who made significant contributions to shaping the future of Shiʿi jurisprudence.

[56] Farhan, *Haraka al-Ijtihad*, 266–67.

The post-Tusi period of stagnation ended with Muhammad b. Ahmad b. Idris, an erudite jurist who infused new life into Shiʿi jurisprudence. In this work, he complains of the stultifying intellectual environment in his time and that the Shiʿi populace were quite indifferent in their commitment to the "*shariʿa* of Muhammad and the laws of Islam." Ibn Idris further complains of pervasive ignorance in the community and the scholars' neglect of the needs of the time.[57]

Ibn Idris was clearly reacting to the rigidity and ossification of Shiʿi *fiqh* in his time. His criticisms were directed primarily at Tusi, whose opinions he attacked assiduously and vociferously in his *al-Sara'ir*. A comparison between Ibn Idris's *al-Sara'ir* and Tusi's *al-Mabsut* also indicates that the former examines and explores aspects of Shiʿi law in far greater detail than Tusi does. The arguments and proofs that Ibn Idris presents are more nuanced and meticulous and include points on which the two scholars differ substantially. An issue that is summarily covered in one line in *al-Mabsut* is sometimes covered much more extensively in Ibn Idris' *al-Sara'ir*. For example, on the question of whether contaminated water becomes pure if it is contained in a cistern that is one *kurr* (377 kilograms full) Tusi concludes that the water remains impure. He justifies his verdict in just one sentence. Ibn Idris, on the other hand, discusses the case in much greater depth and concludes that the water should be considered pure. He states, "On this question alone we have written about ten pages in which we extended our limits, and have explicitly proved our verdict thereon, elucidating various points, and giving proofs and testimonies from the verses of the Qur'an and the authentic traditions."[58]

Ibn Idris's scholarly credentials were tacitly enhanced as he challenged and refuted Tusi's opinions on almost every topic. In fact, in his *al-Sara'ir* he debates and attacks Tusi's arguments in almost every page. He was, at times, very critical of Tusi, especially regarding his acceptance of isolated traditions.[59] Through his invectives against Tusi, he was able to break free from the rigidity that had stifled Shiʿi jurisprudence, injecting, in the process, a sense of vibrancy and dynamism in Shiʿi legal thought. Ibn Idris was also the first scholar to assert that reason (*ʿaql*) should be an independent source of law.[60] Prior to his time, al-Mufid had mentioned that although *ʿaql* was a tool to understand the probativity (*hujjiyya*) of the Qur'an, it was not to be considered an independent source of law.[61]

[57] Baqir al-Sadr, *al-Maʿalim*, 74.
[58] Ibid., 77–78. See also ibid. for other examples of the differences between the two.
[59] On comparisons between *al-Sara'ir* and *al-Mabsut*, see Jannati, *Tatawwur Ijtihad*, 1/290–91.
[60] Muhammad b. Mansur Ahmad Ibn Idris, *Kitab al-Sara'ir* (Qum: Mu'assasa Nashr al-Islami, 1989), 1/2. Farhan, *Haraka al-Ijtihad*, 284–85. On other examples of Ibn Idris's excellent scholarship and refutation of Tusi and other scholars, see Baqir al-Sadr, *al-Maʿalim*, 77 ff. See also cases where Ibn Idris is critical of and disagrees with Tusi in al-Subhani, *Taʾrikh al-Fiqh al-Islami*, 283, 306.
[61] Muzaffar, *Usul al-Fiqh*, 2/102.

The thirteenth and fourteenth centuries marked a period of great intellectual ferment for the Shi'i scholars. They continued the trend of deriving laws beyond the confinement of traditional texts. The vexing problem of deploying rational tools to extract new juristic prescriptions was finally resolved by the scholars of Hilla in the thirteenth and fourteenth centuries. They had to accept that they could not be certain that their rulings fully reflected the Divine legislation on most cases that confronted them. To resolve the conundrum, Ja'far b. al-Hasan (Muhaqqiq) al-Hilli (d.1277), a prominent Shi'i jurist of the time, proposed the adoption of *ijtihad* as a hermeneutical construct in the extrapolation of legal precepts. It is important to comprehend Muhaqqiq's definition and understanding of *ijtihad*. In his work on *usul al-fiqh* titled *Ma'arij al-Usul*, he states,

> According to how jurists commonly use the term, *ijtihad* refers to expending one's efforts to extrapolate legal rulings. Based on this [meaning], the act of deducing laws from the legal sources is a kind of *ijtihad* because the rulings are based on theoretical constructs which, in most cases, cannot be derived from the apparent [meaning] of the sources regardless of whether that is based on analogy or anything else. According to this, analogy is one of the types of *ijtihad*. If it is said—based on this [understanding]—that the Imamiyya must be among the people of *ijtihad*, we say that is [certainly] the case.[62]

Given the traditional Shi'i aversion to *ijtihad* and the need to accommodate it within the confines of Shi'i legal epistemology, Muhaqqiq had to redefine *ijtihad*. For him, *ijtihad* was a process of inferring rulings by methods that had been approbated by the Lawgiver.[63] With the exception of analogy, Shi'is could now be counted as among those practising *ijtihad*. For Muhaqqiq, the *shari'a* was not composed of neatly defined normative laws or perspicuous injunctions that could be easily accessed. On the contrary, there were discrepancies and uncertainties within it. Muhaqqiq therefore redefined *ijtihad* as a method of deducing an injunction that approximated the truth based on a format that was accredited by the *Shari'* (Lawgiver). By this definition, *ijtihad* became a process of deciphering the law, rather than its source.

The acceptance of *ijtihad* was a major breakthrough in Shi'i legal history. To justify his usage of *ijtihad*, Muhaqqiq distinguished between probable knowledge (*zann*) and unrestricted or random reasoning. He defined *ijtihad* as a form of valid conjecture. In other words, in contrast to Sunni devices like *ra'y* and *qiyas*, Muhaqqiq's definition of *ijtihad* generated knowledge that was based on probability.[64] It was only the special form of *zann* that was allowed.[65] In all

[62] Muhaqqiq al-Hilli, *Ma'arij*, 179.
[63] Ibid., 179. On the early Shi'i denunciation of the term *ijtihad*, Farhan, *Haraka al-Ijtihad*, 43–46.
[64] Muhaqqiq al-Hilli, *Ma'arij*, 180–81.
[65] Ibid., 221.

probability, Muhaqqiq drew this distinction because he sensed the need to derive the law beyond the narrow confines of citing from textual sources. Henceforth, Shiʿi scholars accepted reasoning that was based on the revelatory sources (called *al-ijtihad al-sharʿi*) as opposed to the more speculative reasoning based on the intellect (*al-ijtihad al-ʿaqli*). The latter form of reasoning was considered inductive whereas *al-ijtihad al-sharʿi* was seen as deductive reasoning from the sacred texts.

By advocating and approving the use of *ijtihad*, Muhaqqiq was sacrificing the cardinal principle of certitude and acknowledging the presence of speculation in the Shiʿi legal system. He was the first Shiʿi jurist to redefine and embrace *ijtihad*. Subsequently, other scholars also transitioned from insisting on attaining certitude in legal norms to the acceptance of probable truth. By promoting *ijtihad*, Muhaqqiq also posited the notion of a class of scholars capable of discovering the law through rational means especially when they had to deal with issues for which no solution had been provided in the revealed sources. His methodology on *ijtihad* was outlined in an important *usul* work called *Maʿarij al-Usul*. Although quite brief, it is highly regarded in Shiʿi circles.

It was ʿAllama Yusuf b. Mutahhar al-Hilli (d. 1325), his nephew, who introduced newer intellectual principles into Shiʿi *fiqh*. Proclaiming *ijtihad* to be a central principle in Shiʿi legal theory, ʿAllama cites a chapter on *ijtihad* and positions it as an important legal construct in all his major *usul* works (*Mabadi' al-Wusul*, *Tahdhib al-Wusul*, and *Nihayat al-Wusul*). In his discourse on *ijtihad*, ʿAllama acknowledges at the outset that, in the absence of the Imam, most of the law was in a state of uncertainty. For him, neither the Prophet nor the Imams had resorted to *ijtihad*, since they had access to knowledge that produced certitude, either in the form of Divine inspiration or what was transmitted from the Prophet. In addition, since they were infallible, the Imams could neither err nor depend on probability, traits that are intrinsic to *ijtihad*.[66] In the absence of the Imam, jurists had to resort to *ijtihad* in an effort to derive new laws or interpret old ones. In the process, ʿAllama empowered scholars to deduce legal values based on conjecture.

For ʿAllama, knowledge of the law was of two types. Necessary knowledge (*daruri*) was related to things that could be known through reason or revelation. These included acts like prayers, fasting, and that which must be performed before an incumbent act (e.g., ablution before prayers). This genre of knowledge was provided with definitive indicators. The other type of knowledge, bereft of indicators, pertained to *sharʿi* values and was the prerogative of the *fuqaha*'. In the absence of *daruri* knowledge, jurists had no alternative but to resort to *ijtihad* to arrive at an opinion on a *sharʿi hukm*.[67] Through this bifurcation of

[66] ʿAllama al-Hilli, *Mabadi' al-Wusul ila ʿilm al-Usul* (Najaf: Matba`a al-Adab, 1970), 240–41.
[67] Calder, *The Structure of Authority*, 233–34.

knowledge, ʿAllama acknowledged and endorsed an element of doubt inherent in Shiʿi law. By positing *ʿilm* as presumptive knowledge predicated on the texts, ʿAllama also infused the Shiʿi legal system with the flexibility and dynamism that was to characterize subsequent manuals of *usul al-fiqh*.

ʿAllama's writings reveal a clear epistemic transition from certainty to acceptable conjecture. Concomitant to the view that the law was in a state of uncertainty was the need to provide authoritative guidance to the ordinary believer. ʿAllama therefore asserted that the laity must follow the juristic proclamations of a *mujtahid*. Like Muhaqqiq, he divided the Shiʿi community between those who knew and those who did not. Although the determinations of a *mujtahid* were based on conjecture, the actions of the Shiʿis had to accord with the pronouncements of a jurist. One who did not follow the *mujtahid* was proclaimed to be a sinner.[68] ʿAllama actually stated that *taqlid* was permissible rather than mandatory.[69] Later Usuli scholars insisted that *taqlid* was obligatory. This rationalist outlook was subsequently espoused and promoted by the *ʿulama'* of Jabal ʿAmil.

ʿAllama's contention that most of the legal system was conjectural can be substantiated by the fact that most traditions were in the form of isolated reports from the Imams. Earlier, Tusi had claimed that permission to accept *khabar al-wahid* had, in fact, been granted by the Lawgiver. This, he claimed, was the consensus of the true sect.[70] Basing his arguments on Qur'anic verses, traditions from the Imams, and the consensus of the community, ʿAllama also argued vehemently for the use of *khabar al-wahid*. This was further evidence that doubt was now accepted as an integral component in Shiʿi law. Subsequently, ʿAllama also posited new ways and terms to categorize and evaluate traditions. By separating *qiyas* and *ra'y* from *ijtihad*, the scholars of Hilla were finally able to accommodate *ijtihad* in Shiʿism, even though this meant incorporating Sunni methodology into Shiʿi legal theory.

The preceding discussion on the history of Shiʿi legal theory indicates that from the tenth to the sixteenth century, it evolved from an initial desire to preserve certitude to a gradual acknowledgment that the actual law cannot be fully understood or known. The principles and epistemologies of *usul al-fiqh* developed considerably during the times of Muhaqqiq and ʿAllama, and the methodologies they used were, with the exception of the Akhbaris, largely embraced by subsequent Shiʿi jurists.

[68] Ibid., 235.

[69] al-Hilli, ʿAllama, *Mabadi' al-Wusul*, 246–48; also *Ma'arij*, 197–99, where Muhaqqiq states that *taqlid* is permissible.

[70] Norman Calder, "Doubt and Prerogative: The Emergence of an Imami Shiʿi Theory of *Ijtihad*," in Paul Luft and Colin Turner, eds., *Shiʿism: Critical Concepts in Islamic Studies*, 4 vols. (New York: Routledge, 2008), 3/180.

It was through the efforts of both Muhaqqiq and ʿAllama that *ijtihad* as a hermeneutical construct and the concomitant element of *zann* were accepted and validated in Shiʿi legal theory. With time, even more scholars subscribed to the view that *ijtihad* based on *zann* was acceptable. It was embraced with an epistemological distinction between certainty and probability. From now on, *ijtihad* no longer connoted *ra'y* and *qiyas*. Rather, it denoted the academic process of determining *shariʿa* ordinances. With this change, *ijtihad* became an important element in Shiʿi jurisprudence.

After the time of ʿAllama, Shams al-Din Muhammad b. Makki al-ʿAmili (d. 1384), also known as al-Shahid al-Awwal (the First Martyr), was the first Shiʿi scholar to compose a tract on *qawa'id al-fiqh*. These were maxims that comprised legal rules which jurists could use in the derivation of laws. The *qawa'id* also express legal declarations in concise terms. This is in contrast to the detailed methodological procedures cited in *usul al-fiqh*. These maxims can be easily memorized and are applicable to a wide array of cases. They are especially helpful when deriving injunctions for new cases and provide guidelines and standards for validating current edicts.[71]

Generally speaking, the *qawa'id* do not contain citations of particular verses from the Qur'an or statements from the *sunna*. Rather, they are extracted from the revelatory sources. Thus, for example, the principle of no harm (*la darar*) is derived from verse (22:78). In most instances, the *qawa'id* depict the overall aims and objectives rather than the details of the *shariʿa*.[72] Gradually, Shiʿi scholars accepted *ijtihad* and expanded its domain so that the legal principles or maxims that animate and guide a jurist were incorporated in the normative juristic corpus.

The preceding discussion on the history of *usul al-fiqh* and *ijtihad* demonstrates that, historically, the principles embedded in *usul al-fiqh* developed after the science of *fiqh*.[73] During the times of the Imams, there was more discussion of substantive law than of the process of its derivation. In other words, when well-accepted legal positions needed legitimation and valorization, *usul al-fiqh* regulated and restricted as much as it generated or determined the law. By imposing constraints and formulating principles for deriving the law, *usul al-fiqh* dictated the parameters within which the law could operate. At the same time, it

[71] Felicitas Opwis, *Maslaha and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century* (Leiden: Brill, 2010), 139.

[72] Luqman Zakariyah, *Legal Maxims in Islamic Criminal Law: Theory and Applications* (Leiden: Brill, 2015), 17. For a list of Shiʿi *Qawa'id* works, see Farhan, *Haraka al-Ijtihad*, 303. For an illustration of how *Qawa'id* principles were used in issuing the tobacco *fatwa* by Mirza Shirazi, see Mostafa Mohaghegh Damad, *Tahavvolat-i Ijtihad-i Shiʿi, Maktabuha Hawzeha va raveshha: Ijtihad bar Mehvar-i Adalat va Keramat-i Bashari* (Tehran: Shahid Beheshti University tahavvol, 2011), 2/22–23.

[73] The question of whether *usul al-fiqh* was subsequent to *fiqh* and whether interpretation tends to vindicate rather than determine the law is treated by many scholars. al-Husayni, *Al-Ijtihad wa'l-Hayat*, 13.

also laid the theoretical grounds for the derivation of future legal judgments.[74] Since earlier jurists had rejected *qiyas*, *ra'y*, and *istihsan*, Shiʿi jurists were careful not to include arbitrary elements that the Sunnis had accepted under their legal theory. However, as we shall see, this was not completely possible.

Sunni Concepts in Shiʿi *Usul al-Fiqh*

As Shiʿi legal thought developed in a predominantly Sunni milieu, Sunni ideas and concepts began to penetrate into and influence Shiʿi jurisprudence creating, in the process, some discrepancies in it. For example, in his two works on jurisprudence, Tusi cites some Sunni sources and then adds his own judgments based on the principles posited by Shiʿi jurists or those derived from Shiʿi traditions.[75]

ʿAllama's extensive study of Sunni *usul* also led him to be influenced by their legal thinking and to incorporate some of their interpretive tools in his methodology. The definition of *ijtihad* that he cites is appropriated from Sunni sources.[76] To be sure, both Muhaqqiq and ʿAllama borrowed elements from the Sunni legal system in their writings. Al-Ghazali's (d. 1111) conceptions of conjectures had influenced both of them in their formulation of the principles of *ijtihad*. It is highly likely that they also appropriated some legal views from Fakhr al-Din Razi (d. 1210).[77]

As he was influenced by Sunni *usul*, ʿAllama included their thoughts and views in his discourse. Drawing on the Sunni division of the types of *hadith*, he was the first Shiʿi scholar to classify *ahadith* based on their reliability.[78] It is probably for this reason that the founder of the Akhbari movement, Mullah Muhammad Amin Astarabadi (to be discussed in what follows) claimed that ʿAllama's *Tahdhib al-Wusul* is an abridgment of the *Mukhtasar* of Ibn Hajib, which itself is an abridgment of other Sunni *usul* works.[79] As a matter of fact, the Akhbaris blamed ʿAllama for borrowing and inserting Sunni concepts and methodologies in Shiʿi *usul al-fiqh*.

Accusations of being influenced by Sunni methodology can be further corroborated from the juristic division between a *mujtahid* and the laypeople. This

[74] Muhammad Baqir al-Sadr acknowledges that as a discipline, *usul al-fiqh* emerged subsequent to the practice of *fiqh*. However, he indicates that this could not have happened without engaging the theoretical constructs and presuppositions of *usul al-fiqh*. Ali-Reza Bhojani, *Moral Rationalism and Shariʿa: Independent Rationality in Modern Shiʿi Usul al-Fiqh* (New York: Routledge, 2015), 13.

[75] Modarressi, *An Introduction*, 44–45. Also Baqir al-Sadr, *al-Maʿalim*, 73ff., where the author acknowledges Sunni influence on Shiʿi legal theory.

[76] ʿAli-Pour, *al-Madkhal Ila Ta'rikh*, 154–55. Takim, "A Brief History of *Ijtihad* in Twelver Shiʿism," 89–90.

[77] Moussavi, *Religious Authority*, 170.

[78] Bahr al-ʿUlum, *Fawa'id*, 2/260.

[79] Stewart, *Islamic Legal Orthodoxy*, 191.

concept was enunciated by al-Shafiʿi, who used it to express the division between *ʿilm al-ʿamma* and *ʿilm al-khassa*. According to him, the later type of knowledge was the prerogative of the jurists and was the sphere wherein there could be no certainty. ʿAllama made no secret of appropriating of Sunni models and concepts in his works.[80]

Despite some differences, the legal theories of Sunnis and Shiʿis came to be quite similar. The methodology of reconciling law and revelation that had evolved in Sunni circles since the time of al-Shafiʿi in the ninth century was also applied to issues that Shiʿis encountered in the tenth century. They had only to adopt and refine from a well-established pool of exegetical techniques and terminologies to determine the intention of the Lawgiver.[81] Shiʿi scholars also learned from the Sunni experience of *usul*. In order to prove the preponderance of their school, the Shiʿis tried to avoid the pitfalls generated by *qiyas*, *raʾy*, and *istihsan*. Eventually, they were forced to abandon a crucial point in their anti-Sunni polemic: the insistence on certitude (*qatʿ*). They did this by accepting some form of *zann* which, they claimed, had been ratified by the Lawgiver.

Akhbarism and *Ijtihad*

Shiʿi rationalist concepts and the deployment of exegetical tools in *usul al-fiqh* were critiqued and rejected by the Akhbaris in the seventeenth century. The main advocate of the Akhbari movement was Muhammad Amin Astarabadi (d. 1626). He was highly critical of Usuli epistemology, which, he contended, was premised on Sunni legal theory and had adulterated the Shiʿi legal system. In contrast to the prevalent legal theory, he postulated an alternative methodology that he claimed was predicated on certainty and was couched primarily on *hadith* reports.

Astarabadi's major thesis was that the truth (*al-haqq*) was based solely on the *ahadith* of the Imams. Their traditions generate certitude that people depend on in their daily transactions. Anyone with a proper understanding of Arabic and a basic comprehension of the Imams' statements could understand their teachings obviating thereby the need for *mujtahids*. Many Akhbaris even claimed that the correct understanding of the Qur'an is dependent on the *ahadith* since, in itself, the Qur'an is not a source of legal precepts. The Akhbari scholar al-Hurr al-ʿAmili (d. 1688) claimed that there are more than two hundred traditions that prohibit the inference of laws from the Qur'an. Thus, the scripture could only be

[80] Calder, *The Structure of Authority*, 233.
[81] Calder, "Doubt and Prerogative," 3/179.

comprehended through traditions.[82] However, a later Akhbari scholar, Yusuf al-Bahrani (d. 1772) presents a more moderate and nuanced view, stating that many Akhbaris believe that legal ordinances can, in fact, be derived from the Qur'an directly.[83]

Akhbari hermeneutical presuppositions and horizons of understanding were premised on their assessment that certitude was to be derived solely from the four main Shiʿi books of law. For them, these works exhibited the most authentic statements from the Imams (*qatʿ al-sudur*). Consequently, most of the law could be derived from them. There was little, if any, scope for personal reasoning in the law.

A close reading of Astarabadi's *al-Fawa'id al-Madaniyya* indicates that he believed that, in legal matters, reason could only be used to seek the correct traditions to resolve an issue. In itself, *ʿaql* was not a source of law. He was highly critical of the Usuli reliance on reason, which had made them accept *zann* and arrive at conclusions on topics that contravened statements from the Imams. Astarabadi declared unequivocally that the application of *zann* is baseless, because the Qur'an had itself declared, "We have not neglected anything in the Book (6:38)." Only what is in the text is cognitively acceptable.

Astarabadi's invective against the Usulis was centered on the loss of certitude in their methodology. He claimed that as *ijtihad* produced *zann*, the Usuli methodology was inherently defective and had led to the assertion of conflicting legal edicts. The Akhbaris, on the other hand, believed in the validity of all traditions transmitted from the Imams. This meant that there was no need for specialized jurists to derive laws beyond the parameters of traditions.[84] More than anything else, Akhbari opposition to the Usulis was epistemological. For them, the jurist had no special authoritative position in the Shiʿi legal system. Hence, they rejected another key principle in Usuli thinking, that of following the edicts of a *mujtahid* (*taqlid*). Akhbari views on *ijtihad* and *taqlid* can be gauged from a chapter in Hurr al-ʿAmili's *Wasa'il al-Shiʿa*. He devotes an entire chapter that contains thirty-four traditions prohibiting *taqlid*. The chapter is titled, "The chapter on the impermissibility of following the views of one who gives judgment based on his [personal] opinions or on what is not based on traditions from them [the Imams].[85]

[82] Rahim Nobahar, "The Role of the Qur'an in Legal Reasoning (Ijtihad): a Shiʿi Perspective, in Ali-Reza Bhojani, Laurens de Rooij, and Michael Bohlander, eds., *Visions of Shariʿa: Contemporary Discussions in Shiʿi Legal Theory* (Leiden: Brill, 2020), 73–74. See also Moussavi, *Religious Authority*, 93.

[83] Yusuf al-Bahrani, *al-Hada'iq al-Nadira* (Qum: Mu'assasa al-Nashr al-Islami, 1985), 1/27, 1/31. Moussavi, *Religious Authority*, 93.

[84] Astarabadi, *al-Fawa'id al-Madaniyya* (Qum: Mu'assasa al-Nashr al-Islami, 2003), 75, 98.

[85] Al-Hurr al-ʿAmili, *Wasa'il al-Shiʿa*, 27/124.

It should be noted that conflicts and acrimony between Shiʿi rationalists and traditionalists was not a new phenomenon. Even some of the closest companions of the Imams disputed and disagreed among themselves regarding the functional role of *ʿaql* in legislation, the jurisdiction of the intellectual faculties, and the authority of traditions in the derivation of juridical injunctions.[86] By their repudiation of Usulism and its methodology, the Akhbaris were rejecting Sunni methodology and its conception of authority. Other Akhbari scholars like Muhsin Fayd al-Kashani and Hurr al-ʿAmili also rebuked the Usulis for appropriating Sunni devices like the concepts of *ijmaʿ* and *istishab* and its corollaries.[87]

Astarabadi's tirade against the Usulis was not entirely misplaced. The existence of conflicting Shiʿi traditions and polarized *fatawa* in Shiʿi jurisprudence was previously admitted by Tusi, who states, "I have found them [the Righteous Sect] differing in the legal injunctions (*ahkam*). One of them issues a *fatwa*, which his contemporary does not. These differences exist in all chapters of jurisprudence from those concerning the laws on ritual purity (*al-tahara*) to the chapter on indemnity (*al-diya*) and on the questions of worship."[88] Tusi was complaining about the differences (*al-ikhtilaf*) in the religious practices of the righteous sect, which he identified as the Shiʿis. According to Tusi, the disagreements among the Shiʿi scholars were greater than the differences between Abu Hanifa, Shafiʿi, and Malik.[89] For Astarabadi, such disparities were the denouement of deviation from the Imams' traditions and the appropriation of Sunni tools of independent reasoning.

Astarabadi was also concerned at the extent of Sunni influence on Shiʿi jurisprudence. He assiduously complains that the Usulis had borrowed extensively from the Sunnis. This had led them to deviate from the truth. He went even further in rebuffing the concept of imitation (*taqlid*) of a *mujtahid* and the Usuli polarization between the *mujtahids* and the layperson. He labeled this dichotomy as yet another Sunni innovation that had penetrated the Shiʿi ranks. Astarabadi jettisoned the position of and reliance on *mujtahids* by insisting that the ordinary believer is obliged to follow the Prophet and Imams only.[90] By doing this, they would be abnegating probability (*zann*) and reasserting certitude. By insisting on the need to rely solely on the traditions of the Imams, Astarabadi was positing a monolithic Shiʿi worldview governed by a law that was premised on the sacred sources exclusively. His proposed legal methodology, which Robert Gleave terms "scripturalist," was to be developed further by subsequent Akhbari scholars.

[86] Takim, *The Heirs*, 94–103.
[87] Stewart, *Islamic Legal Orthodoxy*, 190.
[88] Tusi, *ʿUdda*, 1/136. Liyakat Takim, "Revivalism or Reformation: The Reinterpretation of Islamic Law in Modern Times," *American Journal of Islamic Social Sciences* 25, no. 3 (2008): 66.
[89] Tusi, *ʿUdda*, 1/138.
[90] Astarabadi, *al-Fawa'id al-Madaniyya*, 18.

It is to be noted that even within Akhbari circles, juristic heterogeneity was quite prevalent. Differences arose within their ranks regarding Qur'anic hermeneutics and the interpretation of Qur'anic verses independently of traditions and the divergent ways of comprehending the scripture. Contrary to what one would expect, Akhbaris were not simple literalists; rather, they demonstrated much intellectual ingenuity and sophistication in the construction and defense of a coherent legal structure. Far from being a monolithic school, intraschool diversity and legal pluralism characterized the Akhbaris from the beginning of the movement. For example, Fayd al-Kashani disagreed with Astarabadi's rejection of the principle of *bara'a* (exemption of assessment of duty when the sources are silent on an issue). Fayd agreed with the Usuli position on the subject and stated that traditions from the Imams demonstrated that unless stated otherwise, all things are to be considered permissible.[91]

Yusuf al-Bahrani provides another example of an Akhbari jurist who did not comply with the strict Akhbari methodology. In composing his magnum opus on Shiʿi jurisprudence, (*al-Hada'iq al-Nadira*), he deployed *ijtihad* and various hermeneutical stratagems in the interpretation of the Qur'an and traditions. Although he rebuffed some Usuli tools like *ijmaʿ* and *ʿaql*, al-Bahrani also applied *ijtihad* in inferring judgments in substantive law. This is evinced in his compendium, where al-Bahrani acknowledges *ijtihad* as a potent methodological tool in the derivation and application of the law. To some degree, his monumental work had compromised with Usulism, making the task of his interlocutor, Wahid al-Bihbahani (discussed in the next section), much easier.

The diffusion and popularization of Akhbari ideology meant that accounts of the lives and traditions of the Imams became ubiquitous and pervasive within the Shiʿi community. In the process, the Imams' status was enhanced considerably in popular imagination, and they became figures of intense personal and devotional attachment. Dissemination of Akhbari ideals also led to the compilation of great *hadith* works by the likes of Hurr al-ʿAmili, Muhsin Fayd al-Kashani, and Muhammad Baqir al-Majlisi.[92]

Wahid al-Bihbahani and the Defeat of the Akhbaris

The Akhbari school's ascendancy lasted until the eighteenth century. Akhbari dominance was challenged and subsequently defeated by Muhammad Baqir Wahid al-Bihbahani (d. 1790–1), who resuscitated and rejuvenated the twin

[91] Muhsin Fayd al-Kashani, *al-Usul al-Asila* (Tehran: Sazman-e Chap-e Danishgah, 1971), 143.

[92] On the main points of contention between the Akhbaris and Usulis, see Robert Gleave, *Scripturalist Islam: The History and Doctrines of the Akhbari Shiʿi School* (Leiden: Brill, 2007), 180–86.

principles of rationalism and *ijtihad*. In his *Risala al-Ijtihad wa'l-Akhbar*, al-Bihbahani contends that during the Imam's absence, a *mujtahid* can only attain knowledge by resorting to conjecture.

In contrast to the Akhbaris, al-Bihbahani posited a different epistemological basis. He claimed that, despite the absence of the Imam, the gates of knowledge can be accessed through evidence gained from the Qur'an, *hadith*, and reason. Although he admitted that certainty is not attainable most of the time, al-Bihbahani maintained that it is possible to use indicators (*qara'in*) that can approximate the Lawgiver's intent.[93] In essence, it is the acceptance of a special form of *zann* (*al-zann al-khass*) that distinguishes the Usulis from Akhbaris.

It is to be remembered that ever since the time of Muhaqqiq, Shiʿi jurists had accepted the existence of *zann* in matters of law, that is, a jurist could not be sure that his findings reflected the correct law on any issue. Al-Bihbahani went further, arguing cogently on the difficulties of ascertaining the actual *hukm* (*al-hukm al-waqiʿi*). Shiʿis were not obliged to follow the actual laws; rather, they were required to follow only what was apparent to them even if that apparent knowledge was predicated on *zann*. This is because access to revelation and certain knowledge is not possible while the twelfth Imam is in occultation. Due to this, the jurist has to assume that probable rather than certain knowledge will suffice. Al-Bihbahani further asserted that only *zann* that is based on indicators is valid, even if the ruling does not accord with the actual law. As Robert Gleave states, al-Bihbahani argued, "the *mujtahid*'s task is not to discover the truth, but to consider all the sources which have probative force . . . in an attempt to find the most probable ruling."[94]

Al-Bihbahani also reasserted the Usuli view that reason and revelation are compatible. The Lawgiver would not require human beings to do something that contravened reason. He cited several rational arguments and quoted Qur'anic verses and traditions to justify his thesis that God would not punish a person without first making His intent and injunctions clear.[95] Due to al-Bihbahani's efforts, there was more debate on concepts like *qubh ʿiqab bila bayan* (that it is abominable to punish without warning), *ʿilm ijmali* (general knowledge) and its ramifications, and greater and more in-depth conversations on principles like *istishab* and *bara'a*. In many ways, this period marks the birth of contemporary *usul al-fiqh*, since newer issues and subjects were now being discussed and contemplated. Al-Bihbahani also devoted a major section of his work on *al-usul al-ʿamaliyya* (procedural principles) concentrating on areas of probabilities and doubts in *sharʿi* ordinances.[96] It is not an exaggeration to state that the breadth

[93] Wahid al-Bihbahani, *al-Fawa'id al-Ha'iriyya* (Qum: Majmaʿ al-Fikri al-Islami, 1995), 142.
[94] Robert Gleave, *Inevitable Doubt: Two Theories of Shiʿi Jurisprudence* (Leiden: Brill, 2000), 75.
[95] Al-Subhani, *Ta'rikh al-Fiqh al-Islami*, 422.
[96] ʿAli-Pour, *al-Madkhal Ila Ta'rikh*, 241. I discuss these principles later in this chapter.

and depth of al-Bihbahani's discourse on Shi'i *usul al-fiqh* were both extensive and unprecedented. It was due to him that the authority of reason was reasserted in Shi'i law and the Akhbaris were eventually defeated.

Like his Usuli predecessors, al-Bihbahani also insisted that every believer is obligated to follow and emulate a *mujtahid*'s *zann*. His argument that the ordinary believer must imitate a *mujtahid*'s decrees is anchored in both rational and scriptural proofs. The Usuli triumph in the nineteenth century augmented juristic status and authority in the community. At the same time, it positioned *ijtihad* as the pivotal point on which the institution of *marja'iyya* was later constructed.

In the process, al-Bihbahani reaffirmed the role of reason in Islamic law and rehabilitated *usul al-fiqh*. With him, Usulism became the sole method of deriving legal ordinances and the cornerstone of Shi'i legal theory, especially as many Akhbari students embraced his mode of thinking. Through al-Bihbahani's efforts, Usuli teachings were disseminated rapidly in Shi'i intellectual circles and especially in the seminaries of the shrine city of Najaf, where he taught. The proximity to the holy city was one of the main reasons for the movement's continuity through succeeding generations of teachers and students.

It should be noted that the acrimonious relations between the Usulis and Akhbaris extended beyond epistemic and academic considerations. Such was the hostility between the two factions that according to al-Bihbahani, Akhbaris were to be considered unbelievers (*kuffar*). During his time, a person could even be executed for being an Akhbari.[97] The hostility was reciprocated by the Akhbaris. Many of them would only hold Usuli books with a handkerchief, believing them to be impure.[98]

Usulism and the Contribution of Murtada Ansari

Wahid al-Bihbahani's assertions on *usul al-fiqh* were further refined and developed by Murtada al-Ansari (d. 1864). As I discuss in this section, he redefined legal terms that had been established by his predecessors and, in the process, empowered jurists to produce new laws on almost any legal question. So important has his contribution been that Shi'i scholars have composed more than eighty commentaries on Ansari's main Usuli work, *Fara'id al-Usul*.[99] In this work,

[97] Heern, *The Emergence of Modern Shi'ism*, 82.

[98] Juan Cole, *Sacred Spaces and Holy War: The Politics, Culture and History of Shi'ite Islam* (London: I.B. Tauris Publishers, 2002), 71–72.

[99] Murtada Ansari, *Fara'id al-Usul* (Beirut: Mu'assasa al-'Alami, 1991). One hundred forty-four *mujtahids* have written commentaries on this book and other titles written by Ansari. See Meir Litvak, *Shi'i Scholars of Nineteenth Century Iraq: The 'Ulama' of Najaf and Karbala* (Cambridge: Cambridge University Press, 1997), 73, and Abdul-Hadi Hairi, "Ansari," *Encyclopedia of Islam*, 2nd ed. (Leiden: University of Utah, 2013).

Ansari initially draws an epistemological distinction between certainty and doubt. He devotes the first section to a discourse on *qatʿ* (certainty), denoting a position of certitude whereby a jurist can extrapolate a ruling and be confident that it expresses the Divine intent since the statements on the topic in the sacred sources are explicit and perspicuous. It is in the second section of Ansari's work that his major contribution lies. In the absence of an explicit textual decree Ansari states that a jurist must initially search for an indicator (*dalil*) to premise his judgment on. Since texts do not clearly pronounce a ruling, a jurist cannot be sure that the text signifies the Divine will. Hence, the ruling cannot be said to be based on complete certainty.

In such cases a jurist has to issue a legal ruling based on a valid conjecture. For Ansari, since the texts might contain a *qarina* that indicates the law, a jurist can issue a ruling with confidence that his judgment approximates the law. By applying various exegetical and interpretive tools, a jurist can assess what constitutes the intention of the Legislator with a high degree of probability. In this case, rational principles are invoked to issue a binding legal norm.

Since the concepts of *qatʿ* and *zann muʿtabar* had been discussed and dealt with by previous scholars, Ansari concentrated on the third category of his epistemological stratification, namely, doubt (*shakk*). When confronted with a situation where the answer is tenuous, how can a jurist issue a legal ruling when the textual sources are silent? It is here that his major contribution lies. Ansari's epistemic scheme promoted the use of *ijtihad* and hermeneutical principles by positing numerous conceivable scenarios and hypothetical situations. His exploration of various possible cases of doubt greatly empowered the jurists to rule on instances in which uncertainty prevailed. Before his time, many jurists refused to rule on such cases because of their strict adherence to the epistemological states of certainty or probability. Ansari's deep analysis and meticulous explorations in the realm of doubt provided jurists with a wider range of interpretive tools to extend the sphere of law to areas where there was even a remote possibility of finding a ruling.

Within the realm of *shakk*, Ansari instituted new juristic parameters by expounding the usage of four major procedural principles (*al-usul al-ʿamaliyya*). These were *istishab* (presuming the previous status of a thing did not change), *baraʾa* (exemption from performing a duty), *ihtiyat* (precaution), and *takhyir* (choice). By setting forth new principles and speculating on various hypothetical scenarios in his discourse on *al-usul al-ʿamaliyya*, Ansari vastly expanded the sphere of Shiʿi law. Henceforth, juridical discourse focused not only on the derivation of laws from textual sources but also on the application of procedural principles that accommodate doubt and allow a jurist to explore various possibilities when confronted with an issue that had no textual basis or historical precedence. Stated differently, jurists were now empowered to rule on possible,

not just on probable spheres of actions. In many ways, it is correct to state that contemporary *usul al-fiqh* was reborn with him. Ansari's students were able to transmit and disseminate his teachings to various parts of the world. His contribution to Shiʿi legal theory has been immense, and his nuanced and often technical deliberations and configurations of legal judgments under incredulous circumstances have surpassed all previous treatments of the topic.

Like al-Bihbahani before him, Ansari also promoted *taqlid* as an institution that all lay Shiʿis must adhere to. This had major ramifications for subsequent jurists who imposed *taqlid* as a fundamental and required principle in Usulism and, in the process, enhanced juristic authority. Thus, for example, in his important text titled *al-ʿUrwa al-Wuthqa*, Muhammad Kazim al-Yazdi (d. 1919) devoted the opening chapter to the question of *taqlid* and *ijtihad*. In this chapter he unequivocally declared that the acts of worship of a believer that were not based on the *fatawa* of a *mujtahid* were null and void. He was the first scholar to consider a layperson's acts invalid if they did not accord with the edicts of a *mujtahid*. He was also the first jurist to insert a separate chapter on *taqlid* at the beginning of his juridical treatise.[100]

The Epistemic State of Certitude (*Qatʿ*) and *al-Usul al-ʿAmaliyya* in Shiʿi Legal Theory

Having examined the history and development of *ijtihad* and *usul al-fiqh*, this chapter now discusses the process through which a *mujtahid* can determine and declare rulings from the rational sources. As I mentioned earlier, Shiʿi jurists in the thirteenth century had to admit that the law is often based on probability rather than certitude and that it could possibly but not necessarily reflect the Divine will. Usulis contrived to develop a series of stratagems to deal with cases where they could not extrapolate prescriptions directly from the textual sources. The purpose of developing this methodology was also to furnish jurists with exegetical tools that would help them extrapolate injunctions when confronted with sociopolitical exigencies during the occultation of the Imam.

In establishing the correct ruling on a particular question on Islamic law, a jurist would use various textual and nontextual sources. The textual sources include the Qur'an and *hadith* reports, since, for the Shiʿis, they all reflect God's will. These are also called *al-dalil al-muhriz* (fortified proofs) or nonrational indicators. If a *faqih* finds a response to his quest in any of these sources, then he does not need to resort to *ʿaql* in deriving a ruling. If, on the other hand, he fails to

[100] Muhammad Kazim Yazdi, *al-ʿUrwa wa'l-Wuthqa* (Tehran: Dar al-Kutub al-Islamiyya, n.d.), 3.

find a precedent or solution on a juridical problem in the fortified proofs, he then turns to certain interpretive tools.

When assessing the role of reason and the deployment of *al-usul al-ʿamaliyya*, it is essential to understand how jurists determine laws for which they do and do not have certainty. As I have discussed previously, the view that Shiʿi law could be predicated on probability had been accepted since the times of Muhaqqiq and ʿAllama in the thirteenth and fourteenth centuries. It had been further reinforced by al-Bihbahani in the eighteenth century in his refutation of the Akhbari thesis.

Based on the epistemic scheme that he promoted, Ansari divides legal decisions according to their levels of certainty. This is an explicit acknowledgment that not all ordinances reflect the will of the Lawgiver and that many of these are based on conjecture. It is also an admission that knowledge of the law can be classified based on the degree of certitude and probability. Ansari states that a person who is bound to follow God's decrees (*mukallaf*) is confronted with three kinds of determinations: those based on *qatʿ*, *zann*, or *shakk*. *Qatʿ* defines an epistemic position where a jurist attains knowledge or complete certainty. There can be no doubt in it, since *ʿilm qatʿi* (knowledge based on certitude) can be derived only from revelation. In fact, the epistemic status of *qatʿ* is so elevated that a person must accept an edict based on *qatʿ*. It is because of this that it has the quality of *hujjiyya* (probative force) and is authoritative. In such cases, there is no need to employ reason.[101]

Ansari also states that a jurist cannot ignore or contravene a ruling based on certainty since it reveals God's exact intent.[102] An example of this is the consumption of pork. Since consuming the flesh of swine is explicitly prohibited in the Qur'an (2:173, 5:3), a legal ruling on this is to be considered normative without resorting to rational or other exegetical tools. Pork is prohibited because of a Qur'anic injunction which, for the jurist, produces *qatʿ* as to the Lawgiver's adjudication on the subject.

According to al-Sadr, no one, not even God, can dispense with the element of probative proof from certainty. He cannot say, for example, that if you are sure that there is no obligation to perform an act, you are not excused from performing it. Excuse or nonobligation cannot be removed from *qatʿ*, just as a person who is certain that an act is permissible, but not required, cannot be punished for not performing it. Similarly, if a person is certain that a drink placed in front of him or her is not wine and s/he consumes it, then God cannot punish her/him for that. This is because certitude contains probative force.[103]

[101] For a definition of and discussion on *qatʿ*, see Muhammad al-Salihi, *Tariq al-Ijtihad*, *al-Marhala al-Ula* (Qum: Mashhur, 1966), 43–47, 55. On the Akhbari view of *qatʿ*, see ʿAli-Pour, *al-Madkhal Ila Taʾrikh*, 190.

[102] Ansari, *Fara'id*, 31.

[103] Baqir al-Sadr, *Lessons*, 59.

Absolute certainty can be attained only when a commandment or interdiction is explicitly stated in a revelatory source. These include laws cited in the Qur'an or in *mutawatir* traditions, for they explicitly demonstrate the intent of the Lawgiver.[104] Unfortunately for the Shi'is, the door to this type of knowledge has been closed due to the absence of the Imam. However, since the Qur'an does not provide details of the injunctions and the *mutawatir* traditions are very few in number, jurists have been compelled to depend on isolated traditions, the consensus of scholars, and reason as alternative sources of legislation.

In the absence of *qat'*, Ansari then engages the perplexing question of determining rulings based on valid conjecture (*al-zann al-mu'tabar*), that is, cases where reason is employed to create binding legal norms. The third and last part of his work, which represents Ansari's main contribution, deals with cases of doubt (*shakk*), where neither guidance in the revelatory sources nor any indication of the probability of the correct answer exists. Such detailed analysis of the epistemic states of certitude, probability, and doubt represented a new phase in Shi'i legal discourse. It is not an exaggeration to state that no scholar before Ansari had expounded the topic in such great depth.[105]

Conjectural Proofs (*Zann*)

Usulis freely admit that, in most cases, a *mujtahid* cannot arrive at a solution to a legal problem from the revelatory sources based on *qat'*. An edict then has to be based on *zann*, which suggests that a decision reached by a *faqih* may be incorrect. Despite the possibility that a legal injunction based on *zann* maybe wrong, it is preferable to doubt (*shakk*), since *zann* is of higher epistemic value. *Zann* covers a wide range of states ranging from speculation to high probability. In reality, more legal precepts fall within the realm of *zann* than *qat'*. This means that a believer cannot be absolutely sure that s/he is fulfilling her/his religious duty.

It was the scholars of Hilla who first constructed the juristic theory of *zann*. 'Allama, for example, freely admitted that reliance on *zann* was unavoidable given the fact that access to the source of certitude was not possible during the *ghayba* of the Imam. For him, a jurist had to resort to *ijtihad*, since that was the only method available to approximate the Divine intent. Since most of the *shari'a* rulings were based on probability rather than certitude, it was *zann* rather than *qat'* that was central to Usuli discussions on epistemic states.[106]

[104] Ansari, *Fara'id*, 30–31.

[105] For an in-depth discussion on *qat'* and al-Sadr's view on this, see 'Abd al-Jabbar al-Rifa'i, ed., *Qadaya Islamiyya: Fikr al-Imam al-Shahid Muhammad Baqir al-Sadr* (Qum: n.p., 1996), 198–202.

[106] 'Allama al-Hilli, *Mabadi' al-Wusul* 240–41.

Many of the more subtle points on *zann* were developed by subsequent scholars, particularly by Wahid al-Bihbahani. He states that although a *mujtahid* may not be able to ascertain the actual ruling on a particular subject, it is only his *zann* that is valid, since the *mujtahid* is aware of the indicators. Al-Bihbahani further claims that a ruling exists for every case, even if a *mujtahid* may not be able to ascertain it. By expending his efforts to arrive at the correct decision, a *mujtahid* has discharged his responsibility. A layperson has to then discharge his/her legal duty by imitating (*taqlid*) the *mujtahid*.[107] Usuli scholars also contended that the *zann* of a *mujtahid* absolves a person from his/her legal obligations. They also claimed that *zann* has probative force and that this had been approbated by the Lawgiver. This was called the probative force of *zann* (*hujjiyya al-zann*).

Henceforth, it was accepted that legal obligations can be deduced based on *zann*. Adoption of this principle was inevitable, given the prolonged absence of the Imam. Since epistemologically *zann* is lower than *qatʿ*, a jurist is required to look for a *qarina* on which a ruling can be founded. This is because a ruling based on *zann* is valid only with an indicator. An essential component in Usuli discussion on the topic is that of *amara*. This refers to an indicator that has been approbated by the Lawgiver. For Shiʿi jurists, *amara* and *al-usul al-ʿamaliyya* cannot in themselves create new rules. Rather, they are deemed to be valid only because the Lawgiver has approbated them.[108] Furthermore, *amara* and *al-usul al-ʿamaliyya* do not represent the actual ruling, since it is possible that the ruling may not accurately reflect the God's will. According to Akhund Khurasani (d. 1911), a twentieth-century Usuli scholar, "there is strong evidence to suggest that the Lawgiver has allowed us to follow the indicators, because, due to His refrain from hardship, He has wished for an easing of the path to true rules so that they could be available to the people."[109]

Zann and *Khabar al-Wahid*

Since it is impossible to arrive at rulings based on *qatʿ* in most cases, Shiʿi scholars had to accept *zann* gradually, but unwillingly, within their epistemic horizons. Although *zann* is not authoritative in itself and has not been approved in Shiʿi law, there are instances when specific types of *zann* have been permitted by the Lawgiver. Since this epistemic state is deemed to have been approbated by

[107] Gleave, *Inevitable Doubt*, 134–35.

[108] For the different types of *amara*, see al-Mirza ʿAli al-Mishkini, *Istilahat al-Usul wa-Muʿzam Abhathiha* (Qum: Matbaʿa al-Hadi, 2007), 69–70.

[109] Cited in Amirhassan Boozari, *Shiʿi Jurisprudence and Constitution: Revolution in Iran* (New York: Palgrave Macmillan, 2011), 133.

the Lawgiver it is considered a validated source of speculative *zann*. It is often accompanied by an *amara*.

A good example of this is isolated traditions. In Usuli terminology, an isolated tradition (*khabar al-wahid*) is also called an *amara*. This refers to a type of *zann* that has been elevated to the level of *hujja* by the Lawgiver (*al-zann al-muʿtabar*) and is sufficient to provide a basis for deducing legal edicts. As such, it is dissimilar to the normal *zann*, which is not binding. Most Shiʿi legal judgments arise from traditions transmitted by narrators (mainly in the form of *khabar al-wahid*), since the other sources—Qur'an, *ijmaʿ*, and *ʿaql*—provide few proofs from which a jurist can arrive at a *sharʿi* ruling.

It is to be noted that in itself, *khabar al-wahid* does not generate *qatʿ*, because even a reliable (*thiqa*) reporter could make a mistake in his transmission or could misunderstand an Imam's statements. The problem for a *faqih* in dealing with *khabar al-wahid*, therefore, is that he cannot be certain that such a report carried by a transmitter expresses the true intent of the Lawgiver. Scholars conjured up terminological stratagems that vindicated the acceptance of *khabar al-wahid*. Given the fact that most *shariʿa* declarations are expressed by traditions and that these generate only *zann*, it was essential for the Usulis to demonstrate that the Lawgiver had approved the dependence on *khabar al-wahid* and had even defended its usage. *Usul al-fiqh* provided the terminological devices to raise the *zann* of *khabar al-wahid* to that of the *hujjiyya* of *amara* (that proofs provided by an *amara* are binding).

From the very beginning, Shiʿi jurists were ambivalent regarding the acceptance of *khabar al-wahid* as correctly expressing the intent of the Lawgiver. This is evident in the writings of their early scholars. Thus, al-Mufid, for example, admitted, "I say that no knowledge or action can be taken based on isolated traditions. And no one can attain certitude in matters concerning religion on the strength of *khabar al-wahid*, unless there is an indicator which demonstrates the trustworthiness of its narrator."[110]

For *khabar al-wahid* to be considered authoritative and binding, al-Mufid says it has to be supported by an indicator. He designates reason as one of the criteria for evaluating the content of *hadith*. He writes, "When we find a tradition that conflicts with the judgment of reason, we dismiss it since reason has ruled of its falsity."[111] For al-Mufid, a *qarina* (indicator) such as reason could elevate a *hadith* to the status of *qatʿ*.

Shiʿi scholars were fully aware of the threat that *khabar al-wahid* posed to their insistence on basing *sharʿi* decrees on certitude. Al-Murtada, for example, rejected *khabar al-wahid* as not binding since it did not provide *qatʿ*, and the

[110] Al-Mufid, *Awa'il al-Maqalat*, 100.
[111] Al-Mufid, *Tashih al-Iʿtiqad* (Qum: Maktaba Dawari, n.d.), 247.

traditions reported by the narrators were often contradictory.[112] Legal decisions in the *shariʿa*, states al-Murtada, must be based on certainty. Conjecture, on the other hand, does not eradicate doubt. He further claimed that there was a consensus among all generations of Shiʿi scholars regarding the prohibition of relying on noncorroborated single traditions in deducing the law.[113]

Tusi also agreed that *khabar al-wahid* did not generate certainty. Otherwise, he stated, no differences would exist among the people over its acceptance nor doubts expressed on its correctness. Furthermore, he stated that there is nothing in the rational proofs that make it incumbent to accept *khabar al-wahid* (*laysa fi'1-ʿaql ma yadullu ʿala wujub dhalik*).[114] He further asserted that there is nothing in *samʿ* (revelation) either that necessitates the acceptance of *khabar al-wahid*.[115]

However, Tusi differed from al-Murtada in that he accepted those singular traditions that were transmitted by Shiʿis only (*min tariq ashabina al-qa'ilin bi'l-Imama*).[116] He argued forcefully for the acceptance of *khabar al-wahid*. Despite al-Murtada's objections, Tusi claimed a Shiʿi consensus on the practice of accepting these genres of traditions which, he states, the Shiʿis have recorded in their compilations (*tasanif*) and *usul* works. If a reporter is trustworthy (*thiqa*), Tusi continues, Shiʿis do not discard his traditions, this being their habit and disposition from the time of the Prophet. For him, the Lawgiver had granted permission for the acceptance of only those traditions reported by members of the righteous sect.

He insisted that the only isolated traditions that were acceptable were those which reflected the utterances of the infallible ones. Moreover, he defended himself against those who accused his predecessors of rejecting *khabar al-wahid*. He claimed that when they spoke of traditions not being reliable, jurists like al-Mufid and al-Murtada referred to those traditions that were reported by non-Shiʿis.[117] The *ijmaʿ* that Tusi claimed had existed among the Shiʿis on *khabar al-wahid*, became, in the terminology of later Usulis, *al-sira al-mutasharriʿa* since this was a practice which had, according to him, existed from the Prophet's time.[118]

By adopting this stance, Tusi was raising the importance of the *hadith* corpus as part of the authenticated *sunna*. Tusi, it appears, was aware of the consequences of rejecting *khabar al-wahid*. It must be remembered that he was the author of two of the major Shiʿi *fiqh* works. Most of his verdicts in these works were based

[112] Wilferd Madelung, "Authority in Twelver Shiʿism in the Absence of the Imam," in George Makdisi et al., eds., *La nation d'autorité au Moyen Age* (Byzance: Occidental Paris, 1982), 168.
[113] Al-Murtada, *al-Dhariʿa*, 2/529–30. On the *qara'in* according to Tusi, see *ʿUdda*, 1/143–44.
[114] Tusi, *ʿUdda*, 1/106.
[115] Ibid., 1/108.
[116] Ibid., 1/126.
[117] Ibid., 1/128.
[118] *al-Sira al-mutasharriʿa* refers to acts that are observed by those who abide by the *shariʿa* even if these practices are not mentioned in the revelatory sources. A good example is that of keeping a beard.

on isolated reports. *Khabar al-wahid* had to be reinstated, at least for the sake of preserving the juridical corpus. The alternative was to depend on *mutawatir* traditions and those *hadith* supported by *qara'in*—these were few and far in between. As the Afghani jurist Asaf Muhsini (d. 2020) admits:

> The consideration of the invalidity (*adam al-hujjiyya*) of *khabar al-wahid* would lead to the nullification of most of our jurisprudence (*fiqh*).[119]

It is to be remembered that at the time when al-Murtada and Tusi were writing, *ijtihad* was not admitted as a source of law, as it was equated with *qiyas*. *Ijtihad* suggests the abdication of certainty, a possibility that was denied by both Tusi and al-Murtada. Since movement from *'ilm* to *zann* was inadmissible, only movement in the opposite direction was possible. This was done by raising *khabar al-wahid* to the level of an approbated and accepted *zann*. With the restrictions imposed on the sources at their disposal, Shi'i jurists had to enlarge the pool from which they could exegetically derive their laws. This was done by reinstating and validating *khabar al-wahid*. Tusi fully affirmed the acceptability of isolated traditions even though it did not generate certainty of the law.

The question of certitude against conjecture was a polemical weapon which the Shi'is could use against the Sunnis. To safeguard their contention that their juridical sources were based on *qat'* or an approbated *zann*, *khabar al-wahid* had to be admitted as a special type of acceptable *zann* (*al-zann al-mu'tabar*). The Shi'is could thus fulfill the needs in the *fiqh* manuals on the one hand and not compromise on the question of certitude on the other. In this way, they could maintain the preponderance of the Shi'i legal system over its Sunni counterpart.

Apart from reinstating *khabar al-wahid*, it was necessary for the Usulis to demonstrate that the Lawgiver had approbated its usage in the legal field. Various proofs were advanced by the Usulis to vindicate their claim that *khabar al-wahid* was an accredited *zann*. These ranged from inferences from Qur'anic verses (especially 49:6) to deducing proofs from the *sira* of the *'uqala'* (the practices or of people of sound mind).[120] Later on, 'Allama also claimed that *khabar al-wahid* was *hujja*, basing his arguments on Qur'anic verses as well as on *ijma'*. The arguments he advanced were more compelling and nuanced than those stated by Tusi or Muhaqqiq.[121]

[119] Asaf Muhsini, *Buhuth fi 'Ilm al-Rijal* (Qum: 1983), 107.

[120] Liyakat Takim, "The *Rijal* of the Shi'i Imams as Depicted in Imami Biographical Literature" (PhD diss., London: School of Oriental and African Studies, 1990), 281–83.

[121] In his *Nihaya*, 'Allama has a detailed discussion on the authority of *khabar al-wahid*. He presents fifteen arguments to support his claim. *Nihaya al-Wusul ila 'Ilm al-'Usul* (Qum: Mu'assasa al-Imam al-Sadiq, 2004), 3/370–414.

The most potent weapon the Usulis could produce to demonstrate that *khabar al-wahid* was an approbated *zann* was that of the practice of the people of sound mind. Al-Sadr argues that if the Imams' *sira* was contrary to the accepted norm of accepting isolated traditions, many questions would have been posed to them. The Imams in turn would have responded to these question at least some of which would have reached us.[122] Their silence in the face of all rational beings' acceptance of *khabar al-wahid* is taken to be an accredited *sira* and hence *hujja*. Thus, what was a mere *zann* (that *khabar al-wahid* was a form of conjecture) was raised to an accepted probability by the Usulis.

Given the fact that an isolated tradition does not produce certitude that reflects the will of the Divine, Usulis had to address the problem of justifying their excessive dependence on *khabar al-wahid*. This they did by extracting various quotations from the revealed proofs that could be cited as possible justification for the validity of *khabar al-wahid* (like verse 49:6 from the Qur'an). Above all, they introduced terminological devices that could make the *zann* of *khabar al-wahid* binding.

Usulis further foresaw a clash between Qur'anic verses against relying on *zann* on the one hand and the acceptance of *khabar al-wahid* on the other. The solution was found in making *khabar al-wahid* an exception to the anti-*zann* rule. The best proof that the Usulis could offer was *sira al-ʿuqala*'. Through this and other exegetical stratagems, they raised *khabar al-wahid* to the level of an approbated *zann*. Despite the lower epistemic value of *zann*, Usulis claimed that the Lawgiver had consented to the use of some types *zann*. They were thus able to valorize and declare legal precepts based on *zann* as *hujja*, even though these precepts had not reached the level of certainty.

Another example of the use of an *amara* in endorsing a juristic ruling is that of the Friday prayers (*salat al-jumʿa*). Many jurists had prohibited the convening of the Friday prayer during the absence of the Imam as no explicit permission from him had been granted. Shahid I (d. 1384), on the other hand, argued, "Jurists have the permission of the Imam available in the *sahih* (authentic) tradition of Zurara in which al-Sadiq had reportedly urged his associates to participate in the *jumʿa* prayers. "The permission," says Shahid I, "of al-Sadiq to Zurara is similar to the permission of the Imam of the age (*sahib al-ʿasr*) to the jurists who have undertaken greater responsibilities than that of convening the *jumʿa* during the occultation."[123]

[122] Baqir al-Sadr, *Durus*, 2/197.

[123] Abdulaziz Sachedina, *The Just Ruler in Shiʿite Islam: The Comprehensive Authority of the Jurist in Imamite Jurisprudence* (New York: Oxford University Press, 1988), 189. Also, Zayn al-Din al-ʿAmili, *Dhikra al-Shiʿa fi Ahkam al-Shariʿa* (Litho, 1855); Liyakat Takim, "From Partial to Complete: Juristic Authority in Twelver Shiʿism," *Journal of South Asian and Middle Eastern Studies* 43, no. 4 (2020): 17.

Doubt (*Shakk*) as an Epistemic State

When a *mujtahid* is not able to base his edicts on either *qatʿ* or *zann*, then he has to establish them on doubt (*shakk*). The main difference between *zann* and *shakk* is that in the case of the former, a *mujtahid* might locate an indicator that would substantiate his ruling. Doubt, on the other hand, is the outcome of a lack of any indication in the textual sources.[124] It is because of this that works on *usul al-fiqh* normally contain a separate chapter on doubt and the various forms that it can take.

Ansari's major contribution in this field was the improvisation of a methodology for jurists to deploy when they were confronted with a case in which they could not attain certainty or conjecture. Depending on the kind of doubt that arises, Usuli jurists, especially starting with Ansari, developed various techniques that were expressed in *al-usul al-ʿamaliyya* (procedural principles) so as to arrive at a ruling that approximated but did not reflect the exact Divine injunction on an issue. It is to be noted that, due to the doubt inherent in the procedural principles they are to be used only as a last resort.[125]

In the absence of any proofs from the textual sources, Ansari articulated four procedural principles in cases of doubt. When a jurist is confronted with a question on whether it is obligatory to perform an act or not and if there is no clear response in the revelatory sources, he must first search for a precedent. If he finds one, then the principle of continuance (*istishab*) will apply. If there is no precedent, the jurist should apply the principle of exemption (*baraʾa*). This principle, which means that an agent is absolved from any legal responsibility, is predicated on the view that if God had wanted an act to be performed, He would have enunciated it very clearly in one of the revelatory sources. If, on the other hand, a precedence is located in the sources, then the ruling should remain the same.[126]

However, if the doubt is secondary, that is, it does not refer to the general principles but only to a specific detail or case, and if there is a known obligation, but several options exist, then all of these options must be followed according to the principle of caution (*ihtiyat*). If it is not possible to pursue all the options, then the principle of choice (*takhyir*) applies, and one option should be chosen.

A jurist may encounter various categories of doubt. Doubt can arise as to whether a particular act is incumbent or not, *al-shakk fi taklif*. For example, a person may know that praying is obligatory but may not be sure if, on Fridays,

[124] Zackery Mirza Heern, "Thou Shalt Emulate the Most Knowledgeable Living Cleric: Redefinition of Islamic Law and Authority in Usuli Shiʿism," *Journal of Shiʿa Islamic Studies* 7, no. 3 (2014): 330.

[125] The classical *usul* works like those of Tusi and al-Murtada do not have a separate section or discussion on the principles of *al-usul al-ʿamaliyya*. Such topics are much later additions in Usuli discourse.

[126] Zackery Heern, "*Shiʿi Law and Leadership: The Influence of Mortaza Ansari* (Latvia: LAP Lambert Academic Publishing, 2010), 26.

the noon prayers or Friday prayers are mandatory to offer. Then a doubt may arise, not regarding the ruling but regarding the subject. For example, an agent may be aware that alcohol is prohibited but is unsure as to whether the glass in front of him/her contains alcohol or not. Another kind of doubt is called *al-shakk al-ijmali*, that is, a person may know that there is alcohol in one of the glasses in front of her/him but is unsure which one contains it.[127] These indicate the various cases and forms of doubts that a person may be confronted with. A jurist has to deduce a ruling based on the procedural principles, and then issue an injunction accordingly. In the following section, I briefly adumbrate the four procedural principles and discuss how they are used to arrive at a judicial ruling.

Istishab (the Presumption of Continuity)

The term *istishab* refers to instances where a prior set of cases continue to the present with no alteration in the situation or condition. This principle connects a later set of circumstances with an earlier one and asserts that the rules applicable to certain conditions will remain valid and enforced as long as the conditions have not changed. Stated differently, the status of a ruling will remain the same until the conditions surrounding the original case are altered.[128]

Although the principle of *istishab* was discussed by earlier Usulis, Ansari expanded it considerably and even introduced new procedures in it.[129] For example, something that was initially ritually pure (*tahir*) does not become impure on the basis of doubt engendered by a lapse of time. In case of such a doubt, *istishab* stipulates that a person should ignore the doubt and observe the previously held certainty. The presumption of continuity thus allows a person to presume that the object retains its original state of purity.

As a principle for extrapolating a ruling, *istishab* was not as important to earlier jurists as it became to later ones. It was either not accepted or accentuated by earlier jurists. For example, al-Murtada did not accept *istishab* as *hujja*.[130] In comparison to subsequent works on the same topic, Tusi has a very small section on *istishab*. He quotes the views of the Hanafis, Shafiʿis, al-Murtada, and al-Mufid on the issue. Tusi also quotes traditions on the *hujjiyya* of *istishab*. More significantly, he does not cite any of the subdivisions and arguments on *istishab*

[127] A discussion on Ansari's division of the types of doubts and possible solutions is beyond the purview of this study.

[128] See al-Subhani, *Ta'rikh al-Fiqh al-Islami*, 434–35 for divisions of *istishab.* Heern, "Thou Shalt Emulate," 331.

[129] Al-Subhani, *Tadhkira al-Aʿyan*, 1/378–79.

[130] Al-Subhani, *Ta'rikh al-Fiqh al-Islami*, 265.

that are cited in subsequent texts.[131] Even medieval scholars like Muhaqqiq al-Hilli and ʿAllama al-Hilli have very brief expositions of *istishab*.[132]

Proofs for *Istishab*

Shiʿi jurists have sought validation for the procedural principles from traditions transmitted from the Imams. In his vindication of *istishab*, al-Bihbahani cites several traditions to prove that the Imams issued rulings based on *istishab* and had taught them to their disciples. Jaʿfar al-Sadiq reportedly told his eminent disciple, Zurara b. Aʿyan, "Certainty cannot be invalidated by doubt."[133] In another tradition, Zurara narrates from al-Sadiq that he asked the Imam, "If a person who is in a state of *wudu'* (ablution) sleeps for a few seconds is the *wudu'* invalidated?' The Imam replied, "While the eye might close, the heart and ear remain aware. Only when the eye, ear and heart are asleep is the *wudu'* broken." Al-Sadiq is also reported to have stated, "Unless a person is certain s/he fell asleep, s/he may presume the continuity of the previous *wudu'*. Do not challenge certainty with doubt, because a certitude can only be replaced when it is challenged by another certitude."[134]

The principle of *istishab* can also be determined by reason. It is logical to assume that a prior state in an object will remain in the same condition until one is certain that it has changed to another state. Because reason determines this, the Lawgiver cannot override this ruling, since there is a correlation between what reason dictates and the determination of the Lawgiver (called *qa'ida al-mulazama*). Reason also dictates that it is correct to assume that what was pure before continues to be in the same state of purity unless we know otherwise. The principle of *istishab* can also be affirmed by *sira al-ʿuqala'*, that is, the practice of people of sound mind, who confirm that a thing will remain in its previous state unless something occurs to transform its prior condition.

Usulis explored various possibilities of the applicability and inapplicability of this principle. Jurists encounter various genres of doubts that can be analyzed in the context of *istishab*. One of these is the example of "doubt of original capability" whereby an original state necessarily ends at a specific time. Is *istishab* applicable in this scenario? A person who is fasting may doubt whether the day has ended (i.e., whether the sun has set). Unless a person is residing at the poles

[131] Tusi, *ʿUdda*, 2/757–58.

[132] Muhaqqiq al-Hilli, *Maʿarij*, 207–209. For ʿAllama *istishab* is *hujja*, because he states, "the *ijma'* of the jurists dictates that a *hukm* which is accepted cannot be revoked by a doubt on its continuity." ʿAllama al-Hilli, *Mabadi' al-Wusul*, 250–51.

[133] On Zurara's question to al-Sadiq on *istishab* and *wudu'*, see Zuhayr al-Aʿraji, "*Falsafa al-Zaman wa'l-Makan fi al-Adilla al-Shar'iyya wa'l-Usul al-ʿAmaliyya*," in *Ijtihad va-Zaman va-Makan*, 1/218.

[134] Al-ʿAmili, *Wasa'il*, 1/245. See also traditions on *istishab* in al-Najafi, *ʿIlm al-Usul*, 40–41.

in the summer, by its very nature daytime ends, since it is impossible for it to continue endlessly. In this case, a doubt about whether daytime continues is not created by the possibility of it being affected by an external factor. Rather, it is produced because, by its very nature, daytime will end, and it will become night. In this instance, the principle of continuity (daytime and the need to continue fasting) is not applicable as long as a person is confident that the sun has set.[135]

Norman Calder cites a rather odd example of how *istishab* can produce unexpected legal results. Prior to a sexual act a hermaphrodite, like everyone else, is considered to be in a state of ritual purity. If he engages in a sexual act with an organ that could not be ascertained to be his actual sexual organ, and "since only one organ could be the real organ (for it was not finally allowed that the ambiguous hermaphrodite was both male and female, only that a disambiguating factor had not been discovered), there was always only doubt as to whether a real sexual act had taken place. Since doubt does not overcome a prior certainty, the hermaphrodite remains in a state of purity unless in the case where both his organs are simultaneously brought into play."[136] Hence, even if he has engaged in sexual intercourse, as long as it is not ascertained that his sexual organ has been used, the hermaphrodite can be considered to be in a state of purity.

The Principle of Exemption from Liability (*Bara'a*)

The principle of *bara'a* applies to cases where the texts do not articulate or proclaim any commandment or interdiction of an act. Since there is no explicit ruling on the performance of or abstinence from an act, a person is free to choose between performing or refraining from it. The principle of exemption also states that when a person is not certain if an item is impure or not, it is to be considered pure. The rationale behind the principle of *bara'a* is that if the Lawgiver had wanted a ruling to be binding, He would have explicitly pronounced it in one of the sources. Thus, based on this principle, a person cannot assume something to be obligatory or prohibited unless s/he has proof to do so.

The concept was discussed from the time of the Buyid scholars onward. Al-Murtada argued, based on reason, that when there is no legal ruling stated, an act is permissible, whereas both al-Mufid and Tusi argued for suspending a decision (*tawaqquf*) pending a revelatory injunction.[137] Although the concept was discussed briefly before him, the term *bara'a* was first used by al-Muhaqqiq

[135] Baqir al-Sadr, *Lessons*, 135. There are various other subdivisions of this principle, which are beyond the scope of this study.

[136] Norman Calder, *Islamic Jurisprudence in the Classical Era*, ed. Colin Imber (New York: Cambridge University Press, 2010), 98.

[137] See al-Murtada, *al-Dhari'a ila Usul al-Shi'a*, 2/808–809; Tusi, *'Udda*, 2/742.

al-Hilli when discussing the principles of abrogation (*naskh*) and isolated traditions.[138] The term was clearly gaining currency during this period. ʿAllama sensed the importance that the principle was to acquire because he states that a *mujtahid* must be well acquainted with the principle of *bara'a*.[139]

The principle of *bara'a* is based on Qur'anic injunctions against holding human beings responsible for duties that have not been proclaimed.[140] It is also derived from Qur'anic verse 17:15 "We do not punish those to whom We have not sent a Messenger." The verse is construed to mean that God will not punish a person for performing or refraining from an act unless He issues an injunction on it. A corollary to the principle of *bara'a* is that a person is not required to observe caution (*ihtiyat*) on an issue when s/he is not sure of a ruling on it. The sixth Imam al-Jaʿfar Sadiq is reported to have said that "everything is *halal* unless it is specifically mentioned to be *haram*."[141]

The principle of exemption can also be affirmed based on *ʿaql*. This is because reason judges that it is wrong for God to punish someone if s/he fails to perform an act for which no ruling has been stipulated. Hence, any act which has not been explicitly forbidden by the Lawgiver can be assumed to be lawful. Based on this premise, the term applied to this source of law is rational absolution, or "the principle that it is evil to punish without a clear declaration" (*qubh iqab bila bayan*). This means that as long as God does not clearly pronounce the law, then it would be wrong for Him to expect obedience.[142]

Reason further dictates that if there is no textual pronouncement on a topic, it can be assumed that the Lawgiver has not issued a ruling on it. The absence of any legislation on the subject continues (*istishab*) until evidence to the contrary is found. Hence, the act can be assumed to be lawful in the eyes of the Lawgiver. Al-Bihbahani goes further, arguing that reason, revelation, and consensus all prove that there is no legally binding command from a just Lawgiver unless there is indubitable proof (textual or otherwise) to support the existence of such a command. Actions for which there are no indicators (*adilla*) are outside the Lawgiver's sphere of interest and hence are permissible.[143]

Usulis argue that the practices of people of sound mind further justifies this principle. Based on the principle that "it is evil to punish for performing an act

[138] Robert Gleave, "Value Ontology and the Assumption of Non-Assessment in Postclassical Shiʿi Legal Theory," in Peter Adamson, ed., *Philosophy and Jurisprudence in the Islamic World* (Boston: Walter de Gruyter, 2019), 174.

[139] ʿAllama al-Hilli, *Mabadi' al-Wusul*, 242.

[140] Qur'an, 4:165, 20:134, 17:15.

[141] Sayyid Fadhel Hosseini Milani, *Thirty Principles of Islamic Jurisprudence* (London: Islam in English Press, 2011), 25. On the types of *bara'a* and differences between jurists on this principle, see al-Mishkini, *Istilahat al-Usul*, 48–49.

[142] See al-Salihi, *Tariq al-Ijtihad*, 160. For other traditions on this, see al-Najafi, *ʿIlm al-Usul*, 37–38.

[143] Amirhassan Boozari, *Shiʿi Jurisprudence*, 20–21. On the distinction between *al-bara'a al-shar'iyya* and *al-ʿaqliyya*. See also Boozari, *Shiʿi Jurisprudence*, 20.

without clarifying that it should be avoided" rational persons judge that it is morally wrong to punish someone for the performance or omission of an act without informing him/her.[144] Some Usulis even argued that *bara'a* is also applicable where the texts are unclear or nebulous regarding an act. The principle can also be invoked when there are contradictory verdicts or statements on an issue.[145]

The principle of *bara'a* also suggests that unless it has been specifically validated by the Lawgiver, conjecture is not considered to be *hujja*. This is because reason rules that if God had wanted an act to be undertaken, He would have proclaimed it in a very clear manner, not based on speculation. It is because of this that Shiʿis refuted certain principles that Sunnis accept. These include principles such as *maslaha*, *qiyas*, *ʿurf*, and *istihsan*. For the Shiʿis, they cannot be sure that the obligations derived from invoking these principles reflect or even approximate the will of the Lawgiver.

Since Shiʿi jurists had rejected *qiyas* and *istihsan*, there were, for them, greater spheres of law for which there were no injunctions. This also means that a wider range of acts could fall under the purview of *bara'a*. The principle of *bara'a* has become a very potent tool for Usuli jurists and provided them with greater flexibility to permit the performance of acts. This is because the lack of a proclamation from the Lawgiver means there is no obligation to either perform or avoid an act. Even though this principle is based on *zann*, Usulis argue the principle could operate in all spheres of law. The principle of *bara'a* is also connected to *istishab*. This is because *bara'a* establishes that in the absence of an injunction, there is no moral duty on an agent. *Istishab* perpetuates the *bara'a* principle by ruling that in the absence of an injunction, a ruling of no assessment cannot be changed unless there is another clear injunction from the Lawgiver to indicate otherwise.

The ramifications of the principle of *bara'a* can be seen in the case of smoking and many other doubtful acts. Since there is no revelatory proof to prohibit smoking, the principle of *bara'a* dictates that smoking should be permitted.[146] The Akhbaris refuted the principle of *bara'a*, arguing that where no textual proof was available and no injunction mentioned regarding an act, an agent should refrain from undertaking it. Thus, due to their disparate epistemological outlook, they prohibited the same act that the Usulis had permitted (smoking) based on the principle of precaution. Due to the presence of reports supporting *bara'a*, some Akhbaris like al-Bahrani argued in favor of it.[147] In more recent times,

[144] Baqir al-Sadr, *Durus*, 1/174.

[145] Gleave, *Scripturalist Islam*, 285.

[146] For further divisions of this principle, see al-Mishkini, *Istilahat al-Usul*, 46–49. For the principle of *bara'a*, see Muhammad Mahdi al-Naraqi, *Anis al-Mujtahidin* (Qum: Matbaʿa Muʾassasa Bustan-e Kitab, 2010), 386–87; for cases where Akhbaris accepted *bara'a*, see Gleave, *Scripturalist Islam*, 204, 285–89.

[147] Gleave, *Scripturalist Islam*, 288–89. For Usuli arguments for *bara'a*, see Gleave, *Inevitable Doubt*, 123–25. On traditions from the Imams regarding *bara'a*, see al-Najafi, *ʿIlm al-Usul*, 37–38; on *istishab*, see ibid., 40–41.

after examining the very sensitive topic of transgender surgery in great depth, Ayatullah Khumayni issued a *fatwa* permitting the procedure based on the principle of *bara'a*.[148]

In contrast, Muhammad Baqir al-Sadr, offers a very different perspective. He claims that human beings are duty-bound to obey God on all issues, whether they are stated in the texts or not. By doing this, they will have fulfilled their obligations toward the Creator. Furthermore, it could be argued that the lack of clarity regarding religious obligations may be due to our lack of understanding rather than God's failure to communicate them. Al-Sadr therefore rules that when a person is unsure of his/her obligations on an issue, s/he must exercise caution by performing all possible duties that would ensure the obligation is fulfilled.[149] His ruling directly contradicts the views proffered by many Usuli scholars who accept the *bara'a* principle when no directive has been issued by the Lawgiver.

The Principle of *Ihtiyat* (Precaution)

Ansari also hypothesized cases when doubts arise concerning details of a particular *hukm*. For example, when a person knows that an obligatory act can be fulfilled in numerous ways but is not sure as to in which form they should be performed, Ansari rules that all possible venues must be explored. By doing so, one can be confident that the religious obligation has been undertaken. This would create considerable difficulties for a believer, since it would entail the performance of multiple acts for a single ritual. If it is impossible to perform all the options, the agent should choose (*takhyir*) between them. In this case, a *faqih* would decide which option closely approximates the actual ruling.[150]

Due to their strict epistemological framework, the Akhbaris favored and applied *ihtiyat* more rigidly than the Usulis did. As previously mentioned, the latter preferred principles like *bara'a* and *istishab* and invoked *ihtiyat* only when there was no clear indicator for a ruling to be issued or when the texts were ambivalent. Usuli reluctance to apply the principle of *ihtiyat* can be illustrated from rulings issued by medieval scholars like Muhaqqiq al-Hilli. He states that it is recommended but not necessary to observe the principle of *ihtiyat*.[151] Thus, for example, a question is posed concerning the washing of a bowl if a dog licks it.

[148] Mahdi 'Ali Pour, "Islamic *Shari'a* law, Neotraditionalist Muslim Scholars and Transgender Sex-Reassignment Surgery: A Case Study of Ayatollah Khomeini's and Sheikh al-Tantawi's Fatwas," *International Journal of Transgenderism* 18, no. 1 (2017): 99.

[149] Baqir al-Sadr, *al-Ma'alim*, 186.

[150] Also Litvak's discussion on Ansari's procedural principles, *Shi'i Scholars*, 72.

[151] Gleave, *Inevitable Doubt*, 105. For conflicting opinions on the validity of *ihtiyat*, ibid., 106.

In contrast to other jurists who ruled based on *ihtiyat*, Muhaqqiq states only one washing of the bowl is necessary.[152] Rather than opting for precaution, Muhaqqiq invokes the *bara'a* principle, since this is the minimum requirement. *Ihtiyat*, on the other hand, would dictate that the same bowl be washed seven times. Performing multiple acts for one ruling would be cumbersome and would, in effect, mean that a person has to repeat the same act several times so as to be certain that the minimum legal requirement has been fulfilled.[153]

Many traditions from the Imams support the principle of *ihtiyat* and the need to exercise it in cases of doubt. For al-Bihbahani, as for most Usulis, *ihtiyat* is to be observed only when a person is confused or uncertain of his/her obligation. As they were more text- than reason-centered, the Akhbaris stressed the principle of caution, especially as they were against the application of the more rationally based *bara'a* principle. For them, exercising the principle of *bara'a* meant the actual obligation remained unfilled. By accentuating the maximalist view of *ihtiyat*, the Akhbaris ensured that the Lawgiver's will has been fulfilled even at the cost of performing multiple acts of worship.

In the juridical corpus, *fatawa* based on *ihtiyat* indicate that a *mujtahid* is not sure of the actual ruling and that there is not enough proof to indicate even the probable ruling on an issue. For some scholars, resorting to the principle of *ihtiyat* may also be an indication of a *mujtahid*'s piety. In some cases, even though a *mujtahid* has arrived at a definitive ruling on an issue, he may opt for *ihtiyat* if he finds that the common verdict (*mashhur*) issued by other jurists contradicts his view.[154] However, the application of this principle can be extremely cumbersome and exacting for an ordinary believer. The rulings of precaution in matters of worship are much fewer than those pertaining to interpersonal transactions. At the same time, the difficulties of being cautious in matters of worship are much less exacting than observing *ihtiyat* in social transactions. For example, repeating a prayer four times when one is not sure of the direction of the *qibla* is not as difficult as having to pay religious dues again.

Precaution also grants a person the license to seek the legal opinion of another *mujtahid* on a particular matter. By issuing a ruling based on precaution, a *mujtahid* shifts the burden of responsibility to another jurist who is more confident or bold to issue a definitive ruling on the same subject. Shams al-Din remarks that a jurist needs to be forthright and courageous to reach a clear determination rather than opting for precaution. He asks jurists to reduce the number of edicts they issue based on precaution especially when it comes to social transactions, since these can be very difficult to apply in practice.[155]

[152] Muhaqqiq al-Hilli, *Maʿarij*, 216–17.
[153] For conflicting opinions on the validity of *ihtiyat*, see Gleave, *Inevitable Doubt*, 106.
[154] See a discussion on this in chapter 5 of the present study.
[155] Al-Rifaʿi, *Maqasid al-Shariʿa*, 42.

It is also correct to state that *ihtiyat* functions in opposition to the principle of no harm or harassment. Whereas *la darar wa-la dirar* affirms the principle of no harm or difficulty in religion, *ihtiyat* does the opposite. For example, if a person is not sure whether s/he is required to offer the *qasr* (shortened) or full prayers at a particular place, the principle of *ihtiyat* demands that s/he should offer both. Similarly, if a person is not sure of the direction of prayers, *ihtiyat* requires that s/he prays four times, one prayer in each direction. The principle also contravenes the Qur'anic verse stating that God wishes ease, not difficulties, for the believers (2:185).

It should be noted that the copious usage of *ihtiyat* in juridical treatises is a relatively new phenomenon, as it is present more among later than earlier scholars. Especially in the last century, *fatawa* based on *ihtiyat* have proliferated. One reason is that, according to Shams al-Din, jurists examine issues through personal rather than societal lens. In doing so, they do not realize the social impact of their *fatawa* based on *ihtiyat*.[156] Shams al-Din's observation can be substantiated by a comparison between earlier juridical texts and contemporary ones. A comparison of Tusi's *al-Nihaya* and al-Khu'i's *Minhaj al-Salihin*, for example, indicates a much greater penchant for issuing judgments based on *ihtiyat* in the latter text.

The preceding discussion indicates that the horizons of understanding of a jurist and the hermeneutics deployed will greatly determine the kind of injunctions he issues. The more flexible the outlook of a scholar, the more variant and accommodating his rulings are likely to be. The rulings of a jurist who accepts and employs *bara'a* in his adjudication for example, are more likely to be malleable than those of a jurist who strictly enforces *ihtiyat* in his decision-making process. This is because *bara'a* allows the issuance of a wider range of juristic rulings than *ihtiyat* does. Generally speaking, it is correct to state that the more flexible the hermeneutical principles employed, the more-wide ranging the outcome of the juridical process, that is, the rulings of jurists will be more diverse. This is because different outcomes can be shown to be consistent with the sources. In such cases hermeneutical principles do not determine the law; rather, they justify it. This is because any outcome of the law can be harmonized with the text.[157] Along the same lines, as I discuss in chapter 4, a jurist who incorporates rational and ethical considerations in his decision-making process is likely to deduce injunctions very different from those produced by one who rules by textual sources only.

[156] Al-Rifa'i, *Maqasid al-Shari'a*, 42–43. For the types of *ihtiyat*, see al-Salihi, *Tariq al-Ijtihad*, 163–67. Also, al-Naraqi, *Anis*, 315, 389–91.

[157] On this Behnam Sadeghi, *The Logic of Law Making in Islam*, 6–7.

Takhyir (the Principle of Option)

The principle of *takhyir* is often invoked when there is a clash between two texts or traditions that cannot be reconciled. It is also applied if a jurist is confronted with a doubt between an obligatory and forbidden act and is not able to reconcile the divergent proofs that he is confronted with. The application of the principle of *takhyir* can be demonstrated in Tusi's attempts at resolving contradictory traditions. Tusi says a jurist must first compare them with the Qur'an. The tradition that agrees with the Qur'an is to be accepted at the expense of its counterpart. If both traditions agree with the Qur'an, Tusi tries to harmonize them by interpreting their contents and engaging in various forms of interpretive exercises. At times, he claims that a particular *rawi* (transmitter) is a Sunni (*ʿammi*) and therefore the tradition should be discarded. He also states that the *hadith* which opposes the Sunni ruling on the same issue is to be preferred to that which agrees with their ruling.[158] On other occasions, he maintains that the *ijmaʿ* of the community is contrary to the purport of the traditions or that a tradition must have been uttered because of *taqiyya* (dissimulation). When confronted with contradictory traditions, Tusi also examines and demonstrates a tradition's unreliability due to weak links in the chain of *hadith* transmitters.[159] He states that it is essential to act on a tradition that is related by the most upright (*aʿdal*) *rawi*. The *ʿadala* of a *rawi* meant, for Tusi, that he should be a believer in the truth (*muʿtaqidan bi1-haqq*), have insight [in his religion], be reliable and not known for lying. If the reporters are equal in their moral rectitude, Tusi states that a reporter who narrates more traditions is to be preferred to one who reports fewer *ahadith*. In the final analysis, when all options have been exhausted, a jurist is free to choose (*takhyir*) between the traditions.[160]

An example of the application of this principle is the choice between performing the Friday or noon prayers. Some jurists have stated that offering the Friday prayers is obligatory, others are not sure if the twelfth Imam had permitted jurists to lead the Friday prayers during the occultation. Many jurists have offered the believing community the option of choosing between offering one of the two prayers, while others have stated that, based on precaution, a person should offer the noon prayers even if he offers the Friday prayers.[161] Traditions

[158] Tusi, *ʿUdda*, 1/147. This criterion is mentioned in the *usul* works because, according to a tradition reported from al-Sadiq, "The people would ask ʿAli questions and then deliberately act contrary to it so as to confuse the masses." al-ʿAmili, *Wasaʾil*, 18/83. Another reason given for this ruling is because Sunni jurisprudence is built on falsehood. Al-Saduq, *ʿIlal al-Sharaʿi* (Najaf: Maktaba al-Haydariyya, 1966), 531.

[159] See, for example, Muhammad b. al-Hasan Tusi, *al-Istibsar Fi Ma Ikhtalafa min al-Akhbar* (Beirut: Dar al-Adwa', 1985), 1/48.

[160] Ibid., 1/4–5.

[161] Al-Mishkini, *Istilahat al-Usul*, 102–103.

narrated from the Imams vindicate the principle of *takhyir*. For example, a person visited the eighth Imam, ʿAli al-Rida, and told him that two reliable narrators reported contradictory traditions. This left him with a dilemma to which the Imam responded, "you are free to choose any one of the two."[162]

Deployment of *al-Usul al-ʿAmaliyya*

As different legal cases arose, Shiʿi jurists had to summon newer strategies to deal with them. Usuli discourse was extended to include not only the revelatory sources of law, but also *al-usul al-ʿamaliyya*. The principles set forth in *al-usul al-ʿamaliyya* help a jurist determine a ruling even when the evidence for a particular act is circumstantial or equivocal. For example, based on the principle of *istishab*, Ansari rules that a jurist does not have the *wilaya al-tasarruf*, that is the authority to dispose of the goods of others. Since the right to dispose did not exist before, and circumstances have not changed, Ansari rules that, based on the principle of *istishab*, a jurist does not have the right to dispose of property that belongs to others.[163] Similarly, jurists during the Qajar period in Iran used Usuli arguments and the principles embedded in *al-usul al-ʿamaliyya* to derive rulings so as to guide the sociopolitical affairs of the community, especially during the constitutional crisis in Iran in 1905–1906.[164] Justification for constitutionalism was argued by Muhammad Husain Naʿini (d. 1936), who claimed "the constitutional system was in conformity with the Usuli legal tradition by referring to the principle of *muqaddamah-yi wajib* (obligatory prerequisite), that is, that the adoption of constitution is obligatory as a precondition to ensure Muslim welfare and security."[165]

Another application of *al-usul al-ʿamaliyya* can be illustrated in the example of cloning. This subject is, of course, not mentioned in the textual sources. Those who oppose cloning cite verse 4:119, which quotes Satan as stating that he will command people to alter God's creation. Based on this verse, some scholars have argued that cloning is tantamount to changing God's creation and hence should be prohibited. In this case, *al-usul al-ʿamaliyya* rules that since there is no explicit text (*nass qatʿi*) to prohibit cloning, the principle of *bara'a* should apply and jurists should permit cloning.[166] The principle of *asl al-ibaha* (by default everything is permitted unless stated otherwise) can also be invoked.

[162] Ahmad b. ʿAli al-Tabrisi, *al-Ihtijaj*, 2 vols. (Mashhad Murtada, 1981), 357.
[163] Sachedina, *The Just Ruler*, 215.
[164] Ibid., 221.
[165] Dahlen, *Islamic Law*, 104.
[166] Al-Qummi, *Kalimat Sadida*, 55.

Application of the principles elaborated in *al-usul al-ʿamaliyya* demonstrate that much of what is purportedly God's law is actually the product of human intellectual endeavor. Based on the principles established in Shiʿi legal theory, when confronted with an issue for which there is no clear textual evidence, jurists either apply what they perceive to be the law or use the procedural principles outlined earlier in cases when they cannot deduce a clear ruling from the textual sources. It is because of the human element in the interpretation and implementation of the principles established in *usul al-fiqh* that, despite the *shariʿa*'s purported encapsulation of all aspects of human activity, there is no unified or monolithic legal system accepted and acknowledged by all Muslims.

Application of the principles of *al-usul al-ʿamaliyya* also substantiates the Muslim reformers' contention that much of the *shariʿa* is humanly constructed rather than Divinely revealed. Given a different set of circumstances, it can be reconstructed to respond to newer settings. Recourse to and reliance on *al-usul al-ʿamaliyya* also lends credence to the view that, in themselves, the revealed sources cannot respond to the multitudinous challenges confronting the community at different times and places.

Through the application of procedural principles, jurists have produced a sophisticated science of theoretical jurisprudence that demonstrates their interpretive abilities. Significantly, in the typology of the epistemic schemes that scholars have defined, there is no discourse on the moral-ethical underpinnings of their rulings. Neither is there a discussion on the ethical and social ramifications of their judgments on the community of believers. Generally speaking, most *fuqaha*' do not discuss what, if any, recourse a jurist has if the laws he has deduced do not comport with universally recognized moral or ethical principles. Within the juridical literature, there is more emphasis on how to derive rather than the moral worth of the law. I expound on this topic in more details in chapters 4 and 5.

Conclusion

Shiʿi legal theory emerged out of a concern to apply consistency in the process of inferring legal injunctions. The concern for knowledge and certitude, which characterized much of Shiʿi juristic literature in its formative period, was displaced with the passage of time, by a recognition of doubt as an inalienable feature of the law. Shiʿi jurists perceived the need to incorporate and even vindicate elements of doubt inherent in the law. While the transition from certitude to conjecture was a development that took place over centuries, the critical phase of this movement can be located in the lifetime of ʿAllama al-Hilli, who elaborated and definitively developed a Shiʿi theory of *ijtihad*. It was ʿAllama and his uncle,

Muhaqqiq, who conceded that juristic pronouncements were frequently based on pragmatism and conjecture rather than on the revelatory sources.

The scholars of Hilla and the Usuli jurists who followed them redefined and then advocated *ijtihad*, which now connoted the abdication of certainty and the assertion of valid conjecture. They further asserted that *ijtihad* is restricted to spheres where no clear edict can be deduced from the canonical sources. This was an explicit acknowledgment that the law was partially humanly constructed and represented an approximation rather than an accurate reflection of the Divine intent.

In the process, the authority and status of the scholars increased tremendously, since the masses were made to depend on them. Jurists also had to deal with the perplexing problem of how to derive the law when in a state of doubt. While the scholars of Hilla sought ways to justify speculation in matters pertaining to the law, al-Bihbahani asserted that a jurist's prerogative was to determine the most probable rather than the actual ruling. By performing acts based on probability, a person had fulfilled his or her obligations.

Whereas earlier scholars had ruled on areas where there was probability or certainty that their judgments indicated the wishes of the Lawgiver, Ansari constructed and methodically explored the epistemological categories of certainty, speculation, and doubt. He reconstructed the epistemic states of Islamic legal theory by refining and developing procedural principles as normative juristic positions. This empowered jurists to issue rulings on many spheres of law that had hitherto remained beyond their realm, broadening, in the process, the scope of Islamic law.

Ansari divided legal decisions into three categories and distinguished between valid and invalid conjectures. He also instituted systematic rules which allowed jurists to explore areas which had elements of doubt through his articulation of the procedural principles. Ansari's typology of epistemic states empowered jurists to extend their areas of investigation into virtually any legal matter. Whether he intended it or not, Ansari increased the sphere of the jurists' authority to beyond the revealed law. They could now infer the law through various forms of rational exegetical techniques.