Islamic Law in Theory and Practice

Introduction to Islamic Law

Ahmed Akgunduz

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"The world today has become one large village. Muslims and non-Muslims live side by side and have to learn about one another, share commonalities and respect differences. At this time more than one and a half billion Muslims live in this village. Some of them are pious Muslims, trying to live in accordance with Islamic rules, whereas others do not while believing that these rules come from God (*the Qur'an*), from interpretations of His Messenger (*the Sunnah*) or the consensus of Muslim jurists (*ijmâ*), and are at least rules derived via analogy (*qiyâs*) from the main sources of Islam. Most Muslims think along these lines and agree with the above. The reader should remember that Muslim individuals should live according to Islamic rules in private, but no individual is responsible for implementing Islamic law. In any event, the need to learn the facts about Islamic law is necessary for Muslims as well as for non-Muslims if they live in the same society with Muslims, at least in the sense of general information.

This book is divided into eight chapters.

Chapter I. Because of the many misunderstandings that arise, some terms related to Islamic Law, such as *Sharî'ah, fiqh, qânûn, 'urf*, Islamic Law, and Muhammadan Law are explained.

Chapter II. Here, in this chapter dedicated to references on Islamic Law, the real added value of this book is found.

Chapter III. This chapter looks at four periods of Islamic Law: the period of the Prophet Muhammad, the period of the Companions, the period of the Tabi'în, and an introduction to the period of *Mujtahidîn*.

Chapter IV. We will provide detailed information here on the different law schools and theological divisions.

Chapter V. This chapter will be devoted to a period of Islamic law that has been neglected in both old and new books and articles, i.e. the period of Islamic Law after the Turks converted to Islam (960-1926).

Chapter VI. This chapter will focus also on three main subjects: Anglo-Muhammadan law (Indo-Muslim law), Syariah or Islamic Law in Southeast Asia, and Islamic Law in contemporary Muslim states like Egypt, Pakistan, Morocco, Indonesia and Jordan.

Chapter VII. We will explain the system and methodology of Islamic Law in this chapter.

Chapter VIII. We will give some brief information here on the implementation of Islamic Law, its future; some encyclopedical works on Islamic law, and new institutions of Islamic *fiqh*."

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FOREWORD

The world today has become one large village. Muslims and non-Muslims live side by side and have to learn about one another, share commonalities and respect differences. At this time more than one and a half billion Muslims live in this village. Some of them are pious Muslims, trying to live in accordance with Islamic rules, whereas others do not while believing that these rules come from God (the *Qur'an*), from interpretations of His Messenger (the *Sunnah*) or the consensus of Muslim jurists (*ijmâ'*), and are at least rules derived via analogy (*qiyâs*) from the main sources of Islam. Most Muslims think along these lines and agree with the above. The reader should remember that Muslim individuals should live according to Islamic rules in private, but no individual is responsible for implementing Islamic law.

Despite the above view of Islamic rules, many tendencies with respect to Islamic law can be found among Muslim scholars and non-Muslim scholars. Some of them try to interpret sacred texts according to hermeneutical[1] rules that are used mostly in

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[1] We could define hermeneutics as the study of the general principles of interpretation. Traditional hermeneutics – which includes Biblical hermeneutics – refers to the study of the interpretation of written texts, especially texts in the areas of literature, religion and law. Contemporary or modern hermeneutics encompasses not only issues involving the written text but everything in the interpretative process.

As is well known, Muslim jurists use the terms *tafsîr* or *ta'wîl* for interpretation, not hermeneutics. We should not confuse Islamic legal terms and European terms. We will explain the rules for interpretation in Islamic law in the second book.

Some scholars argue that law and theology constitute particular forms of hermeneutics because of their need to interpret legal tradition/scriptural texts. Moreover, the problem of interpretation has been central to legal theory, at least since the 11th century C.E. in Christianity. In the Middle Ages and the Renaissance, the schools of glossators, commentators and *usus modernus* were distinguished in line with their approach to the interpretation of "laws" (mainly Justinian's *Corpus Iuris Civilis*).

The University of Bologna gave birth to a "legal renaissance" in the 11th century C.E., when the *Corpus Iuris Civilis* was rediscovered and started to be systematically studied by people like Irnerius and Gratianus. It was an interpretative Renaissance. Since then, interpretation has always been at the center of legal thought. Among others, Savigny and Betti, also made significant contributions to general hermeneutics. Legal interpretivism, the most famous version of which was developed by Ronald Dworkin, can be seen as a branch of philosophical hermeneutics (cf. Gayle L. Ormiston and Alan D. Schrift, *The Hermeneutic Tradition: From Ast to Ricoeur* (Albany: NYU Press, 1990), pp. 39-115; Paul Ricoeur, *Interpretation Theory: Discourse and the Surplus of Meaning* (Fort Worth: Texas Christian University Press, 1976).

Muslim scholars have discussed this problem in *usûl al-fiqh* under the title of *tafsîr* and *ta'wîl*. But Islamic modernism is an attempt to find new interpretations of the law or to construct a new hermeneutics that facilitates interpretations consistent with the demands of modern society. Mem-

Christian theology, and they forget the Islamic rules and principles for interpretation, which are called *usûl al-fiqh*. Some of them compare Islamic law and rules to Christianity, call for reforms regarding claims of historicity and confuse Islamic legal terms and European terms.[2] Some say that Islamic law is outdated and that Muslim society should have secular law. Others are trying to create a new Islam in the name of European Islam or Moderate Islam and describe *Sharî'ah*, i.e. Islamic law, as, in fact, barbarian.

European universities have taught Islamic law in an orientalist way to non-

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bers of this school are said to "go to excess" in their hermeneutics of the texts, whether theological or legal, or outright traditions. Everything that does not agree with their view is given a new "spin" in the name of interpretation (Habib Rahman Md. Ibramsa, "Muslim Modernists and New Hermeneutic Approach to the Prophetic Tradition: Special Reference to the Injunction of Sariqah and Hirabah," paper presented at the 34th Annual AMSS Conference, "*Muslims and Islam in the Chaotic Modern World: Relations of Muslims among Themselves and with Others*." Temple University, Philadelphia, September 30 - October 2, 2005, http://www.amss.org/proc/pdf/Ibramsa.pdf (accessed 11.07.2009).

[2] Historicity refers to how history is, to allow discussion as to how its form is interpreted (linear, circular, repetitive etc). The historicity of the Bible addresses the question of the historical accuracy of the Bible, the extent to which it can be used as a historical source and what qualifications should be applied from the academic viewpoint.

Historicism is a school of interpretation that, in its theological usage, treats the eschatological prophecies of Daniel and Revelation as finding literal fulfillment on earth through the history of the church and especially in relation to the struggle between the true church and apostasy. Historicism is contrasted to Preterism, Futurism and Idealism. Emerging within the early church, Historicism became a dominant eschatological interpretation in the Protestant-Catholic conflicts of the Reformation. A Historicist approach was taken by Martin Luther, although claims that John Calvin held to the Historicist interpretation are not universally recognized. Among conservative Protestants, historicism was supplanted in the 19th century C.E. by Futurism, with the rise of dispensationalist theology. Historicism continues to be taught in churches originating in the Adventist movement (Leroy Edwin Froom, *The Prophetic Faith Of Our Fathers*, vol. II (1948), pp. 267-79, 436).

With respect to the historicity of Islam, the earliest source of information for the life of Muhammad is the Qur'an, even though it does not provide a great deal of such information. Next in importance are the historical works by the writers of the third and fourth century of the Muslim era. According to this theory, Muhammad is "the only founder of a major world religion who lived in the full light of history and about whom there are numerous records in historical texts, although like other pre-modern historical figures not every detail of his life is known." The supporters of this theory attempt to distinguish between the historical elements and the non-historical elements of many of Muhammad's sayings. A major source of difficulty in the quest for the historical Muhammad is the modern lack of knowledge about pre-Islamic Arabia. (Abdualziz Sachedina, "The Ideal and Real in In Islamic Law," in: Ravindra S. Khare, *Perspectives on Islamic Law, Justice, and Society* (Lanham: Rowman & Littlefield, Publishers, 1999), pp. 15-31; F.E., Peters "The Quest for Historical Muhammad," *International Journal of Middle East Studies,* 23 (1991): 291-315; Cf. Kai Hafez and Mary Ann Kenny, *The Islamic World and The West: An Introduction to Political Cultures and International Relations* (Leiden: Brill 2000), pp. 52-4.

Muslim students. The works by Joseph Schacht, Ignaz Goldziher and A. W. T. Juynboll, etc. are well known. There are many Muslim critics of their work, but two important changes have now occurred. *First*, most students in Islamic Studies in Western countries are Muslims. They are sometimes more aware of the original sources of Islamic law than their teachers are. *Second*, non-Muslim scholars have changed and have become more objective. For example, they call themselves Islamologs rather than orientalists and talk about Islamic law instead of Muhammadan law. There are many new serious works by non-Muslims on Islamic law.

In any event, the need to learn the facts about Islamic law is necessary for Muslims as well as for non-Muslims if they live in the same society with Muslims, at least in the sense of general information. For this reason, as a professor in Islamic law at the Islamic University of Rotterdam, I have concluded that a manual on Islamic law is urgently needed for university students as well as for all those who need to learn some general information about Islamic law. I have benefited from original sources in Arabic or Ottoman manuscripts, but I have benefitted from English books written by Muslim or non-Muslim scholars. For example, *Islamic Theories of Finance: With an Introduction to Islamic Law and a Bibliography* by the non-Muslim Ottoman scholar Nicolas Aghnides, *Principles of Islamic Jurisprudence* by Mohammad Hashim Kamali, and works by Waeel Hallaq, Rudolph Peters and others have helped me.

I propose arranging this work in 4 books:

Book 1: *Introduction to Islamic Law*. This book is a concise history of developments in Islamic law. I believe I have many new things to say about this subject, especially about references to Islamic law and developments in Islamic law after the Turks embraced Islam. I hope students and my colleagues will appreciate that. Here, I will discuss the methodology and the implementation of Islamic law in Muslim countries.

Book 2: The Principles of Islamic Jurisprudence. This book will discuss new tendencies in the interpretation of Islamic sacred texts, such as historicity and the hermeneutical method suggested by some Muslim scholars like Fazlur Rahman,[3] Hassan

[3] Fazlur Rahman Mâlik (1919 –1988) is a well-known Muslim scholar. He was born in the Hazara area of British India (now Pakistan). His father, Maulana Shihab al-Din, was a well-known scholar of the time who had studied at Deoband and had achieved the rank of *alim* through his studies of Islamic law (*fiqh*, *hadîth*, Qur'anic *Tafsîr*, logic, philosophy and other subjects). Rahman studied Arabic at Punjab University and went on to Oxford University where he wrote a dissertation on ibn Sina. He then began teaching, first at Durham University where he taught Persian and Islamic philosophy, and then at McGill University where he taught Islamic Studies until 1961. He moved to the University of Chicago in 1969. There he was instrumental in building a strong Near Eastern Studies program that continues to be among the best in the world. Rahman also became a proponent for reform of Islamic policy and was an advisor to the State Department. He died in 1988. Since Rahman's death his writings have continued to be popular among Islamic and Near Eastern scholars. His famous works are *Islam* (Chicago: University of Chicago Press, 1979 (2nd ed.); *Islam and Mod-*

Hanafi[4] and Muhamnmad Arkoun,[5] and summarize all the rules relating to principles of Islamic jurisprudence as explained by Muslim scholars in the books of *usûl al-fiqh*.

Book 3: Islamic Public Law. Here I will discuss Islamic constitutional law, administrative law, financial law, penal law, trial law with judges and international law. I will focus on the implementation of *Sharî'ah* and the power of legislation in Islamic law.

Book 4: Islamic Private Law. In this book I will explain Islamic rules relating to personal law, family law, heritage law, contract law, goods law, law of citizenship. I will discuss different variants of application in different Muslim countries.

Muslims believe that different prophets may come in one age, and that they have come. Since the coming of the Seal of the Prophets[6], the *Sharî'ah* of Muhammad is sufficient for all peoples in every age: there is no longer any need for different laws. However, in secondary matters, the need for different schools has persisted to a degree. Just as clothes change with the seasons and medicines change according to dispositions, so sacred laws change with the ages, and their ordinances change according to the capacities of peoples. Because the secondary matters of the ordinances of *Sharî'ah* are similar to human circumstances, they, like medicine, are implemented in line with those circumstances.

We do not agree with the view that the *Sunnah* and the theory of the sources of Islamic law did not really develop until the 9th century and that Islamic law did not really derive from the Qur'an and the *Sunnah*. Our explanations on this subject can be found in this book and the next.

We believe that because of the doctrine *"A perspicuous Arabic Qur'an"*[7] the meaning of the Qur'an is clear. From beginning to end, the Divine address revolves around authoritative meanings, corroborating them and making them self-evident.

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ernity: Transformation of an Intellectual Tradition (Chicago: University of Chicago Press, 1982); *Major Themes of the Qur'an* (Chicago: University of Chicago Press, 2009); *Revival and Reform in Islam*, ed. Ebrahim Moosa (Oxford: Oneworld Publications, 1999).

[4] Hassan Hanafi is a professor of philosophy and a leading authority on modern Islam. He studied at the Sorbonne in Paris, and since 1967 he has been a professor of philosophy in Cairo, as well as a visiting professor at universities in France, the United States, Belgium, Kuwait and Germany. His most famous book in English is *Cultures and Civilizations: Conflict or Dialogue; Islam in the Modern World*.

[5] Arkoun is a French-Algerian scholar and has written many books, e.g., *Islam: To Reform or to Subvert?* See Tamara Sonn, *Interpreting Islam* (Oxford: Oxford University Press, 1996), especially pp. 189-90; *The Unthought in Contemporary Islamic Thought* (London: Saqi Books, 2002).

[6] The prophecy of Muhammed has rasied a number of remarks among Christians; because they believe that Jesus Christ is greater than all prophets and revelation comes from one who is greater than all prophets. Cf. Conference of European Churches, *Witness to God in a Secular Europe,* (Geneva: 1985), p. 40.

[7] The Qur'an, *Fussilat*, 40:3.

Not to accept those authoritative meanings suggests the denial of the Almighty God and an insult to the Prophet's understanding. That is to say, those authoritative meanings have been taken successively from the source of Prophethood.

We should keep in mind here that only sovereign Muslim states/governments have the legal authority to implement Islamic law. An individual Muslim has no legal authority or power to implement Islamic law. The law of Islam certainly does not say that every Muslim is obliged to implement Islamic law. It matters not how efficient and popular that individual may be as a brave warrior or a meticulous planner of unlawful and immoral schemes of hatred, terror and destruction. Only people who are properly qualified and trained, and hold a license from Muslim governmental authorities, have the authority to issue *fatwâs*. Not every Muslim individual qualifies as a *Muftî* (a jurist-consult or scholar of law who has been given a license to issue *fatwâs*.). For this reason Bediuzzaman says: *"And we know that the fundamental aims of the Qur'an and its essential elements are fourfold: divine unity (al-tawhîd), prophethood (al-nubuwwah), the resurrection of the dead (al-hashr), and justice (al-ʿadalah).*[8] *Al-Adâlah* means law. He adds in another treatise: "Let *our ulul-amr (satesmen and political authorities) think over implementing these rules".*[9]

We as Muslim scholars are not comfortable about the generalizations used by most critics of Islamic law. Most critics speak and write about Islamic law and Muslims as if there were no serious theological and ethnic differences to be found within this religion or its adherents, as is the case in most world religions. Knowledge about the history and phenomenology of Islam as a world religion is sparse in Europe, if not simply absent. Islam is often covertly or sometimes even overtly identified with an anti-democratic theocracy and with terrorism. This is not true. But there is a second matter about which we feel uncomfortable too, i.e. the present debates on Islamic law and Muslims. Those mainly involved in this debate are non-Muslims, often motivated by an anti-religious and often rather fanatically atheistic spirit. The main reason for this is the simple fact that Europeans do not yet have enough of an "Islamic elite", i.e. a group of well-educated and well-integrated intellectuals who are able to demon-

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[8] Bediuzzaman Said Nursi, *Signs of Miraculousness, The Inimitability of the Qur'an's Conciseness*, (Istanbul: Sozler Publications, 2007), Introduction, p. 18.

[9] Abu al-Hasan Ali ibn Muhammad al-Mawardi, *al-Ahkâm al-Sultaniyyah fi al-Wilayat al-Diniyyah, (*Kuwait: Dar ibn Qutaybah, 1989), pp. 22-23; Zafir al-Qasimi, *Nizâm al-Hukm fi al-Sharîʿah wa al-Târîkh al-Islâmî,* (Beirut: Dar al-Nafaʿis, 1990), pp. 352-53; Berger, Maurits, "Sahrîʿah Law in Canada- Also Possible in the Netherlands?" in Paulien van der Grinten, Ton Heukels, F. J. A. van der Velden, *Crossing Borders: Essays in European and Private International Law, Natioanlity Law and Islamic Law*, (Amsterdam: Kluwer Rechtswetenschapelijk Publicaties, 2006), pp. 173-83; See some discussions in the Netherlands: Maurits Berger, "Sharia in Europa? Welke Sharia," *Eutopia*, October 2005, nr. 11; http://www.wijblijvenhier.nl/index.php?/archives/711-Donner-Minister-van-Sharîʿah.html (accessed 5. 9. 2009).

strate that an Islamic faith and an Islamic lifestyle are possible and viable within a modern, Western, and democratic context.[10]

We prefer to write what Muslim jurists *(fuqahâ)* have explained as the interpretation of the Qur'an and the *Sunnah*. Our success will be measured by our ability to reflect what existed in Islamic sources correctly. Everything human beings start falls short; we are ready to perfect our study with the help of contributions by readers and constructive criticism. I would like to thank all those who read this book and contribute constructively to it. I am thankful to God Who enabled me to complete this book of my work.

23. 12. 2009 Rotterdam

Ahmed Akgunduz

[10] Cf. Prof. Dr. Anthon Zijderveld, *The Speech in Opening Academic Year of 2005-2006 at the IUR,* (Rotterdam, 2005).

OUTLINE OF THE BOOK

Students of Islamic studies, scholars and researchers may wonder why a new book on Islamic law and its history is needed – there are already many books in English and Arabic. Therefore, I would like to explain our methodology and the new features of this first book of the series Islamic Law in Theory and Practice.

This book is divided into eight chapters.

Chapter I. Because of the many misunderstandings that arise, some terms related to Islamic Law, such as *Sharî'ah, fiqh, qânûn, 'urf,* Islamic Law, and Muhammadan Law are explained. We will give clear definitions, using primary sources and indicate the interrelated meanings they have. The main characteristics of Islamic Law and the mutual influences between Islamic Law and other legal systems will be discussed.

Chapter II. Here, in this chapter dedicated to references on Islamic Law, the real added value of this book is found. As scholars know, there are many valuable old sources (like Kâtib Chelebi Haji Khalifah's *Kashf al-Zunûn 'an Asâmî al-Kutub wa'l-Funûn* and Mustafa Tashkopruzadeh's *Miftâh al-Sa'âdah we Misbâh al-Siyâdah)* and new ones (like Nicolas Aghnides's dissertation *Islamic Theories of Finance: With an Introduction to Islamic Law and a Bibliography*, J. Schacht's book *An Introduction to Islamic Law*, and Laila al-Zwaini/Rudolph Peters's work *A Bibliography of Islamic Law 1980-1993)* on this subject. But there are some things missing in these works. Researchers and students need comprehensive and concise references on Islamic Law. These references will be classified under several categories: theoretical and applied references (*shar'iyyah* records, *fatâwâ,* archival documents, legal arrangements, and legal codes (*qawânîn*)). Applied sources have largely been lacking in the works listed. No legal system can be understood precisely without reference to applied sources. Here the theoretical sources will be classified systematically. This chapter will serve as a useful manual for all students and researchers.

Chapter III. This chapter looks at four periods of Islamic Law: the period of the Prophet Muhammad, the period of the Companions, the period of the *Tabi'în,* and an introduction to the period of *Mujtahidîn.* We will explain the main sources, features and provide examples of legislative activities in these periods.

Chapter IV. We will provide detailed information here on the different law schools and theological divisions. A crucial point on this subject will be corrected, and we will draw attention to the importance of not confusing the two kinds of schools: schools of thought *(i'tiqâd)* and schools of law (*fiqh).* Most Muslims – and some scholars as well – display confusion on this subject. Therefore, all schools in Islam will be divided into two groups. First are *schools of thought* (*al-madhâhib al-I'tiqâdiyyah*), a category that includes 1) *Ahl al-sunnah wal-jamâ'ah* schools, which have been described by Sunnî scholars as *al-Madhhab al-Haq* (Righteous School) and 2) *Ahl al-*

Bidʿah schools, which are described as heretical or *al-Madhhab al-Bâtil* by Sunnî Muslim scholars. It is possible to describe these schools of thought as Sunnî or Shiʿî; but schools of law cannot be described as either Sunnî or Shiʿi. Second are *schools of law* (*al-madhâhib al-ʿamaliyyah-fiqhiyyah*). We want to remind our readers that nobody can describe any law school as Sunnî or Shiʿî, *bâtil* or *haqq* or otherwise because the question of *fiqh* is not a matter of faith. A Muslim, such as Zamakhshari, the author of *al-Kashshâf*, may be Muʿtazilî in faith but Hanafî in *fiqh*. There are exceptions only with respect to the Shîʿa and some *Fiqh Schools*. Shîʿa is a school of thought, whereas Jaʿfariyyah and Zaidiyyah are *Fiqh Schools*. But everybody who was affiliated with the Shîʿa was also affiliated with either the Jaʿfariyyah or Zaidiyyah schools. Wrong descriptions of schools can often be found in books, articles and on websites.

Chapter V. This chapter will be devoted to a period of Islamic law that has been neglected in both old and new books and articles, i.e. the period of Islamic Law after the Turks converted to Islam (960-1926). We will explain legal activities and draw attention to the improvement of Islamic Law before and after the Ottoman State and focus on legal codes and the codification of Islamic law in this period. We think that this chapter also adds value to the history of Islamic Law.

Chapter VI. Here we will indicate some classifications for Islamic rules; because especially at present there are many confusing views on Islamic Law. Without information on these classifications nobody can discuss hermeneutics and historicity correctly. This chapter will focus also on three main subjects: Anglo-Muhammadan law (Indo-Muslim law), Syariah or Islamic Law in Southeast Asia, and Islamic Law in contemporary Muslim states like Egypt, Pakistan, Morocco, Indonesia and Jordan.

Chapter VII. We will explain the system and methodology of Islamic Law in this chapter. Islamic Law is an original legal system, having a particular system of arrangement and classification. All books on Islamic jurisprudence followed a system that was more important and practical for ancient jurists, instead of the distinction between public and private law based on Roman law. We argue that Islamic Law is mixed, having some features of the casuistic method: Islamic Law does invoke case law (*mas'alah*) to some extent. But Islamic Law also has some features of the abstract method because it has general legal principles that should be implemented. Based on theological and rational arguments, the juridical authority of what *mujtahids* called holistic evidence (*al-dalîl al-kullî*) is considered one of the fundamentals (*usûl)* to which *mujtahid*s had given priority over single and partial rulings.

Chapter VIII. We will give some brief information here on the implementation of Islamic Law, its future; some encyclopedical works on Islamic law, and new institutions of Islamic *fiqh*.

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1 *SHARÎʿAH, FIQH* AND ISLAMIC LAW

1.1 Definitions

1.1.1 Sharîʿah (Sharʿ or Sharʿ-i Sharîf)

The term *Sharîʿah* is the general name given to Islamic law and refers to the body of Islamic Law. It means "way" or "road to the water source," "path to be followed", "the way to the source of life" and it is the legal framework within which the public and private aspects of life are regulated for those living in a legal system based on Islamic principles of jurisprudence and for Muslims living outside the borders of an Islamic country. We can use *sharʿ* or *sharʿ-i sharîf* as well. A road signifies a wide path between two boundaries, and thus *Sharîʿah* is a broad road whose parameters are what is obligatory and what is forbidden.[1] With respect to this meaning the Qur'an says: *"Then We put thee on the (right) Way of Religion (Sharîʿah): so follow thou that (way), and follow not the desires of those who know not."*[2] *Sharîʿah* refers to the Islamic law, includes the totality of God's commandment, and deals with many aspects of day-to-day life, including politics, economics, banking, business, contracts, family, sexuality, hygiene, and social issues. In its general meaning, as the law, *Sharîʿah* constitutes a divinely ordained path of conduct that guides Muslims toward a practical expression of his religious conviction in this world and the goal of divine favor in the world to come. This definition includes matters of conduct (*ʿamaliyyât*) as well as matters of belief (*iʿtiqâdiyyât*), and of ethics (*akhlâqiyyât*). Here Islamic law (*fiqh*) is only a part of *Sharîʿah*. This term is similar to *Dîn* or Islam. In this narrow sense, *Sharîʿah* refers to the complete rules of Islam that relate to matters of conduct (*ʿamaliyyât*). That is similar to *fiqh* or Islamic Law.[3] We call someone who is an expert

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[1] Mannâʿ al-Qattân, *Târîkh al-Tashrîʿ al-Islamî* (Beirut: al-Risâlah, 1987), pp. 14-16; al-Bukhari, Abu Abdillah, Muhammad ibn Ismaʿil (194/810—256/870): *El-Jâmiʿ al-Sahîh* (Cairo: Kitâb al-Îmân, n.d.); cf. Hisham M. Ramadan, *Understanding Islamic Law: from Classical to Contemporary*, (Oxford: Rowman Altamira, 2006), pp. 3ff.

[2] The *Qur'an* 45:18; 57:24; 16:90; 4:104, 135.

[3] Abdulkarim Zaidan, *al-Madkhal Li Dirâsah al-Sharîʿah al-Islâmiyyah* (Baghdad, Matbaʿah al-Ânî, 1977), pp. 38-40; Saʿd al-Dîn Masʿûd al-Taftazânî, *al-Talwîh ilâ Kashf Haqâiq al-Tanqîh*, vol. I, (Beirut, Dâr al-Arqam, 1998), p. 21; Nicolas Aghnides, *Islamic Theories of Finance: With An Introduction to Islamic Law and a Bibliography* (New York: Columbia University, 1916), p. 23; cf. Maurits S. Berger, *Klassieke Sharîʿa en vernieuwing,* WRR webpublicatie nr. 12 (Amsterdam: Amsterdam University Press, 2006), p. 13; Irshad Abdal-Haqq, "Islamic Law: An Overview of its Origin and Elements," Hisham M. Ramadan, *Understanding Islamic Law: from Classical to Contemporary*, (Lanham: Rowman Altamira, 2006), pp. 4-8.

on Islamic law a *faqîh.*[4]

The concept of *Sharî'ah* has been completely confused in legal and common literature. For some Muslims, *Sharî'ah* includes the Qur'an and the *Sunnah*. For others, it also includes classical *fiqh*. We can easily distinguish clearly between two meanings of *Sharî'ah*. There must be no confusion here,[5] although we cannot understand why some scholars use the term *"paradigm of Sharî'ah."*[6] In a general sense, the word *sharî'ah* has been used to include not only the substantive rules of the Qur'an and Sunnah, but also all the rules derived from them by the way of *ijtihâd (juristic techniques).* Unfortunately many of these ordinances are viewed by a few modern scholars as responses to particular historical or social situations. We think that main rules of Sharî'ah are solely legal and religious rules of the Qur'an and Sunnah; but other ordinances would be viewed as the result of jurisprudential methods. The distinction between *sharî'ah* and *fiqh* is clear; but these concepts have been confused by some scholars.[7]

We do not agree that there are three kinds of *Sharî'ah* (*fiqh*, God's Ideal Legal System and different kinds of Islamic law in Muslim countries). *Sharî'ah* is one and its sources are the same for all. But some interpretations relating to *Ijtihâdî* rules may differ, as we will explain in the following chapters. That is the case in all legal systems.[8]

There are elements in the "secularized" way of life in Europe that may offend Muslims, not only as a strange and foreign customs, but also as outright contrary to basic Islamic principles. This is sometime reflected in the conflict between *Sharî'ah* and civil legislation in European States.[9]

1.1.2 Fiqh (Islamic Law)

The word *fiqh* is an Arabic term meaning "deep understanding" or "full compre-

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[4] See Jasser Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law* (London: The International Institute of Islamic Thought, 2008), pp. 56-57.

[5] Cf. Auda, *Maqâsid al-Sharî'ah*, p. 59.

[6] Nasr Abu Zaid, *Reformation of Islamic Thought: A Critical Historical Analysis*, WRR Verkenning nr. 10 (Amsterdam: Amsterdam University Press, 2006), pp. 14-15.

[7] Ralph H. Salmi, Cesar Adib Majul and George Kilpatrick Tanham, *Islam and Conflict Resolution: Theories and Practices,* (University Press of America, 1998), pp. 61-3; Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law,* (Oxford University Press US, 2005), pp. 206-07.

[8] Berger, *Klassieke Sharî'a en Vernieuwing,* pp. 16-18; Maurits Berger, "Sharî'a in Europa? Welke Sharî'a," *Eutopia*, October 2005, nr. 11.

[9] Conference of European Churches, *Witness to God in a Secular Europe,* (Geneva: 1985), p. 46.

hension."[10] Technically, the science that derives the *Sharî'ah* values and rules from *Sharî'ah* sources is the "science of *fiqh*", *"furû' al-fiqh"* or simply *fiqh*, and the person knowledgeable in this science is a *faqîh*. The historian ibn Khaldun describes *fiqh* as "knowledge of the rules of God that concern the actions of persons who deem themselves bound to obey the law respecting what is required (*wâjib*), forbidden (*harâm*), recommended (*mandûb*), disapproved (*makrûh*) or merely permitted (*mubâh*)."[11]

There are two main definitions of *fiqh* in Islamic sources. *Fiqh* has been defined by Abu Hanîfa in a general way as "the one's knowledge of what is to its advantage and disadvantage." This definition, it will be observed, is very broad and includes matters of conduct (*'amaliyyât*) as well as matters of belief (*i'tiqâdiyyât*) and of ethics (*akhlâqiyyât*). Some have restricted *fiqh* to matters of conduct, such as civil transactions (*mu'âmalât*) and religious ritual (*'ibâdât*).[12] That is similar to *Sharî'ah.*

Fiqh has also been defined in a specific way by other Muslim *fuqahâ* as "the deduction of the Sharî'ah values relating to conduct from their respective particular (*tafsîlî*) evidences." With the use of the term *"Shar'iyyah,"* the intention is to exclude intellectual and perceptual values, such as the obligation of belief in God and the Prophets. The word "conduct" (*al-'amaliyyah*) excludes points of theory, such as the position that the *ijmâ'* is lawful evidence for the establishment of Sharî'ah values. "Deduction" (*mustanbatah*) excludes knowledge acquired from a *mujtahid* instead of by direct inquiry into the evidence.[13]

According to this, a person is not called a *faqîh* if he knows only *Sharî'ah* values. He is called a *faqîh* only if he has, through personal inquiry and thought, deduced that values himself. This definition follows Shâfi'îte scholars. The Hanafîte definition and the one adopted in the modern Ottoman civil code (*Majalla*) ignore the way in which this knowledge has been obtained. Consequently, mere knowledge of Sharî'ah values

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[10] The Qur'an, Taha, 20: 27-28; Nisa, 4: 78; Wahba al-Zuhaylî, *al-Fiqh al-Islamî wa Adillatuhû,* (Damscus: Dâr al-Fikr, 1997), 11 vols. v. I, p. 29.

[11] Abdurrahman ibn Khaldun, *Târîkh ibn Khaldun, Kitâb al-Ibar wa Dîwân al-Mubtadâ wal Khabar fi Ayyâm al-'Arab wal-'Ajam wal-Barbar wa man Asarahum min Zawi al-Sultan al-Akbar,* vol. I (Beirut: Dar al-Kutub al-Ilmiyyah, 1992), p. 476; Bedruddîn Muhammad al-Zarkashî, *al-Bahr al-Muhît Fî Usûl al-Fiqh*, vol. I (Kuwait City: Kuwait Ministry of Awqâf, 1988), pp. 21-27; Reuben Levy, *The Social Structure of Islam* (Cambridge: Cambridge University Press, 1957), p. 151; Muhammad ibn 'Ali ibn-Muhammad al-Shawkani, *Irshâd al-Fuhûl*, vol. I (Cairo: Dar al-Kutub, 1992), pp. 47-48; Abdulkarim ibn Ali ibn Muhammad al-Namlah, *Ithâf Dhawil-Basair bi Sharh Rawdhah al-Nazir fi Usûl al-Fiqh*, vol. I (Riyadh: Dar al-Asimah, 1996), pp. 53-59; Auda, *Maqâsid al-Sharî'ah*, pp. 56-57.

[12] Al-Taftazânî, *al-Talwîh ilâ Kashf Haqâiq al-Tanqîh*, vol. I, pp. 31-34; Aghnides, *Islamic Theories of Finance*, p. 24; Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî,* vol. I, pp. 49-56; al-Zuhaylî, *al-Fiqh al-Islamî wa Adillatuhû,* v. I, pp. 29-30.

[13] Al-Namlah, *Ithaf Dhawil-Basair bi Sharh Rawdhah al-Nazir*, vol. I, pp. 59-70; cf. Berger, *Klassieke Sharî'a en vernieuwing*, pp. 14-15; Zuhaylî, al-Fiqh al-Islamî, v. I, pp. 30-1.

is *fiqh* and the person who has this knowledge is a *faqîh*. In other words, a *faqîh* need not be a *mujtahid*.[14]

Finally, the term "particular" indicates that the premises that *fiqh* uses are not directly obtained from the four bases of *Sharî'ah*, namely, the Qur'an, the *Sunnah*, *ijmâ'* and the *qiyâs*. These sources, as they stand, are too general (*ijmâlî*) and are not available for the purposes of *fiqh* until they have been reduced by a particular science to logical propositions, each relating to one particular set of values. Then the term Islamic law generally is used in reference to the entire system of law and jurisprudence associated with Islam, including the primary sources of law and the subordinate sources of law and the methodology used to deduce and apply the law.

In summary, *fiqh* relates to:

- Human acts that are entirely a matter of divine rights (*huqûq al-lah=public rights*), namely, (a) prayers (*salâh*), (b) fasting (*sawm*), (c) legal alms (*zakâh*), (d) war (*jihâd*), covering war and peace, the latter including the fiscal and other relations of the Muslim state to its non-Muslim subjects, and (e) pilgrimage to Mecca. We can say this part constitutes worship jurisprudence.
- Human acts that are entirely a matter of private rights (*huqûq al-'ibâd*).
- Human acts of a mixed nature, namely, the tithe (*'ushr*)[15].

We can summarize by saying that the term *fiqh* corresponds to Islamic Law, whereas *Sharî'ah* corresponds to *Dîn* or *Islam* completely. But, unfortunately, many scholars are confused about this difference and think that *Sharî'ah* is only Islamic Law. For that reason we call religious rules that have been sent to us completely *Sharî'ah*. In its general sense, *fiqh* includes only matters of conduct (*'amaliyyât*) and excludes matters of belief (*i'tiqâdiyyât*) and of ethics (*akhlâqiyyât*).[16]

1.1.3 Qânun and 'Urf

Qânun is a Persian word that was arabized to mean principles or *usûl*, and since the beginning of the Ayyubid and Ottoman states it has come to mean written laws or

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[14] Al-Taftazânî, *al-Talwîh ilâ Kashf Haqâiq al-Tanqîh*, vol. I, pp. 34-38; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 38-40; Ahmed Akgunduz and Halil Cin, *Turk Hukuk Tarihi*, vol. I. pp. 113-14.

[15] Mu'awwadh and 'Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 56-66; Aghnides, *Islamic Theories of Finance*, pp. 28-29.

[16] Muhammad Amîn ibn 'Âbidîn, *Radd al-Muhtâr alâ al-Durr al-Muhktâr*, vol. I (Damsascus, Dâr al-Thaqâfah wa al-Turâth, 2000), pp. 121-34; cf. Abdal-Haqq, "Islamic Law: An Overview of its Origin and Elements," Hisham M. Ramadan, *Understanding Islamic Law*, pp. 3-4.

legal codes. Written laws, in countries that endorse Islamic law as the legal system, could be derived directly from *fiqh*. The Majalla (Civil Code of the Ottoman State) is a good example of this. I published 760 *Qânûnnâme* (the book of *qânûn*s) in my work *Osmanli Qânûnnâmeleri ve Hukuki Tahlilleri.* This meaning has applied to family and inheritance law in Muslim countries like Egypt and Iraq since the collapse of the Ottoman State.[17] In form, *qânûn*s could be either single statutes or collections of statutes devoted to a single subject. From time to time a number of *qânûn*s have been brought together in the form of *qânûnnâme* (the book of *qânûn*s), which might be special or of general application.[18]

The *qânûn* is subservient to the *Sharîʿah*, and should only have regulated areas are the *Sharîʿah* unclear, or have been practical specifications of the *Sharîʿah*. If anybody read all legal codes (*qânunnâmes*) of Ottoman State, he or she would see that this rule hasn't change in history of Islamic law. The best example about relations between *sharîʿah* and *qânûn* is the *firmân* of Mustafa II (1695-1703):

> It is also highly perilous and most juxtapose the terms *sharîʿah* and *qânûn*. Therefore in *firmân*s and decrees all matters shall for this reason be based on the firm support of the noble *sharîʿah* only..... And warnings are given against the coupling of the terms noble *sharîʿah* and *qânûn*.[19]

ʿUrf means custom or, more accurately, a good custom which the community and *Sharîʿah* principles approve of. That is from secondary sources for Islamic law, which we will discuss in the second book of this work.[20]

1.1.4 Muhammadan Law

Muhammadan (also written Mohammedan, Mahommedan, Mahomedan or Mahometan) is a term used both as a noun and as an adjective, and means belonging or relating to either the religion of Islam or to that of the Islamic prophet Muhammad. The term is now largely superseded by Muslim, Moslem or Islamic but was commonly used in Western literature until at least the mid-1960s.[21] Muslim is more often used

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[17] Ahmed Akgunduz, *Osmanli Qânûnnâmeleri ve Hukuki Tahlilleri*, vol. I-IX, (Istanbul: OSAV, 1989-1992); Auda, *Maqâsid al-Sharîʿah*, pp. 57-58.

[18] Richard C. Repp, "Qânûn and Sahrîʿa in the Ottoman Context,", 'Azîz 'Azmah, *Islamic Law: Social and Historical Contexts*, (New York: Routledge, 2006), pp. 125-26.

[19] Osman Nuri Ergin, *Majalla-i Umûr-i Belediye*, (Istanbul, 1338/1922), vol. I. p. 568; Cf. Repp, "Qânûn and Sahrîʿa in the Ottoman Context," 'Azîz 'Azmah, *Islamic Law*, pp. 131-32; Vikør, *Between God and the Sultan,* p. 208.

[20] 'Ali Muhammad Muʿawwadh and Âdil Ahmad 'Abdulmawjûd, *Târikh al-Tashrîʿ al-Islamî,* vol. I (Beirut: Dâr al-Maktabah al-Ilmiyyah, 2000, pp. 16-7; Auda, *Maqâsid al-Sharîʿah*, pp. 58-59.

[21] See, for instance, the second edition of *A Dictionary of Modern English Usage* by H.W. Fowler, revised by Ernest Gowers (Oxford: Oxford Language, 1965).

today than Moslem, and the term Mohammedan is generally considered archaic or in some cases even offensive. Mohammedan was in use as early as 1681, along with the older term Mahometan, which dates back to 1529 at least.

In Christian Western Europe until the 13th century or so, some Christians believed that Muslims worshiped Mahomet, while other Christians considered him to be a heretic. Still other medieval European writers referred to Muslims as "pagans" or by sobriquets such as the paynim foe. Some works, like The Song of Roland, depict Muslims worshipping Muhammad as a god or worshipping various deities in the form of "idols" ranging from Apollo to Lucifer, but ascribing to them a chief deity known as "Termagant". These and other variations on the theme were all set in the "temper of the times" of what was seen as a Muslim-Christian conflict since medieval Europe was constructing a concept of "the great enemy" in the wake of the quick-fire success of the Muslims through a series of conquests shortly after the fall of the Western Roman Empire and because of the lack of concrete information in the West about Islam and Muslims.[22]

Unfortunately, during the Middle Ages the Christian world held a largely antagonistic view of Muhammad. This partly represented a lack of knowledge about the Muslim prophet but also stemmed from the fact that Islam and Christianity were secular and religious enemies throughout much of this period. Medieval scholars and churchmen held that Islam was the work of Muhammad who was in turn inspired by Satan. Muhammad was frequently calumnized and made a subject of legends taught as fact by preachers. For this reason they preferred to use the term Muhammadan Law rather than Islamic Law. English scholars especially affected Indian and Indonesian Muslim scholars and, as a result the latter have used the former term instead of Islamic Law.[23]

We would like to convey the main account in the words of Asaf A. A. Fyzee, who called his work, *Outlines of Muhammadan Law:*

> Now, first, an apology for the term *Muhammadan law*. The word itself is unsatisfactory and, spells it how you will, it does not improve. This ugly term as well as its variants Moohummudu (Baillie), Mahomedan (the Judical Committee of the Private Council and most Indian Courts), Mahommedan (Nicholson), Muslim (Tyabji) and occasionally Mussalman are all open to serious objection. Strictly speaking, the religion taught by

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[22] Kenneth Meyer Setton, *Western Hostility to Islam and Prophecies of Turkish Doom* (American Philosophical Society, 1992). pp. 4-6; Montgomery Watt, *Muhammad: Prophet and Statesman* (Oxford: Oxford University Press, 1961), p. 229

[23] Setton, Western Hostility to Islam, pp. 5; See Shama Churun Sircar, *The Muhammadan Law: A Digest of the Law Applicable Especially to the Sunnîs of India*, (Calcutta: Thacker, Spink and Co., 1873), pp. 1-6; Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, (Delhi: Oxford University Press, 1978).

the Prophet was Islam, not Muhammadisms. The system is called as *fiqh* and the term Islamic Law is used synonymously with it.[24]

As we will explain in the next section, when we state that the origin of Islamic law is fundamentally the will of God, we mean the pure revelation and that Muhammad was the Messenger of God. In conclusion, we believe that Islamic law has originating from God. At the very least, it is based on a set of rules emanating from God through His revelation.

1.2 The Main Characteristics of Islamic Law

Islamic law (*fiqh*) is a divine legal system and has certain distinguishing characteristics. Let us summarize some of them:

1. The origin of Islamic law is different from the origin of contemporary legal systems. The first major distinction between *Sharî'ah* and Western legal systems is the result of the Islamic concept of law as the expression of the divine will. With the death of the Prophet Muhammad in 632, communication of the divine will to humankind ceased; the terms of the divine revelation were thus henceforth fixed and immutable. Therefore, when considered the process of interpretation and expansion of this source material was held to be completed through the crystallization of the doctrine in the medieval legal handbooks, *Sharî'ah* law became partly static and partly dynamic. We will explain this in the third book in the chapter on constitutional law.[25]

The origin of Islamic law is fundamentally the will of God. The sources of law are the words of God, the Qur'an, the *Sunnah* of the Prophet Muhammad and sources derived from these two main sources. What they have in common is that they are all based on God's will. Islamic law, with God's will as its origin, effects equality, since it is sent to all humankind and cements its legitimacy through the spiritual emotions of religion. This point was defined specifically in the Ottoman Legal Family Decree (*Hukuk-ı Aile Kararnamesi*) of 1917. Respect for persons in Islamic Law is rooted in the Divine injunctions of the Qur'an and the precepts of the Prophet.[26]

2. Another distinguishing character of Islamic law is that it incorporates two means of sanctioning. Aside from punishments, invalidity and other such material sanctions, there is also a spiritual sanctioning of the human heart, mind and con-

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[24] Fyzee, *Outlines of Muhammadan Law*, pp. 1-2.

[25] Mu'awwadh and Abdulmawjûd, *Târîkh al-Tashrî' al-Islamî,* vol. I, pp. 109-16; Zuhaylî, *al-Fiqh al-Islamî,* v. I, p. 32.

[26] Mannâ' al-Qattân, *Târîkh al-Tashrî' al-Islamî* (Beirut: al-Risâlah, 1987), pp. 21-25; Zuhaylî, *al-Fiqh al-Islamî,* vol. I, pp. 33-6; cf. "Sharî'ah" In *Encyclopedia Britannica*, http://www.britannica.com /EB checked/topic/538793/ Sharî'ah (accessed June 6, 2009).

sciousness. There are a number of examples of this in Islamic law books. For example, trade executed after the call for *Jum'ah* prayer is *qadhâan* (according to legal judgment), i.e. legitimate according to the civil law. However, it is not permissible *diyânatan* (according to religious and ideal law). In the same way, a person who commits the crime of damaging private property has to pay reparation to the owner but also has other-worldly responsibilities for "attacking another's property."[27]

> It is true the government secret service and police cannot see me and I can hide from them, but the angels of a Glorious God who has a prison like Hell see me and are recording all my evil deeds. I am not free and independent; I am a traveler charged with duties. One day I too will be old and weak.[28]

3. The scope of *Sharî'ah* is much wider, since it regulates the human being's relationship not only with his neighbors and the state, which is the limit of most other legal systems, but also the relationship with his God and his own conscience. Ritual practices, such as daily prayers, almsgiving, fasting and pilgrimage, are an integral part of *Sharî'ah* and usually occupy the first chapters in the legal manuals. *Sharî'ah* is also concerned as much with ethical standards as it is with legal rules, indicating not only what humans are entitled to or bound to do in law but also what they, in all conscience, ought to do or refrain from doing. Accordingly, certain acts are classified as praiseworthy (*mandûb*), which means that performing them brings divine favor and not performing them divine disfavor. Others acts are considered blameworthy (*makrûh*), which means that not performing them brings, divine favor and performing them divine disfavor. But in neither case is there any legal sanction of punishment or reward, nullity or validity. *Sharî'ah* is not merely a system of law but a comprehensive code of behavior that embraces both private and public activities.[29]

Contemporary law systems regulate relationships between citizens and groups of citizens whereas Islamic Law also regulates the relationship between a person and God. This is why all *fiqh* books begin by describing regulations of religious services such as *salâh*, pilgrimage and fasting. The other subjects are listed in accordance with how close they lie to religious matters.[30]

4. Through the principles of divine law Islamic Law has made it necessary for social and economic institutions as well as their laws to change. It has left interchangeable rules open to interpretation and has proclaimed that *"it is undeniable that some*

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[27] Al-Qattân, *Târîkh al-Tashrî' al-Islamî,* pp. 23-25; Zuhaylî, *al-Fiqh al-Islamî,* vol. I, pp. 37-8.

[28] Bediuzzaman Said Nursi, "Eighth Topic," in Said Nursi Bediuzzaman, *The Rays, The Fruits of Belief* (Istanbul, Sozler Publications, 2002) p. 245.

[29] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî,* vol. I, pp. 56-66, 123-34.

[30] Cf. "Sharî'ah," In: *Encyclopædia Britannica.*

judgments will vary and change over time."[31] In some areas Islamic Law did not provide any details; rather, the basic tenets were determined and the rest left in the hands of the judicial authority at the time. We can mention some tenets such as mutual consent in debt verdicts, the individualization of crime and punishment and the principle of *shûrâ* in constitutional law. The Qur'an says: *"and who manage their affairs by mutual consultation..."; "and consult with them about the matter ...."*[32] The rule of *"necessities make the unlawful lawful"*[33] can also be applied to a variety of situations. The Qur'an mentions certain fundamental principles like freedom, justice, public interest (*maslahah mursalah*). In short, Islamic Law is an original jurisprudence with some very distinguishing characteristics.[34]

Some modern scholars have tried to explain the features of development for Islamic law and claimed that "in the case of Islamic law, the essential attributes – those that gave it its shape – were four: (1) the evolution of a complete judiciary, with a full-fledged court system and law of evidence and procedure; (2) the full elaboration of a positive legal doctrine; (3) the full emergence of a science of legal methodology and interpretation which reflected, among other things, a large measure of hermeneutical, intellectual and juristic self-consciousness; and (4) the full emergence of the doctrinal legal schools, a cardinal development that in turn presupposed the emergence of various systemic, juristic, educational and practice-based elements."[35] These topics are the subjects of discussion, but here we have only mentioned the attributes of Islamic Law.[36]

1.3 The Relation between Islamic Law and Other Legal Systems

1.3.1 The Influence of Islamic Law on Other Legal Systems

There is no doubt that the foundations of modern Western civilization, and of European philosophy of law, are to be found in the Middle Ages and Islamic legal thinking.[37]

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[31] *Majalla al-Ahkâm al-Adliyyah* (The Ottoman Courts Manual (Hanafî)), Article 1801.

[32] The Qur'an, 42:38; 3:159.

[33] *Majalla al-Ahkâm al-Adliyyah,* Article 21.

[34] Muhammad Ali Es-Sâyis, *Târîkh 'ul-Fiqh 'il-Islâmî* (Cairo: Dâr al-Kutub al-Ilmiyyah, d.n.), pp. 8-10; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 40-45; Zuhaylî, *al-Fiqh al-Islamî,* vol. I, pp. 39-41.

[35] Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2007), p. 3.

[36] Al-Qattân, *Târîkh al-Tashrî' al-Islamî*, pp. 20-25.

[37] Christopher Roederer and Darrel Moellendorf, *Jurisprudence*, (Lansdowne: Juta and Company Ltd, 2007), pp. 495ff.

A) *Comparisons with common law.* The methodology of legal precedent and reasoning by analogy (*qiyâs*) used in Islamic law was similar to that of the common law legal system. It has been suggested that several fundamental English common law institutions may have been derived or adapted from similar legal institutions in Islamic law and jurisprudence and introduced to England after the conquest of England by the Normans. The Normans had conquered and inherited the Islamic legal administration of the Emîrate of Sicily and "through the close connection between the Norman kingdoms of Roger II in Sicily – ruling over a conquered Islamic administration – and Henry II in England" and also via the crusaders during the Crusades. The connection with Norman law in Normandy may be real, but it should be remembered that common law owes a great deal to Anglo-Saxon traditions and forms and in its current form represents an interaction between the two systems.[38]

The *Waqf* in Islamic law, which developed during the 7th-9th centuries, bears a notable resemblance to trusts in the English trust law. For example, every *Waqf* was required to have a *wâqif* (truster, *mutawallîs* (trustee), *qâdhî* (judge) and beneficiaries. Under both a *waqf* and a trust, "property is reserved, and its usufruct appropriated, for the benefit of specific individuals or for a general charitable purpose; the corpus becomes inalienable; estates for life in favor of successive beneficiaries can be created," and "without regard to the law of inheritance or the rights of the heirs; and continuity is secured by the successive appointment of trustees or *mutawillîs*." The trust law developed in England at the time of the Crusades during the 12th and 13th centuries was introduced by Crusaders who may have been influenced by the *waqf* institutions they encountered in the Middle East.[39]

The precursor to the English jury trial was the *Lafif* trial in classical Mâlikî jurisprudence, which was developed between the 8th and 11th centuries in North Africa and Islamic Sicily, and shares a number of similarities with later jury trials in English common law. Like the English jury, the Islamic *Lafif* consisted of twelve individuals chosen from the neighbourhood and sworn to tell the truth, bound to yield a unanim-

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[38] *The Normans* gave their names to Normandy, a region in northern France. They were descended from the Viking conquerors of the territory and the native population of mostly Frankish and Gallo-Roman stock. Their identity emerged initially in the first half of the tenth century, and gradually evolved over succeeding centuries until they disappeared as an ethnic group in the early thirteenth century. The name "Normans" derives from "Northmen" or "Norsemen", after the Vikings from Scandinavia who founded Normandy (*Northmannia* in its original Latin). They played a major political, military, and cultural role in medieval Europe and even the Near East. Cf. G. A. Loud and Alex Metcalfe, *The Society of Norman Italy*, (Leiden: Brill, 2002), pp. 297-98.

[39] Ahmed Akgunduz, *Islam Hukukunda ve Osmanli Tatbikatinda Vakif Muessesesi* (Istanbul: OSAV, 1996), pp. 76-100; Monica Gaudiosi, "The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College", *University of Pennsylvania Law Review*, vol. 136, no. 4, 1988: 1231-261.

ous verdict, on matters *"that they had personally seen or heard, binding on the judge, to settle the truth concerning facts in a case, between ordinary people, and obtained as of right by the plaintiff."*[40]

Islamic jurists formulated early contract law that introduced the application of formal rationality, legal rationality, legal logic and legal reasoning in the use of contracts. Islamic jurists also introduced the concepts of recession (*iqâlah*), frustration of purpose (*istihâlah al-tanfîdh* or "impossibility of performance"), Acts of God (*Âfât Samâwiyah* or "Misfortune from Heaven") and force majeure in contract law. Other possible influences of Islamic law on English common law include the concepts of a passive judge, impartial judge, *res judicata*, the judge as a blank slate, individual self-definition, justice rather than morality, rule of law, individualism, freedom of contract, the right against self-incrimination, fairness over truth, individual autonomy, untrained and transitory decision making, overlap in testimonial and adjudicative tasks, appeal, dissent, day in court, prosecution for perjury, oral testimony, and the judge as a moderator, supervisor, announcer and enforcer rather than adjudicator.[41]

Similarities between Islamic law and American common law have also been noted, particularly with regard to constitutional law. According to Asifa Quraishi, the methods used in the judicial interpretation of the constitution are similar to those in the Qur'an, including the methods of "plain meaning, literalism, historical understanding 'originalism,' and reference to underlying purpose and spirit."[42]

The earliest known lawsuits may also date back to Islamic law. There was a *hadîth* tradition that reported that the Caliph 'Uthman ibn Affan (580-656) attempted to sue a Jewish subject for recovery of a suit of armour. His case was unsuccessful, however, due to a lack of competent witnesses.

Precursors to common law concepts in property law were found in classical Islamic property law, including the concepts of leasehold (including duty to take and keep property in possession and holdover tenancy), joint ownership (including partition, pledge, bailment, lost property, license and trespass), acquisition (including intestate succession), duress (*ikrâh*), transfer by sale (including contract formation, meeting of the minds, declaration, duress and risk of loss), transfer by gift, rights and

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[40] Ziba Mir-Hosseini, *Marriage on Trial: Islamic Family Law in Iran and Morocco*, (I.B.Tauris, 2000), p. 101.

[41] Akgunduz, *Turk Hukuk Tarihi*, vol. II, pp. 215, 234-35; John Makdisi, "Formal Rationality in Islamic Law and the Common Law," *Cleveland State Law Review* 34 (1985-6): 97-112; Jâmila Hussain, "Book Review: The Justice of Islam by Lawrence Rosen", *Melbourne University Law Review* (2001): p. 30.

[42] Asifa Quraishi, "Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence," *Cardozo Law Review* 28 (2006): 67-121 [68].

restrictions on transfers (including restraint on alienation, appurtenance, fixture, preemption, mortgage and water rights), will (including entitlement to shares, revocation, ademption, lapse, abatement and ambiguity), attacks on ownership (including concepts of theft, robbery, usurpation, nuisance, and defense of necessity) and causation (including remote consequences, intervening human cause, concurrent cause and uncertain cause). Many of these concepts were summarized in Islamic juristic texts, including the *Hidâyah* by the Hanafî jurist al-Marghinani, the *Minhâj al-Tâlibîn* by the Shâfi'î jurist Yahya ibn Sharaf al-Nawawi, the *Mukhtasar* by the Mâlikî jurist Khalil ibn Ishaq al-Jundi, and the *Fatâwâ-i 'Âlamgirî* by Hanafî jurists.[43]

B) *Influence on civil law.* One of the institutions developed by classical Islamic jurists that influenced civil law was the *hawâlah*, an early informal value transfer system, which is mentioned in texts of Islamic jurisprudence as early as the 8th century. *hawâlah* itself later influenced the development of the *Aval* in French civil law and the *Avallo* in Italian law.The "European commenda" limited partnerships (Islamic *qirâd*) used in civil law as well as the civil law conception of *res judicata* may also have its origins in Islamic law.[44]

Islamic law also introduced "two fundamental principles to the West, on which the future structure of law would later stand: equity and justice."[45] These principles were precursors to the concept of pacta sunt servanda in civil law and international law. Another influence of Islamic law on the civil law tradition was the presumption of innocence, which was introduced to Europe by Louis IX of France soon after he returned from Palestine during the Crusades. Prior to this, European legal procedure consisted of either trial by combat or trial by ordeal. In contrast, Islamic law was based on the presumption of innocence from the beginning, as declared by the Caliph 'Umar in the 7th century: "Decide only on the basis of proof, be kind to the weak so that they may express themselves freely and without fear, deal on an equal footing with litigants by trying to reconcile them."[46]

The concept of ombudsman was derived from the example of the second Muslim caliph, 'Umar (634-644), and the concept of *Qâdhî al-Qudhât* (developed in the Muslim world), which influenced the Swedish King Charles XII. In 1713, fresh from self-

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[43] Asifa Quraishi, "Interpreting the Qur'an and the Constitution," *Cardozo Law Review* 28 (2006): 67-121 [68].

[44] Cf. Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: a Critique of the 'Clash of Civilizations' in the New World Order*, (Oregon: Hart Publishing, 2005), pp. 47-50.

[45] Ali Haydar, *Durar al-Hukkâm Sharhu Majalla al-Ahkâm*, (*trans.* into Arabic by Fahmi al-Husayni) v. I (Beirut: Publisher, n.d), pp. 17-20 (in Arabic).

[46] Ibn al-Qayyim al-Jawziyya, *I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn*, vol. I (Beirut: Dar al-Kutub al-Ilmiyyah, 1996), p. 70.

exile in Turkey, Charles XII created the Office of Supreme Ombudsman, which soon became the Chancellor of Justice.[47]

C) *Influence on international law.* The first treatise on international law (*Siyar* in Arabic) was the Introduction to the Law of Nations written at the end of the 8th century by Muhammad al-Shaybânî (804), an Islamic jurist of the Hanafî school, eight centuries before Hugo Grotius wrote the first European treatise on the subject. Al-Shaybani wrote a second, more advanced treatise on the subject, and other jurists soon followed with other multi-volume treatises on international law written during the Islamic Golden Age. They dealt with both public international law and private international law.[48]

These early Islamic legal treatises covered the application of Islamic ethics, Islamic economic jurisprudence and Islamic military jurisprudence to international law, and were concerned with a number of modern international legal topics, including the law of treaties; the treatment of diplomats, hostages, refugees and prisoners of war; the right of asylum; conduct on the battlefield; the protection of women, children and non-combatant civilians; contracts across the battle lines; the use of poisoned weapons; and the devastation of enemy territory. The Umayyad and Abbasid caliphs were also in continuous diplomatic negotiations with the Byzantine Empire on matters such as peace treaties, the exchange of prisoners of war, and payment of ransoms and tributes.[49]

The Islamic principles of international law were largely based on the Qur'an and the *Sunnah* of Muhammad, who gave various injunctions to his forces and adopted practices concerning the conduct of war. The most important of these were summarized by Muhammad's successor and close companion, Abu Bakr, in the form of ten rules for the Muslim army:

> O people, so that I may give you ten rules for your guidance in the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies. Do not kill a child, a woman, or an aged man. Bring no harm to the trees, nor burn them with fire, especially those that bear fruit. Slay none of the enemy's flock, save for your food. You are likely to pass by people who have devoted their lives to monastic services; leave them alone.[50]

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[47] Marcel A. Boisard, "On the Probable Influence of Islam on Western Public and International Law," *International Journal of Middle East Studies* 11 (1980): 429-50; V. Pickl, "Islamic Roots of Ombudsman System," *The Ombudsman Journal, Number 6* (1997): pp.101-08.

[48] Ahmad al-Serakhsi, *Sharh al-Siyar al-Kabîr,* Vol. I-IV (Cairo: al-Maktabah al-Islâmiyyah, 1971); Rehman, *Islamic State Practices, International Law,* pp. 48-50.

[49] Akgunduz, *Turk Hukuk Tarihi*, vol. I, pp. 437-38, 449-52.

[50] 'Ali ibn Muhammad ibn al-Athir, *al-Kâmil fi al-Târîkh*, vol. II (Beirut: Dar Sadir, 1995), p. 335.

There is evidence that early Islamic international law influenced the development of Western international law through various routes such as the Crusades, the Norman conquest of the Emîrate of Sicily, and the Reconquista of al-Andalus. In particular, the Spanish jurist Francisco de Vitoria and his successor Grotius may have been influenced by Islamic international law through earlier writings influenced by Islam such as the 1263 work *Siete Partidas* by Alfonso X, which was regarded as a "monument of legal science" in Europe at the time and was influenced by the Islamic legal treatise *Villiyet* written in Islamic Spain.[51]

D) *Influence on legal education.* Madrasahs were the first law schools, and it is likely that the "law schools known as Inns of Court in England" may have been derived from the madrasahs, which taught Islamic law and jurisprudence.

The origins of the doctorate dates back to the *ijâzat at-tadrîs wa'l-iftâ* ("license to teach and issue legal opinions") in the medieval Islamic legal education system, which was equivalent to the Doctor of Laws degree and was developed during the 9th century after the formation of the *Madhhab* legal schools. To obtain a doctorate, a student "had to study in a guild school of law, usually four years for the basic undergraduate studies" and ten or more years for post-graduate studies. The "doctorate was obtained after an oral examination to determine the originality of the candidate's theses," and to test the student's "ability to defend them against all objections, in disputations set up for the purpose" which were scholarly exercises practiced throughout the student's "career as a graduate student of law." After students completed their post-graduate education, they were awarded doctorates, giving them the status of *faqîh* (master of law), *muftî* (professor of legal opinions) and *mudarris* (teacher), which were later translated into Latin as magister, professor and doctor respectively.[52]

1.3.2 Relation to other Legal Systems

The question of the influence of foreign, particularly Roman law upon Islamic law has been much debated, with some scholars assuming a profound influence of Roman law upon Islamic law, while others deny practically any influence. For this reason we

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[51] J. Kelsay, "al-Shaybani and the Islamic Law of War," *Journal of Military Ethics* 2 (2003): 63-75; H. Yousuf Aboul-Enein and Sherifa Zuhur,, *Islamic Rulings on Warfare*, Strategic Studies Institute, US Army War College (Darby: Diane Publishing Co.), p. 22.

[52] Cf. Akgunduz, *Turk Hukuk Tarihi*, vol. I, pp. 266-76; John A. Makdisi, "The Islamic Origins of the Common Law," *North Carolina Law Review* 77 (1999): 1635-1739; cf. Shaikh M. Ghazanfar, *Islamic Civilization: History, Contributions, and Influence: a Compendium of Literature*, (Lanham: Scarecrow Press, 2006), pp. 399ff.

should indicate to some points.[53]

A) Islamic law only abrogates rules that are in disagreement with its teachings. The Qur'an, on the whole, confirms the Torah and the Bible, and whenever a ruling of the previous scriptures is quoted without abrogation, it becomes an integral part of Islamic *Sharî'ah*. So, Islamic Law accepts *revealed laws preceding the Sharî'ah of Islam (Sharâyi'u Man Qablanâ)* as one of its secondary sources.[54] Islamic Law can benefit from any legal system whenever there is no explicit *Shar'î* injunction on that issue and it does not contradict *Ahkâm Shar'iyyah*. For this reason Islamic Law has benefited from old customs and rules on administrative and military law.[55]

It can also be expected that some influence by Talmudic jurisprudence, with its basis in the Torah, and Roman jurisprudence, which was influenced by Christianity, can be found within Islamic law, as long as they are not contrary to basic Islamic principles.

B) *Influence of Roman law on Islamic Law.* Roman law is the legal system of ancient Rome. As used in the West, the term commonly refers to legal developments prior to the Roman/Byzantine state's adoption of Greek as its official language in the 7th century. As such, the development of Roman law covers more than one thousand years from the law of the Twelve Tables (449 BCE) to the Corpus Juris Civilis of Emperor Justinian I (around 530 CE). Roman law, as preserved in Justinian's codes, became the basis of legal practice in the Byzantine Empire and later in continental Europe as well as Ethiopia.

It is somewhat interesting that some statements have been made by certain Western judicial scholars to the effect that "Islamic Law is but the Roman Law of Justinian in Arab dress" or that the "Arabs added nothing to Roman law but a few mistakes." Arabists like von Kremer[56] and Goldziher[57] are among those who have made

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[53] Cf. Herbert J. Liebesny, *The Law of the Near & Middle East: Readings, Cases, & Materials*, (New York: SUNY Press, 1975), pp. 33-8.

[54] Fuat Bizans Köprülü, "Müesseselerinin Osmanli Müesseselerine Te'siri Hakkinda Bazi Mülâhazalar," *Türk Hukuk ve Iktisat Tarihi Mecmuasi*, no. 1, pp. 165-72; Ahmad al-Serahsi, *Sharh al-Siyar al-Kabîr*, Vol. I-IV (Cairo:1971).

[55] 'Abd al-Wahhâb Khallâf, *Ilm Usûl al-Fiqh*, 20th ed. (Kuwait City: Dar al-Qalam, 1986), pp. 94, 220.

[56] Alfred von Kremer (May 13, 1828 in Vienna;. 1889) was an orientalist. At Vienna he first studied philosophy, then jurisprudence, and traveled from 1849-1851 to Syria and Egypt through a stipend from the academy of the sciences. His most famous work was *Culturgeschichte des Orients under den Chalifen* (Vienna: 1875-77).

[57] Ignâc (Yitzhaq Yehuda) Goldziher (June 22, 1850 – November 13, 1921), often credited as Ignaz Goldziher, was a Hungarian orientalist and is widely considered to be among the founders of modern Islamic studies in Europe. He was the first Jewish scholar to become a professor at Budapest University (1894), and represented the Hungarian government and the Academy of Sciences at numerous international congresses. He received the gold medal at the Stockholm Oriental Con-

such claims. The mighty river of Roman law had doubtlessly inundated the valleys of Europe, but it certainly did not irrigate the desert of Arabia. To the contrary: Fitzgerald[58] states that "there is no evidence of such borrowing, and indeed the whole idea is absurd."[59]

There are many central differences between them. *First*, Islamic Law is based on Revelation whereas Roman law is the Lawyers' Law. *Second*, being of divine origin, Islamic Law is virtually and mostly immutable, and, finally, it is wider in scope than Roman law, for it includes, in addition to public and private laws, even international relationships of which the Arabs were the pioneers. Roman law was codified in digest forms like the 12 Tables, but the Islamic *Sharî'ah*, being ideal and valid for all ages, cannot properly be codified by such dynamic elements as *Ijtihâd* (fresh thinking), *Ijmâ'* (consensus), etc.[60]

The first scholar to point out that a comparison of Roman and Islamic Law would be of interest was Reland[61], a professor of oriental languages at Utrecht in 1708. The a priori case for Roman influence on *Sharî'ah* was forcefully put by two professional lawyers, Gatteschi and Sheldon, who wrote in 1865 and 1883 respectively. Neither knew Arabic. In 1875 von Kremer discussed the question extensively in his *Culturgeschichte*. In 1890 he published his *Muhammadanische Studien* in which he showed how *Hadîths* reflected the legal and doctrinal controversies of the two centuries after the death of Muhammad rather than the words of Muhammad himself. He was a strong believer in the view that Islamic Law owes its origins to Roman law, but in Patricia Crone's view his arguments are "uncharacteristically weak" here. In the 1950s

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gress in 1889. He became a member of several Hungarian and other learned societies and was appointed secretary of the Jewish community in Budapest. He was granted a Litt.D. from Cambridge (1904) and an LL.D. from Aberdeen (1906). His eminence in the sphere of scholarship was due primarily to his careful investigation of pre-Islamic and Islamic law, tradition, religion and poetry, in connection with which he published a large number of treatises, review articles and essays contributing to the collections of the Hungarian Academy.

[58] Forster Fitzgerald Arbuthnot (1833 –1901) was a notable British Orientalist and translator. His early career was spent as a civil servant in India; his last post was as Collector for the Bombay government. He wrote *Arabic Authors, The Mysteries of Chronology, Early Ideas* (1881, under the pseudonym Anaryan) and *Sex Mythology, Including an Account of the Masculine Cross* (1898, privately printed), which attempts to trace the phallic origins of religious symbols. His main work is *Arabic Authors: A Manual of Arabian History and Literature.*

[59] Cf. Herbert J. Liebesny, *The Law of the Near and Middle East: Readings, Cases, & Materials*, (Albany: New York State University Press, 1975 pp. 33-6.

[60] Patricia Crone, *Roman, Provincial and Islamic Law: The Origins of the Islamic Patronate* (Cambridge: Cambridge University Press, 1987), pp. 1-7; Sa'îd al-'Ashmâwî, *al-Sharî'ah al-islâmiyya wa-l-Qânûn al-Misrî* (Cairo: Maktabah Madbûlî al-Saghîr, 1996).

[61] Adriaan Reland (1676-1718) was a Dutch scholar, cartographer and philologist.

Schacht[62] was the leading Western scholar on Islamic law, whose *Origins of Muhammadan Jurisprudence* (1950) is still considered one of the most important works ever written on the subject, essential for all advanced studies. He resumed Goldziher's work on the Islamic tradition. His writings on these subjects were uncharacteristically poor. Sava Pasha, who was an Ottoman Christian jurist, rejected Goldziher's view and wrote that Islamic Law is derived exclusively from the Word of God and the conduct of the Prophet. When Goldziher insisted on Roman influence in his review, attributing Pashas' "naivete" to his oriental origins, Pasha wrote a vehement reply, affirming his position on the origins of *Sharî'ah* and pointing out that whereas he himself (a Greek Christian) was an Aryan, Goldziher (a Hungarian Jew) was a Turanian whose aggressiveness arose from the fact that he still had some drops of Mongol blood in his veins.[63]

But, fundamentally, Islamic law was not derived from Roman law as some orientalists claimed. It would be unreasonable to claim that the Prophet Muhammad, who had gone to Damascus twice at the ages of 9 and 24, could have memorized Roman law without knowing Greek, Syriac or Latin, and was illiterate. Furthermore, Roman influence was weak in the areas in which Islam arose. Most importantly, it is impossible to find a trace of Christian belief in *fiqh* books and Islamic lawyers. There are also no similarities in terms of basic tenets and the frameworks of Islamic and Roman jurisprudences. To quote Sava Pasha,

> I had believed for some time in the idea of some so-called jurists of our time that Islamic law was derived from Roman law. However, after long and detailed studies with the sources of Islamic law, I have come to the conclusion that this argument has no merit and depends more on imagination than on strong evidence.[64]

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[62] Crone, *Roman, Provincial and Islamic Law*, pp. 1-17, 102-08; Ignâc Goldziher, *Muhammadische Studien,* vol. I (1889-90), p. 188n, v, II, pp. 75f; Sava Pasha, *Etudes sur la theorie du droit musûlman*, vol. I (Paris: Marchal et Billard, 1892-1898) pp. xviff, xxi; Sava Pasha, *Le droit musûlman explique* (Paris: 1896), p. 26; Joseph Schacht, *Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press 1950), p. vii; Von Kremer, *Culturgeschichte*, vol. I, ch. 9, pp. 532ff. Cf. Sava Pasha, *Islâm Hukuku Nazariyâtı Hakkında Bir Etüd*, I/VIII-IX; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 73-89; Yusuf Ziya Kavakçi, *Suriye Roma Kodu Ve Islâm Hukuku* (Ankara: Ataturk Universitesi, 1975), p. 76.

[63] Joseph Schacht, born in Ratibor, March 15, 1902 and died in Englewood, August 1, 1969, was a British-German professor of Arabic and Islam at Columbia University in New York. He was the leading Western scholar on Islamic Law, whose *Origins of Muhammadan Jurisprudence* (1950) is still considered one of the most important works ever written on the subject, essential for all advanced studies. The author of many articles in the various editions of the *Encyclopaedia of Islam*, Schacht also edited *The Legacy of Islam* for Oxford University Press. Other books include *An Introduction to Islamic Law* (1964).

[64] Sava Pasha, *Islâm Hukuku Nazariyâtı Hakkında Bir Etüd*, I/VIII-IX; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 73-89; Kavakçi, *Suriye Roma Kodu Ve Islâm Hukuku*, p. 76.

C) The other divine jurisprudences and Islamic jurisprudence also interact. The origin of and point of anchorage for all legal systems is God's will. Since Islamic Law is the final divine body of law, it has invalidated all previous ones. It is the fruit of the revelation sent down to Prophet Muhammad. Despite some influence by other legal systems, the framework itself is not derived from any other jurisprudence.

It must be mentioned that *there are two kinds of injunctions in Islamic Law*. A further point that is a cause for confusion is raising the suspicion that, prior to Islam, there was no slavery, male or female, and Islam introduced it. However, Islamic Law contains two kinds of injunctions.

The first are injunctions that, not existing in previous legal systems, were laid down by Islam as principles for the first time. In other words, Islam established them, such as *zakâh* and the shares of inheritance. Islamic scholars state that these are for the benefit of humankind one hundred percent. They also contain many instances of wisdom and purposes, even if people are not aware of them.

The second are injunctions that Islam did not introduce: they already existed and Islam modified them. That is, Islam was not the first to lay them down as principles; rather, they were part of the legal systems of other societies and were applied in savage form. Since it would have been contrary to human nature to abolish injunctions of this kind suddenly and completely, Islam modified them, changing them from barbaric into civilized laws.

Polygamy is one of the injunctions Islam modified. It did not introduce this as something that was non-existent. Polygamy was practiced before Islam and in a barbaric form. Islam, however, put it into civilized form. That is, Islamic law did not raise the number of possible wives from one to four but reduced the number to four from eight or nine. It introduced particular conditions that, if not met, demanded certain penalties. This is indicated in the following verse: *"Then marry from among women such as are lawful to you — two, or three, or four; but if you have reason to fear that you might not be able to treat them with equal fairness, then [only] one."*[65]

After the revelation of this verse those Companions of the Prophet who had more than four wives were ordered to choose four and divorce the rest. Ghilan ibn Umayya, for example, chose four of his ten wives and divorced the rest. And Hârith ibn Qays, who had eight wives, did the same.

The same is true for slavery. Islam did not introduce slavery if it did not exist in other societies. Rather, Islam accepted it and modified it.[66]

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[65] The Qur'an 4:3-4.

[66] Bediuzzaman, *Munazarât* (Istanbul: Risale-i Nur Kulliyâti, 2002), p. 1955. Bediüzzaman Said Nursî (1878– March 23, 1960) was an Islamic thinker and the author of the Risale-i Nur Collection, a

D) Sacred laws could change in accordance with the period.

> Indeed, in one age different prophets may come, and they have come. Since subsequent to the Seal of the Prophets, his Greater *Sharî'ah* is sufficient for all peoples in every age, no need has remained for different laws. However, in secondary matters, the need for different schools has persisted to a degree. Just as clothes change with the change of the seasons and medicines change according to dispositions, so sacred laws change according to the ages, and their ordinances change according to the capacities of peoples. Because the secondary matters of the ordinances of the *Sharî'ah* look to human circumstances; they come according to them, and are like medicine.
>
> At the time of the early prophets, since social classes were far apart and men's characters were both somewhat coarse and violent, and their minds, primitive and close to nomadism, the laws at that time came all in different forms, appropriate to their conditions. There were even different prophets and laws in the same continent in the same century. Then, since with the coming of the Prophet of the end of time, man as though advanced from the primary to the secondary stage, and through numerous revolutions and upheavals reached a position at which all the human peoples could receive a single lesson and listen to a single teacher and act in accordance with a single law, no need remained for different laws, neither was there necessity for different teachers. But because they were not all at completely the same level and did not proceed in the same sort of social life, the schools of law became numerous. If, like students of a school of higher education, the vast majority of mankind were clothed in the same sort of social life and attained the same level, then all the schools could be united. But just as the state of the world does not permit that, so the schools of law cannot be the same.[67]

E) With respect to Islamic law, especially with regard to public domain and management issues, there is much overlapping between Islamic jurisprudence and other legal systems. The last point to be examined concerns the relation of Islamic law to such systems. Some influence by the Persians (*Sasanî*) can be seen especially with respect to administration.[68] For example, 'Umar was also the first state man to shape the political development of the early Islamic state. He was the first to establish the financial institution of the *dîwân* and to take the title *amîr al-mu'minîn*. He requested this from Salman al-Farisî and benefited from the system of the Sasani Empire.[69]

Qur'anic commentary exceeding six thousand pages. He is commonly known as Bediuzzaman, which means "the wonder of the time."

[67] Bediuzzaman, "The Twenty-Seventh Word," *The Words* (Istanbul: Sozler Publications, 2007), pp. 512-13.

[68] Ibrahim Kafesoglu *Türk Millî Kültürü* (Istanbul: Enderun Kitâbevi, 1983), p. 34-40.

[69] 'Umar, *Encyclopedia of Islam* (Leiden: Brill, 1993); cf. Bodil Hjerrild, "Islamic Law and Sasanian Law," Christopher Toll, Jakob Skovgaard-Petersen, *Law and the Islamic World Past and Present*, (Copenhagen: Kgl. Danske Videnskabernes Selskab, 1995), pp. 49ff.

2 THE SOURCES OF INFORMATION FOR ISLAMIC LAW (REFERENCES)

First and foremost, there is no shortage of references with respect to the history of Islamic Law. In actual fact, the libraries (particularly the Süleymaniye in Istanbul, al-Maktabah al-Zâhiriyyah in Damascus and the Cairo Libraries) and the archives (especially the Prime Ministerial Archives of the Ottoman State) are the richest treasuries of the history of Islamic Law with respect to both theoretical and applied references. We will classify and mention only some important references in this book. Since most of the new and old references are mentioned in our footnotes and the bibliography in the study of each topic, it will suffice to give some general information about our references here. References for Islamic Law can be categorized into two groups: *theoretical* and *applied*.[1]

2.1 Theoretical References

The theoretical references of Islamic Law are ranked as follows in their order of significance.

2.1.1 Books of Fiqh (Applied Islamic Law)

In Islamic Law these references are called *Furû' al-Fiqh,* i.e. Books of Applied Islamic Law, which are comprised of detailed rules that are taken as the basis for application. In point of fact, these references on Islamic law are also the primary quintessential references. Since the 7th century C.E., the rules of Islamic Law have been compiled by jurists known as *faqîh*s (Islamic jurists). We have the works of the very founders of the four *Madhhabs* (Schools of Islamic Law) famous in Islamic Jurisprudence, viz. *Hanafî, Hanbalî, Mâlikî* and *Shâfi'î.* With reference to the detailed information in this regard on those topics to come, we can mention as an example here the work by Imâm Shâfi'î, called *al-Umm,* consisting of eight volumes totaling 2500 pages (204/819). On the other hand, the first codification of the Hanafî *madhhab* was written by Imâm Muhammad, a student of Imâm A'zam, in six essential volumes that were first annotated by jurists in Qarakhan in a very detailed way. Their zeal was later

[1] Some sources about this subject are Imran Ahsan Khan Nyazee, *Bibliography of Islamic law: the Original Sources,* (Islamabad: Niazi Publishing House, 1995); John Makdisi and Marianne Makdisi. "Islamic Law Bibliography: Revised and Updated List of Secondary Sources." *Law Library Journal,* 87 (1995): 69–191; William B. Stern, "Bibliography of Mohammedan Law," 43, *Law Library Journal,* 16 (1950).

carried on by Muslim jurists.[2]

Books of Islamic Law can also be classified into two groups by those who elaborate on the topics of this law and their methods of elaboration.

2.1.1.1 *Mudallal* (Supported with Arguments) Books of Islamic Law

These books not only mention the legal rules but also detail the references to each legal case as well as the other opinions and theories on the topic at issue. Furthermore, they reach a preferred conclusion by discussing different views on disputed legal cases. The comparative cross-*Madhhab*s work called *al-Asrâr*, written by Abu Zaid Ubaydullah (430/1039) of Dabbus, which was the first city in Turkistan to profess Islam, and, again, the perfect seven-volume work on legal codifications called *Badâyi' al-Sanâyi' Fi Tartîb al-Sharâyi'* written by Abubakr Ibn Mas'ûd (578/1191) of Kashan, again a city in Turkistan, are among the most exquisite examples in this group.[3]

The statements in the *fiqh* books of one school concerning views held in another are not always accurate and must be viewed with caution. As a rule, greater caution is needed in regard to books that may not, strictly speaking, be called *fiqh* books, such as the work *al-Mâwardi*, than would be necessary for a work on *fiqh* proper, such as the *Hidâyah* or the *Minhâj*. Works of the latter type, which are objects of constant study and comment as well as of actual application, have remained, relatively speaking, immune from textual corruption. Moreover, it is easy to correct any corruptions that may have crept into the text by referring to the source books of the school on which they are invariably based. Works of the former type, however, have not had the benefit of these corrective agencies to the same extent.

We would like to mention here very important sources of this kind from important law schools. In the next editions of this work we may add new references if there are any contributions by scholars.

2.1.1.1.1 Hanafite Books with Arguments on the Application of Fiqh

We could say that Abu Hanîfa was the first author of a book which its name was the *al-Fiqh al-Akbar*;[4] but this is about theology not Islamic law. This is a work of the

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[2] Mustafa ibn 'Abdullah Kâtib Chelebi Haji Khalifah (1068/1657), *Kashf al-Zunûn 'an Asâmî al-Kutub wa'l-Funûn* (Beirut: Dar al-Fikr, 2007); Ahmed Akgündüz, *Mukayeseli Islam ve Osmanlı Hukuku Külliyâtı* (A Collection of Comparative Legislation of Islam and Ottomans) (Diyarbakır: Dicle University Law School, 1986), pp. 70ff.

[3] Kâtib Chelebi, *Kashf al-Zunûn,* vol. I, pp. 125, 227.

[4] Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 264.

first rank and has been commented upon by various writers. His two famous pupils Abu Yusuf and Imâm Muhammad have written books about Islamic law.

1. *Kitâb al-Kharâj* by Ya'qub ibn Ibrahim Abu Yusuf (182/731). It is a valuable treatise on financial and political questions addressed to Caliph Harun-al-Rashid. *Adab al-Qâdhî* by Abu Yusuf discusses the duties of a *Qâdhî*.[5]

2. *Al-Mabsût* by Shams-al-a'immah Abu Bakr Muhammad ibn Ahmed al-Sarakhsi (483/1090), Cairo: Matba'ah al-Sa'âdah, 1323/1905, in 30 parts; a famous commentary on *al-Kâfî fi Furû' al-Fiqh* by Muhammad ibn Muhammad al-Marwazi al-Hâkim al-Shahîd (334/945). This work combines the works of Muhammad ibn al-Hasan. There are many *Mabsûts,* but when the word is used without any further qualification it is this work that is meant. The commentary is combined with the text. The work was dictated by the author in prison. In the preface he says that, seeing that many of his contemporaries were engaged in controversy or subtle dialectics, or subordinated legal *(fiqh)* considerations to philosophical ones, he attempts to base the legal principles on legal considerations pure and simple. The arguments used by later *fuqahâ* are almost always found in the *Mabsût.*[6]

3. *Al-Muhît,* known as *al-Muhît al-Radhawi* or *al-Muhît al-Sarakhsi* by Radhi-al-Dîn Muhammad ibn Muhammad al-Sarakhsi (544/1149), available in three different sizes. Unless it is stated otherwise, the name refers to the large size of this *Muhît* in distinction from the next *Muhît.* In his work the author gathered all the legal determinations (*masâil*) with their motives and meanings. He first mentions the cases of the *Mabsût,* then the *Nawâdir,* then the *Al-Jâmi',* then the *Ziyâdât.*[7]

4. *Al-Muhît al-Burhânî fî al-Fiqh al-Nu'mâni* by Burhân-al-dïn Mahmud ibn Ahmad ibn al-Sadr- al-Shahid al-Bukhâri ibn Mâzah (570/1174). This *Muhît* is sometimes confused with the above, which is the more standard of the two. This is a larger work than the previous, utilizing the works of Muhammad ibn al-Hasan as well as the legal decisions arrived at by later jurists *(fatâwâ* and *wâqi'ât),* such as his own father. It often provides the arguments.[8]

5. *Badâyi' al-Sanâyi' fî Tartîb al-Sharâyi'* by Alâ'-al-Dîn Abu Bakr Ibn Mas'ûd al-Kasani (or al-Kâshâni) *Malik al-Ulamâ* (587/1191), Cairo, 1327/1909. Apparently, this is based on the *Tuhfah al-Fuqahâ* by his teacher Ala'-al-Dîn Muhammad ibn Ahmad al-Samarqandi who, according to the author, was the only jurist before him to take the trouble to arrange *(tartîb)* the legal material. The arrangement of the work is highly

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[5] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 359.

[6] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 483.

[7] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 512.

[8] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 511.

schematic and quotes the views of al-Shâfi'î and sometimes of Mâlik, with their arguments, mentioning the Hanafîte arguments last.[9]

6. *Al-Hidâyah* by Shaykh-al-Islâm Burhân-al-Dîn 'Ali ibn Abu Bakr al-Marghinâni (593/1196). This is a commentary on the author's own *Bidâyat al-Mubtadî* and one of the most esteemed Hanafîte compendiums. A poem states that, like the Qur'an, this work has abrogated *(naskh)* its predecessors. The work may be said to be a commentary on the *al-Jâmi' al-Saghîr* and the *Mukhtasar al-Quduri*, on which the *Bidâyah al-Mubtadî* is based. The *Hidâyah* is both a digest and a commentary. The author, commenting on each text of the original, has expounded the law on particular points by citing authorities from the most approved works by early writers on Islamic Law.

Famous Commentaries: (a) *al-Nihâyah* by his disciple Husâm-al-Dîn Husayin ibn 'Ali al-Sighnâqi (710/1310); (b) *Mi'râj al-Dirâyah* by Qiwâm-al-Dîn Muhammad ibn al-Bukhâri, esteemed for its independence of view. This book was translated by C. Hamilton (London: W.H. Allen, 1870). al-Kâki (749/1348) gives the opinions of the four *Imâms,* their reasons, and the old and more recent views, etc. (c) *Gâyah al-Bayân* by Amir Kâtib ibn Amir 'Umar al-Itqâni (758/1357). (d) *Al-'Inâyah* by Akmal-al-Dîn Muhammad ibn Mahmad al-Bâbarti (786/1384), esteemed in the Ottoman State as one of the best. It is an abridgement for purposes of instruction in his own larger *al-Nihâyah.* It contains useful analytical summaries. (e) *Fath al-Qâdîr* by Kamâl-al-Dîn Muhammad ibn 'Abd-al-Wâhid ibn al-Humâm (861/1456).[10]

2.1.1.1.2 Shâfi'î Books with Arguments on the Application of Fiqh

1. *Kitâb al-Umm,* by Muhammad ibn Idris al-Shâfi'î (204/819). The most important copy is a recension by al-Rabi' Abu Muhammad al-Murâdi. There is also a recension by al-Hasan al-Za'farani, one of al-Shâfi'î's Baghdad disciples, but it has disappeared. The *Umm* is a valuable source for the study of law. It is full of *hadîths* and contains many repetitions. There are abridged recensions *(mukhtasar)* of al-Shâfi'î's teachings by al-Rabi', Abu Ya'qub al-Buwayti, and Ismail ibn Yahya al-Muzani (264/877). The *Mukhtasar* by al-Muzani is the most widely known of them. Al-Nawawi speaks of it as one of the five most widely used books in his time, the other four being the *Muhadhdhab,*

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[9] Kâtib Chelebi, *Kashf al-Zunûn,* vol. I, pp. 227, 316.

[10] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, pp. 816-17; Ahmad Sa'id Hawwa, *al-Madkhal ila Madhhab al-Imâm Ebu Hanîfa al-Nu'man* (Jeddah: Dar al-Andulus al-Khadra, 2002), pp. 353-74; Abu l-Khayr Ahmad ibnMuslih-al-Dîn Mustafa Tashkopruzadeh (968/1560), *Miftâh al-Sa'âdah we Misbâh al-Siyâdah,* vol. II (Beirut: Dâr al-Kutub al-Ilmiyyah, 1985), pp. 236-62; Nicolas Aghnides, *Islamic Theories of Finance: With An Introduction to Islamic Law and a Bibliography* (New York: Columbia University, 1916), pp. 177-82; Shama Churun Sircar, *The Muhammadan Law: A Digest of the Law Applicable Especially to the Sunnîs of India* (Calcutta: Thacker, Spink and Co., 1873), pp. 37-48.

the *Tanbîh,* the *Wasît* and the *Wajîz,* which will be discussed later. The opinions of al-Shâfi'î cited in the *Umm* and the other recensions of his teachings in Egypt are called his recent opinions *(jadîd)* in distinction from his older views *(qadîm)* contained in recensions of his teachings in Baghdad, such as the *Kitâb al-Hujjah.*[11]

2. *Al-Hâwi al-Kabîr* by Ab al-Hasan 'Ali ibn Muhammad al-Mâwardi (450/1058). This is an exhaustive treatise on *fiqh.* A condensation of it is the author's *al-Iqnâ'.* Al-Mâwardi is said to have written the *al-Iqnâ'* on the order of the caliph al-Qâdir-bi'Ilah in competition with al-Quduri, the Hanafîte.[12]

3. *Al-Ahkâm al-Sultâniyyah* by the same Al-Mâwardi. Ed. Max Enger, Bonn, 1853. This is a justly renowned work that gives the description of an ideal state. Some of the subjects it covers are not to be found elsewhere, as the author himself points out in his conclusion. The treatment is schematic and clear-cut in many cases with respect to content, closely following al-Shâfi'î's *Umm.* The views of Abu Hanîfa and Mâlik are mentioned.[13]

4. *Nihâyah al-Matlab fi Dirâyah al-Madhhab* by Abu'l-Ma'âli 'Abd-al-Mâlik ibn Abu Muhammad 'Abdullah al-Juwayni, Imâm-al-Haramain (478/1085), an extensive work in forty parts, "the like of which has not been composed in Islam."[14]

5. *Al-Basît* by Hujjah al-islam Abu Hâmid Muhammad ibn Muhammad al-Gazzâli (505/1111). This is based on the *Nihâyah al-Matlab* of his teacher Imâm-al-Haramain. *Al-Wasît al-Muhît bi Aqtâr al-Basît* is a compendium of the former by the author himself. It is one of the five books referred to by al-Nawawi as *al-Wajîz.* It is an excellent schematic summary of all the Shâfi'îte views, independent *(aqwâl)* or deduced *(wajh);* the authors responsible for them are not mentioned. The differences from al-Muzani, Abu Hanîfa and Mâlik are indicated by letters. The best known of the commentaries on the *Wajîz* is the *Fath al-'Azîz 'ala Kitâb al-Wajîz* by Abu al-Qâsim al-Rafi'i (623/1226). *Al-Rawdah,* by al-Nawawi, is an abridgment of it.[15]

6. *Al-Muhadhdhab* is the well-known work by al-Shirâzi and provides arguments and difficult points. The most famous commentary on it was written by Abu Zakaria Muhiuddîn Yahya ibn Sharaf al-Nawawi (1234-1278), *al-Majmû' Sharh al-Muhadhdhab* is a comprehensive manual of Islamic law according to the Shâfi'î School.[16]

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[11] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 347.

[12] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 490.

[13] Kâtib Chelebi, *Kashf al-Zunûn,* vol. I, p. 80.

[14] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 784.

[15] Kâtib Chelebi, *Kashf al-Zunûn,* vol. I, p. 237.

[16] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 728; Tashkopruzadeh, *Miftâh al-Sa'âdah,* vol. II, pp. 289-332; Aghnides, *Islamic Theories of Finance,* pp. 186-89; Sircar, *The Muhammadan Law,* p. 36.

2.1.1.1.3 Mâlikî Books with Arguments on the Application of Fiqh

1. *(Al-Masâ'il) al-Mudawwanah,* a recension by Qâdhî Sahnun Abu Sa'id ibn 'Abd-al-Salam al-Tanukhi (240/854). It consists of questions by Sahnun and answers by 'Abdurrahman ibn al-Qâsim, who was one of Mâlik's students for 20 years. As a rule, these answers repeat Mâlik's literal words, although at times they are Ibn al-Qasim's own interpretation of what Mâlik said. The *Mudawwanah is* a revision by Ibn al-Qâsim of Asad ibn al-Furât's *Asadiyyah* when it was submitted to Ibn al-Qâsim by Sahnun, who had studied the *Asadiyyah* under Asad. Because Asad failed to incorporate the corrections of Ibn al-Qâsim as found in Sahnunn's copy, the *Asadiyyah* was forgotten. After Ibn al-Qâsim's death, Sahnun incorporated *hadîth*s into his copy that supported some of its views and improved its arrangement. *Mukhtalitah* is another name given to the *Mudawwanah*. The *Mudawwanah* is the greatest Mâlikîte authority. [17]

2. *Al-Wâdihah* by Abu Marwân 'Abd-al-Mâlik ibn Habib al-Sulami (238/852) of Spain, who studied under Ibn al-Qâsim and spread the Mâlikîte teachings in Spain. The *Wâdihah* naturally found favor in Spain.

3. *Al-Mustakhrajah min al-Asmi'ah al-Masmû'ah min Mâlik ibn Anas,* known as *Al-'Utbiyyah,* by Muhammad ibn Ahmed al-'Utbi al-Qurtubi (255/869), a student of Ibn Habib. This work superseded the Wâdihah and itself became an object of study and comment. The commentary on it by Muhammad ibn Ahmed ibn Rushd (520/1126) deserves mention. It is called *Kitâb al-Bayân Wa'l-Tahsil Wa'l-Sharh we 'l-Tawjîh wa'l-Ta'lîl fa Masâ'il al-Mustakhrajah* arranged in the conventional fiqh book chapters. The author, after citing the questions and Mâlik's answers and, for example, the view of Ibn al-Qâsim, introduces his own view as "Qâdhî Muhammad ibn Rushd," supporting it by lengthy arguments. It is a valuable source-book for determining the development of the school. The *Mudawwanah, Asadiyyah* and *'Utbiyyah,* are called *al-Ummahât,* i. e. the mother books. [18]

4. *Kitâb al-Nawâdir wa al-Ziyâdât* by 'Ubayd-allah ibn 'Abdurrahman ibn Abu Zaid al-Qayrawani (386/996). It combines the previous works and collects all legal opinions for Imâm Malik, which did not exist in *Mudawwanah.*

5. *Al-Mugaddamât al-Mumahhadât li Bayân ma Aqtadathu Rusûm al-Mudawwanah min al-Ahkâm al-Shar'iyât wa al-Tahsilât al-Muhkamât li Ummahât*

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[17] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 531; Abdurrahman ibn Khaldun, *Târîkh ibn Khaldun, Kitâb al-Ibar wa Dîwân al-Mubtada wal Khabar fi Ayyam al-Arab wal-Ajam wal-Barbar wa man Asarahum min Zawi al-Sultan al-Akbar,* vol. I (Beirut: Dar al-Kutub al-Ilmiyyah, 1992), pp. 481-82.

[18] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 138; Abdurrahman ibn Khaldun, *Târîkh ibn Khaldun,* vol. I, pp. 481-82.

Masâ'iliha al-Mushkilât (Ibn Rushd) by Abu al-Walid Muhammad ibn Ahmed ibn Rushd al-Qurtubi (520/1126), grandfather of the famous philosopher ibn Rushd (Averroes). It indicates the etymology and the justification of the words and meanings of the Mudawwanah. Its treatment is analytical.

6. *Sharh al-Talqîn for Qâdhî Abdulwahhab al-Baghdadi* (422/1031), by Abu 'Abdullah Muhammad ibn 'Ali al-Tamimi al-Mâziri (536/1141), known as the *Imâm.* He is another famous jurist who commented on the *Mudawwanah.* Al-Mâziri distinguished himself by his generally accepted independent views *(qawl).* Ibn Yunus, al-Lakhmi, ibn Rushd and al-Mâziri are the four authorities whose opinions are mentioned, and authorship is specified by Khalil in his famous *Mukhtasar.*

7. *Al-Dhakhîrah* for Ahmad ibn Idris Shihabudîn as-Sanhaji al-Qarafi al-Mâlikî (684/1285). That is a magisterial fourteen-volume work recently published in the Emîrates that looks at Mâlikî fiqh with proofs from usûlî sources. It is like an encyclopedia of Islamic Law.[19]

2.1.1.1.4 Hanbalî Books with Arguments on the Application of Fiqh

1. *Al-Jâmi' al-Kabîr* Abu Bakr al-Khallal (334/945-403/1012). Al-Khallal traveled to various places searching for the juristic opinions and *fatwâs* issued by Imâm Ahmad. He gathered such a large number of *fatwâs* that he compiled a book of about twenty volumes.[20]

2. *Al-Mughnî* by Muwaffaq-ud Dîn Abu Muhammad 'Abdullah ibn Ahmad ibn Muhammad ibn Qudamah (620/1223), a well-known Hanbalî book on *fiqh.* He compared all schools and mentioned all the arguments.[21]

3. *Al-Ahkâm al-Sultâniyyah* (political theory and rulings on government) by al-Qâdhî Abu Ya'la al-Hanbalî (458/1065).[22]

4. *Al-Muharrar* by Imâm Abdus-Salam ibn 'Abdullah (652/1254), the grandfather of Imâm Ibn Taimiyya, reviewed Imâm Ahmad's *fatwâs* and wrote a book on jurisprudence.[23]

5. *Majmû' al-Fatâwâ al-Kubrâ* (A Great Compilation of *Fatâwâ*) by Taqi ad-Dîn Ahmad Ibn Taimiyya (1263–1328). It is a set of thirty-six volumes on the Islamic reli-

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[19] Aghnides, *Islamic Theories of Finance*, pp. 190-93; Abdurrahman ibn Khaldun, *Târîkh ibn Khaldun,* vol. I, pp. 481-82.

[20] Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 451.

[21] Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 607.

[22] Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 80.

[23] Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 506.

gion.

6. *Zâd al-Maʿâd* by Muhammad ibn Abu Bakr ibn al-Qayyim (1292-1350).[24]

2.1.1.1.5 Shiʿî Books with Arguments on the Application of Fiqh

1. *Bashâʿir al-Darajât fi Ulûm Âl-i Muhammad wamâ Khassahum bihi* by Abu Jaʿfar ibn al-Hasan al-Qummi (290). We could say that he was second founder.

2. *Sharâyiʿ al-Islam* by Najm-al-Dîn Jaʿfar ibn Muhammad al-Hilli Abu al-Qâsim (436-676/1044-1277). A commentary on it is the *Masâlik al-Afhâm* (964/1556) by Zayn-al-Dîn ibn ʿAli al-Shâmi al-ʿÂmili. A French translation of the *Sharâyiʿ* is A. Querry's *Droit Musûlman* (Paris, 1871). N.B.E. Baillie's *A Digest of Mohummudan Law, etc.,* Part II, 2nd ed. (London, 1887) is based on the same work. Another commentary on it is *Madârik al-Ahkâm* (1006/1597) by Muhammad ibn 'Ali al-Musawî al-Âmilî.[25]

2. There are four essential books by Imâmiyyah on fiqh and hadith. They are: *Al-Kâfî, Man lâ Yahduruhu Al-Faqîh, Al-Tahdhîb, and Al-Istibsâr.* These books have collected all narration relating to Islamic Law for *Fiqh al-Jaʿfarî.* Shiʿî jurists say that Shiʿî faqîhs have written 400 books on *Fiqh al-Imâmiyyah,* and they are preserved and summarized in these four books. These are called *al-Usûl al-Arbaʿah* and, although they concern Hadîths, they have been arranged according to fiqh chapters. A) *Al-Kâfî* by Abu Jaʿfar Muhammd al-Kilinî al-Râzî (Thiqa al-Islam) (329/940). B) *Man lâ Yahduruhu al-Faqîh* by Abu Jaʿfar Muhammad ibn Babuvayh al-Qummî (380/990). C) *Tahdhîb al-Ahkâm* by Abu Jaʿfar Muhammad al-Tûsî Shaykh al-Tâifah (460/1067). D) *Al-Istibsâr* by Shaykh al-Tâifah (460/1067). Al-Hurr al-'Âmilî (1104/1692) has combined all these works under the title Vasâil al-Shîʿa in thirty volumes.[26]

2.1.1.1.6 Zâhirî Books with Arguments on the Application of Fiqh

Al-Kitâb al-Muhallâ bi al-Âthâr by Abû Muḥammad ʿAlî ibn Ahmad ibn Saʿîd ibn Hazm (994–1064). We can translate the name of this book as "The Book Ornamented with Traditions." It is a wealth of scholarship in which ibn Hazm discusses each question separately. On each question he cites the views of earlier scholars of high achievement, not restricting himself to the views of the four schools of *Fiqh* but also citing the rulings by scholars like al-Hassan al-Basri (110/728), al-Laith ibn Sa'ad (175/791), Atâʿ (114/732), Sufian al-Thawrî (161/777), al-Awzaʿî (157/773), etc. He

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[24] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 4; Aghnides, *Islamic Theories of Finance,* p. 194.

[25] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 65.

[26] Aghnides, *Islamic Theories of Finance,* p. 194.

also quotes the evidence they cite in support of their views. [27]

2.1.1.2 *Ghair al-Mudallal* (Not Supported with Arguments) Books of Islamic Law

These books of *fiqh* narrate only legal rules and institutions or explain only the words and sentences of legal texts in order to facilitate the understanding of decisions. They either do not treat the comparison to the opinions of other jurists or detail the references of rules at all or only mention them. The legal text *al-Gurar* by Molla Khusraw (885/1480), an esteemed jurist of the era of the Muhammad the Conqueror, and the annotation thereof, *al-Durar*, which elucidates the text, the eight-volume *Hukuk-i İslâmiyye Ve Istılahat-ı Fıkhiyye Kamusu* written by 'Umar Nasuhî Bilmen, a contemporary jurist, set examples for this group. On the other hand, the legal text called *Multaqâ al-Abhur*, authored by Ibrahim al-Halabi (1549) of the Imâms of Fâtih Mosque, which was studied as a textbook for centuries in Ottoman *madrasah*s (schools/universities), and the annotation of the aforementioned text, *Majma' al-Anhur*, also known as *Dâmâd*, written by Shaikh al-Islam Abdurrahman ibn al-Muhammad (1078/1667), are among the works that could be mentioned in this group.[28]

The official – and the first – acceptance of such a book on Islamic Jurisprudence like the Legal Code of the State in the Ottoman State occurred for the aforesaid book called *Multaqâ al-Abhur* between circa 1648 and 1687. Through the *firman* of Murad IV this work, which was later translated into Turkish as well, almost became the official legal code of the Ottoman State that covered criminal law, family law and, in short, all legal issues resembling laws.[29]

The Islamic Law sources fall into three fairly distinguishable classes: (a) the so-called texts (*matn*) or compendiums (*mukhtasars*); (b) the commentaries (*sharh*) and glosses (*hashiyah*, *taqrîr*, *ta'lîq*); (c) the collections of legal opinions (*fatwâs*). The compendiums provide in a more or less general way the principles of law regarding concrete cases and are intended to serve as a basis of instruction and as a mnemonic aid. As a rule, they do not mention the arguments and do not indicate the views of

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[27] Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 510.

[28] Akgündüz, *Külliyât*, pp. 75ff.; Abu Zaid Dabbusi, *Kitâb al-Asrâr*, Süleymaniye Library, Ayasofya No: 1021; Mas'ûd al-Kashani, *Badâyi' al-Sanâyi'*, vol.1 (Beirut: 1974), p. VII; Molla Khusraw, *Durar al-Hukkâm* (Istanbul:, 1317), vol. I-II; Ibrahim al-Halebi, *Multaqâ al-Abhur* (Istanbul:1309); Dâmâd, *Majma' al-Anhur* (Istanbul, al-Matbaah al-Âmirah, 1331), vol. I-II; Omer Nasuhi Bilmen, *Hukuk-i İslâmiyye Ve Istılahat-ı Fıkhiyye Kamusu* (A Lexicon of Islamic Legislation and Terminology of Islamic Jurisprudence), vol. I-VIII (Istanbul: Bilmen Yayinevi, 1985).

[29] PA (Prime Ministry Ottoman Archives), YEE-14-1540, pp. 13-14.

other schools. Because they are intended to be learnt by heart by the students, the ideal that the writers of such compendiums set for themselves is to make them as brief but as comprehensive as possible.

The *Mukhtasar of Khalil* probably came closer to this ideal than any other. Various devices are used to indicate, without stating clearly, if a certain view was held by the founder of the school (*nass*) and if it is an independent view (*qawl*) or merely an application by analogy (*wajh, qawl mukharraj*) of an existing view. Those responsible for a given view and the view to be preferred of the various views are also indicated. The Hanafîte usage in this last respect is to cite first the view favored by the writer of the text, unless the text gives the arguments as well. In such a case, first the views and then the respective arguments are presented, with the view and argument favored given last. While no established usage has prevailed on the whole here, in some instances a fairly common understanding seems to have been reached. A thorough study of this subject would be most helpful for the proper understanding of the sources. Probably the chief distinction between a commentary and a gloss is that a gloss is sketchier and goes into questions of grammar and syntax more often and at length.

2.1.1.2.1 Hanafî Books without Arguments about the Application of Fiqh

1. *Kutub Zâhir al-Riwâyah, Zâhir al-Madhhab,* or *al-Usûl.* These are the source-books of the Hanafîte School and were written by Muhammad ibn al-Hasan al-Shaybâni (187/803). According to Ibn al-Humâm, unless Muhammad indicates the contrary, the views stated in these books are those of Abu Hanîfa and Abu Yusuf, as well as his own. They are the following:

(a) *Al-Mabsût,* also called *al-Asl.* The different parts of the *Mabsût,* known as the "Book of so-and-so," were composed separately, and the name *Mabsût* (extended) was given to them when they were combined. Many commentaries were written on the *Mabsût,* among others by Shams-al-a'immah ʿAbd al-ʿAzîz ibn Ahmed al-Halwânî (or Halwâ'i) (448/1056). The original work of al-Shaibânî was al-Mabsût which can be compared with Pandectae.[30]

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[30] Benjamin Jokisch, *Islamic Imperial Law: Harun-al-Rashid's Codification Project,* (Berlin: Gruyter Gmbh, 2007), p. 279ff. *Pandects* is a name given to a compendium or digest of Roman law compiled by order of the emperor Justinian I in the 6th century (A.D. 530-533). These pandects were one part of the Corpus Juris Civilis, the body of civil law issued under Justinian I. The second and third parts were Institutiones, and the Codex Constitutionum. A fourth part, the Novels (or "Novellae Constitutiones"), was added later. Cf. J. E. Goudsmit, *The Pandects: A Treatise on The Roman Law and upon its Connection with Modern Legislation,* (Clark: The Lawbook Exchange, Ltd., 2005), pp. 1-4.