

UṢŪL AL-FIQH: BEYOND TRADITION¹

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I

Anyone who ever takes the intellectual history of religion seriously is bound to deal with the notion of originality either directly or obliquely. And perhaps more than any other religion, the originality of Islam, of its intellectual history, of its scripture, and even of its founder, has long stood at the centre of Western scholarly discourse. That the textual foundations as well as the originator of this religion were studied, and indeed questioned, in terms of originality need hardly be stressed. The Prophet's originality was often doubted, and the Qur'ān was seen as no more than a poor reproduction and disorderly imitation of earlier monotheistic scriptures. The attribute of imitation, as a binary opposite of originality, was thus attached, if not made inherent, to Islam from its moment of birth.

In the rest of its history, Islam was to receive the same indictment. Its intellectual history, like virtually all other facets of its life, was predominantly perceived in orientalist discourse in terms of influences, debts, borrowings—terms that persistently negate the quality of originality. Speaking of borrowing, a prominent orientalist declared that 'No cultural history lends itself better to studying this [phenomenon of borrowing] than does that of the Muslim peoples.'² The possible debt of Islam to other religions and cultures has often been deemed not as a hypothesis to be proved or disproved, but rather as an established fact only to be taken for granted. Evidence thus becomes unnecessary, and indeed superfluous. In his discussion of the 'sources of Islamic civilization', and of Islam's indebtedness to other legal systems, von Grunebaum was able to announce with resounding confidence: 'It is, I

¹ A summary of this paper was presented at the University of Manchester as part of a conference entitled 'Law and its Interpretation in Judaism and Islam', 23–5 September 1991.

² Brunschwig, 'Perspectives', 59.

believe, only our lack of familiarity with Sassanian law which prevents us from uncovering its traces in the *fiqh*.³ Accordingly, foreign influences on Islamic civilization are certainly out there; the only problem is that we cannot always identify them!

Even the formidable growth and developments during the first three Islamic centuries, recognized as relatively impressive by Islamicists, are none the less not credited as achievements comparable with those of other cultures. Islam in the second/eighth and third/ninth centuries was, Brunschvig maintains, 'a system that had grown very substantial in various directions.... During this fruitful formative period, Islam was already—it is undeniable—a powerful factor; but this factor, whatever originality it had in some points and in its texture as a whole, still resulted from multiple components drawn heavily on older civilizations.'⁴ Whatever 'texture' means here, and wherever those 'points' are, the verdict is clear: the originality of what is thought to be the best centuries of Islamic cultural and intellectual contribution is seriously marred (if not negated altogether) by Islam's penchant for appropriating from other cultures. 'To borrow a well-expressed formula', Brunschvig continues, Muslims "turned in a horizontal spiral around their techniques". It was the same for their thinking. It is well known today that "proliferating detail" characterizes civilizations that are moving their feet in one spot but not going beyond themselves.' He advises us that this 'failure to go beyond oneself' or 'stagnation or stiffening of the joints in Islamic history' (generally characterized as ankylose)⁵ must be studied.⁶ It is curious, to say the least, that rendering a judgement on the 'stagnation' of Islamic culture was possible despite the acknowledged fact that the phenomenon still awaits further study and thus is not within the realm of established knowledge.⁷ As we have noted earlier, discourse on things Islamic does not take the form of a hypothesis whose truth or falsehood is to be tested, but rather of a postulate, only to be posited, affirmed, and reaffirmed, whatever its true epistemic value. More curious, if not astonishing, is the daring generality and universality of the judgement, for it offers neither distinctions nor exceptions. It is categorical, yet it is confident.

Thus discourse on Islam and Muslims took the form of assertions,

³ See his 'Sources of Islamic Civilization', 37.

⁴ Brunschvig, 'Perspectives', 53. It is significant that before it was published in *Unity and Variety in Muslim Civilization* in 1955, Brunschvig's 'Perspectives' constituted the inaugurating article of the prestigious journal *Studia Islamica* (1 (1953), 5–18).

⁵ See, e.g., the articles of Gardet and Schacht in *Classicisme et déclin culturel*, 93 ff., 141 ff.

⁶ Brunschvig, 'Perspectives', 58.

⁷ Note, for instance, the characteristic spirit in which *Classicisme et déclin culturel* was written.

judgements, and postulates concerning not only originality and, more accurately, the lack of it, but also the intellectual inadequacy of Muslims to aspire to any form of genuine originality. Brunschvig, to be sure, was not alone in upholding these views of Islam. In fact he expressed, more or less, the mean of orientalist discourse on a variety of things Islamic. In theology and dialectical method Muslims are thought to be no more than the appropriators of what once belonged to their non-Muslim predecessors; in philosophy they not only failed to produce their own system, but theirs was a 'mediocre assimilation' of Greek philosophical ideas.⁸ Nearly all branches of knowledge in Islam were subject to the same judgement. And the *Shari'a* was by no means an exception.

Orientalist commentary on the history of *Shari'a* may be characterized as a subcategory of the broader commentary on the history of Islam as a whole. This commentary reduces Islamic history to a short-lived upsurge of a body politic accompanied by some sort of a civilization, followed by an endless process of widespread decline. Against this long and persistent decline, the rather brief rise at the outset would seem an anomaly, and thus an exception to the general rule which is deterioration, decay, and stagnation. In introducing his book *Women in Muslim Family Law*, J. L. Esposito reproduces the received wisdom on Islamic legal history which, we have noted, stands in orientalist perception as a subcategory of Islam's general history. The 'dynamism of legal development', Esposito tells us, was 'stifled' after the fourth/tenth century, and what remained was a 'static Muslim society and law in the medieval period'.⁹ Esposito's knowledge of dynamism in the early Islamic legal system comes mainly from the excellent findings of Schacht, and perhaps to a lesser extent from the more limited studies of Goldziher and, ironically, Brunschvig. But credible evidence for a static Muslim society in the medieval period is not proffered, nor can one observe any significant, respectable research in support of this statement. Esposito's evidence includes closing the gate of *ijtihad*, political decay, and the Mongol invasion. I do not wish here to venture a refutation of these widespread claims, though one can now easily maintain either that such evidence is mythical, as is the case with the closure of the gate of *ijtihad*,¹⁰ or that a *necessary connection* between the facts purportedly constituting evidence and the supposed facts of categorical decline and a static Muslim society has not thus far been established.

It is rather curious that Esposito was speaking here with full authority

⁸ See J. Duchesne-Guillemin's remarks in the introduction to *Unity and Variety*, 6.

⁹ Esposito, *Women*, 10, 12.

¹⁰ See Hallaq, 'Was the Gate of Ijtihad Closed?', 3–41; and 'On the Origins of the Controversy about the Existence of Mujtahids', 129–41.

although his scholarly expertise lies elsewhere. This authority, as is well known, finds its roots early in European studies of the Orient, an authority that has been anchored in sets of assumptions the greatest bulk of which have not been adequately demonstrated. A central set of these assumptions revolves around the idea of a massive decline due to rigidity, lack of imagination, a penchant for repetition, an inherent Arab conservatism, and a host of qualities that essentially run counter to originality.¹¹ Explicit statements, intimations, and latent assumptions of this idea are quite abundant in orientalist writings and can be multiplied at will. Snouck Hurgronje, whose scholarly legacy still persists among living students of Islamic law, was writing also within the *sunna* of orientalism when he spoke of this decline and of its alleged accompanying symptoms. One such symptom that is relevant to our present concern is what he saw as the incredulously monolithic nature of Islamic law. Of this Hurgronje wrote:

[I]t may be said without exaggeration that no modern science shows such a surprising unity of method as the Muslim *fiqh*. Differences in the character and in the education of the persons who devoted themselves to this science, and the various needs of countries and peoples, could not fail to bring about variations; by the beginning of the second century people were speaking of the *fiqh* of A or of B, the *fiqh* of Medina, Syria, or Iraq. Nevertheless all this did not imply variations of any importance because the principle was everywhere the same.

It is true that eminent Muslim scholars ... wrote books in order to refute one another ... [B]ut all this does not prevent us from recognising that polemics did not touch essential points.¹²

Of course, neither Hurgronje nor anyone else by his time had conducted any sort of comprehensive or near-comprehensive research to substantiate these statements. Hurgronje was simply relaying his impressions of a rather select legal literature that he encountered and that was available to him. His sparse documentation of what he wrote on the history of *Shari'a* is sufficient indication of his generalist approach.

Over a century later, Hurgronje's thought on the subject remains in full force among younger scholars, with, alas, the same impressionistic support.¹³ The position of the majority of today's Islamicists is predominantly this: that Islamic law was laid down in the first three or four centuries of Islam; that legal creativity was exhausted immediately

¹¹ See, e.g., Vesey-Fitzgerald, 'Nature and Sources', 106; Esposito, *Women*, 10–12.

¹² Snouck Hurgronje, *Selected Works*, 279.

¹³ Note that Schacht, with his magisterial authority, stamped Hurgronje's writings on Islamic law with approval: '[T]he writings of Snouck Hurgronje are fundamental for a correct understanding of the nature of Islamic law.' *Introduction*, 216.

thereafter; and that new ideas and principles have not evolved since then. The entire legal literature of Islam after the third-fourth/ninth-tenth centuries is thus reduced to virtual nothingness. As recently as 1987 Patricia Crone was able to write, again basing herself on nothing but impressionistic evidence in a long orientalist tradition, that 'In practical terms ... any legal work composed between 800 and 1800 may be cited as evidence of classical doctrine.'¹⁴ Crone couples the unforgivably rash and unsubstantiated statements of Hurgronje with another shortcoming of which Hurgronje was innocent: to Crone there are now available works of excellent scholarship, such as those of Chehata¹⁵ and Meron,¹⁶ which instruct us carefully to reconsider the archaic beliefs promulgated by Hurgronje and his like. But Crone here still labours under an ideology that has thus far proved immune to the sound and highly promising scholarship in the field.

Crone's aforementioned statement amounts to an assertion that legal works written throughout the millennium after AD 800 are identical, and can therefore be isolated from a particular context of time and place. When common sense dictates that some sort of change throughout the centuries was inevitable, as Schacht seems to have assumed, the occurrence of change and development is finally admitted but given such a marginal import that it disappears into oblivion when compared with what is seen as the massive stagnation and 'ankylose'. 'Even during the period of *taklīd*', Schacht tells us, 'Islamic law was not lacking in manifestations of original thought in which the several schools competed with and influenced one another. But this original thought could express itself freely in nothing more than abstract systematic constructions which affected neither the established decisions of positive law nor the classical doctrine of the *uṣūl al-fiqh*.'¹⁷ It is instructive to note here that despite the total absence of research on the 'period of *taklīd*', Schacht, who in this statement faithfully follows in the footsteps of Hurgronje, could still pass this definitive judgement.

II

The insidiously prevalent view of decay, 'ankylose', and intellectual rigidity is completely antithetical to variety, difference, originality. Most importantly, it negates from Islamic history the notion of individuality

¹⁴ See her *Roman, Provincial and Islamic Law*, 19.

¹⁵ *Études de droit musulman*.

¹⁶ 'The Development of Legal Thought', 73–118.

¹⁷ Schacht, *Introduction*, 71–2.

and individual human experience. Accepting the perfect interchangeability of a ninth-century text with that of a nineteenth-century one would amount to reducing the texts and their authors to a single experience, to a single act of writing, to a single mind. The implications of such an attitude are immeasurably grave, for it obscures the cultural and social factors that may, and quite often do, unravel the individuality of human intellectual experience which constitutes, together with a multiplicity of cognate yet different experiences, that culture and society.

Both substantively and methodologically, the study of originality as an activity in intellectual history, and in our case in Islamic legal theory, is of great significance: substantively, because a conscious effort at seeking to locate any activity of originality expands for us the range of variety, and thus the multiple forms of discourse in legal thought; methodologically, because such an expansion can have no place if the possibility of originality's existence is excluded from the bag of assumptions with which the modern scholar approaches legal theory.

Uşūl al-fiqh as a theoretical activity that lays claim to a particular reality demands our attention on two distinct levels of enquiry. The first level is the system of interpretation and the sets of principles and precepts that determine the deontic values of external reality. Here it cannot be assumed that Islamic legal theory as a hermeneutical, logical, and ultimately juridical system is disconnected from actual reality and positive law. But more on this later. The second level of enquiry addresses, on the one hand, the direct and oblique relationships between legal theory and positive law, and, on the other, the concrete human circumstances of the individual author and their role in shaping his abstract and theoretical production. The connection between the aggregate of these circumstances—an aggregate that has been called worldliness—and the author's theoretical formulations differs from the first level of enquiry in that its causes are not exclusively juridical. While the dynamics between legal theory and positive law, and in turn between positive legal doctrine and society—which is the locus of the law—are purely juridical, the dynamics of worldliness, i.e. the connection between the world of the legal theoretician as author and his theoretical production, belong to things textual. It is these types of dynamics that force to the forefront not only the subtle imprints of individuality on legal contents, but the more obvious uniqueness of the author's intellectual make-up as reflected in his text.

Thus worldliness is here defined as the aggregate of the components of reality surrounding and affecting, directly or indirectly, consciously or subconsciously, the thinking processes and hence the intellectual production of the *uṣūlī*. I said intellectual in order to bring to promi-

ence the crucial constituents of a theoretic that do not squarely belong to positive legal doctrine but which must constitute an integral part of evaluating legal literature by the historian of ideas. However, if legal, quasi-legal, and purely ideational components of legal theory are all brought under scrutiny, it can be maintained that juridico-social reality constitutes the most obvious element of worldliness. But also of considerable importance is obviously a multiplicity of subsidiary factors that enter into the complex process of textual production. A significant determinant giving, among many other things, orientation and direction to the legal theoretical text is the intellectual traditions upon which the author draws. Legal theoreticians, steeped in Greek philosophy and logic, or theology, or mysticism, are bound to be affected by both the methods and the substantive assumptions prevalent in these fields of enquiry, with this having an impact on their particular perception of legal theory. Finally, the audience of the *uṣūlī* partakes in his worldliness, for it directs and colours his mode of argumentation which constantly assumes the existence of an intellectual contact with that audience.

These factors which we have subsumed under the above-mentioned levels of enquiry have been largely ignored. If it is agreed that the study of originality constitutes a legitimate path of enquiry into intellectual history in general, and into *uṣūl al-fiqh* in particular, then these factors must be present in all thinking about the subject. Originality as a quality that occurs in our minds is partly the substitution of an activity, in this case a textual activity, that succeeds in overshadowing, if not pushing aside, other mental activities. Such a quality cannot claim universal presence, nor, therefore, can it even demand the critical attention of the scholar, if these factors are suppressed or deemed irrelevant in our enquiries.

III

Like any system of interpretation, *uṣūl al-fiqh* starts from given or self-evident premises. The decisive fact about these premises is that, while they are humanly conceived, they must strive to express what is thought by the *human mind* to be God's law. In short, they are bound by the unalterable proposition of the divine origins of the law. This basic but crucial fact restricts, on the one hand, the range of possible interpretations, yet allows, on the other, a wide spectrum of interpretative possibilities within the divine limitations of the law. Marxism and empiricism provide two, out of many, analogous examples of philosophies that allow for significantly divergent interpretations while simultan-

cously setting a boundary beyond which the committed philosopher simply cannot go. Hume, Berkeley, and Locke, for instance, afford us three empiricist philosophical systems; yet they are widely different from each other. Shāfiʿī, Sarakhsī, Ghazālī, and Shāṭibī, among others, present us with equally divergent legal theories that assume the common denominator of a divine command. If we are justified, and we surely are, in studying the three British philosophers as authors of distinct and unique empiricist philosophies, we are equally justified in viewing the four Muslim doctors as proponents of theories that are so different from each other as to constitute four widely variant interpretations of the means to arriving at God's law.

In principle then one cannot speak of *uṣūl al-fiqh* as a single, uniform phenomenon, for one must account for the differences that exist between one *uṣūl* theory and another. The differences manifest themselves as distinct interpretations that may be placed on a wide spectrum whose extreme ends represent uncompromising literalism and liberal pragmatism. Ibn Ḥazm, for instance, belongs to the former while Tūftī¹⁸ and Shāṭibī belong to the latter. Between these two extremes stands a whole range of theorists, each armed with what he thinks to be the tools necessary for his task. And these changed from one theorist to another.

The most obvious indication of the differentials between theories is the fact of the controversial contents of *uṣūl al-fiqh*. A mere perusal of the contents of works produced even in a single century reveals considerable differences. A review of the jurists' production throughout a millennium discloses astonishing opinions of what the subject-matter of this discipline is or should be. It is well known that Ghazālī criticized those legal theorists who, he thought, went to excesses in treating issues of theology, positive law, and grammar in *uṣūl al-fiqh*.¹⁹ Shāṭibī also put forth a similar criticism, limiting his theory to issues that were clearly intended to serve his particular purposes.²⁰ There was nothing throughout the jurists' writings to indicate that the subject-matter of *uṣūl al-fiqh* was either fixed or well defined. A survey of a randomly selected topic, *al-ʿazīma wal-rukḥṣa*,²¹ reveals that it was discussed in a number

¹⁸ In his *Sharḥ al-Arbaʿīn al-Nawawīyya*.

¹⁹ Ghazālī, *Mustaṣfā*, i. 9–10; see also Makḍisī, 'Juridical Theology', 34–5, for a discussion of the contents of *uṣūl al-fiqh*.

²⁰ Shāṭibī, *Muwāfaqāt*, i. 17–18.

²¹ 'Azīma is the binding force of a ruling without consideration for mitigation due, e.g., to hardship. *Rukḥṣa* represents the mitigation or the setting aside of legal rulings in favour of more lenient ones due to such hardship. See Ibn Qudāma, *Rawḍa*, 58; Shāṭibī, *Muwāfaqāt*, i. 204–45, ii. 84–119.

of works,²² but was left out altogether in the works of Ibn al-Ḥājjib,²³ Bājī,²⁴ Shīrāzī,²⁵ Juwaynī,²⁶ and Tilimsānī.²⁷ The inclusion or exclusion of Greek logic is another well-attested matter.²⁸ The discussions of legal propositions (*ḥurūf*), Kalām theories of knowledge, the auxiliary sources of the law, and an array of other topics, were incorporated or excluded at will, and could never, as such, affect the credibility and quality of a work.

In the same vein, the arrangement of material in the works of *uṣūl* varied according to authors, with certain arrangements generating at times criticism by fellow jurists. Some jurists began by an exposition of the legal norms (*ahkām*), to be followed by the four sources of the law, the controversial sources, legal language, *qiyās*, *ijtihād*, *taqlīd*, and finally *tarjīḥ* (preponderance). Others, who objected to this arrangement,²⁹ preferred to begin by an exposition and analysis of the legal language, and then proceeded to other issues, their reasoning being that all things are dependent on the language of the *Sharīʿa* and a proper discussion of this language paves the ground for the rest of the topics in the book. Yet others chose to begin with logic, or a theory of knowledge, thereafter taking up the legal norms, the four sources, legal language, and so on.³⁰ Ṭūfī gave a lengthy analysis of at least six distinct methods (*turuq*) of arrangement which belonged to Ghazālī, Shīrāzī, al-Fakhr al-Rāzī, Qarāfī, Ibn al-Ṣayqal, and Āmidī. Having discussed these, he then offered a method of his own.³¹ And Ghazālī himself declared his own method in *al-Mustasfā* to be unique.³²

The choice of contents and of their arrangement was combined with emphasis or de-emphasis of certain issues selected to be included in the theory. The various degrees of importance given to *istiḥsān* and *istiṣlāḥ* in the various works are an obvious case in point. Other issues were the subject of such an expanded and specialized enquiry that they resulted in independent treatises of a highly individualistic nature. Ibn Taymiyya's *Mas'alat al-Istiḥsān* and Ghazālī's monumental *Shifā' al-Ghalīl* represent two instances.

The choice of particular contents, the method of their arrangement, and the extent to which these contents are explicated are but three

²² In addition to sources cited in the previous note, see Sarakhsī, *Uṣūl*, i. 117, 303; Ghazālī, *Mustasfā*, i. 98; Ibn al-Lahḥām, *Qawā'id*, 114; Taftāzānī, *Hāshiyya*, ii. 8; Āmidī, *Iḥkām*, i. 101.

²³ *Muntahā al-Wuṣūl wal-Amal*.

²⁴ *Iḥkām al-Fusūl*.

²⁵ *Tabṣira*.

²⁶ *Burhān*.

²⁷ *Miftāḥ al-Wuṣūl*.

²⁸ See Hallaq, 'Logic, Formal Arguments', 321–35.

²⁹ e.g. Ṭūfī, *Sharḥ al-Rawḍa*, i. 97–8.

³⁰ e.g. Ibn al-Ḥājjib, *Muntahā al-Wuṣūl wal-Amal*.

³¹ Ṭūfī, *Sharḥ*, i. 101–6; for his own method, see 107–8.

³² *Mustasfā*, i. 4 (l. 7).

symptoms of a more fundamental variety of doctrine with which one must deal if a serious study of *uṣūl al-fiqh* is to be undertaken. Dismissing these differences as ornamental, superficial, or irrelevant amounts to a deliberate disregard of some of the crucial means to a successful diagnosis of what the individual treatise of *uṣūl al-fiqh* is all about.

IV

We have spoken earlier of the components of worldliness which compete in producing the text. The competition, whose locus is the mind of the author, takes various forms, and each form produces a different result. At times the competition leads to a synthesis of the entirety of the components, namely, to a state of equilibrium in which all the components exercise influence and receive proportionate representation. At others, and this seems to be more frequent, it leads to the dominance of one or more components over the others, in which case the text becomes partly subservient to the imperatives of the overriding component(s). I said 'partly' because the text can never be wholly geared towards the service of these imperatives. After all, the divine components of the law, coupled with the sheer authority of tradition within the discipline, are weighty and powerful constants in any competition.

Be that as it may, a significant component of the worldliness of any legal theory is the juridical reality of the social and political order. In the light of the findings of recent scholarship, we now have no good reason to assume any appreciable gulf between the social realities of Islam and the variant interpretations of the law. Modern research has shown that the *Shari'a* remained to a significant degree the supreme law, even in those areas of legal practice which have for long been assumed to have lain outside the domain of the *Shari'a*—e.g. penal, commercial, and land law. In land law and land taxation and rent B. Johansen has shown that legal practice is in conformity with the *Shari'a* and that the jurists were not hesitant to reinterpret the religious law in order to address the exigencies arising in their societies.³³ Brunshvig has also convincingly shown that the variety of positive legal doctrines is closely connected with the sociological matrix from which these doctrines emerged.³⁴ Other studies of legal practices throughout selected epochs and locales of Islamdom have similarly pointed to the connect-

³³ Johansen, *Islamic Law on Land Tax*, especially 124–5.

³⁴ See his 'Considérations', 61–73.

edness of social realities and judicial doctrines,³⁵ notwithstanding the partial supplementation of religious law by the state. In a detailed study of Muslim commercial law—a law that has until recently been supposed to have little relevance to actual practice—Udovitch has shown how much awareness the medieval lawyers demonstrated in their writings about commercial law and partnership. The ‘jurists’ discussion of commercial matters’, he argues, ‘was based on a fairly clear and accurate understanding of the economic realities of their environment, and a consciousness of the likely effects of their promulgations on the conduct of economic life’.³⁶ Udovitch concluded that Islamic partnership and commercial law represents ‘an instance of the logic of practical reality interacting with the theoretical edifice of Islamic law and achieving an equilibrium that eminently satisfied the requirements of both theory and practice’.³⁷ It is to be noticed here that the reference to ‘theory’ includes positive law as a theoretical exposition of what the law should be. In any case, it is undeniable that recent specialized studies of this matter increasingly and consistently point in the direction of a close link between positive law and socio-economic, political, and other realities.³⁸

Even more undeniable is the inextricable relationship between positive law and legal theory. The fifth/eleventh-century Shams al-Dīn al-Sarakhsī composed a highly original work on legal theory, and this was for the explicit purpose of explaining the methodology on the basis of which he elaborated his positive legal system.³⁹ A close examination of his *Uṣūl* reveals its careful and constant attention to positive law and legal practice. The book is almost single-mindedly legalistic, and the persistent reference to *furūʾ* cases betrays the affinity between the positive rulings of Sarakhsī and his methodology and theory of legal interpretation. In their legal theories Abū Zayd al-Dabbūsī and Sarakhsī’s contemporary, Pazdawī, have also given a great deal of attention to the legal practices of their day.⁴⁰ Qarāfī has also linked his positive law as expounded in *al-Dhakhīra* with his theory of law which he laid down

³⁵ We are referring to studies conducted, among others, by B. Johansen, R. C. Jennings, U. Heyd, H. R. Idris, A. L. Udovitch, David Powers, G. Nahal, D. P. Little, Huda Lutfi, D. Creelius, H. Gerber, and J. Mandaville.

³⁶ Udovitch, ‘The “Law Merchant”’, 119, 116 f. Udovitch’s main contribution in this area is his *Partnership and Profit in Medieval Islam*.

³⁷ ‘The “Law Merchant”’, 130.

³⁸ Wansharīsī’s *al-Miʿyār al-Mughrib* is, among others, an eloquent testimony for this link.

³⁹ Sarakhsī, *Uṣūl*, i. 10.

⁴⁰ For Dabbūsī, see his *Taʾsis al-Nazar*, as well as Ghazālī’s references to him in *Shifāʾ al-Ghalīl*, *passim*. For Pazdawī’s theory, see his *Uṣūl*.

in *Tanqīh al-Fuṣūl*,⁴¹ making the latter the methodological prolegomenon to the former.

That positive law and legal theory were interconnected is shown by the qualifications necessary for a jurist to become adept as an *uṣūlī*. Some legal theorists deemed an adequate proficiency in positive law indispensable for the successful *uṣūlī*, and failure to fulfil this requirement meant a major deficiency in one's knowledge of legal theory.⁴² In fact, it was universally agreed that the *raison d'être* and sole purpose of *uṣūl al-fiqh* is the formulation of positive law. And this finds expression in the literature of *adab al-qāḍī* where theory and practice meet. In his work *Adab al-Qāḍī*, for instance, Māwardī allocates about 350 out of a total of 1400 pages for a comprehensive exposition of *uṣūl al-fiqh*, for he thought it necessary for *qāḍīs* and *muftīs* to be able to practise *ijtihād*, which cannot be carried out without a proficient knowledge of *uṣūl*.⁴³ The requirement that *muftīs* and *qāḍīs* be able to practise *ijtihād* through the prescribed theory of *uṣūl* was stipulated in as early a theory as that of Shāfi'ī.⁴⁴ The two sciences of *uṣūl* and *furū'* became formally interdependent and were later merged into one area of specialization. In the fifth/eleventh, and particularly the seventh/thirteenth, century a new branch of legal science, which we may label as *takhrīj*, made an appearance. The declared purpose of this science, hitherto unstudied, was to bring under close scrutiny specific principles of legal methodology and theory together with cases of positive law that *derive* therefrom (hence the term *takhrīj*). Zinjānī's *Takhrīj*, Isnawī's *Tamhīd*, and Tilimsānī's *Miftāḥ* are three prominent representatives of this genre.⁴⁵

As a matter of principle and methodology then *uṣūl al-fiqh* could never be severed from *furū'*. And in certain works of legal theory, such as that of Sarakhsī, the competing components of worldliness have given way to the overriding demands of juridical reality in the external world. But the dominant component or components of worldliness may originate not in concrete juridical reality but rather in a non-legal field of discourse which may exercise influence upon the legal theorist's modes of thought. Among the intellectual traditions that left an indelible mark on a number of *uṣūl* works are theology, philology, dialectic,

⁴¹ See his *Sharḥ Tanqīh al-Fuṣūl*, 2. Further on his *Tanqīh* and *Sharḥ*, see below, section VI.

⁴² See, e.g., Ibn al-Farrā', 'Udda, i. 70; Sarakhsī, *Uṣūl*, i. 10.

⁴³ Māwardī, *Adab*, i. 636–7.

⁴⁴ See his *al-Umm* (*Bāb Ibtāl al-Istiḥsān*), vii. 274. See also Hallaq, 'Iftā' and *Ijtihād* in Sunnī Legal Theory'.

⁴⁵ Other works that may be considered to belong to this branch of legal knowledge are Shirāzī's *Tabṣira* and Ibn al-Laḥḥām's *al-Qawā'id wal-Fawā'id*. See also the editor's introduction to Isnawī's *Tamhīd*, 15 ff.

logic, and, to a lesser degree, mysticism. The substantive involvement of *uṣūl al-fiqh* in the arena of Kalām is well documented.⁴⁶ The works of Ghazālī, Ibn al-Ḥāḥib, and Anṣārī afford us other examples of the incorporation of logic into *uṣūl al-fiqh*, although the precise effects and implications of such incorporation still await detailed study.⁴⁷ The *uṣūl* works of Bājī, Ibn ‘Aqīl, and Ibn al-Ḥāḥib also present us with examples of theories deeply affected by dialectic (*jadal*); and *Qawā’id al-Aḥkām* of Ibn ‘Abd al-Salām reflects, among other things, mystical as well as contemporary political influences. In the sphere of language and philology, *uṣūl al-fiqh* was more than a recipient of the contributions made by the specialists in the respective fields. It is not without good reason that Zarkashī remarked that ‘the scholars of *uṣūl al-fiqh* have made a close study of certain matters in the language of the Arabs not achieved by the grammarians or the philologists.’⁴⁸

Now, although these intellectual traditions constitute a component of worldliness which competes with that of juridical reality and positive law, the two components are not mutually exclusive, for they often provide ideological support for each other at different stages of theory. One cannot overstress the multifaceted nature of *uṣūl al-fiqh* which comprises what is equivalent in Western jurisprudence to legal theory, legal methodology, interpretation, and, more importantly in this context, legal philosophy. In works where the two aforementioned components are equal competitors, it is quite conceivable, as is in fact often the case, that these components may sustain aspects of theory, methodology, and/or philosophy. For example, the question of *sharā’i’ man qablanā* (namely, laws governing nations before the advent of the Islamic revelation) can be profitably sustained on the level of legal philosophy by deploying an array of arguments emanating from the field of theology without there being a necessary connection, or contradiction, between the doctrine held with regard to this question and other doctrines in the same work pertaining to the methodology of positive law as strictly so defined. An indication of the absence of such a necessary connection is the exclusion of the discussion of *sharā’i’ man qablanā* from certain *uṣūl* works, notably Shāṭibī’s *Muwāfaqāt*. In the case of this work, the component of juridical reality is ever paramount, and that of the intellectual traditions is fully controlled and creatively placed in the service of the methodological considerations of the work. But in the discussion of more involved issues, the two components

⁴⁶ See the writings of G. Makḍī, especially ‘Ash‘arī and Ash‘arites’, 44 ff., 64 ff., 34 ff. See also Rāzī’s *Muḥaṣṣal*, 269–70, 296, *passim*.

⁴⁷ For an attempt in this direction, see, e.g., Hallaq, ‘Logic, Formal Arguments’, 315–58.

⁴⁸ Cited in G. Makḍī, ‘Juridical Theology’, 39.

operated with equally competing force. The elaborate doctrines of *'illa* and *ta'lil* (causation) in the *Uṣūl* of Sarakhsī and the *Shifā'* of Ghazālī offer two examples of the conflict between the two components. Here, theological considerations were reconciled with purely legal exigencies.

The synthesis of the various components in one and the same work is thus to be expected. Ibn 'Abd al-Salām's *Qawā'id al-Aḥkām* brings into prominence not only the imaginative and original uses into which old and familiar *uṣūl* concepts and doctrines are put, but the unique manner in which the author chose to deal with a legal theoretic. The first striking, and somewhat uncommon, feature in this work is the Ṣūfī presence in it: Ibn 'Abd al-Salām was a declared mystic.⁴⁹ Second, the author includes metaphysical discussions indirectly relevant to his text.⁵⁰ Third, through purely legal devices the author engages himself in defining political concepts as well as outlining the political obligations of the sovereign. This should be of no surprise since he, together with Ibn al-Ḥājib, clashed with the Syrian political authorities, a clash that resulted in their exile to Egypt.⁵¹ Fourth, Ibn 'Abd al-Salām gives weight to the role of custom (*'urf*, *'āda*) and societal practices in both theoretical and positive legal considerations. Fifth, there seems to be a deliberate attempt to exclude from *Qawā'id* a number of *uṣūl* issues that are normally taken up by legal theorists. Now, all elements of the work, however variegated in content and focus they may seem, are remarkably well integrated into one theoretical whole. Ibn 'Abd al-Salām's treatise provides an example, by no means singular, of a synthesis of several competing components that variably derive from political reality, juridical practices, positive and customary law, Ṣūfī experience, metaphysics, and other, perhaps less important elements, which may be unravelled upon a closer examination of the author and his work.

When we speak of 'author' the intention is not limited to identifying a mere agent of writing who *happened* to be acting in an indistinguishable framework of time and place. Rather an author, every author, is the depository of a unique combination of experiences that find their genesis and momentum in what we have called the components of worldliness. But although these are the most salient ingredients in effecting *uṣūl* theories, there may be added a number of subsidiary components affecting the ultimate subject-matter and form of the text. We shall touch upon only one or two examples of such subsidiary components in order to make our point.

It is well known that *uṣūl al-fiqh* ranked rather high on the educational syllabus of the *madrassa*, and this had considerable consequences

⁴⁹ Subkī, *Ṭabaqāt al-Shāfi'riyya*, v. 83.

⁵¹ Subkī, *Ṭabaqāt al-Shāfi'riyya*, v. 81.

⁵⁰ *Qawā'id*, 168–74.

on the overall genre of legal theory. One of the most central facts about the life of *uṣūl al-fiqh* as a science is that while, if not because, it was the theoretical underpinning of the actual legal experiences of Islamic societies, it occupied a paramount place among academic subjects. Thus, along with the components we have thus far mentioned, the pedagogical and didactic side of many *uṣūl* works must never be underestimated. A good number of these works originated either as textbooks intended for teaching students, or as lecture notes (*ta'liqāt*) taken down by students on the authority of their teachers. In either case, the element of the pedagogical background of a text cannot be ignored or even marginalized. It is simply a crucial fact in our study and evaluation of the text.

Once a treatise is identified as pedagogical, it cannot be judged in isolation from other, usually larger, works by the same author/professor. For it was the norm that educational textbooks and manuals constituted abridgements of longer works that expressed *particular* doctrines of *individual* authors. A survey of these textbooks might give the impression that they are generic in their treatment of the subject-matter. And this may well be true. But textbooks conveyed only the 'minimum' doctrine whose 'maximum' (or perhaps 'optimum') lies in complete and comprehensive works which were, more often than not, composed prior to the textbooks. These latter were employed as guiding lines by the professor whose commentary and explanation in the seminar provided the students with the full analytical range of the text. A textbook, therefore, without the professor's oral commentary—which was at any rate indispensable in the classroom—or without the comprehensive work, can hardly be expected to reflect either the calibre or the originality of its author.

A collateral index of the originality of the professor's text and his annotation of it is provided by the notes (*ta'liqas*) taken down by students. The *ta'liqas* were not without originality, and, as has been shown, they reflected a wide variety of doctrines.⁵² At times the students gave a faithful account of the professor's series of lectures, but at other times they reformulated and even criticized the teacher's doctrine. A well-known example in point is Ghazālī's notes, published as *al-Mankhūl min Ta'liqāt al-Uṣūl*, where he often disagrees with his teacher al-Juwaynī and offers his own views.⁵³

Thus the audience as the final destination of the *uṣūlī*'s discourse

⁵² G. Makdisi, *Rise of Colleges*, 122.

⁵³ It is worth noting that Juwaynī's *uṣūl* theory as expressed in *al-Burhān* was not lacking in originality. Subkī, for instance, maintained that 'in *al-Burhān* Juwaynī followed the footsteps of no one, and I call this work of his the puzzle of the nation [*lughz al-umma*]', *Ṭabaqāt*, v. 192.

partakes in shaping the text. The pedagogical treatise, unless dedicated to dialectic (*jadāl*), tends to be less polemical and argumentative than a treatise written with a view to establishing one's own scholarly credibility and originality among one's peers. The presence of argumentation and detailed lines of reasoning was fundamental in the explication of an original idea, and what Muslim jurists knew as *taḥqīq al-adilla* (the verification of legal proofs) was indispensable to any attempt to establish oneself as an independent authority, with a distinct *ṭarīqa* in the field. Āmidī, for example, tells us that he wrote his large work *al-Iḥkām fī Uṣūl al-Aḥkām* to advocate and prove the truthfulness of what he thought to be the correct views, and, conversely, to refute what he deemed false.⁵⁴ This work, however, proved to be quite difficult for students, so he abridged it by eliminating complicated arguments and lines of reasoning, and by retaining the basic doctrines (*qawā'id*) propounded in the unabridged text.⁵⁵ Āmidī's younger contemporary, Ibn al-Ḥāḍib, went further: he is said to have abridged Āmidī's *Iḥkām* in his *Muntahā al-Wuṣūl* and thereafter he abridged the abridgement in *Mukhtaṣar al-Muntahā* for the 'benefit of the intelligent student'.⁵⁶ For the same pedagogical purposes Ṣafī al-Dīn al-Baghdādī abridged his *Taḥqīq al-Amal* by removing detailed lines of argument and keeping only the essentials of theory.⁵⁷

On the non-pedagogical level, one may give the example of how two (or more) texts by the same author differ precisely because they are directed at different audiences. In his *Iḥkām al-Fuṣūl*, for instance, the Mālikī jurist Bājī gave a detailed and systematic exposition of the Madinese consensus (*ijmā' ahl al-Madīna*), which comprised two types of consensus. This work was clearly directed at an *uṣūlī* audience not particularly interested in scholarly disputation. But in his *Minhāj*, a dialectical *uṣūl* work, Bājī ostensibly thought it more defensible to drop one type of the Madinese consensus and retain the other.⁵⁸

V

The foregoing makes it abundantly clear that no adequate study of *uṣūl al-fiqh* can be undertaken without taking into consideration the effects that the components of worldliness, severally or aggregately, have on the text. With such a consideration there should be coupled a set of assumptions allowing for the possibilities of variety, development, and

⁵⁴ See his *Muntahā al-Sūl*, 3, ll. 2–3.

⁵⁵ Ibid. 3.

⁵⁶ *Mukhtaṣar*, 2, ll. 3–6.

⁵⁷ See the abridgement *Qawā'id al-Uṣūl wa-Ma'āqīd al-Fuṣūl*, 82.

⁵⁸ See the editor's introduction to Bājī's *Iḥkām*, 129 f.

originality. It is simply wrong to omit from one's consideration the fact of geographical disparity between, say, Andalusia and Persia, or for that matter between Baghdad and Damascus. It would be equally and flagrantly wrong to suppress the assumption that two jurists separated by six or seven centuries ought to be driven apart by a multiplicity of doctrinal, substantive, structural, organizational, and stylistic differences. It would be utterly unreasonable to underestimate the developments occurring between an eighth-century Egyptian theory and another belonging to fourteenth-century Andalusia. A comparative study of Shāfi'ī's and Shāṭibī's theories affords us perhaps the best rebuttal of the dogmatic view insisting on the morbidly uniform and monolithic nature of *uṣūl al-fiqh*.⁵⁹

In the remainder of this section I shall indicate possible areas of research that may profit from the application of a methodology that does not a priori preclude the possibility of originality in legal theory. I shall limit my remarks to two broad examples, one relating to three works by the same author, the other to a number of commentaries by different commentators.

The three works are by Ghazālī who affords us a case study not only of the uniqueness of his own discourse on legal theory but also of the significant changes and developments within his writings on the subject. We have already seen the role of the audience in determining and creating differences in the contents of Bājī's two works. The audience in Ghazālī's case is but one among a number of elements that interacted in producing his discourse. The tumultuous events during the last two or three decades of his life were sufficient to guarantee a variegated outlook at the intellectual consistency of religious and non-religious disciplines. In legal theory *al-Mankhūl* was the first treatise Ghazālī wrote, and being a *ta'līqa*, it was ineluctably influenced by the teachings of his professor Juwaynī. We know of at least three other major works by Ghazālī on legal theory: *Shifā' al-Ghalīl*, *Mustaṣfā*, and *Tahdhīb al-Uṣūl*. Unfortunately, the latter is lost and seems to have been the most comprehensive and detailed of his *uṣūl* treatises.⁶⁰ In *Shifā' al-Ghalīl*, which he wrote probably before *Tahdhīb* but certainly after *Mankhūl*, he expounds one of the most thorough and original theories of legal causation, to which he in fact dedicated the entire work. A general comparison between the three works, *Mankhūl*, *Shifā'*, and *Mustaṣfā*, reveals substantial differences in Ghazālī's views on *ta'līl*. On various

⁵⁹ In addition to the sources quoted under section I above, see Lambton, *State and Government*, 4; M. Bernand, 'Kiyās', 241a, declares that 'With the elaboration of the science of the *uṣūl al-fiqh*, the concepts are defined and fixed' (italics mine).

⁶⁰ See Ghazālī's description of the treatise in *Mustaṣfā*, i. 4; and Hourani, 'Revised Chronology', 292.

aspects of *uṣūl*, not dealt with in *Shifā'*, the early *Mankhūl* differs considerably from *Mustaṣfā*, a work he wrote about two years before his death.⁶¹

In the opening pages of *Shifā'*,⁶² Ghazālī boasts that the treatise contains marvels of scholarship and the quintessence of knowledge. To understand and appreciate the book, Ghazālī bids the reader rid himself of erstwhile beliefs and familiar ways of thinking, for old habits of thought hinder sound apprehension. The 'reader must fulfil the prerequisite of being thirsty for understanding secrets that have not been unravelled in [existing] writings, and he must be eager to grasp truths unknown to people'.⁶³ These remarks should by no means be taken as self-vaunting. Ghazālī is preparing the reader for what is to come, namely, a theory of legal reasoning and causation that manifests a great deal of ingenuity. An adequate study of this treatise will certainly take us beyond the bounds of this essay, but it suffices in order to make our point to refer to his discussion of *munāsaba* (relevancy)⁶⁴ where he introduces the issue of *maṣlaḥa* (public interest) as a central element in reasoning about legal cases.⁶⁵ Significantly, he allots to this matter over 120 pages out of a total of about 600 pages.⁶⁶ More significant is the fact that his theory of *munāsaba* and *maṣlaḥa* is underscored by a strong tendency towards reason as the basis of determining public interest which ultimately enters into the legal norms of the *Sharī'ā*. In fact, his bold tendency towards reason was so obvious that he felt compelled, on more than one occasion, explicitly to dissociate himself from Mu'tazilism.⁶⁷

It is indeed a long leap between Ghazālī's theory of *munāsaba* in *Shifā'* and that which he expounded later in *Mustaṣfā*,⁶⁸ where he is clearly less imaginative and more conservative. His conservatism in this work seems to run through the entire gamut of legal theory. It is instructive that under the category of *munāsaba* in *Shifā'* he offers a lengthy discussion of the issue of *maṣlaḥa* and *ri'āyat al-maqāṣid* (upholding the aims of the law), thus adopting *maṣlaḥa* as a formally legitimate principle. In *Mustaṣfā*, on the other hand, he not only abandons reason as a major source of defining *maṣlaḥa*, but by refusing to discuss it under *munāsaba* and by relegating it to the chapter on

⁶¹ Hourani, 'Revised Chronology', 301–2.

⁶² *Shifā'*, 4–8.

⁶³ Ibid. 8.

⁶⁴ The relevance of a property as a legal cause ('illa) is said by some jurists, including Ghazālī, to be a legitimate method of establishing the cause of a legal ruling. However, some jurists, such as Dabbūsī, argued that this method is highly subjective and arbitrary. But Ghazālī maintained that the method can be justified on objective and rational grounds. See his *Shifā'*, 142–3.

⁶⁵ Cf. Brunschvig, 'Valeur et fondement', 375 ff.

⁶⁶ See *Shifā'*, 142–266.

⁶⁷ Ibid. 163 (l. 1), 204–5.

⁶⁸ *Mustaṣfā*, ii. 296–306.

istiṣlāḥ,⁶⁹ where the principle is considered controversial, he reduced a major avenue of reasoning to the domain of controversial legitimacy. If we were to locate Ghazālī on the aforementioned spectrum whose two extreme ends are uncompromising literalism and liberal pragmatism, we would argue that in *Shifā'* he may be placed closer to the latter, whereas in *Mustaṣfā* he strongly tilted towards the former.

Why did Ghazālī change his position? Although Ghazālī's biography and checkered career are relatively well known to us, they are not quite sufficient to explain fully the differences in the two works. A thorough study of the contents of his legal works and a detailed chronological account of his personal and professional experience are needed before any such explanation is attempted. However, we may tentatively venture to explain the differences in terms of the varying components of worldliness behind the two texts. Ghazālī wrote *Shifā'* in an early period of his scholarly career, but certainly at a time when he was mature enough not to be directly influenced by Juwaynī, or for that matter by anyone else. It is clear from his treatment that he was familiar with an extraordinary range of scholarly legal writings on the subject. We know that at this phase of his career he taught law in Baghdad, issued *fatwās*, and was intensely involved in the study of the legal sciences, as evinced in the many juridical works he composed early on in his life.⁷⁰ These works also included a number of treatises on positive law and juridical dialectic. We also know that at this time, but also earlier, Ghazālī became quite interested in the rational sciences and the rational movements in Islam. His serious preoccupation with positive law, on both the pedagogic and the practical levels, as well as his avid interest in a variety of rational disciplines, each constituted a necessary condition which together were sufficient to produce *Shifā'* and the theory of *munāsaba* he expounded there. But both conditions were absent towards the end of his life, when he wrote *Mustaṣfā*.

After his spiritual crisis in Palestine and Syria, rationality seems to have failed Ghazālī, and the mundane affairs of the world concerned him least. In *Mustaṣfā*, a work that was written in the same period as *Iḥyā' 'Ulūm al-Dīn*, there is a marked retreat to fearsome piety. The *Mustaṣfā* was little more than a manual for teaching law,⁷¹ in which Ghazālī safely stated the 'minimum' doctrine without risking what might be taken as daring, innovative, or controversial. The pragmatism and the attention to *maṣlaḥa* that characterized *Shifā'* are entirely absent from *Mustaṣfā*. Yet the latter remains uniquely Ghazālīan in its choice

⁶⁹ Ibid. ii. 297, l. 3.

⁷⁰ See Subkī, *Ṭabaqāt al-Shāfi'iyya*, iv. 104 ff.; Hourani, 'Revised Chronology', 292.

⁷¹ He himself acknowledged that the treatise was intended for students. See *Mustaṣfā*, i. 4.

of subject-matter, treatment, style, and the logical prolegomenon which became its hallmark.

This instance of variety in Ghazālī's theoretical treatises on law is by no means exceptional. It may be found in the works of several other jurists, beginning with Shāfi'ī, whose 'Old' and 'New' doctrines are well known, down to Ṭufī, whose *Sharḥ Mukhtaṣar al-Rawḍa* shares virtually nothing with his theory of *maṣlaḥa* which he expounded in *Sharḥ al-Arba'in al-Nawawiyya*.

Variety, and indeed originality, find expression not only in the jurists' very own works but also elsewhere where they are least expected. The conventional view has it that commentaries, super-commentaries, and super-glosses on juridical works betray a slavish commitment to the ideas propounded by the original author, and thus what is offered by the commentators is nothing more than hair-splitting motivated by a single-minded concern for the merely trivial minutiae of legal doctrine.⁷² Again, this has long been the prevalent view among orientalisists despite the glaring fact that no study whatsoever has been conducted to trace down systematically the developments of doctrine in these commentaries and super-commentaries. Even a preliminary assessment of this literature reveals enough facts and information as to render the traditional view invalid.

While commentaries must have been a conceivable avenue for the less imaginative and ambitious jurists to publish their traditional knowledge, they also constituted another avenue for jurists of a higher calibre to put forth distinctly original ideas. Perhaps the foremost and most immediate act of originality in the work of these latter commentators is that, unlike the former, they managed to inject themselves between the original text and the reader, only to assert, as a constant reminder, that their presence is essential and that nothing, in effect, can reach the reader except through them. This kind of commentary allows the text to be connected with its audience only after having the commentator bestow on it his own colour and after filtering it through his 'ideological' screen. Nor is this all. The commentator in this genre has generally proved to be uncommitted to the substance, arrangement, and orientation of the original work and its author. The commentators had their own agenda which was, more often than not, independent of the original work.

One can distinguish at least six types of commentary on *uṣūl al-fiqh* works, and, except for one, they are distinctly individualistic. The

⁷² See, e.g., Coulson, *History of Islamic Law*, 84; Gibb, *Mohammedanism*, 104: 'Since the formal legal doctrines and definitions of the [juridical] schools remained substantially unchanged through all the later centuries, there is little to be gained by tracing down and discussing their formidable output of juristic works.'

exception belongs to the type concerned with annotating the lexical connotation of words and concepts used by the original author or, if it is a super-commentary, by the first commentator. In this there is very little, if any, originality and innovation worth mentioning. The second type is a commentary that explicates undeveloped concepts, expands in detail on the original text's terse language, and clarifies its ambiguities. One of the many examples of this type is Ibn 'Abd al-Shakūr's *Musallam al-Thubūt*, a commentary on the abridgement entitled *Fawātiḥ al-Raḥamūt* by Anṣārī; another is Shīrāzī's *Sharḥ al-Luma'*, a commentary on an earlier work by the same author. What separates this type from two other kinds of commentary is the commentator's concern for bringing out in detail what he thinks to be the intended meanings and ideas of the original author, without being avidly committed to defend or refute them, as is the case with the third and fourth types in our classification. Such commentaries seem to have been especially written, as their authors would at times openly admit,⁷³ with a view to rebutting criticism directed at a particular text or author, or refuting doctrines in the *uṣūl* work which is the object of their commentary. Both al-ʿAḍud al-ʾIjī and Taftāzānī wrote, respectively, a commentary and a super-commentary on Ibn al-Ḥājj's *Mukhtaṣar* primarily in defence, but also in explanation, of the work against the disdain directed at it by anonymous opponents.⁷⁴ ʿAbbādī also composed his *al-Āyāt al-Bayyināt* as a super-commentary on Maḥallī's commentary on *Jamʿ al-Jawāmiʿ* of Subkī with the explicit purpose of defending Maḥallī and Subkī against the attacks of the adversaries.⁷⁵ On the other hand, Māziri and Anbārī have each commented on Juwaynī's *Burhān* in a reportedly critical vein.⁷⁶ Likewise, Aṣfahānī's *Bayān al-Mukhtaṣar*, a commentary on Ibn al-Ḥājj's aforementioned work, is replete with criticism of Ibn al-Ḥājj's theory.

The fifth type of commentary has as its main concern the synthesis of doctrines belonging to different legal schools or jurists. Anṣārī's and Ibn 'Abd al-Shakūr's commentaries, for instance, represent an attempt at bringing into one coherent whole the Shāfiʿī and Ḥanafī theories of law,⁷⁷ whereas Bukhārī's commentary on Pazdawī's *Uṣūl* is an example of a synthesis of different doctrines held by a number of jurists.⁷⁸ Finally,

⁷³ See, e.g., sources cited in the next two notes.

⁷⁴ See ʾIjī, *Sharḥ*, i. 5; Taftāzānī, *Hāshiya*, i. 3.

⁷⁵ ʿAbbādī, *Āyāt*, i. 2–3. See also below, n. 90.

⁷⁶ Aghnides, *Mohammedan Theories*, 174.

⁷⁷ See Ibn 'Abd al-Shakūr, *Musallam*, i. 7 (l. 14).

⁷⁸ It is also worthy of note that certain non-commentative works had as their goal the synthesis of two schools of legal thought. See, for instance, Shātibī's *Muwāfaqāt* (i. 8), declared by its author to be a work bringing together the teachings of Ibn al-Qāsim and those of Abū Ḥanīfa.

the sixth type is a commentary on an abridgement where both the abridgement and the commentary on it are undertaken by the same jurist. Qarāfī's commentary on his own abridgement of Rāzī's *Maḥṣūl*, and Ṭūfī's commentary on *al-Bulbul*, an abridgement he made of Ibn Qudāma's *Rawḍa*, are two cases in point.

Now, with the exception of the first type, commentaries seem to manifest greater or lesser degrees of innovation and originality, not unlike the varying degrees of originality exhibited by the authors upon whose texts these commentaries were written. And like these authors, the commentators were subject to the similar influences brought about by the components of worldliness. A significant indication of the commentators' contribution to recreating and refashioning the original text lies in a comparison between commentaries on the same text. In the case of Ibn al-Hājib's *Mukhtaṣar*, which attracted seventy commentaries in a span of a mere two centuries after its author's death,⁷⁹ it would be utterly unreasonable to assume that all these commentaries, some of which are by leading jurists and theologians, are nothing but the rehashing of the same themes. In fact, even a preliminary comparison between Ijī's *Sharḥ* (and Taftāzānī's super-commentary) on the one hand, and Aṣfahānī's *Bayān* on the other, discloses such vast differences between these works that the only common ground they share seems to be reducible to their point of departure, namely, the *Mukhtaṣar*.

Nor should one assume that the abridgements (*mukhtaṣarāt*) which constituted the bases of commentaries are completely faithful to the original works from which they were abstracted. In abridging larger works, jurists took liberties in selecting certain materials and in rearranging them, and when they wrote commentaries on their own abridgements they took even more liberties in determining what is or is not important, and emphasized or de-emphasized issues as they deemed fit. The result of this process of sifting, selecting, and augmenting was that the original, unabridged text had little in common with the final commentary. Consider the case of Qarāfī who abridged Rāzī's *Maḥṣūl* under the title *Tanqīḥ al-Fuṣūl fī lkhtīṣār al-Maḥṣūl*.⁸⁰ Qarāfī declared that in the abridgement 'there are hidden meanings that can by no means be understood except by me, since I have not taken them from anyone else'.⁸¹ To explain these meanings, he wrote a *Sharḥ* on the *Tanqīḥ*, resulting in a work that is vastly different from Rāzī's *Maḥṣūl*. Between the freedoms Qarāfī exercised in abridging the original work and his independence in writing the commentary, his *Sharḥ Tanqīḥ al-Fuṣūl* certainly deserves to be studied as a work entirely of his own

⁷⁹ Yamānī, *Īthār al-Haqq*, 200.

⁸⁰ He again abridged this abridgement under the title *Mukhtaṣar Tanqīḥ al-Fuṣūl*.

⁸¹ *Sharḥ Tanqīḥ al-Fuṣūl*, 2.

creation. So was Ṭūfī's commentary on his own abridgement of Ibn Qudāma's *Rawḍa*, which is said to be an abridgement of Ghazālī's *Mustaṣfā*.⁸² Ṭūfī's *Sharḥ* drastically differs from both Ibn Qudāma's and Ghazālī's works. In the abridgement and the commentary on it, Ṭūfī claimed he exercised his own *ijtihād*, and in the latter he explicitly maintained that he expressed unique views not to be found elsewhere.⁸³ In the substance of doctrines in the *Sharḥ*, in the arrangement of the subject-matter, and in the lines of reasoning leading to the elaboration of the theory, he argued that he followed his own methods and no one else's.⁸⁴

We are obviously under no obligation to take the jurists' evaluation of their own contributions at face value. But such descriptions acquire an added significance when even a preliminary study of the jurists' works, whether commentative or not, reveals the ingenuity and individualistic imprint of their discourse. Qarāfī's and Ṭūfī's commentaries, among many others, may be said without the slightest hesitation to be as independent-minded as any other 'original' work. It would certainly not be an exaggeration to say that the use of abridgements as the basis of expanded works represents more a pretext than a genuine need for a text to the substance and framework of which the jurists were committed.⁸⁵ This, of course, raises the question of why these jurists opted to comment on abridgements of already existing works rather than compose treatises entirely of their own. A complete answer must await further research, but we may tentatively argue that while some theorists were indeed limited in their commentaries to the main ideas expressed in the text upon which they were commenting, others found in well-accepted and highly authoritative abridgements a means through which their works, which have only the semblance of commentaries, would gain immediate recognition and acceptance. The attribution and association of a work/commentary with a distinguished text would guarantee its ultimate, if not immediate, success and absolve it from the initial burden of proving itself.

⁸² Ṭūfī, *Sharḥ*, i. 98. Yet another example is Ibn al-Najjār's commentary on his own abridgement of 'Alā' al-Dīn al-Mirdāwī's *Tahrīr*, entitled *Sharḥ al-Kawkab al-Munīr* (i. 21, 29).

⁸³ Ṭūfī, *Sharḥ*, iii. 750.

⁸⁴ Ibid. i. 95, 97–8; iii. 750, 751.

⁸⁵ It is remarkable, for instance, that Shīrāzī chose to write a large work of *uṣūl* by way of commenting on his own *Luma'*. *Sharḥ al-Luma'*, however, could stand as an entirely original (viz. non-commentative) work, and some bibliographers have indeed thought it so and have given it another title, i.e. *al-Wuṣūl ilā Ma'rīfat al-Uṣūl* (see editor's introduction to *Sharḥ al-Luma'*, 57). Another interesting case is that of 'Abbādī who commented on Maḥallī's commentary on Juwaynī's *Waraqāt*, this having the dubious distinction of being the shortest treatise on *uṣūl* we know. The choice of the *Waraqāt* as the object of a commentary is curious since the treatise barely states the

VI

Admitting the legitimacy of the relationship between the author and his worldliness, as well as the resultant products of this relationship, would necessarily mean that variety and originality are qualities whose *possible* existence must be presumed until proved otherwise. To preclude their existence a priori would be methodologically wrong.

The problematics of the now dominant methodology lie precisely in its controlling assumption that the law is immutable, this having the necessary consequence that it is rigid and thus monolithic. This archaic approach accounts, among other things, for the fact that thus far there has been no single study which attempts to trace down the chronological development of concepts and doctrines within *uṣūl al-fiqh*. If the underlying assumption insists on a monolithic and immutable legal history, then any curiosity about an intellectually vigorous development in this literature is crushed before its birth.

Chronological conceptual developments within *uṣūl* went hand in hand with the extent of variety and originality we have been discussing. The science of legal theory attracted the best minds, and their ingenious contributions over the centuries could not but result in significant developments. To acknowledge the inventiveness of Shāfi'ī, Ibn Surayj, Dabbūsī, Bāqillānī, Baṣrī, Juwaynī, Ghazālī, Ibn 'Aqīl, Rāzī, Ibn Taymiyya, Shāṭibī, and a dozen others, and still refuse the proposition that, methodologically, significant developments must be considered in the bag of our assumptions, would amount to blind obstinacy.

This is certainly not a far-fetched argument, for it has a firm foundation in *uṣūl al-fiqh*'s history. Even in the relatively scarce primary literature thus far published one can detect important doctrinal developments. Consider, for instance, the development of discourse concerning the requirement that a *muftī* must be a *mujtahid*, a development that reflects the adaptation of legal theory to the exigencies of juridical practices.⁸⁶ Another instance is the problem of the authoritative basis of consensus which posed serious difficulties and challenged the jurists' imagination. The problem was debated in as early a period as that of Shāfi'ī, if not before, and until the beginning of the fifth/eleventh century it remained unresolved. It was only during the next three centuries that a solution was found, and only then was the problem finally put to

outline of *uṣūl* (it consists of about 1600 words). Be that as it may, 'Abbādī later abridged his long commentary (*sharḥ kabīr*) on Mahallī. It is not inconceivable that the shorter commentary could serve as the text of another commentary, and this latter may be considerably different from 'Abbādī's long commentary.

⁸⁶ This issue has been studied in some detail. See Hallaq, '*Iftā'* and *Ijtihād* in Sunnī Legal Theory'.

rest.⁸⁷ But the solution would have been unattainable had it not been for concurrent and concomitant developments which armed the jurists with tools that enabled them to reach a solution. The central device that was brought to bear upon the authoritativeness of consensus was the thematic *tawātur* in prophetic traditions (*tawātur ma'nawī*),⁸⁸ and this in turn would not have been developed had it not been for elaborating a theory of induction which reached a high level of sophistication by the eighth/fourteenth century.

The theory of public interest (*maṣlaḥa, istiṣlāḥ*) represents another area of the law that witnessed a great deal of development. It now hardly needs arguing that Ghazālī's concept of *maṣlaḥa* expounded in *Shifā'* was an outstanding advance over previous concepts. Yet, Ghazālī's writings on this issue would seem unimpressive when compared with the monumental achievement of Shāṭibī in his *Muwāfaqāt*, a work entirely based on a unique and creative marriage between a notion of induction and the doctrine of *maṣlaḥa*.⁸⁹ Although Shāṭibī seems to have assimilated in his work the views Ghazālī expressed in his *Shifā'*, he took the theory of *maṣlaḥa* into unprecedented dimensions. Shāṭibī, however, would not have been able to produce his theory without having had at his disposal a rich variety of highly developed doctrines of law and legal logic. While it is undeniable that Shāṭibī's theory is the outcome of a process that began in the second/eighth century, it would not be an exaggeration to maintain that he was far more indebted to the contributions made during the three centuries that immediately preceded him than to the earlier period.

A development parallel to that of *istiṣlāḥ* is *istiḥsān* which did not culminate in a work of the weight and stature of *Muwāfaqāt*, yet succeeded in attracting some of the most complex and seminal arguments in the history of *uṣūl*. It is indeed a long way from the elementary notions of *istiḥsān*, as found in Abū Ḥanīfa and Shaybānī, to the theories on the subject propounded by Pazdawī,⁹⁰ Sarakhsī,⁹¹ and, later on, Ibn Taymiyya who allocated to its treatment an independent treatise.⁹² The broad outlines of the evolution of *istiḥsān* from the second/eighth-century arbitrary or semi-arbitrary mode of reasoning—severely attacked by Shāfi'ī—to a coherent and systematic doctrine during the fifth/eleventh century and thereafter are well known.⁹³ And like the

⁸⁷ See Hallaq, 'On the Authoritativeness of Sunni Consensus', 427–54.

⁸⁸ Ibid. Also see id., 'On Inductive Corroboration', 9–24.

⁸⁹ See, e.g., Hallaq, 'On Inductive Corroboration', 24–9; id., 'The Primacy of the Qur'ān', 84–90.

⁹⁰ *Uṣūl*, iv. 2–14, 32–43.

⁹¹ *Uṣūl*, ii. 199–215.

⁹² i.e. *Mas'alat al-Istiḥsān*.

⁹³ For a discussion and analysis of the main authors on *istiḥsān*, see J. Makdisi, 'Legal Logic', 73–85.

interconnected developments of *al-tawātur al-ma'nawī*, induction, and consensus, *istihsān* was capable of development only by virtue of the refinements that took place in the theory of causation (*ta'līl*)⁹⁴ which in its fifth/eleventh- or seventh/thirteenth-century form would have bewildered Shāfi'ī.

VII

Acknowledging these developments, and, more importantly, acknowledging the possibility of their existence throughout the history of *uṣūl al-fiqh*, has serious implications for our methodology. For it not only sheds the myth of a monolithic Islamic legal theory, but calls upon those who still adopt such a myth to re-evaluate the basic assumptions and starting-points of their thinking on the subject. The theory of an individual jurist cannot any more be taken to represent an anonymous collectivity called *uṣūl al-fiqh*; there is simply no such thing. Can any one theory equally represent the contributions of Shāfi'ī, Sarakhsī, Ghazālī, Ṭūfī, and Shāṭibī? Can Ibn al-Hājib speak for Baṣrī, or, for that matter, for any of the leading figures of *uṣūl*? Shāfi'ī or Shāṭibī are no more representatives of *uṣūl al-fiqh* than William of Ockham or Berkeley of British empiricism. The contributions of the leading jurists cannot be treated as an indistinguishable mass, one speaking for the other, the other for one. A glance at biographical works instructs us that these jurists were individuals with a strong sense of their individuality. Each was the product of his own experience and of his own age, no less than we who write about them are the products of our own specifically social, religious, political, and ideological experiences and backgrounds. The worldliness underlying and affecting their discourse varied from one jurist to another, and changed with the constant changes of time. The fifth/eleventh-century *uṣūlist* Sam'ānī perhaps did not apprehend the prophetic quality of his words when he declared that the law is 'an ongoing science continuing with the passage of centuries and changing with the change of circumstances and conditions of men'.⁹⁵

⁹⁴ For a preliminary attempt at tracing developments in *ta'līl* see Hallaq, 'The Development of Logical Structure', 42–67.

⁹⁵ Cited in G. Makdisi, 'Juridical Theology', 36.

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